Written submissions on Copyright Amendment Bill B13B-2017

The Anton Mostert Chair of Intellectual Property Law

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Background

In the letter to the National Assembly Speaker, dated 16 June 2020, President Cyril Ramaphosa referred the Copyright Amendment Bill B13B-2017 (the "Bill") back to the National Assembly. Amongst the reasons cited by the President for doing so were concerns about the constitutionality of the Bill and the negative effects on the rights of authors and copyright owners.

On 4 June 2021, the Portfolio Committee on Trade and Industry (the "Portfolio Committee") invited stakeholders and interested parties to submit written submissions with reference only to clause 13 (sections 12A, 12B, 12C and 12D), clause 19 (section 19B) and clause 20 (section 19C) of the Bill. These comments are submitted in response to such invitation.

Initial remarks concerning the process

It is a matter of grave concern that the Portfolio Committee's approach remains an attempt to "panel beat" the Bill, which, from the first draft released for comment to the public in 2015, is very poorly drafted, and contains some deeply problematic proposals. Given the troubled passage of the Bill, and, most importantly, given the President's action of (and reasons for) referring the Bill back to the National Assembly, there appears to no valid reason why the public's right to submit comments has been limited to specific clauses. Whose interests are being served by this deeply flawed process? This is certainly not in the best interest of the country.

The Portfolio Committee seems to have followed suit where the Department of Trade and Industry ("DTI") left off, namely, trying to rush through an ill-considered amendment, in a high-handed, and highly-questionable manner. Furthermore, given the Portfolio Committee's protracted involvement in the Bill, it appears that the Portfolio Committee has arrogated to itself the responsibility of drafting the Bill, and custodianship of the legislation.

In a constitutional democracy, legislation needs to follow a credible and inclusive process, and should evidence a balanced and considered approach. Instead, the Department of Trade and Industry (DTI) appears to have followed a questionable process, and the Portfolio Committee (through its persistent and protracted involvement in the Bill) is, in effect, condoning the failures at the DTI concerning the Bill, and is itself acting in a problematic fashion. For example, the passage of the Bill appears to have come about in the absence of the involvement of the Statutory Advisory Committee on Intellectual Property, which is provided for in the Copyright Act 1978 (the "Act"). Why has there been no accountability concerning the DTI's flawed

process concerning the Bill? Moreover, what is the appropriate function of a portfolio committee? Surely it is not to *draft* legislation, but the Portfolio Committee has, by now, been more involved in the drafting of the Bill than the DTI. In the circumstances, is it possible for the Portfolio Committee to play a credible oversight function (and advise parliament) when *it* appears to have taken responsibility for the Bill, rather than the DTI? Is that fact in itself not more than sufficient indication of the fact that what parliament received from the DTI was not the product of an acceptable standard, and should the Portfolio Committee not by now have rejected the Bill in its entirety, with the necessary rebuke of the DTI? In other words, if the Portfolio Committee should recommend the passing of the Bill by parliament, it is, arguably, not exercising its oversight function, but rather more doing a "sales pitch" in respect of its own handywork.

The fact that these submissions largely repeat previous submissions made by the Chair (as, no doubt, will submissions by others be repetitive) concerning the relevant clauses, the latest invitation for comments does raise serious doubts about the motive of this exercise. Why would the Portfolio Committee take these submissions any more seriously than the previous submissions concerning the Bill? In fact, for the Chair (and others who will be making submissions), the submission of further comments does tend to border on the irrational, because — based on prior conduct — there cannot be any reasonable expectation that the Portfolio Committee will be taking the submissions (or its supervisory role) seriously. In other words, this submission, once again, appears to be part of just another cosmetic exercise of public engagement?

Clause 12 "Repeal of section 12"

While this clause has not been specified as one of the clauses on which comments may be submitted, it does serve to illustrate: the absurdity of limiting comments to specific clauses; and, the poor quality of the legislative drafting in the Bill. Section 12 is repealed but not replaced. The new proposed section 12A is clearly meant to replace section 12, so why are those provisions not being proposed as a new section 12?

Clause 13 "Insertion of sections 12A, 12B, 12C and 12D in Act 98 of 1978"

General remarks concerning fair use

Before dealing with the specific provisions, a few general remarks would be in order. It is clear that the Bill seeks to introduce the American fair-use approach to exceptions. There are two approaches by which the exceptions to the exclusive rights granted to copyright owners are provided for in copyright legislation in different countries, namely, fair dealing and fair use. It should immediately be noted that — despite the rhetoric of supporters of fair use — the overwhelming majority of jurisdictions employ a system of fair dealing, so it would be inappropriate to suggest that fair use is a readily-accepted alternative to fair dealing.

Under a system of fair dealing, such as that which currently exists in South African law, there are a limited number (or a *numerus clausus*) of exceptions for specified purposes in respect of each category (or type) of copyright work. In contrast to the fair-dealing approach to copyright exceptions, fair use is an open-ended approach to possible exceptions to copyright protection. The fair-use approach is not confined to specified uses (or purposes) that are provided for in the legislation, and *any* unauthorised use of copyright works may be considered to be permissible, if a court considers that the particular use amounts to fair use.

The introduction of fair use is highly problematic, and questionable, for two main reasons. First, fair use creates a level of uncertainty amongst copyright stakeholders that does not exist with fair dealing. In comparison with fair dealing, fair use greatly increases the threat of litigation, and the costs associated with it, as it does not provide sufficient clear guidelines to as to what is permissible. If anything, it simply favours parties with great financial resources to litigate. Very significantly, even in the country of its origin, the United States, the fair use doctrine has been the subject of sustained criticism. For example, it is said that "the doctrine of fair use is impervious to generalization and that attempts to derive its meaning from careful analysis of specific

cases are futile."[1] On what basis is it then considered to be a superior approach to copyright exceptions than our current system of fair dealing?

Second, adoption of fair use may cause South Africa to breach its international treaty obligations under the Berne Convention and the TRIPs Agreement, in particular, the so-called "three-step test". The three-step test provides that the exclusive rights of a copyright owner can be limited, provided the limitations satisfy the following requirements: they are confined to certain special cases; they do not conflict with the normal exploitation of the copyright work; and, they do not unreasonably prejudice the legitimate interests of the copyright owner. A broad, open-ended exception — which is what fair use amounts to — will not satisfy the first step of the test.

For the aforementioned reasons alone, the proposed introduction of fair use should be rejected. A more detailed critique of fair use has been provided in the only South African peer-reviewed article on the topic (S Karjiker, "Should South Africa adopt fair use? Cutting through the rhetoric" 2021 *TSAR* 2 240), which has been attached to these written submissions, and should be considered to form part thereof. Nonetheless, specific submissions will now follow on the particular proposed provisions.

Section 12A

The Act does not protect performances. That is the province of the Performers' Protection Act, and is just another example of the conceptually-garbled approach being proposed in the Bill. Having said that, the introduction of fair use will cause a corresponding dilution of performers' rights pursuant to the Performers' Protection Amendment Bill (see proposed section 8(2)(f)).

Fair use in respect of a work covers all the restricted acts for literary (or musical) works included in section 6 and the corresponding sections for other categories of work. So, for instance it will cover acts, such as, reproducing, publishing, performing,

[1] B Sookman & D Glover "Why Canada Should Not Adopt Fair Use: A Joint Submission to the Copyright Consultations" (2009) 2 *Osgoode Hall Review of Law and Policy* 139 at 151 quoting Gideon Parchomovsky *et al* "Fair Use Harbors" (2007) *Virginia Law Review* 1483 at 1484-1486

broadcasting, the copyright work. While performing the copyright work may be an exclusive act given to the copyright owner (for example, section 6(c)), this is clearly not what is being referred to, as there is no good reason why only one specific exclusive right is mentioned. It is, therefore, unnecessary and wrong to make specific reference to performance of a work as that creates the anomaly that an exemption is given in the Act to performances protected under the Performers Protection Act.

The proposed section corresponds, to some extent, with the present section 12 of the Act, but with one important difference. It is clear that, as a consequence of the words "such as", the specific examples given of fair use are simply illustrative (and not a closed list), and gives the court an extremely wide discretion to exempt any uses of whatsoever nature of a copyright work. This is very far reaching and will probably make our range of exemptions from copyright infringement one of the widest in the world. The situation is aggravated by the proposed new section 12B, which provides for yet further mandatory exemptions that are over and above the discretionary exemptions in section 12A. The net result is that tremendous uncertainty is created as to precisely what a copyright owner can actually prevent. This uncertainty does not benefit copyright owners and creatives, and especially not South African copyright owners and creatives (who are purportedly among the main beneficiaries of the Bill). If anything, it only serves the interest of certain large technology companies, who have an interest in diluting the rights of copyright owners.

