



6 JULY 2021

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To: Mr. D Nkosi, Chairperson: Portfolio Committee on Trade and Industry,
Parliament, Cape Town

Dear Honourable Member Mr. Nkosi,

Re: Submission on Sections 12A (Fair Use) of the Copyright Amendment Bill 2017

Thank you for giving the public another opportunity to make written submissions on Sections 12A, 12B, 12C and 12D, 19B and 19C of the 2017 Bill. I made several submissions before and appreciate that I can do so again. I presented at the public hearings in August 2017, on behalf of the library and information services sector, and would appreciate the opportunity to present at the online hearings on 4 and 5 August 2021.

I am a professional/specialist librarian with 48 years' working experience, 38 years of them being at Wits University Library in different posts. My last 24 years before retiring in 2020 were in copyright and related issues and during that period I obtained my Master of Laws (LLM) in copyright relating to people with disabilities. I have been calling for more balanced copyright laws since 1998. I was leader of two copyright tasks teams representing the higher education and library sectors in 1998 and 2000, which challenged and persuaded the DTI to withdraw more restrictive Draft Regulations (1998) and proposals to amend the Copyright Act (2000). Together with USAID and DFID SA, I also encouraged Mr. Xavier Carim, Chief Negotiator of the US/SACU Free Trade Agreement not to adopt the restrictive TRIP-Plus Chapter in the FTA and this was one of the key factors why the FTA was declined by SACU in 2006. I am now a Scholarly Communications and Copyright Consultant. See my bio attached ([Annexure B](#)).

1. Constitutionality and Compliance with International Commitments:

I am perplexed as to why these sections are under review at all, considering they were informed by and drafted within a framework of international IP policies, treaties, treaty proposals, research reports, commission, reviews of the Copyright Act, the EIFL model copyright law and many other relevant documents. Many of the provisions are included in copyright laws of countries around the world and are not new, different, or unusual. In fact, many developed countries and some developing countries have enjoyed similar provisions for years, meaning that South Africans have been deprived of such benefits for decades. These Sections were also passed by the Parliamentary legal team and both Houses of Parliament in 2019, and were strongly supported by the DTI, DSAC, and the ANC, EFF and several smaller political parties in Parliament.

At no stage was there any issue about their constitutionality or a possible conflict with international agreements when they approved the Bill and sent it to the President. The fact that these exceptions were all adopted or adapted from copyright laws around the world surely confirms their compliance with international treaties.

No country that has adopted fair use or any of the other exceptions as set out in these sections under review, or in the Bill in general, have attracted any enforcement actions under Berne, TRIPS, the WCT or any of the other several international frameworks or dispute mechanisms under which they could have been contested. The durability and lack of controversy about the U.S. copyright flexibilities is ample evidence that this system does not conflict with either South Africa or the U.S.A.'s international trade obligations.

Other countries that fair use in their copyright law have also not had any action taken against them. Unlike South Africa, their copyright reforms were not stalled by the U.S. conglomerates that benefit daily from fair use in their country and the European Commission, influenced by the same conglomerates. Leaders of their countries were not pressured to revoke their laws. Unfortunately, such conglomerates managed to persuade the EU and the USTR to interfere in the domestic law-making of South Africa by threatening our economic stability and trade options. This is indeed a dangerous precedent. Are the EU and US going to try and stop the next version of the Bill if they do not like it?

This deplorable pattern of economic bullying and undue pressure by the USTR and the European Commission on our President and sovereign State must never happen again. See articles and letters about U.S. and EU interference in SA's domestic copyright reforms below:

- How the US and EU pressured South Africa to delay copyright reform - <https://www.politico.eu/article/how-washington-and-brussels-pressured-south-africa-to-delay-copyright-reform/>
- See my submission in this regard to the USTR in January 2020 - https://libguides.wits.ac.za/ld.php?content_id=51932196
- The majority of submissions made at the USTR hearings opposed a USTR trade review and supported the Copyright Amendment Bill – see: [https://libguides.wits.ac.za/Copyright and Related Issues/tradeissues](https://libguides.wits.ac.za/Copyright_and_Related_Issues/tradeissues)
- Open letter to the EU Ambassador to South Africa on copyright laws - <https://www.apc.org/en/pubs/open-letter-eu-ambassador-south-africa-copyright-laws>
- Open letter to the President of South Africa on South African copyright laws - <https://www.apc.org/en/pubs/open-letter-president-ramaphosa-south-african-copyright-laws>
- IFLA and APC letter to President Ramphosa - https://libguides.wits.ac.za/ld.php?content_id=54865085
- Letter from Creative Commons SA - https://libguides.wits.ac.za/ld.php?content_id=53415889

The President’s referral letter to the Speaker was remarkably similar to Adv Steven Budlender SC’s submission dated 22 February 2019, made to the Select Committee on Trade and International Relations on behalf of a group of South African rightsholders, some of whom are part of multinational conglomerates such as Pearson PLC, Sony, Universal and Warner Music.

