

July 9, 2021

To: Portfolio Committee on Trade and Industry
For attention:
RE: Copyright Amendment Bill [B13B - 2017]

WHO WE ARE

This submission is on behalf of the Global Expert Network on Copyright User Rights. The Network is an association of over 100 copyright academics from over 30 countries who conduct research and offer technical assistance to governments and stakeholders on the reform of copyright limitations and exceptions to promote the public interest.¹

Professor Sean Flynn, Counsel of Record, is a former Law Clerk for the late Chief Justice Arthur Chaskalson, is currently a Senior Research Fellow at the University of Cape Town IP Unit, and has been conducting research and leading academic projects in South Africa for over two decades.

WHO WE HAVE CONSULTED WITH

Members of the Global Expert Network on Copyright User Rights that were consulted on this submission include:

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¹ Global Network on Copyright User Rights, <http://infojustice.org/flexible-use>.

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REQUEST TO PRESENT AT PUBLIC HEARING

We request to be represented by our counsel of record, Professor Sean Flynn, at the public hearings on the Bill scheduled on Wednesday, 4 August, and Thursday, 5 August 2021.

SUMMARY OF OUR COMMENTS

We provide this comment on Clause 13, section 12A of the Copyright Amendment Bill [B13B-2017]. Section 12A is an open general exception for “fair use” of copyrighted works. This provision is largely an updating of South Africa’s current general exception for “fair dealing” with a copyrighted work. The primary improvements of Section 12A over the current fair dealing exception are

- (1) to open the list purposes to which the exception can apply by virtue of including the words “such as” before the list of authorized purposes, and
- (2) providing an explicit balancing test to determine whether a particular use is fair.

Benefits of the hybrid approach

In our view, the proposed fair use provision combined with the specific list of exceptions provides South Africa the “best of both worlds” combining openness and predictability. The open fair use exception makes the exceptions future-proof. It permits the law to adapt to new uses, technologies, and purposes which may not be anticipated in the specific exceptions. The list of specific exceptions in Section 12B provides a higher degree of predictability for the set of uses long authorized in South Africa copyright law.

Compliance with international law

This hybrid approach to exceptions is fully compliant with international law. The so-called “three step” test does not prohibit open general exceptions that operate through case by case application of a specifically delineated balancing test. At least 11 countries have similar provisions in their law and none have been challenged.

Copyright Amendment Bill

We include below further explanations of each of these points.

Signed,

A handwritten signature in black ink, appearing to read "Sean Flynn". The signature is fluid and cursive, with the first name "Sean" and the last name "Flynn" clearly distinguishable.

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I.	SECTION 12A IS WELL-CRAFTED AND REFLECTS INTERNATIONAL BEST PRACTICE.....	4
A.	“Such as”	4
B.	“In addition to uses specifically authorized.”	6
C.	“All relevant factors”	6
II.	FAIR USE CAN BENEFIT THE SOUTH AFRICAN ECONOMY AND SOCIETY.....	7
A.	Fair use benefits creation and innovation.....	7
B.	Economic analysis supports benefits of fair use.....	8
C.	Industry studies claiming negative impacts are flawed	9
III.	FAIR USE COMPLIES WITH INTERNATIONAL COPYRIGHT LAW	10

I. SECTION 12A IS WELL-CRAFTED AND REFLECTS INTERNATIONAL BEST PRACTICE

The fair use right in Section 12A is a well-crafted provision that reflects modern developments and understandings gained internationally over the last 50 years of fair use jurisprudence.

A. “Such as”

Copyright laws with historical roots in the English common law tradition normally contain a general exception for a “fair” utilization of any work for a number of broadly framed purposes.² Many countries authorize a “dealing” with a work, as does the current South African Copyright Act. Others authorize a “use,” as did the original South African Copyright Act of 1978.³ The terms “use” and “dealing” mean the same thing. They apply the exception to all exclusive rights (e.g. to reproduction, communication, etc.).⁴

The key difference between the present South African fair dealing right and the proposed fair use right is the words “such as.” The current South African fair dealing exception applies only to “research or private study,” “criticism or review,” and “reporting current events.” The new proposed exception applies to these and a longer list of defined purposes and, in addition, to analogous purposes by virtue of inclusion of the words “such as” before the illustrative list:

² See Jonathan Band, *Fair Use and Fair Dealing Handbook* (collecting examples).

³ South Africa Copyright Act, 1978 (“12(1) Copyright shall not be infringed if a literary or musical work is used solely, and then only to the extent reasonably necessary” for a set of specific purposes.). See 17 USC § 107 (1976) (authorizing the “the fair use of a copyrighted work ... for purposes such as”); Bangladesh Copyright Act, Sec. 72 (providing exception for “Fair use of a literary, dramatic, musical or artistic work for the purpose of ...”); Uganda Copyright Act Sec. 15(1) (“The fair use of a protected work in its original language or in a translation shall not be an infringement”).