An example (and this is but one of many examples) of the significant widening of the possible exceptions is paragraph (1)(i), which allows for the making of a personal copy of a work for non-commercial purposes, without qualification and irrespective of whether the individual acts reasonably, fairly or otherwise. In other words, the individual can legitimately make an exact reproduction of an entire book that he has borrowed, or taken, from a library in order to avoid having to purchase his own copy. If every potential reader (or a large number of readers) of a book was to adopt this approach (which is contemplated by the section), the author's entire market would be destroyed. This renders the whole purpose of copyright largely nugatory. Such conduct is clearly unreasonably prejudicial to the legitimate interests of the copyright

owner. This situation is avoided under the present fair-dealing approach because the use for the specified exempted purpose must still be reasonable or fair.

As already indicated, countries generally give exceptions on the basis of fair dealing, or, far less commonly, fair use. While the Bill seems to adopt both of these forms of exceptions, it, in substance, now introduces an open-ended, fair-use system. This approach cannot be supported, and the Bill should remove any attempt to introduce a system of fair use, for the reasons already stated. Any grounds for the expansion of the list of exceptions, such as, for the purposes of parody, should be expressly provide for. No other exceptions should be allowed to be created by the courts under an open-ended fair-use system.

Neither the DTI, nor the Portfolio Committee has provided any basis to suggest that the adoption of fair use is in compliance with South Africa's treaty obligations. In fact, despite some support amongst academics for the introduction of fair use, there is no detailed analysis — other than bald assertions about its alleged compliance with the Berne Convention or the TRIPs Agreement. On the contrary, as detailed in the attached article, it has been rejected in the UK, Australia, New Zealand and the EU. The DTI and the Portfolio Committee are being misled, or are now willingly accepting a false narrative about the merits (and lawfulness) of fair use, and its level of acceptance internationally.

In light of the aforesaid, simple questions need to be answered: Who is seeking this change, and why?

Section 12A(b)(iii)(bb)

This again illustrates the absurdity of allowing only piecemeal submissions on a fundamentally-flawed Bill. The proposed section uses the term "commercial", and there is a proposed definition of "commercial", which makes this provision potentially highly problematic.

In the proposed definition of the term “commercial” (clause 1), why is the meaning limited to “direct” economic advantage? Surely an activity attaining any economic advantage should be considered to be commercial. For instance, distributing free copies of a musical CD, which ultimately leads to a song becoming a hit and, thus, in great demand to be purchased, although not immediately achieving economic advantage, ultimately does so and, therefore, should be considered to be commercial. It appears that the attempted definition of “commercial” may simply create grounds for some types of infringing activity to be excused. If this is what is being intended, it is deeply mischievous. This is particular the case in the context of the new proposed fair use provision in the proposed section 12A. For example, when an Internet user uploads infringing content onto YouTube and that user, or Google, potentially earns advertising revenue as a consequence of that copyright infringement, is that non-commercial use because the benefit is considered to be “indirect”?

The definition appears to be unnecessary, and the issue of what is commercial should be considered in the context of a particular provision. Accordingly, this definition should be deleted. Of course, for the avoidance of any doubt, the introduction of fair use is also strongly condemned.

Section 12B

Section 12B(1)(f)(i)

In light of the previous comments concerning the proposed definition of “commercial”, it is problematic that it may now be acceptable to make an unauthorised free translation and to benefit indirectly therefrom. This should not be permitted.

Section 12B(1)(i)

Again, in light of the proposed definition of “commercial”, this exception is of considerable wider application than it should be. Given the scope of the other exceptions, and in light of section 12B(2), the words “and made for ends which are not commercial” should be deleted.

Section 12B(2)

The inclusion of the word “include” means that the list of examples is not exhaustive, and is, in fact, unlimited. There is no justification for making this provision open ended. Accordingly, the word “include” should be deleted.

Section 12B(3)

What is the purpose of this provision? It just seems to provide for uncertainty, or an even wider, unwarranted, dilution of copyright. This provision should be deleted.

Section 12B(6)

This subsection is incomprehensible in its present form and should be re-drafted. It demonstrates that the person(s) responsible for the drafting lack understanding of the applicable law and the relevant legal principles.

Presumably, what is intended is to make provision for the so-called first-sale doctrine (or exhaustion). On this assumption, what the sub-section should say is something along the following lines:
“The first sale of an article in any country by, or with the authority of, the copyright owner in respect of a work embodied in it shall enable that article to be imported into the Republic and to be resold or otherwise disposed of, without infringing that copyright and irrespective of any right of copyright held by any person in that work.”

Of course, there is an even simpler solution to deal with the problem of parallel importation, and that is to amend section 23(2) of the Act. However, it does require the draftsperson to know what the current law in South Africa is, which does not appear to be the case.

Section 12D

Section 12D(1)

This subsection is very badly worded and contains mixed, and incorrect use of terminology, which makes its interpretation uncertain and difficult. It ought to read along the following lines:

"*…a person may make a reproduction of a work, or may broadcast it, for the purposes of educational and academic activities; provided that the extent of the reproduction or of the portion broadcast does not exceed the bounds of what can reasonably be justified, having regard to the legitimate interests of the copyright owner.*"

Section 12D(3)

The Act contains no reference to "indigenous communities" and confers no rights on such groups. This is a consequence of the Intellectual Property Law Amendment Act 2013 ("IPLAA") not having been brought into operation. This reference should be deleted. For the avoidance of doubt, it is submitted that IPLAA should never be brought into operation as it would simply distort the legal principles in the different legislation it seeks to amend.

Section 12D(6)

The "instruction" should be taking place at a recognised educational institution.
"Incorporate" is not a restricted act under Act. "Reproduce", which is a restricted act, should be substituted for it. The effect of an exemption is to authorise the performance of a restricted act under Act.

"Assignment" has a recognised specific meaning in copyright law, namely, to transfer the ownership of copyright. It should not be used in this context as it is potentially misleading and could cause confusion.

Section 12D(7)

Before recommending some suggested changes to this subsection, it should be noted that the impact on the viability of South African academic publishing by this proposed section needs to be properly investigated. Given the fact the academic publications form a significant part of funding of tertiary institutions, which is funded by the state, it is important that there remain viable publications to promote such academic publishing. Of course, arguably, the greatest beneficiary of this proposed provision is Google Scholar, who has not invested in the academic publication, but will benefit from. Unless a service like Google Scholar similarly financially contributes directly to academic publication, why should it be granted this type of benefit? For example, there is not even an obligation for such a service pay a portion of any revenue it receives (such as, from advertising) in connection with its publication of the relevant work. Why not?

Section 20 "Substitution of section 19B"

Section 19B(2)

The subsection refers to "reproduction of the code and translation of its form". This does not conform to the Acts terminology. A computer program is usually programmed in source-code form. Any version of the code that is created thereafter, such as, the object code (or machine code), is protected as an "adaption" of the source code (see sections 1 (*sv* "adaptation" para (d)) and 11B(f)). The section should, therefore, refer to "reproduction of the computer program or adaptation thereof".

Section 19B(2)(c)

Second, it limits the decompilation exception to those "parts of the original program which are necessary in order to achieve interoperability". It must be noted that the process of decompilation is complex and computer-aided. Prior to the process of decompilation being carried out, it is seldom possible (and usually impossible) to identify the parts of a computer program that are needed to achieve interoperability.

The entire computer program must, and will usually, be decompiled in order to find all the relevant parts. Thus, in order to give the decompilation exception practical relevance, this subsection should be deleted.

Section 19B(4)

While section 19B permits decompilation to achieve "interoperability" with another program, it defines this concept by limiting it to the exchange of *information* and the use of that information. This is inappropriate, as it unduly restricts the decompilation right. Computer programs are intended to perform particular functions. Therefore, interoperability should be defined as the ability to perform its function in relation to the decompiled program or another program.

Clause 20 "Insertion of section 19C in Act 98 of 1978"

While it is right that the exceptions are confined to non-commercial purposes (subject to the earlier remarks concerning the definition of "commercial"), there should probably also be an exception for "art market professionals" to be able to market or advertise the artworks that they are selling. For example, they should be able to show photographs of these artworks on their websites or other marketing material. This is particularly the case now that it is proposed that a resale royalty right be introduced (see section 7B).

Section 19C(2)

What is the purpose of this section? If one of the listed institutions owns a tangible article embodying a copy of copyright work (such as, a book), this activity is not restricted by copyright, and, consequently, no exception is required. In fact, that is what the listed institutions, such as, libraries, have been doing for centuries! Accordingly, the subsection should be deleted.

Section 19C(4)

Again, this activity is not restricted by copyright, and, consequently, no exception is required. Accordingly, the provision should be deleted.

Section 19C(7)

The passage “without the consent of the copyright owner” is redundant and should be deleted as it may cause confusion. First, the point has already been made in subsection (1) and does not need to be repeated. Second, the phrase is not repeated in the other relevant subsections, and this makes the current subsection different for no good reason. This may give rise to serious issues of interpretation of the section.

Section 19C(9)

The Act makes no reference to “indigenous communities”, nor does it confer any right on such groups. This is a consequence of the IPLAA not being in force. The phrase should be deleted.