South Africa’s Copyright Amendment Bill follows international best practice for a fair and balanced copyright system that safeguards the fundamental rights of both users and authors. Some countries have hailed this Bill as a model for not only developing countries, but also developed countries. I know academics and librarians in Australia who are waiting patiently to see the outcome of our Bill, as they want similar provisions in their law. I am chair of the African Library and Information Associations (AFLIA)’s Copyright and Legal Matters Working Group, which represents librarians on the continent. Many of the members of AFLIA are looking forward to South Africa’s Bill being passed, as they would like to propose similar provisions in their own copyright reforms.

2. Current Copyright Act is Unconstitutional

In my humble view I think that the current Copyright law is unconstitutional in many ways. It discriminates against and prejudices people with disabilities, but also restricts or prohibits access to information, teaching and learning materials, research resources, etc. It fails to protect authors and creators from unfair contracts which result in unfair royalty payments and excludes options for royalty payments for performers. It fails to provide exceptions for museums and galleries,

which are custodians of our cultural heritage and places of research, education, leisure and tourist information services. Its exceptions for education, research, libraries and archives are very limited and pre-date the Internet and WWW, so relate to printed material, not material in the digital space. It fails to include a mechanism to enable performers to earn royalties. All these go against the spirit of our Constitution and the Bill seeks to remedy these serious omissions and discriminatory practices.

As you are aware, the constitutionality of the current law is currently being questioned in the Gauteng High Court. The Blind SA's case against Parliament, the President and the Ministers of DIRCO and DTI has been set on the roll for hearing on 21 September 2021.

Blind SA Constitutional Challenge of the Copyright Amendment Bill -
<https://blindsa.org.za/2020/06/19/blind-sa-constitutional-challenge-of-the-copyright-amendment-bill/>

3. Clause 13, Section 12A – Fair Use

I applaud the DTI and Parliament for including the progressive fair use provisions in the Bill as they align with copyright laws in at least 12 other countries that already enjoy these benefits.

I believe that much of the opposition to fair use comes from a misunderstanding of how fair use works and the benefits of fair use. From recent webinars I have attended, it is surprising that even IP lawyers do not know how it works at ground-level, so they choose to reject it on a theoretical level rather than find out exactly how it works. They are unaware of or wish to ignore the real benefits of fair use and have the notion that it is a '*permit to infringe*', when in fact, it is a '*permit to increase access to knowledge*' for all South Africans, including users, custodians and producers of intellectual property. There has been much misinformation and fearmongering in the media about the "catastrophic impact" fair use may have on our publishing and entertainment industries. These assumptions have been widely debunked by IP experts and academics here and abroad. I support the comments and conclusions in the opinions and presentation below:

See: Joint Academic Opinion on CAB - <http://infojustice.org/wp-content/uploads/2021/05/South-Africa-CAB-Academic-Opinion-05102021.pdf> and Opinion by S. Cowen SC et al. sent to President Ramaphosa - [https://libguides.wits.ac.za/Copyright and Related Issues/Opinion](https://libguides.wits.ac.za/Copyright%20and%20Related%20Issues/Opinion).

An excellent read is the myth-busting speech by the Deputy Chair of the Australian Productivity Commission - "What is Fair?" – see: <https://www.pc.gov.au/news-media/speeches/fair>

Opponents of fair use in Section 12 of the Bill state the provisions are excessive and far exceed those of the U.S. They say this will become the only country in the world with such extensive rights for users. They warn in ongoing media campaigns and at seminars that this will be “extremely catastrophic” for authors and publishers in South Africa and that foreign investors will no longer invest in the country’s creative industries. This is a major exaggeration and fearmongering at best. The Copyright Amendment Bill’s fair use provisions are not unique, nor are they far broader than those of the U.S.

Whether the words “such as”, “for example”, “including”, “for instance”, “namely”, or any other words are used in Section 12A, they all enable lawful flexibility within fair use, framed by 4 determining factors or criteria. South Africa decided to adopt a hybrid model which is not unusual as other countries also have similar variants. The fact that Section 12A gives some examples of fair use, gives users of copyright works more clarity within the 4 criteria that determine whether such use is fair or not. It is not necessary though to make such a list, as “such as” includes all these activities and others. For example, text and data mining is not itemised in the US fair use, but would be permitted under fair use, as would the use of extracts in course reserves for educational purposes (as in Section 12D (2) of the Bill), e-mailing a screenshot to a colleague, playing an audio recording for history students or a music remix for music students, etc. The US does not list many examples, as “such as” is a catch-all phrase, but all the examples listed in Section 12A of the Bill are also permitted under fair use in the U.S.

The provisions of fair use in Section 12A will greatly improve access to information, particularly in the digital environment. They are also progressive, flexible, future-proof and address the needs of the 21st century. They enable and advance development, innovation, AI, robotics, gaming, inventions and prosthetic enhancements through 3D printing, augmented reality, inventions, and futuristic technologies in relation to the Third and Fourth Industrial Revolutions. They are also necessary for people with disabilities, as they are also students, researchers, educators, authors, creators, employers and employees, artists, gamers, politicians, programmers, government officials, even Ministers.

- For more information about fair use, its benefits and best practices, see: **ANNEXURE B**
- Also, see Resources at:
[https://libguides.wits.ac.za/Copyright and Related Issues/fairuse fairdealing](https://libguides.wits.ac.za/Copyright%20and%20Related%20Issues/fairuse%20fairdealing).

Some guidelines on how to judge fairness are set in law, but some things are left to the courts to interpret. Concerns have been raised that the Bill’s punitive measures for infringement are inadequate. Critically, in the US, and under the Bill in Parliament, the financial impact on the copyright holder must be considered when judging fairness – which means under fair use systems piracy remains an

infringement of copyright, just as it is now. Fair use is subject to 4 criteria and is not carte blanche for copying everything and anything free without compensation to rightsholders. Copying anything more than what is fair would require permission from rightsholders. Without permission or a licence, it would be infringement.

Suggestions by rightsowners and other opponents of the Bill claim that the U.S. judiciary and precedents of hundreds of years will not be available in South Africa and that punitive measures are totally inadequate. Well, this is incorrect and myopic, as there is a wealth of online jurisprudence and other helpful legislative documentation to assist our judiciary, like it has assisted other countries with fair use. Their flippant comments deride our respected judiciary and this should not be tolerated.

Our internationally respected judiciary will decide on appropriate restitution where necessary. It does not have to specify punitive and/or statutory penalties in the Bill to be able to apply appropriate restitution. Each case will be determined on its merits and will create appropriate precedents for future cases. Not every case will have to go to court for interpretation of the application of fair use, since there are already many useful online Best Practice Guidelines on Fair Use that will assist users, custodians, producers and creators of information, when using copyright material.

See: Examples of Best Practice Guidelines for Various Stakeholders - [https://libguides.wits.ac.za/Copyright and Related Issues/BestPractice](https://libguides.wits.ac.za/Copyright%20and%20Related%20Issues/BestPractice)

The Bill provides for a Copyright Tribunal to avoid court litigation, where possible. There are also pro bono legal services in various institutions and legal firms around the country that will assist people who do not have the financial means to take infringement matters to court. As precedents are made, they will provide guidance for future cases.

Fair use is forward-looking and 'future-proof'. The first case on fair use was in *Folsom v Marsh* 9.F.Cas.342 (C.C.D. Mass 1841). Fair use was coded in the US Copyright Act of 1976 and has not had to be amended as it applies to new technologies as they arise. Its four criteria give clarity to what can be used and reused, whilst our current fair dealing provisions are not clear. In recent cases, the SA courts have in fact resorted to the 4 criteria of fair use to make their decisions.

4. Support for Fair Use Provisions in Section 12A

As a librarian, consultant, copyright expert, author, educator, trainer, blogger, and open access and open science promoter, I fully support the fair use provisions. Fair

use is not just for users of information. It is for all stakeholders, including users, custodians, creators, innovators, publishers and other producers of information. No one can write, create, innovate, or invent without accessing, reading, using or reusing, adapting or adding to someone else's work. The metaphor of "dwarfs standing on the shoulders of giants" in the knowledge hierarchy is very relevant in this context. Like a coral reef, knowledge is built on information that has built up over time to which more information is added. No knowledge is new in today's world – everything builds on what has gone before.