Section 19C(10)

The opening words, namely, “Notwithstanding any other section” is most inelegant, and unusual drafting. The conventional, and better, expression would be to substitute it with “Notwithstanding the provisions of this Act”.

Section 19C(13)

The subsection creates a necessary exception in favour of the despatching library: it is authorised to make a reproduction of a work. However, the receiving library also makes a reproduction of the work and requires a similar exception in its favour. This should be provided. Also, the way the subsection currently reads is that it seems to place an obligation on the despatching library to ensure that the receiving library carries out the requirements of paragraph (b) and that the despatching library’s right

to rely on the exemption is conditional upon this being done. If this is the intention, it should be stated more clearly.

Section 19C(14)

The phrase “protected from any claim for damages, from criminal liability and from copyright infringement” is contorted and should be simplified. It can simply be provided that those persons are “absolved from [or, have immunity against] any claims of copyright infringement”. If they are absolved from any claims of copyright infringement, there can be no question of damages or criminal liability being incurred.

As for paragraph (b), if the work is in the public domain, there is no copyright protection, and it is incorrect to make reference to “the copyright work”. In addition, the Act only protects copyright and not “related rights” (whatever this may mean) and such reference is inappropriate and should be deleted. Accordingly, the phrase “the copyright work, or material protected by related rights” should simply be replaced by “the work”.

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24 June 2021

ISSN 0257-7747

TYDSKRIF VIR DIE SUID-AFRIKAANSE REG

JOURNAL OF SOUTH AFRICAN LAW

2021 · 2

TYDSKRIF VIR DIE SUID-AFRIKAANSE REG

Journal of South African Law

ARTIKELS

AANTEKENINGE

REGSPRAAK

UNIVERSITEIT VAN JOHANNESBURG

- Die Tydskrif vir die Suid-Afrikaanse Reg staan onder beheer van die Fakulteit Regsgeleerdheid van die Universiteit van Johannesburg.
- ISSN 0257–7747
- Ten volle geakkrediteerde tydskrif by Dept van Onderwys (DOE) *Social Sciences Citation Index (SSCI) Web of Science (WoS)* and *Scopus* accepted accredited journal
- Redaksie: J C Sonnekus BA LLB LLM LLD (redakteur); S F du Toit BA LLB LLD; K E van der Linde BIuris LLB BA Hons LLM LLD; C F Hugo BA (Regte) LLB LLM LLD; M M Watney BA LLB LLM LLM LLD; M J van Staden LLB LLM LLD; M L du Preez BA LLB LLM; C H MacKenzie BA (Hons) MA PhD (taaladviseur)
- Redaksionele advieskomitee: Nasionaal – sy ed regter J C Kriegler; sy ed appèlregters F R Malan; R W Nugent en N P Willis; sy ed regter D H van Zyl; proff D van der Merwe en M F B Reinecke. Internasionaal – Proff V Sagaert (Leuven); M Martinek (Saarbrücken); W J Zwalve (Leiden).
- Redaksie-adres: Fakulteit Regsgeleerdheid, Universiteit van Johannesburg Posbus 524 Auckland Park 2006 Suid-Afrika/Editorial address: Faculty of Law University of Johannesburg PO Box 524 Auckland Park 2006 South Africa – Telefax (011) 559 2049.
- Uitgewer: JUTA Law – Kaapstad – Claremont – Johannesburg.
- Uitgewersadres: Posbus 24299, Lansdowne, 7779 Suid-Afrika – Telefaks (021) 659 2360. Publisher's address: PO Box 24299, Lansdowne, 7779 South Africa – Telefax (021) 659 2360.
- Hierdie tydskrif verskyn in Februarie, Mei, Augustus en November van elke jaar. 'n Register vir elke jaar word die daaropvolgende jaar versend.
- 2021 intekengeld: inskrywings deur agente of boekwinkels: R1 687,00 (BTW ingesluit)
- Drukker: DJE Flexible Print Solutions.

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Should South Africa adopt fair use? Cutting through the rhetoric

S KARJIKER*

SAMEVATTING

MOET SUID-AFRIKA BILLIKE GEBRUIK AANNEEM? RETORIEK OMSEIL

Die wetgewer poog om met die Wysigingswetsontwerp op Outeursreg ingrypende veranderinge in die Wet op Outeursreg aan te bring, waarby die instelling van billike gebruik ("fair use") ingesluit word. Hierdie voorgestelde wysiging blyk nie die resultaat te wees van enige erkende hersieningsproses nie, en vereis 'n deeglike ontleding van die gevolge daarvan. Hierdie radikale afwyking van ons huidige benadering ten opsigte van die uitsonderings in outeursreg is deur sommige bekende tegnologie maatskappye ondersteun, nie net in Suid-Afrika nie, maar ook in ander regsgebiede soos die Verenigde Koninkryk, Australië en Nieu-Seeland. Die artikel spreek ernstige kommer uit oor die implikasies van die instelling van billike gebruik in die Suid-Afrikaanse reg. Sodra verby die retoriek van die beweerde meerderwaardigheid van billike gebruik beweeg word, is die prentjie wat ontstaan verontrustend. Alhoewel daar entoesiastiese ondersteuning blyk te wees vir die instelling van billike gebruik vanuit sekere oorde, is die geskiedenis daarvan om regsekerheid te vestig in die regsgebied van sy statutêre oorsprong, die Verenigde State, minder bemoedigend. Billike gebruik vereis 'n litigasieproses tussen die verskillende partye om die toelaatbare uitsonderings op outeursreg te bepaal. Daar is geen noodwendige rede waarom billike gebruik meer responsief is op tegnologiese verandering as wetgewende hervorming nie.

Daar is beduidende verskille in ons regstelsel en die litigasieproses wanneer dit vergelyk word met dié van die Verenigde State. Versuim om die verskille te erken, kan tot onvoorspelbare en onbedoelde gevolge lei. Uitsonderings op die outeursreg behels aspekte van openbare beleid. Dit moet nie deur regters beslis word ooreenkomstig 'n agenda wat daargestel is deur private litigante nie. In 'n demokratiese samelewing moet openbare beleidskwessies deur die parlement bepaal word en dit mag openbare deelname insluit.

Billike gebruik, of enige vorm van oop uitsonderings, kan daartoe lei dat Suid-Afrika sy verdragsverpligtinge kragtens die Bernkonvensie, die TRIPs-ooreenkoms en in die besonder die sogenaamde "drie-stap-toets" mag oortree. Dit is ook duidelik dat die houding van die Europese Unie en die Verenigde State teenoor die groot tegnologie maatskappye minder uiteenlopend is, en dat wetgewende maatreëls ingestel word, of oorweeg word, om die uitbuiting van die regte van outeursreghebbendes te beperk. Voorstanders vir die instelling van billike gebruik het nog geen regverdiging verskaf waarom Suid-Afrika dit só moet gedra oor sy internasionale verpligtinge nie.

1 *Introduction*

In 2015, the department of trade and industry introduced the Copyright Amendment Bill (the bill),[1] which will amend the Copyright Act,[2] in an attempt to update South African copyright law. Although the bill, and the process followed in its development, have been subjects of much scrutiny and criticism, arguably, the most concerning proposal – amongst a number of deeply problematic provisions –

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1 GN 646 of 2015 in *GG* 39028 (27-07-2015). Subsequent reference to the bill will be to the latest draft: Minister of Trade and Industry "13B-2017 Final Draft 15.11.2018" Parliamentary Monitoring Group http://pmg-assets.s3-website-eu-west-1.amazonaws.com/B13B-2017_Copyright.pdf (20-05-2020).

2 98 of 1978.

[ISSN 0257 – 7747]

is the introduction of fair use.[3] The proposed introduction of fair use, as is the case with other far-reaching proposed changes, has not been the result of any recognised review process concerning the Copyright Act. In fact, the only review of the Copyright Act was that undertaken by Farlam J, which did not concern itself with the vast majority of the proposed changes in the bill, including the departure from our current system of fair-dealing exceptions.[4]

Reports indicate that the department of trade and industry realises that this would be a significant shift in policy, and has "likely … far-reaching unintended consequences", but this has not deterred the department from reconsidering its proposed amendments in this regard.[5] It is not difficult to determine the impetus for the department of trade and industry's proposal to depart from our current fair-dealing system, or to figure out who is likely to benefit from this departure. The departure from fair dealing to fair use has been lobbied for by technology companies, not only in South Africa, but also in other jurisdictions, such as the United Kingdom,[6] Australia[7] and New Zealand.[8]

The purpose of this article is to consider the case for the adoption of fair use, and to subject fair use to the type of scrutiny that appears to be lacking, despite it receiving enthusiastic academic support in certain quarters. This article seeks to demonstrate that those supporting the adoption of fair use are doing so either as a consequence of their ignorance of (or a blind spot concerning) its consequences, or – worse still – they are part of a lobbying campaign, notwithstanding any concerns about its introduction. Once you get beyond the rhetoric of the claimed superiority of fair use, the emerging picture concerning fair use is a rather bleak one.