Large multinational conglomerates in the US, e.g. Walt Disney, Paramount Pictures, Sony Pictures, Universal City Studios and Warner Brothers, etc., use and benefit substantially from fair use every day. They have become extremely wealthy because fair use has enabled them to access, use, re-use, remix and transform third-party material into new creations, innovations and inventions – without having to apply for copyright licences or pay heavy copyright fees each time.

The same conglomerates continue to lobby strongly to stop South Africa's copyright reforms which will afford our people the same benefits they enjoy. How ironical. They are applying the "kick away the ladder" strategy towards developing countries. Ha-Joon Chang, in his book "Kicking Away the Ladder: Development Strategy in Historical Perspective", highlights the paradox that many of today's high-income countries did not pursue strict policies when they were climbing the economic ladder of success in the 19th century. Rather, these countries took advantage of less developed countries and implemented high tariffs and sectoral industrial policies, delayed the introduction of democratic reforms, stole industrial technologies and intellectual property from one another and other countries, did not have independent central banks, and so forth. Only when the US became a lucrative exporter of intellectual property did it sign the Berne Convention. Now it tries to stop other less developed countries from having the same benefits.

In Chang's view, developed countries are hypocritical when they seek to deny developing countries access to the same policy tools and intellectual property benefits that they have enjoyed for decades. This is basically to ensure they do not benefit from the same legal flexibilities, especially because they are net importers of intellectual property. It is a selfish, monopolistic attitude towards developing countries, which are generally importers of intellectual property and pay exorbitant amounts for resources and copyright licences to developed countries.

Hollywood and its empire would not be where they are today without the benefits of fair use, yet they want to deprive South Africa of those benefits, as well as exceptions for education, research, libraries and archives, galleries and museums, and for people with disabilities.

Because of the flexibility of fair use, the US boasts the largest and wealthiest publishing, IT and entertainment industries in the world. One must question why

said organisations are trying so hard to stop this Bill. Is it because they earn billions of dollars every year from copyright fees from developing countries? Are their profit margins far more important than the dignity and human rights of people in South Africa? Is their profit line more important than giving children the opportunity to access learning material to be educated and to progress to tertiary education or employment in the future?

Are the figures on their income sheets more important than giving access to people with disabilities, who up to now still experience what the World Blind Union describes as a “book famine”? Is bullying South Africa into a copyright straitjacket not just a new form of colonialism?

The US is not the only country with fair use in its copyright legislation. Other countries that have adopted fair use in their copyright laws are: Bangladesh, Israel, Liberia, Malaysia, Philippines, Poland, Singapore, Sri Lanka, South Korea, Taiwan and Uganda. There has not been any “catastrophic disaster” in their publishing and entertainment industries as opponents of the Bill would want us to believe. I have personally written to various IP academics, and librarians in some of the above countries and they have all said that publishers still publish, authors still write, artists and musicians still create, researchers still invent and innovate, educators still teach, students still study, libraries still buy textbooks and learning materials, and so on. Fair use is currently also under consideration in Australia, Ireland and Canada. They await the outcome of South Africa’s Bill too.

See: Fair Use/Fair Dealing Handbook (J. Band) - https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2333863

Copyright laws in all countries borrow ideas and principles from international treaties and from the domestic law of other countries. We should never shut out good ideas, even if we did not invent them.

The more restrictive “fair dealing” system in our current Copyright Act is outdated, limited, static and does not address the digital world, nor the demands of the 21st century and the Fourth Industrial Revolution. Fair dealing only allows a closed list of acts in the print/analogue environment without having to get permission from rights-holders, whereas fair use is an “open-ended” list, allowing more flexibility when using material, especially in the digital space. Fair use is progressive, dynamic, future-proof and digital-friendly. Fair use has been used in courts in the US and Europe for about 200 years so there is a wealth of jurisprudence to draw on. Other countries with fair use are developing their own jurisprudence, as will South Africa, as it has been doing on constitutional issues since 1994.

5. Some Documentary Support for Fair Use

Fair use has been supported in various documents around the world, and in many research reports, reviews and previous submissions to Parliament in South Africa. For example:

- In South Africa, Owen H. Dean, author of the Handbook of South African Copyright Law, in paragraph 9.2.3 (page 1-96) posits that *“the American and Australian approaches to fair use are commonsensical and reasonable and should be followed by the South African courts”*.
- In 2000, the Department of Trade and Industry published proposals to amend the SA Copyright Act, supported by the publishing industry. The proposals were very restrictive towards education, libraries and other related sectors, which challenged them, and subsequently they were withdrawn by the DTI, and not included in the Copyright Amendment Act of 2002. The proposals to amend the Copyright 2000 included fair use provisions (albeit a 5th factor, which have since become obsolete). The higher education and libraries rejected the proposals in toto, not the fair use specifically, but for other valid reasons. However, in its 2001 AGM resolution, the International Federation of Reprographic Rights Organisation (IFRRO), together with the Publishing Association of South Africa (PASA) and the Dramatic, Artistic and Literary Rights Organisation (DALRO) strongly supported the proposals to amend the Copyright Act, which included the fair use provisions. One wonders why they are opposing fair use in 2021.
- Recommendation 6.1 of the Australian Government’s Response to the Productivity Commission states: *“The Australian Government should accept and implement the Australian Law Reform Commission’s final recommendations regarding a fair use exception in Australia”*.
- A study by Deloitte in March 2018, entitled *“Copyright in the digital age: An economic assessment of fair use in New Zealand”* recommends fair use for New Zealand.
- In Canada’s recent Statutory Review of the Copyright Act, Recommendation 18, a more illustrative fair dealing, not exhaustive provision, has been recommended, by including the words ‘such as’, which is a step towards adopting fair use.
- Gowers Review (UK, 2006) (p. 62), states: *‘Fair uses’ of copyright can create economic value without damaging the interests of copyright owners”*.
- In the Department of Trade and Industry’s 2011 commissioned WIPO study entitled *“The Economic Contribution of Copyright-Based Industries in South Africa”*, WIPO quotes the following from Gowers Review:

The existence of a general fair use exception that can adapt to new technical environments may explain why search engines were first developed in the USA,

where users were able to rely on flexible copyright exceptions, and not in the UK, where such uses would have been considered infringement”.

In its concluding recommendations, WIPO states:

The South African copyright regime does not include exceptions and limitations for the visually impaired or for the benefit of people with any other disability (e.g. dyslexics) as well as for technological protection measures (such as encryption of the protected material) and electronic rights management information (such as digital identifiers). Furthermore, despite the existence of exceptions for purposes of illustration, for teaching and research, the legal uncertainty surrounding the use of works has led to the conclusion of agreements between the collecting societies and educational establishments to the financial detriment of the latter. As exceptions have the potentials to create value (Gowers Review, 2006), we suggest that DTI should review the Copyright Act in order to introduce limitations in accordance with the Berne Convention three steps test (article 9(2)) and with the fair use provision and to clarify clauses as necessary.

6. Some of my inputs and articles on fair use and related matters in the Bill:-

- **My submission on CAB in 2017 -**
https://libguides.wits.ac.za/ld.php?content_id=33935312
- **Fair use does not conflict with Berne -** <https://bit.ly/2PGrDkl>
- **Why Fair Use is so important for South African copyright law -**
<https://theconversation.com/why-fair-use-is-so-important-for-south-african-copyright-law-107098>
- **‘Fair use’ in new Copyright Bill benefits everyone**
<https://www.dailymaverick.co.za/article/2019-09-17-fair-use-in-new-copyright-bill-benefits-everyone/>
- **Amendment of SA Copyright law – a long and bumpy road -**
https://libguides.wits.ac.za/ld.php?content_id=47524027
- **Genesis and Process of CAB**
<http://wiredspace.wits.ac.za/handle/10539/12525>
- **My Letter to Speaker of National Assembly -**
https://libguides.wits.ac.za/ld.php?content_id=57148729
- **South Africa’s Copyright Amendment Bill – 5 Years On**
<http://infojustice.org/archives/42570>
- **Does the South African Copyright Bill Promote Plagiarism?**
<http://infojustice.org/archives/41511>
- **Accommodating Persons with Sensory Disabilities (LLM Thesis by Dissertation)**
<http://wiredspace.wits.ac.za/handle/10539/12525>
- **Informative video – “Fair Use in South Africa” – I am one of the speakers -**
https://www.youtube.com/watch?v=wsrfkFkS_xM