2 *Exceptions to copyright protection*

The exclusive rights that copyright legislation grants to copyright owners are subject to limitations (or exceptions) that allow others (namely, third parties) to use copyright works in certain circumstances, without having to obtain the copyright owners' consent.[9] There are two approaches by which the exceptions are provided for in copyright legislation in various jurisdictions, namely, fair dealing and fair use.[10] It should immediately be noted that the overwhelming majority of jurisdictions employ a system of fair dealing, so it would hardly be appropriate to create the impression that fair use is a readily-accepted alternative to fair dealing.[11] However, given the

3 cl 12A of the bill.

4 Copyright Review Commission Report 2011 (Farlam Review) par 4.8 https://www.gov.za/sites/default/files/gcis_document/201409/crc-report.pdf (20-05-2020).

5 "Legislation: Copyright Bill process reaches cross roads" *Legalbriefs* 4446 (25-04-2018) http://legalbrief.co.za/diary/legalbrief-today/policy-watch/legislation-copyright-bill-process-reaches-cross-roads/#redirect (25-04-2018).

6 Hargreaves *Digital Opportunity: A Review of Intellectual Property and Growth* (2011) 52.

7 Australian Law Reform Commission *Copyright and the Digital Economy: Final Report* (2013) (ALRC Report) 95 n 41.

8 Deloitte *Copyright in the Digital Age: An Economic Assessment of Fair Use in New Zealand* (2018) (Deloitte Report) https://www2.deloitte.com/content/dam/Deloitte/nz/Documents/Economics/dae-nz-copyright-fair-use.pdf (29-11-2020).

9 Some subject matter may be devoid of any copyright protection. See *eg* s 12(8) of the Copyright Act.

10 There is no point to viewing a so-called "hybrid" approach to exceptions as being anything other than a fair-use approach. If there are defined exceptions, but there is also an open-ended exception that typifies the fair-use approach, for all intents and purposes, it amounts to fair use.

11 Besides the United States, the other jurisdictions that have adopted fair use are Israel, Singapore, South Korea and the Philippines. See the ALRC Report (n 7) 89 and the Deloitte Report (n 8) 15.

volume of the rhetoric concerning fair use, one could be forgiven for thinking that fair use is as prevalent as fair dealing.

Under a system of fair dealing, such as that which currently exists in South African law, there are a limited number (or *numerus clausus*) of exceptions in respect of each category (or type) of copyright work. "Dealing" in this context does not refer to dealing in the commercial sense, but rather to "use" of the copyright work. For example, the most well-known exceptions are those applicable to literary (or artistic) works, namely, the right to use the works for purposes of research or private study, or for personal or private use; for criticism or review; or, for reporting current events.[12] The fair-dealing exceptions act as a defence against conduct that would otherwise constitute copyright infringement.[13] In other words, if there is no copyright infringement, there is no need to consider the exceptions.[14] Whether a defendant is able to rely on any of these exceptions involves a two-stage enquiry: first, establishing whether the particular use (*eg* reproduction) was for the exempted purpose (*eg* research), and, second, whether the use was fair.[15] If the particular use of copyright material was not for the exempted purpose, there can be no question of such use being exempted. Importantly, as mentioned, the list of exempted purposes is an exhaustive, or closed, list. The determination of whether a particular use is fair is for the court to determine – objectively – and involves a value judgment, depending on the particular facts or circumstances, determined at the time of dealing.[16] It is a matter of fact, degree and impression.[17]

In contrast to the fair-dealing approach to copyright exceptions, fair use, most notably, applicable (and having its legislative origin) in the United States, is an open-ended approach to possible exceptions to copyright protection. While the United States system lists specific exceptions (or exemptions) similar to those found in the current South African legislation,[18] they are simply illustrative exceptions as to what is permissible; any other use may be allowed, provided that such use is considered to amount to fair use when assessed against the criteria stipulated in the United States legislation.[19] In other words, the fair-use approach is not confined to uses that are specifically provided for in the legislation, and any unauthorised use of copyright works may be considered to be permissible, if a court considers the particular use to amount to fair use, in accordance with the stipulated four factors. The four factors against which a particular use will be assessed are the following: the purpose and character of use; the nature of the copyright work; the amount and substantiality of the portion used; and the effect on the potential market of the copyright owner.[20]

[12] s 12(1) Copyright Act (n 2). See also s 29, 30(1) and 30(2) of the Copyright, Designs and Patents Act 1988 (UK CDPA).

[13] *Moneyweb (Pty) Ltd v Media 24 Ltd* 2016 4 SA 591 (GJ) par 111.

[14] This is also the case in the US. See LaFrance *Copyright Law: In a Nutshell* (2011) 309 and 310. In the US, it is also a defence against infringement of moral rights (LaFrance 310).

[15] the *Moneyweb* case (n 13) par 102.

[16] the *Moneyweb* case (n 13) par 112, 114 and 121.

[17] the *Moneyweb* case (n 13) par 114. See also *Hyde Park Residence Ltd v Yelland* 2001 Ch 143 158 and 171.

[18] s 108 to 122 Copyright Act 1976, Title 17 USC (US Copyright Act).

[19] s 107 US Copyright Act (n 18). See also ALRC Report (n 7) 89.

[20] s 107 US Copyright Act (n 18).

The principal argument advanced by proponents of fair use is not a particularly complicated or nuanced argument.[21] It is claimed that fair use provides greater flexibility than fair dealing: given the fact that there are no *numerus clausus* of exceptions, fair use enables the creation of exceptions that are necessitated by technological developments.[22] In a fast-moving world of technological innovations, the law is simply too slow at responding to the challenges posed by technological changes, which require the creation of further exceptions. There is also the suggestion that fair use will lead to increased economic growth, because it allows for greater innovation.[23] In addition to subjecting this claimed benefit of fair use to critical analysis, this article will also express a view on whether fair use complies with South Africa's obligations under international treaties, namely, the Berne Convention[24] and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement).[25]

It is important to note something at the outset. In the criticism of fair use that follows, it is in no way being suggested that our present fair-dealing exceptions are currently adequate, and that they do not require revision. Quite the contrary, it is recognised that the fair-dealing exceptions require revision. For example, there may be problems that those who seek to archive valuable musical collections are encountering, due to the inadequate provisions relating to libraries and archives.

3 *The case against fair use*

Despite the fact that flexibility is the strongest argument for fair use, even some of its proponents are wary about such a claim and are simply prepared to state that a fair-dealing system "may not be" the best when it comes to the issue of flexibility, without expressly stating that fair use is superior in this regard compared to fair dealing.[26] This is hardly a ringing endorsement of the supposed greatest advantage of fair use. The reason for this mealy-mouthed support for fair use should become clear from what follows.

The claimed flexibility that fair use may offer comes at a price. That price is uncertainty, and is too high a price, not to mention that fair use may breach South Africa's international obligations. Most copyright stakeholders would prefer certainty about the extent of the permissible uses, rather than having to speculate about the types of uses that would require the copyright owners' authorisation, and those which may be performed without such authorisation.[27] Of course, that laws provide certainty is generally considered desirable by society, not simply in the context of copyright exceptions. Even the Australian Law Reform Commission

[21] There is also the hint of jingoism about the superiority of fair use (and United States law in general), which will, no doubt, become evident to anyone who has engaged with the literature on the topic. There is the not-so-subtle suggestion that the world would be a better place if every other legal system resembled the American legal system in this regard. See *eg* the following quote (ALRC Report (n 7) 106): "The copyright industries in the United States remain without peer. These industries have achieved global dominance against the backdrop of a domestic fair use defence."

[22] ALRC Report (n 7) 92 and 95.

[23] ALRC Report (n 7) 104.

[24] Berne Convention for the Protection of Literary and Artistic Works 1161 UNTS 3 (Berne Convention).

[25] Agreement on trade-related aspects of intellectual property rights including trade in counterfeit goods, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 ILM 1125, 1197 ("TRIPs Agreement").

[26] Deloitte Report (n 8) 20.

[27] Sookman and Glover "Why Canada should not adopt fair use: a joint submission to the copyright consultations" 2009 *Osgoode Hall Review of Law and Policy* 139 141.

Report, which recommended the adoption of fair use in Australia, acknowledged the importance of "[c]opyright exceptions be[ing] certain and predictable".[28] Fair use results in a level of uncertainty that is at least an order of magnitude greater than that under fair dealing.