See: ANNEXURE A – USEFUL Q & A ON FAIR USE

ANNEXURE B – BIO OF D.R. NICHOLSON

ANNEXURE A

USEFUL Q&A ON FAIR USE

Question: *Why has the Bill adopted concepts such as fair use, which originated in other countries?*

Answer: Copyright laws in all countries borrow ideas and principles from international treaties and from the domestic law of other countries. We should never shut out good ideas, even if we did not invent them here. Fair dealing in our current Copyright Act is outdated, limited and static, and does not address the digital world. Fair use, on the other hand, is progressive, dynamic and future proof and 'digital-friendly'. Fair use has been used in courts in the U.S. and Europe for about 200 years and there is a wealth of jurisprudence to draw on. The first case was in *Folsom v Marsh* 9.F.Cas.342 (C.C.D. Mass 1841). Fair use was coded in the U.S. Copyright Act of 1976 and has not had to be amended, as it applies to new technologies as they arise. Ten other countries have also adopted fair use in their copyright laws and more countries are considering it, because it is 'future-proof' and benefits users and producers of information and knowledge. Its 4 factors give clarity to what can be used and reused, whereas fair dealing does not. Recommendation 6.1 of the Australian Government's Response to the Productivity Commission states: *"The Australian Government should accept and implement the Australian Law Reform Commission's final recommendations regarding a fair use exception in Australia"*. There are also many [Best Practice Guidelines on Fair Use](#) available for different users and creators, which help to avoid litigation on these issues.

Question: *Will fair use lead to greater recourse to the courts and a dependence on U.S. jurisprudence, causing unnecessary financial problems for authors or publishers?*

Answer: No. Fair use is lawful, and by its nature, must be fair, and is determined by the application of 4 factors to each specific situation. Compliance will avoid the need for litigation. There is also a large international body of jurisprudence available on fair use, which countries with fair use can draw on as they build up their own jurisprudence. Israel is one example. Many countries have begun to enact fair use statutes, but each country's courts may then interpret the provisions in their own way. Just as the SA judiciary has developed jurisprudence on constitutional and other matters, so it will do the same with matters relating to fair use and other copyright matters.

Question: *Under fair use, can a whole textbook be copied and 2000 copies be made for students, without permission?*

Answer: Absolutely not. That is copyright infringement, and also piracy, if they are sold to students. This is definitely not fair use, as it impacts on the rights-owners' exploitation of that work in the market. It does not comply with the 4th factor of fair use and would exceed any reasonable application of the 3rd factor. Fair use calls for a reasonable application of the factors. No reasonable person would call such copying reasonable.

Question: *Are the provisions for fair use in SA Bill much wider than fair use in the U.S.?*

Answer: No. The SA Bill lists examples of acts permitted under fair use to provide some clarity for users and producers of copyright works, but all those acts would be covered under "such as" in the U.S. fair use provisions. The U.S. has precisely the same model as the Bill proposes. In addition to fair use, the U.S. Copyright Act has specific exceptions for libraries, archives, educational institutions, people with print disabilities, users of software, religious institutions, charitable organizations, small restaurants, agricultural or horticultural organizations, vending machine operators, and families that want to censor inappropriate material.

Question: *Should the fair use provisions in the Bill be accompanied by statutory damages?*

Answer: No. The lack of inordinate statutory damages (which, in the internet age, make little sense) does not remove the right of South African judges to determine penalties for infringement, when this occurs. The Bill supplements the existing framework of remedies and penalties with criminal penalties for the removal of copyright management information and the circumvention of technological protection measures. Thus, the Bill provides additional means of targeting infringement online. South Africa is adequately equipped to deal with and punish infringement – for further details see: [South African Legal Expert Assessment of IIPA Petition of 18 April 2019, in respect of South African Copyright Amendment Processes](#)

Question: *Does the PWC Report quoted by rights owners present the true picture about fair use and other provisions in the Bill?*

Answer: The PWC report has been repeatedly debunked for its misunderstanding of the issues at stake. This study was a survey of executives who naturally would be protective of their profits and would provide exaggerated figures and forecasts. PWC's work on copyright was, in particular, dismissed by IP experts, researchers, librarians and the Australian Productivity Commission (PC), which criticised its narrow focus for failing to take account of the public benefits of greater access to information. In the same report the PC called for fair use. Karen Chester, Deputy Chair, Productivity Commission, addressed this topic very practically in her speech "[What is fair?](#)" Fair use is not 'carte blanche' to copy textbooks and everything else for free. In fact, its 4 factors make it quite clear what the parameters are for copying. Any copying that competes with the rights-owner's right to exploit the work in the market is not fair use.

Question: *What impact did 'expanded fair dealing' (not fair use) have on the Canadian publishing industry?*

Answer: The direct link between exceptions for education and the decline in the publishing industry has largely been debunked by researchers and librarians in Canada. The Deputy Chair of the Australian Productivity Commission, also stated in her abovementioned speech "What is fair?" that the claim that fair use destroys publishing industries and has done so in Canada "*did not stand up to even modest scrutiny: the experience in Canada has been grossly misrepresented and ignores specific market factors there*". Spending on educational publishing has in fact risen in Canada, with local producers gaining market share. Disruptions in the market such as open access publishing, student preferences for second-hand books,

online works, reduced spending on new curricula, new media players such as Google and Apple, etc., have contributed to some of the financial challenges experienced by Canadian publishers. Ongoing consolidation within the sector and global economic trends have also led to the disappearance of some smaller players, as is the case in any market.

In Canada's recent [Statutory Review of the Copyright Act](#), Recommendation 18, a more illustrative fair dealing, not exhaustive provision has been recommended, by including the words 'such as', which is a step towards adopting fair use.

Question: *Did the introduction of fair use negatively affect the publishing industries of countries that adopted it?*

Answer: There is no evidence that the introduction of fair use in the U.S. and ten other countries has led to the decline or destruction of their publishing industries. To the contrary, the U.S. boasts the largest and wealthiest publishing industries in the world, as do their entertainment and IT industries, because of the flexibilities permitted by fair use. In fact, there is [some evidence](#) that fair use actually helps industries. In other countries that have fair use, publishers continue to publish and authors continue to write.

Question: *Do transformative uses of copyright works compete with the market of the original work of the authors and publishers?*

Answer: No. When a use is transformative, it does not compete with the original market – in fact, it may even boost it. The obligation to pay an original rights-holder could make many new ideas uneconomical. Rights-holders of course remain free to set original prices at a level they deem fit, bearing in mind the value of the work to a user.

Question: *Will every case relating to fair use have to go to the courts for a decision?*

Answer: No. Fair use is lawful and its 4 factors provide the framework for use of copyright works. Only cases of copyright infringement would need to go before the courts. It is appropriate and within a user's or rights-holders' rights to seek legal recourse, when appropriate. In such instances, the user is most often in a far weaker position than the rights-holder. The Bill provides for a Copyright Tribunal which will serve as a channel for assessing and resolving issues for affected parties, and in the process, help to avoid court action, where possible.

Question: Was fair use recommended in the WIPO Study commissioned by the DTI in 2011?

Answer: Indeed, it was. In 2011, the DTI commissioned a WIPO Study on "[The Economic Contribution of Copyright-Based Industries in South Africa](#)". WIPO's report clearly states (with reference to the Gowers Review of 2006), that:

*The existence of a general **fair use** exception that can adapt to new technical environments may explain why search engines were first developed in the USA, where users were able to rely on flexible copyright exceptions, and not in the UK, where such uses would have been considered infringement".*

In its concluding recommendations, it states:

*The South African copyright regime does not include exceptions and limitations for the visually impaired or for the benefit of people with any other disability (e.g. dyslexics) as well as for technological protection measures (such as encryption of the protected material) and electronic rights management information (such as digital identifiers). Furthermore, despite the existence of exceptions for purposes of illustration, for teaching and research, the legal uncertainty surrounding the use of works has led to the conclusion of agreements between the collecting societies and educational establishments to the financial detriment of the latter. As exceptions have the potentials to create value (Gowers Review, 2006), we suggest that DTI should review the Copyright Act in order to introduce limitations in accordance with the Berne Convention three steps test (article 9(2)) and with the **fair use** provision and to clarify clauses as necessary.*

Question: What does the Handbook of South African Copyright Law (author: Owen Dean) say about fair use?

Answer: In paragraph 9.2.3, on page 1-96, the author, Owen H. Dean, posits that “the America and Australian approaches to fair use are commonsensical and reasonable and should be followed by the South African courts”.