As already indicated, fair use "offers no bright-line test and no per se rules."[29] Unlike fair dealing, fair use provides no certainty concerning the type of use that may be permissible. "Every case turns on its specific facts … [which] makes its likelihood of success difficult to predict in specific cases."[30] As already noted, in the case of fair dealing, the first leg of the fair-dealing enquiry concerns establishing whether the particular use is for the permitted purpose. While there may be some dispute about whether a particular use of a copyright work falls within the exempted purpose, there is no uncertainty about what the permitted exempted uses are. The contentious issue tends to be whether the particular use is fair, which is something that would have to be considered under fair use too, whereas under fair use the particular use may also be contentious. Fair use is not confined to specific uses. In fact, it has been suggested that the four factors for the determination of whether a particular use constitutes fair use under United States law could be considered in assessing whether a specific exempted use was fair under South African law.[31] Given the aforementioned, it becomes patently clear how absurd the following claim of superiority of fair use over fair dealing is: "US fair use is notably *more specific* than the UK fair dealing provision by its articulation of other factors besides purposes that should be taken into account when making a judgment about whether a challenged use is fair."[32]

Curiously, the Australian Law Reform Commission Report states that the absence of defined permitted purposes does not make fair use uncertain, but rather flexible.[33] There is ample evidence in the United States confirming the greater uncertainty that results from fair use, when compared to fair dealing. This, of course, lays bare any claims by proponents for the adoption of fair use in South Africa concerning the alleged ease with which fair use can be applied; it is simply not a view shared by noted American scholars. Halpern says the following about fair use in the United States: "What are not clear are the boundaries, standards, and parameters of the doctrine necessary to a reasonable degree of predictability."[34] There has been "an enormous amount of scholarly attention" given to the United States' fair use provision, "nearly all" of which "has been highly critical" thereof.[35] Even United States commentators who seek to restore some confidence in the United States' fair-use approach concede that it "has to some extent run off the rails".[36]

The aforementioned criticisms, while damning enough, are by no means the harshest criticisms levelled at the United States' fair-use doctrine. No lesser a commentator than Nimmer has been extremely critical of the fair-use test as embodied in the United States Copyright Act. He says that the United States statutory

[28] ALRC Report (n 7) 88.
[29] LaFrance (n 14) 309.
[30] LaFrance (n 14) 309.
[31] Dean and Karjiker *Handbook of South African Copyright Law* (2015) 1-96.
[32] Samuelson and Hashimoto "Is the US fair use doctrine compatible with Berne and TRIPS obligations?" 2018 *SSRN* 6 – italics added.
[33] ALRC Report (n 7) 94.
[34] Halpern *et al Fundamentals of United States Intellectual Property Law* (2012) 92.
[35] Beebe "An empirical study of US copyright fair use opinions, 1978-2005" 2008 *University of Pennsylvania Law Review* 549 552.
[36] Beebe (n 35) 596.

provision is as useful as a dartboard in determining whether a particular use would be considered to be fair use.[37] Lessig, who actually seeks more far-reaching changes to copyright, echoes this dismal account of fair use in the United States:

> "[F]air use in America simply means the right to hire a lawyer to defend your right to create. And as lawyers love to forget, our system for defending rights such as fair use is astonishingly bad — in practically every context, but especially here. It costs too much, it delivers to slowly, and what it delivers often has little connection to the justice underlying the claim. The legal system may be tolerable for the very rich. For everyone else, it is an embarrassment to a tradition that prides itself on the rule of law."[38]

Nimmer's reason for his damning criticism is that each of the listed four factors leaves too much room for subjective determination. He provides support for his view by indicating that there have been cases where a lower court has come to an opposite conclusion on each of the four factors to that reached by the particular appeal court. It is suggested that courts tend to first decide whether a particular use constitutes fair use, and then proceed to rationalise their decision to conform to that predetermined result, rather than that conclusion being the outcome of the cumulative result of the assessment of each of the four factors.[39] While some courts appear to have a tendency to make their assessments of each of the four factors conform with the relevant outcome,[40] other courts' assessments appear to show conflicts with their assessments of each of the four factors.[41] In other words, there have been court decisions in which courts have assessed the use in relation to each of the factors to be fair, but concluded that there was no fair use.[42] The converse has also occurred: a court appears to have assessed the use in relation to each of the factors to be unfair, yet concluded that there was fair use.[43] Nimmer, therefore, says "it is largely a fairy tale to conclude that the four factors determine the resolution of concrete fair use cases".[44] Even at the level of the United States supreme court, there has been a decision where the court was split straight down the middle.[45]

Proponents of fair use, such as Samuelson, are acutely aware that critics of fair use point to its indeterminacy and uncertainty, and its failure to satisfy the three-step test.[46] Thus, in order to counter those criticisms, it is suggested that the fair-use case law "falls into numerous predictable patterns … several meaningful 'clusters' of fair use cases".[47] Fair use, in practice, is said to pertain to "certain special cases".[48] If that is indeed the case, would it not provide greater certainty to specifically enumerate those "special cases" in legislation, in the manner that fair dealing does? That should provide more certainty than having matters resolved by

[37] Nimmer "'Fairest of them all' and other fairy tales of fair use" 2003 *Law and Contemporary Problems* 263 280.
[38] Lessig *Free Culture: The Nature and Future of Creativity* (2004) 187.
[39] Nimmer (n 37) 281. This phenomenon, so-called stampeding, has been claimed by Beebe to "generally" not exist (Beebe (n 35) 590), but he also admits that the application of the four-factor test has become formulaic (Beebe 562).
[40] Nimmer (n 37) 282.
[41] Nimmer (n 37) 282-3.
[42] Nimmer (n 37) 282-3.
[43] Nimmer (n 37) 283.
[44] Nimmer (n 37) 282.
[45] Nimmer (n 37) 282.
[46] Samuelson and Hashimoto (n 32) 1-2.
[47] Samuelson and Hashimoto (n 32) 6. It is probably also the source for the same claim in the Deloitte Report (n 8) 42.
[48] Samuelson and Hashimoto (n 32) 7.

litigation, which necessarily is highly fact-specific, as a court can only deal with the facts of the matter before it. In fact, it is conceded that the United States' courts best avoid "more categorical" rulings, by, for example, holding that "posting book chapters online is per se fair use".[49]

In fact, the contrary view has been strongly expressed about fair use. It has been claimed that "the doctrine of fair use is impervious to generalization and that attempts to derive its meaning from careful analysis of specific cases are futile".[50] Of course, if there is uncertainty, it increases the likelihood of litigation, which, arguably, makes fair use a more costly and inefficient system. The evidence would suggest that it is the latter view that may be a more accurate reflection of the true state of affairs concerning fair use. It is, no doubt, because of this concern that the Deloitte Report seeks to point out that government regulation, having to periodically update fair-dealing exceptions, is not costless.[51] Rather tellingly, the Deloitte Report is careful not to make a definitive statement, namely, that such costs would be greater than the costs of a fair-use approach.[52] The authors of the report probably hoped that that is the conclusion the reader of the report would come to. Before considering the evidence, it should be noted that, to the extent that a form of exceptions necessarily involves costs, the costs of government regulation are socially preferable as those costs are, effectively, spread over society, whereas under fair use the costs of litigation have to be borne by the relevant litigating parties. Fair use requires private litigation to determine the permissible exceptions to copyright. Of course, the extent that the outcome of private litigation, which is necessarily fact specific, and unpredictable, can – and ought to – serve to establish general exceptions, is questionable, and considered further below.

It is not difficult to see why proponents of fair use have such a tough time convincing us that fair use will not result in greater uncertainty, and concomitant increased litigation. While this is not an empirical study, it is necessary to comment on the difference in the respective levels of litigation in the United States and the United Kingdom. This is because proponents of fair use are eager to placate concerns about increased litigation, as a consequence of the greater uncertainty. There is evidence to indicate that fair use may result in increased litigation, which should not come as a surprise, given the increased uncertainty. An empirical study on United States fair-use cases between 1978 and 2005 (namely, a period of 28 years) done by Beebe indicates that there were 215 federal cases, which yielded 306 judgments (opinions).[53] During the same time period there were 23 reported cases in the United Kingdom concerned with fair dealing. Of course, the United States' economy is larger, and it is necessary to factor that into the comparison. According to the World Economic Forum, in 2017 the United States' share of the global economy was 24.32 per cent and the United Kingdom's was 3.85 per cent.[54] That makes the United States economy roughly 6.32 times bigger than the United Kingdom economy, a ratio that can be assumed to have remained relatively similar over the aforementioned period. All things being equal, and on the assumption that the fair-use approach does not result in increased litigation, we would expect there

[49] Samuelson and Hashimoto (n 32) 19.
[50] Sookman and Glover (n 27) 151 quoting Parchomovsky *et al* "Fair use harbors" 2007 *Virginia Law Review* 1483 at 1484-1486.
[51] the Deloitte Report (n 8) xi.
[52] the Deloitte Report (n 8) xi.
[53] Beebe (n 35) 565.
[54] https://www.weforum.org/agenda/2017/03/worlds-biggest-economies-in-2017/ (14-06-2018).

to be about 34 fair-dealing cases in the United Kingdom, and not 23 cases. However, the level of litigation in the United Kingdom is significantly lower than that in the United States, by almost one third.