Question: Does the Australian Law Reform Commission's Report 122 (2014) entitled "[Copyright and the Digital Economy](#)" say anything about fair use?

Answer: Yes, in fact it supports **fair use** and confirms that it is compliant with Berne and TRIPS Agreements. The Australian Government, in its response to the Productivity Commission Inquiry, also recommends a **fair use** exception for Australia.

Question: What is New Zealand's approach to fair use?

Answer: A 2018 Study by Deloitte in March 2018, entitled "[Copyright in the digital age: An economic assessment of fair use in New Zealand](#)" recommends fair use for New Zealand.

Question: Does the Bill negatively affect the AGOA and other GSP trade agreements that South Africa has with the US?

Answer: No, in fact the Bill incorporates the fair use provisions from the US and a number of similar provisions for education, disabilities, etc. so fair and equitable protection will be given to US copyright works. [Adequate mechanisms](#) to protect all copyright works and their markets are also included in the Bill.

ANNEXURE B

BIO OF DENISE R. NICHOLSON

Denise Rosemary Nicholson (BA HDipLib (UNISA), LLM (WITS)) retired from the University of the Witwatersrand, Johannesburg, South Africa (Wits) in December 2020, after nearly 38 years' professional service in various library posts. She has 24 years' experience in copyright issues, open access and scholarly communication. She is well-recognised internationally, regionally and in South Africa, for her advocacy and promotion of access to knowledge, open access and copyright awareness, and her campaign for more balanced copyright laws in South Africa and other developing countries. She has been a member of various copyright projects and committees in South Africa and abroad. She was co-founder of the African Access to Knowledge Alliance in 2005, which was involved in several key projects in Africa until 2010. She was invited, with full sponsorship, to speak at many conferences around the world during the past 24 years. She has published many articles, book chapters, newspaper articles and blog items. She has had input into various policy and other documents for international, regional and local organisations. For 22 years, she offered a free online information service on various topics. She has received several prestigious library awards, as well as the Wits Vice-Chancellor's Academic Citizenship Award (2015) for her work in copyright and access to knowledge matters nationally, regionally and internationally. On retirement, she closed her online newsletter which had over 8000 subscribers globally. She commenced a new eBulletin service from 1 March 2021.

In 1998 and 2000, she was Convenor of two Copyright Task Teams, mandated by the SA Vice-Chancellors' Association and the Committee of Technikons (predecessor of Universities South Africa, to challenge more restrictive copyright amendments being proposed by the Government. These amendments would have had a seriously negative impact on education, libraries, research and persons with disabilities. As a result, both the Draft Regulations (1998) and Proposals to Amend the Copyright Act (2000) were withdrawn from the Copyright Amendment Act of 2002. She co-established the African A2K Alliance in 2004, which was involved in 3 key copyright projects in Africa (2007-2010), including the 8-country African Copyright & Access to Knowledge (ACA2K) Project.

During 2005 she initiated meetings and communicated with Mr. Xavier Carim, the Chief Trade Negotiator of the DTI International Trade Office about the US/SACU FTA. She was helped by DFID and USAID who placed the matter on the DTI ITO's Agenda in 2005. She positively encouraged Mr. Carim not to adopt the more restrictive TRIPS Plus IP Chapter in the FTA. SACU countries declined to sign the Agreement in 2006.

She presented at many copyright workshops and at the DTI multi-stakeholders' conference in 2015. In 2017, at the Parliamentary hearings, she represented the library and archives sectors in the only slot allocated to these sectors. She also provided various international, regional and local documents to assist the DTI when drafting the Bill. She made several submissions on the Bill and also submitted comments to the USTR public hearings in 2020.

She is an expert copyright advisor to the IFLA Committee on Copyright and Other Legal Matters, the Library Association of South Africa, and the National Council for Library and

Information Services. She is a member of the Academy of Science of South Africa's Scholarly Publishing Committee. She recently gave input into the Open Data and Cloud Policy.

She is continuing her work in copyright, open access and scholarly communication through her new consultancy, Scholarly Horizons, established in March 2021. Through project work, she continues to collaborate with international, regional and local organisations to promote access to knowledge, more balanced copyright laws, and research integrity. She has recently been invited to serve on the Steering Committee of the EIFL African Copyright Project and the Advisory Board of Fidelior in Ireland.