In fact, another study by Nimmer lists at least 60 cases in a period of just eight years (1994-2002); interestingly, this period followed the United States' supreme court's fourth fair-use decision in 1994.[55] The Deloitte Report also indicates that there were 60 cases in a period of seven years (2009-2016).[56] While the Deloitte Report seeks to reduce the significance of the number of cases, by stating that only six proceeded to a full trial,[57] it clearly shows that the fair-use system results in a consistently greater number of cases, which proponents of fair use find difficult to deny.

The risk associated with the uncertainty created by conflicting court decisions is not simply theoretical (or statistical), as the United States' legislature has had to amend section 107 of the United States' Copyright Act to clarify confusion caused by decided cases. For example, congress amended the wording of the section in 1992 to provide that the fact that the relevant copyright work is unpublished is not dispositive of the issue of whether there may be fair use in respect of such a work.[58] Moreover, as a consequence of the prevailing uncertainty, industry guidelines have been developed to provide the necessary certainty that businesses require.[59]

Even if there is a threat of increased litigation under a fair-use system, we are urged not to be concerned about this; courts in foreign jurisdictions "will be able to rely upon the established principles of fair use in the body of the United States law, along with existing precedents surrounding the fair-dealing exceptions".[60] Given the poor track record of fair use in the United Sates, this appears to be the kind of generosity we would be well-advised to decline. Moreover, there are significant differences between our system of litigation and that which exists in the United States. A failure to appreciate these differences may have ramifications that are difficult to predict. Thus, even if, for argument's sake, fair use may be working well in the United States of America, it is not a forgone conclusion that it will similarly work well in South Africa, which has a different system of litigation. For example, in United States civil litigation, a successful litigant is generally not allowed to recover its costs from the losing litigant.[61] In other words, costs tend not to follow the event. Moreover, in copyright litigation, if the plaintiff copyright owner seeks damages for infringement, either party to the litigation may demand a trial by jury.[62] Notwithstanding the problems created by disproportionately large damages awards (even outside awards of punitive damages),[63] juries, as finders of fact, are considered to be desirable because they ensure that there is a form of democratic participation in the determination of copyright disputes.[64] Juries must be impartial and, due to random selection, must consist of a cross-section of the population.[65] This should be borne in mind when considering the following issue.

[55] Nimmer (n 37) 267 and 278.
[56] the Deloitte Report (n 8) xi.
[57] the Deloitte Report (n 8) 46.
[58] LaFrance (n 14) 317.
[59] Sookman and Glover (n 27) 159.
[60] the Deloitte Report (n 8) 47.
[61] Bonfield *American Law and the American Legal System* (2006) 66.
[62] LaFrance (n 14) 307.
[63] LaFrance (n 14) 349.
[64] Bonfield (n 61) 82.
[65] Bonfield (n 61) 71.

4 *Who should determine public policy?*

While the principal claimed advantage of fair use is its flexibility and responsiveness, it is important to be mindful of the fact that it is a *post hoc* and *ad hoc* system, and does not provide a level of certainty comparable to a fair-dealing system. This point is acknowledged by the Deloitte Report when it states that "as an ad hoc analysis, even a finding of fair use in one case has no bearing on whether another use, even of the same work, will be considered fair".[66] It, thus, begs the question of how such a system is more efficient and how it facilitates creativity when it creates inherent uncertainty. Any perceived positive effect on creativity, to the extent that such exists, is, at best, coincidental.

As already noted, most stakeholders desire certainty, and that is not what fair use provides. This could result in disruptions to licensing arrangements and other possible uses of copyright.[67] Unscrupulous users of copyright content could easily seek to use the uncertainty created by fair use, and the threat of litigation, to avoid paying royalties, or to use it as a wedge to reduce the royalty payments.[68] Companies like Google and YouTube could easily use – and, arguably, have used – the leverage which fair use provides, because of uncertainty, to impose royalty rates on copyright owners on a "take it or see you in court" basis. For example, it may, in part,[69] account for the so-called value gap, namely, the fact that YouTube undercompensates copyright owners in the music industry, while it earns significant revenue from copyright content uploaded to its platform.[70]

How much room for negotiation would fair use (along with its attendant litigation costs) provide South African copyright owners vis-à-vis Google in relation to its YouTube service? Interestingly, when New Zealand rejected fair use in 2002, one of the specific concerns was the fragility of its market, given its small size.[71] The size of the Canadian market was also raised as a reason for rejecting fair use because "overbroad exceptions and limitations can have adverse effects on the ability to earn adequate remuneration from creative endeavours".[72] The introduction of fair use does not simply involve changing the text of our legislation; it could have serious economic consequences for our copyright owners, artists and musicians, who the government claims need more protection, but would potentially expose them to increased risk of litigation, and lower levels of remuneration.

All the arguments in favour of fair use are premised on a fundamental, underlying assumption, namely, that courts will always get matters of policy right, and that important issues that require clarification will be litigated. Even if the finding of a court is potentially applicable to other comparable situations, fair use will not necessarily produce the advantages that it is claimed to offer over fair dealing. Judges do not choose the cases that come before them. The effect of fair use is to allow policy decisions to be determined by individual litigants and the courts, which is "a far less effective, less democratic and less principled way to approach

66 the Deloitte Report (n 8) 24-25.
67 Sookman and Glover (n 27) 145.
68 Sookman and Glover (n 27) 154-155.
69 Another reason for the value gap is said to be uncertainty caused by the safe-harbour provision in the Digital Millennium Copyright Act 1988, which introduced section 514 into the US Copyright Act.
70 Lawrence "Addressing the value gap in the age of digital music streaming" 2019 *Vanderbilt Journal of Transnational Law* 511 514; Bridy "The price of closing the 'value gap': how the music industry hacked EU copyright reform" 2020 *Vand J Ent & Tech L* 323 325.
71 Sookman and Glover (n 27) 147.
72 Sookman and Glover (n 27) 164.

copyright reform".[73] First, a court can only determine the particular matter, with reference to the specific parties, before it. It is trite that bad cases make bad law. The Deloitte Report itself recognises this risk when it laments that the United States supreme court in the *Harper & Row Publishers* case[74] "may have erred in referring to [the] effect of the use upon the potential market for or value of the copyrighted work" as the "most important element of fair use".[75] All that can be said about this lamentation is that such a consequence is an inherent risk associated with fair use.

Second, matters that need clarification may never be ventilated in court because of inequality of bargaining power, and the costs of litigation, which may result in socially-undesirable outcomes. For example, should a dispute arise, one of the disputing parties, due to its precarious finances, may decide to avoid costly litigation, and settle on a basis that may be less favourable to its interests, as a consequence of the uncertainty concerning the particular use of copyright material. More importantly, as far as the alleged responsiveness of fair use to technological developments is concerned, given the congested court rolls in South Africa, and the possibilities of appeals, it could be years before there is any legal certainty about a particular use of a copyright work. The required responsiveness to technological advancements and greater certainty can be achieved if the department of trade and industry ensures that there is a properly constituted, functioning, and staffed statutory advisory committee, which is provided for in terms of section 40(1) of the Copyright Act. Such a committee can initiate a review of the statutory provisions, whenever it considers it appropriate.

Third, beyond the concern that two courts can come to different conclusions on questions of public policy, and that the outcome of litigation is not predictable, there is the fundamental concern that fair use amounts to giving the courts – with all due respect to judges – the right to determine public policy in the realm of copyright law.

The fact that the legislation, under fair use, does not provide a *numerus clausus* of permitted uses necessarily means that the courts act in a quasi-legislative capacity. There is no escaping from that fact, as proponents of fair use seek to do.[76] Since its first legislative enactment in the United Kingdom Statute of Anne,[77] "[c]opyright has always been concerned with promoting the public interest".[78] Accordingly, matters of policy should, ideally, be determined by the legislature. It is not appropriate to relegate the legislature to the position of simply fixing judicial errors concerning copyright policy, as proponents of fair use are comfortable to do. In summary, what is the constitutional basis for giving the courts the competency to determine copyright policy within our constitutional framework? Proponents of fair use need to provide the basis for such an extraordinary step.

5 *Fair use and South Africa's treaty obligations*

Fair use, or any form of open-ended exception, may cause South Africa to breach its treaty obligations under the Berne Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights, in particular, the so-called "three-

[73] Sookman and Glover (n 27) 163.
[74] *Harper & Row Publishers, Inc v Nation Enters* 1985 471 US 539.
[75] the Deloitte Report (n 8) 32-33.
[76] the Deloitte Report (n 8) 54.
[77] 1710, 8 Anne c 19.
[78] the ALRC Report (n 7) 100.

step test".[79] The three-step test, contained in article 9(2), became part of the Berne Convention following the 1967 revision session held in Stockholm, Sweden.[80] Originally, article 9(2) pertained only to exceptions to the reproduction right granted to copyright owners,[81] but article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights extended its scope to all the exclusive rights of a copyright owner.[82] Article 13 simply repeated the three-step test, apart from expanding the scope of exceptions to all exclusive rights. Thus, article 9(2) of the Berne Convention (as extended by article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights) is considered to be the general limitation provision to the exclusive rights provided by copyright, and is the international standard, or norm, for limitations.[83] South Africa is a signatory to both the Berne Convention[84] and the Agreement on Trade-Related Aspects of Intellectual Property Rights.[85]

The three-step test provides that the exclusive rights of a copyright owner can be limited, provided the limitations satisfy the following requirements: they are confined to certain special cases; they do not conflict with the normal exploitation of the copyright work; and they do not unreasonably prejudice the legitimate interests of the copyright owner.[86] Exceptions to the exclusive rights of a copyright owner may be of two forms, namely, with or without compensation to the relevant copyright owner. Where the exceptions are without compensation to the copyright owner, the exceptions "necessarily will be very limited" because they would, almost invariably, prejudice the legitimate interests of the copyright owner.[87] Exceptions with compensation would take the form of compulsory licences.[88]

As the name suggests, the steps of the three-step test are three distinct tests, and have to be applied sequentially, in the specified order, to the extent required.[89] The requirements of the three-step test are cumulative: if the requirements of either step one or step two have not been satisfied, it is not necessary to consider any subsequent

79 Sookman and Glover (n 27) 146, 147 and 160-161.

80 Samuelson and Hashimoto (n 32) 3.

81 It is said to be in the spirit of the Berne Convention to have the owner of copyright be a natural person. Therefore, it refers to the "author" as the person who is granted the exclusive rights. It is, however, recognised that member states can have different national approaches to copyright authorship and ownership, which must be respected. In the glossary it is, therefore, noted that the author, as referred to in the Berne Convention, denotes the person that is entitled to the economic and moral rights in relation to a copyright work (Ficsor *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* (2003) 32, 89, 268, 300). In South Africa, section 21 of the Copyright Act provides that the author shall be deemed the owner of the economic rights in relation to a copyright work, subject to several exceptions. References to the "author" in the context of international law shall, thus, be construed as the copyright owner in the South African context.

82 Newby "What's fair here is not fair everywhere: does the American fair use doctrine violate international copyright law?" 1999 *Stan L Rev* 1633 1648; Samuelson and Hashimoto (n 32) 10; Jehoram "Restrictions on copyright and their abuse" 2005 *EIPR* 359 361.

83 Dworkin "Exceptions to copyright exclusivity: is fair use consistent with article 9.2 Berne and the new international order" 2000 *International Intellectual Property Law & Policy* 66-1 66-20.

84 World Intellectual Property Organisation "WIPO-administered Treaties" http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15 (accessed 20-05-2020).https://wipolex.wipo.int/en/treaties/ShowResults?start_year=ANY&end_year=ANY&search_what=C&code=ALL&treaty_id=15 (30-12-2020).

85 World Trade Organization "South Africa and the World Trade Organisation" https://www.wto.org/english/thewto_e/countries_e/south_africa_e.htm (30-12-2020).

86 a 9(2) Berne Convention, as read with a 13 TRIPs Agreement.

87 Dworkin (n 83) 66-5.

88 Dworkin (n 83) 66-5.

89 Jehoram (n 82) 361; Lucas "For a reasonable interpretation of the three-step test" 2010 *EIPR* 277 281.

step; the three-step test will not have been satisfied in those circumstances.[90] In fact, it has been suggested that the three steps are arranged in a hierarchy of their respective importance, which makes the first requirement the most important.[91]

The first requirement, namely, that exceptions have to be confined to special cases, will be the subject of specific enquiry, as it is said to be the requirement that fails to be satisfied by fair use. While it should by now be obvious that the fair-dealing approach provides greater certainty than the fair-use approach,[92] the issue is really whether fair use is, notwithstanding its open-ended nature, sufficiently certain to satisfy the first requirement of the three-step test, namely, that exceptions be confined to certain special cases. It is "quite questionable" whether fair use satisfies the first requirement of the three-step test.[93] The purpose of the first requirement is to provide copyright owners and third parties with legal certainty.[94] It has been submitted that the first step of the three-step test embodies two requirements, namely, an exception must be for a specific purpose, and must serve a clear ("special") public purpose.[95] In other words, a broad, open-ended exception will not satisfy the first step of the test.[96] This position appears to have been recognised by a panel of the Agreement on Trade-Related Aspects of Intellectual Property Rights Dispute Settlement Body (World Trade Organisation Panel),[97] which indicated that an exception must provide sufficient certainty and be clearly and specifically defined.[98]

The dispute before the World Trade Organisation Panel indirectly concerned the effect and import of the first step of the three-step test. However, as will become clear, the dispute is also illustrative of the realpolitik at play concerning the United States and its ability to act unilaterally, without significant sanction, and raises serious concerns about the legality of aspects of United States' copyright law, particularly fair use. The European Union, on behalf of its composers, initiated the dispute and claimed that, as a consequence of the United States' business exception (see below), the United States was in violation of its obligations under article 9(1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights, which requires that signatories to the agreement comply with the Berne Convention (other than the obligation in respect of moral rights).[99]

At issue in the aforementioned dispute was the amended section 110(5) of the United States' Copyright Act, which placed limitations on the exclusive rights granted to copyright owners pursuant to section 106 of the United States' Copyright Act. More particularly, it concerned the exceptions to the performance rights of composers. Pursuant to the so-called "business exception" in section 110(5)(*B*), in effect, an exception was granted in respect of the performance rights of composers in non-dramatic musical works embodied in radio or television broadcasts that were transmitted in the majority of restaurants, cafes and retail businesses. No compensation was paid to composers for the lost revenue due to the business exception. In essence, the European Union's claim was that the business exception

90 Jehoram (n 82) 361; Lucas (n 89) 281.
91 Jehoram (n 82) 361.
92 Rostoll "Copyright in news?" 2017 *TSAR* 425 437.
93 Lucas (n 89) 278-9. See also Jehoram (n 82) 360.
94 Jehoram (n 82) 360.
95 Jehoram (n 82) 361.
96 Jehoram (n 82) 361.
97 Panel of the World Trade Organisation, United States a 110(5) of the Copyright Act (June 15, 2000) WT/DS160R (Panel Decision).
98 Lucas (n 89) 278.
99 Panel Decision (n 97) 7.

was incompatible with the three-step test, and that the United States should amend its legislation to bring it into conformity with its obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights.[100]

The World Trade Organisation Panel agreed with the European Union, and it concluded that the business exception was in contravention of the Agreement on Trade-Related Aspects of Intellectual Property Rights.[101] As far as the first step of the three-step test is concerned, the World Trade Organisation Panel had the following to say:[102]

> "The term 'special' connotes 'having an individual or limited application or purpose', 'containing details; precise, specific', 'exceptional in quality or degree; unusual; out of the ordinary' or 'distinctive in some way'. This term means that more is needed than a clear definition in order to meet the standard of the first condition. In addition, an exception or limitation must be limited in its field of application or exceptional in its scope. In other words, an exception or limitation should be narrow in quantitative as well as a qualitative sense. This suggests a narrow scope as well as an exceptional or distinctive objective. To put this aspect of the first condition into the context of the second condition ('no conflict with a normal exploitation'), an exception or limitation should be the opposite of a non-special, ie, a normal case."

It is difficult to see how fair use – an open-ended standard for exceptions to copyright protection – could, in the light of the aforementioned, constitute a special case, as required by the first step of the three-step case. In fact, in the past, "Australia, New Zealand and the United Kingdom have cited international treaty obligations as one of the reasons for not adopting a fair use system".[103] No doubt, given the problem of the language of the first step of the three-step test, it has even been suggested that the United States fair use is not itself a copyright exception "within the meaning of the Berne three-step test, and hence does not run afoul of it".[104] In other words, as the United States fair-use provision provides for an open-ended standard, and no specific exemptions, it does not conflict with the three-step test, because it creates no actual exemptions. While this type of sophistry may seem convincing, it avoids dealing with the consequences of this open-ended standard. That consequence is neatly described by Dworkin when he says that the fair-use doctrine "has to be applied by the courts in a fact intensive way and on a case-by-case basis. The individual approaches and underlying attitudes of some judges in such exercises are unlikely to be as consistent as specific legislative defenses."[105] In other words, this makes the United States' system of copyright exceptions distinctly ad hoc, when compared to a fair-dealing approach.

As indicated, there is no peer-reviewed research in South Africa indicating why fair use, as proposed by the bill, would be consistent with South Africa's obligations under the Berne Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights. Given the clear language of the three-step test, and how different our legislative history and systems of litigation are from those of the United States, it is submitted that there has to be a proper legal basis for the introduction of fair use in South Africa. That simply has not been provided. It is not good enough to rely on the fact that its existence under United States law is a basis

[100] Panel Decision (n 97) 7.
[101] Panel Decision (n 97) 69.
[102] Panel Decision (n 97) 33.
[103] Sookman and Glover (n 27) 162.
[104] Samuelson and Hashimoto (n 32) 8. This is the view of Hughes, and not that of the authors.
[105] Dworkin (n 83) 66-12.

for its adoption in South Africa. If anything, the United States' attitude to the Berne Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights is, arguably, selective and self-serving.

Briefly put, the United States' position concerning whether its fair-use approach complies with the three-step test has been nothing more sophisticated than simply asserting that its system of fair use is compliant with its obligation under article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights.[106] Compared to other developed countries, the United States had eschewed acceding to the Berne Convention for over a century, and its position was anomalous, until it finally joined the Berne Convention in 1989.[107] The United States reluctantly acceded to the Berne Convention: while the United States insisted that developing countries should, via the Agreement on Trade-Related Aspects of Intellectual Property Rights, give effect to the minimum level of copyright protection provided for by the Berne Convention, these countries, in turn, pointed out the United States' lack of consistency – the United States itself was not a signatory to the Berne Convention. Thus, the United States was not left with much of a choice: if its insistence that developing countries give effect to the Berne Convention was going to be tenable, it had to accede to the Berne Convention.[108]

Of course, a mere assertion of compliance, together with the fact that the United States has not changed its fair-use approach to copyright exceptions, following its accession to the Berne Convention, does not provide proof of its compatibility with the three-step test. The attempts at justifying why fair use is compatible with the three-step test are unconvincing, ex post facto rationalisations, with the strongest argument being that there has been no direct World Trade Organisation challenge (or "frontal challenge"[109]) to the United States' fair-use approach.[110] To suggest that the absence of a World Trade Organisation challenge to the legality of the United States' fair-use approach is proof of its compatibility with the three-step test amounts to the logical fallacy of affirming the consequent.[111] In effect, the argument takes the following form: If the United States' fair-use approach is compatible with the three-step test (that is, it is legal), it implies that there will be no World Trade Organisation challenge to its legality (because it will be futile to question, and challenge, its legality). As there has been no direct World Trade Organisation challenge to the United States' fair-use approach, it must be because it is compatible with the three-step test. This type of argument is clearly fallacious. As a matter of logic, there could be other reasons why there has been no direct World Trade Organisation challenge to the United States' fair-use approach.

There is, in fact, one very good reason why there has been no direct World Trade Organisation challenge to the United States' fair-use approach, namely, realpolitik. It has been suggested by Hughes that "it would be 'politically disastrous' for a World Trade Organisation member to make a 'frontal challenge' to the US fair use doctrine".[112] The fact that there has been no direct World Trade Organisation challenge to the United States' fair-use approach serves to demonstrate the United States' global influence, rather than suggesting that it complies with the three-step

[106] Newby (n 82) 1649.
[107] Samuelson and Hashimoto (n 32) 4.
[108] Jehoram (n 82) 360 n 6.
[109] Samuelson and Hashimoto (n 32) 10 n 93.
[110] See *eg* Samuelson and Hashimoto (n 32) 13.
[111] Warburton *Thinking from A to Z* (2007) 6-7.
[112] Samuelson and Hashimoto (n 32) 10 n 93.

test. Its accession to the Berne Convention was reluctant, and it disregarded aspects of the Berne Convention that it found unsuitable. For example, it used its political influence to insist that the obligation to protect moral rights pursuant to article 6*bis* of the Berne Convention be excluded from the Agreement on Trade-Related Aspects of Intellectual Property Rights.[113] The United States also seems reluctant to jettison its practice of copyright registration, which it had to abandon on acceding to the Berne Convention. In effect, United States copyright owners are still burdened with a registration requirement in order to institute copyright infringement proceedings, whereas foreign copyright owners do not have to do so.[114]

Even in relation to the Agreement on Trade-Related Aspects of Intellectual Property Rights, the United States' position displays a contradictory approach; despite being instrumental in its adoption, it "is quite prepared to undermine its own creation for the sake of some political convenience".[115] For example, following the World Trade Organisation Panel's finding that the United States' section 110(5)(*B*) business exception was incompatible with the three-step test, and its obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights, the United States, despite an undertaking to remedy its infringement, did not amend the offending statutory provision. Instead, the United States agreed to arbitration to determine the compensation payable for future losses, which, at the time of the award, was determined to be $1.1bn.[116] Thus, rather than changing its law, the United States taxpayer has to make an annual payment to the European Union, which payment "is now the yearly ransom for the maintenance of the infringing business exception in the American law".[117]

6 *Conclusion*

Given the concerns about fair use, it certainly requires a comprehensive justification from those who advocate for, and support, the introduction of fair use in South Africa. These concerns have never been acknowledged, and satisfactory counterarguments to these concerns have not been provided. Of course, South Africa could rely on a crude, secondary realpolitik rationalisation. We could adopt the fair-use approach on the basis that as it is unlikely that the United States will be sanctioned for its violation of its treaty obligations,[118] and that we could take sanctuary in its shadow. It is suggested that this is not the cavalier attitude that we should be taking to our international obligations, given that fair use does not offer the claimed benefits, and may have unintended consequences in its application.

Given the problems with fair use and the three-step test, it is clear that advocates for fair use are keen to point out that fair use is more responsive to technological changes, as legislative reform is too slow to respond. Of course, this is the line of argument that tends to be promoted by its beneficiaries: technology companies. They have paid for reports, such as the Deloitte's Report, urging the adoption of fair use in New Zealand. This line of argument has even found its way into law commission reports on copyright reform:[119] "The ALRC considers that it is not sufficient that

[113] Lucas (n 89) 279.
[114] LaFrance (n 14) 301-303.
[115] Jehoram (n 82) 362.
[116] Jehoram (n 82) 362.
[117] Jehoram (n 82) 362.
[118] Sookman and Glover (n 27) 162 n 73.
[119] the ALRC Report (n 7) 105.

innovative businesses 'operate free of active threats of litigation'. They should be able to operate confident in the knowledge that they may use copyright material, if that use is fair."[120]

Needless to say, this approach is a licence for technology companies to ignore, prima facie, the rights of copyright owners, as – under fair use – it will be left to the courts to determine whether a particular use is fair. This attitude will expose copyright owners to the flagrant abuses of their rights, as most of them simply do not have the resources to challenge the infringement of their rights and the risks associated with costly litigation that is central to a system of fair use. This is a fact which the Australian law reform commission recognises, but is prepared to discount.[121] The consequences of the deference shown by the Australian law reform commission to the technology companies – imbibing the move-fast-and-break-things attitude – has now been recognised as creating unacceptable societal imbalances.[122] The tide has since turned against big tech.[123]

It is clear that the European Union is now trying to claw back ground against technology companies, like Google, because, inter alia, it missed the early warning signs about Google's exploitation of the rights of copyright owners for its own benefit. An example of this is the value gap. In order to try to address the value gap, the European Union has introduced the Digital Single Market Directive,[124] in particular, article 17 thereof. Despite much criticism of this move by the European Union, the United States Copyright Office has also recognised the fact that there has been inappropriate protection given to technology companies pursuant to the safe-harbour provisions of section 512 of the American Copyright Act, which was introduced by the Digital Millennium Copyright Act 1998.[125]

More importantly, fair dealing does not necessarily result in copyright law being less responsive to new challenges posed by technology. Whether the law is responsive to changing needs depends more on a well-functioning custodianship of copyright law by the executive and legislative arms of the state. In fact, legislative amendments can be brought about more quickly than a particular matter can be resolved through litigation, which is, in any event, necessarily limited to the particular facts of the case at hand. Then there is the issue of whether it is appropriate for the development of copyright policy to be left to the devices of particular litigants, with their narrow, self-serving interests. In other words, private litigants should not be determining copyright policy. As already mentioned, exceptions to copyright involve issues of public policy, and, it is not appropriate that decisions of that nature be left to judges to make, and the agenda should not be set by private litigants. Issues of public policy must, ideally, involve public participation and debate, and be approved at the appropriate legislative level in a democratic society, namely, parliament.[126]

[120] the ALRC Report (n 7) 105.
[121] the ALRC Report (n 7) 115.
[122] Taneja and Hemant "The era of 'move fast and break things' is over" *Harvard Business Review* (22-01-2019), https://hbr.org/2019/01/the-era-of-move-fast-and-break-things-is-over (1-01-2021).
[123] Hern and Alex "New UK tech regulator to limit power of Google and Facebook" *The Guardian* (27-11-2020), https://www.theguardian.com/technology/2020/nov/27/new-uk-tech-regulator-to-limit-power-of-google-and-facebook (01-12-2020).
[124] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the digital single market and amending Directives 96/9/EC and 2001/29/EC.
[125] Rechardt "Balance lost: the US Copyright Office finds US copyright safe harbour provisions have been tilted askew" 2020 *Journal of Intellectual Property Law & Practice* 571.
[126] Lucas (n 89) 282.

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