⁴ Indeed, because of the similarity it is possible for fair dealing exceptions, interpreted liberally, to operate very similarly to fair use exceptions. See Ariel Katz, *Debunking the Fair Use vs. Fair Dealing Myth: Have We Had Fair Use All Along?* in *The Cambridge Handbook of Copyright Limitations and Exception*, 113-14 (Shyamkrishna Balganes, Ng-Loy Wee Loon and Haochen Sun eds), Cambridge University Press, 2021) CanLIIDocs 94, <https://canlii.ca/t/t11z>

Copyright Amendment Bill

Current Law Section 12(1)

Copyright Amendment Bill Section 12A,
emphasis added

(1) Copyright shall not be infringed by any fair dealing with a literary or musical work-

(a) for the purposes of research or private study by, or the personal or private use of, the person using the work;

(b) for the purposes of criticism or review of that work or of another work; or

(c) for the purpose of reporting current events -

(i) in a newspaper, magazine or similar periodical; or (ii) by means of broadcasting or in a cinematograph film;

12A. (1) (a) In addition to uses specifically authorised, fair use in respect of a work or the performance of that work, for purposes *such as* the following, does not infringe copyright in that work:

(i) Research, private study or personal use, including the use of a lawful copy of the work at a different time or with a different device;

(ii) criticism or review of that work or of another work;

(iii) reporting current events;

(iv) scholarship, teaching and education;

(v) comment, illustration, parody, satire, caricature, cartoon, tribute, homage or pastiche;

(vi) preservation of and access to the collections of libraries, archives and museums; and

(vii) ensuring proper performance of public administration.

The list of illustrative purposes is innovative in including both traditional fair dealing purposes (e.g., criticism or review), as well as more modern purposes that have been recognized by statutes and in case law in other countries (e.g., “comment, illustration, parody, satire, caricature, cartoon, tribute, homage or pastiche”). The “such as” language permits courts to interpret the exception to apply to analogous uses that are not specifically defined. Taken together, we believe that the fair use provision will be highly predictable by those using it.⁵

⁵ Empirical studies of U.S. fair use law show that the doctrine is quite predictable, contrary to a common rhetorical trope used by critics. See Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549 (2008) (showing consistency in the application of the four factors across

There are at least 10 countries that have adopted the “such as” or a similar model to permit general exceptions to apply to analogous purposes over time. These include:

United States (1976)
Thailand (1994)
Philippines (1997)
Liberia (1997)
Sri Lanka (2003)
Singapore (2005)
Israel (2007)
Taiwan (2007)
South Korea (2011)
Malaysia (2012)
China (2020)⁶

B. “In addition to uses specifically authorized.”

The opening phrase -- “In addition to uses specifically authorized” -- makes clear that the fair use clause intends to cover issues unaddressed in its specific exceptions, as is the case with US fair use. This is particularly important to obtain the benefit of fair use as enabling adaptation to technology and culture change. It also signals to the interpreter that there exist a full set of specific exceptions (in 12B et seq.), which we commend for adding to the predictability of the law.

C. “All relevant factors”

The proposal includes a well-considered four-factor test that reflects the global trend in commonwealth countries.⁷ The four factors helpfully refer to consideration of whether “such use serves a purpose different from that of the work affected,” and “the substitution effect” in the market, reflecting recent clarifications in international case law.⁸

The provision also helpfully reflects the traditional approach that in interpreting whether a use is fair “all relevant factors shall be taken into account, including but not limited to” the listed four factors. The ultimate effect is that the fair use right

a large number of cases over time); Matthew Sag, *Predicting Fair Use*, 73 Ohio St. L.J. 47 (2012) (same).

⁶ For discussion of the adoption of fair use models over time, see Elkin-Koren, Niva and Netanel, Neil Weinstock, *Transplanting Fair Use Across the Globe: A Case Study Testing the Credibility of U.S. Opposition*, 72 Hastings L.J. 1121 (2020); Peter K. Yu, *Customizing Fair Use Transplants*, 7(1) *Laws* 9 (2018).

⁷ See Jonathan Band, *The Fair Use/ Fair Dealing Handbook*, <http://infojustice.org/wp-content/uploads/2013/04/Band-and-Gerafi-04032013.pdf> (reporting that over a dozen fair use and fair dealing jurisdictions have adopted a similar four-factor test).

⁸ See *Authors Guild v. Google*, 804 F.3d 202, 214 (2d Cir. 2015):

“The more the appropriator is using the copied material for new, transformative purposes, the more it serves copyright’s goal of enriching public knowledge and the less likely it is that the appropriation will serve as a substitute for the original or its plausible derivatives.” (2d Cir. 2015) (explaining the convergence of reasoning within US courts on transformative use).

turns on a proportionality test balancing the legitimate interests of the author with those of the user and society at large.

II. FAIR USE CAN BENEFIT THE SOUTH AFRICAN ECONOMY AND SOCIETY

A. Fair use benefits creation and innovation

The openness of fair use to analogous purposes carves out additional space for free expression and innovation. If a creator or innovator is sued by a copyright holder, there is a potential defense available as long as the user can prove (which is the user's burden) that the use serves an important purpose and does not unduly harm the interests of the author. This flexibility of fair use bolsters the strong connection with freedom of expression.⁹ Journalism, video game production, graphic art, documentary film, and many other creative industries in South Africa's economy may benefit.¹⁰ The flexibility of fair use also provides a needed tonic for innovation. Technologies like machine learning and artificial intelligence rely on sufficiently flexible exceptions to copyright,¹¹ as have the introduction of numerous

⁹ See Christophe Geiger & Elena Izyumenko, *Copyright on the Human Rights' Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression*, 45 Int'l Rev. Intell. Prop. & Competition L., Issue 3 (2014) (discussing EU courts interpreting and expanding copyright exceptions through free expression jurisprudence); Henning Grosse Ruse-Khan, *Overlaps and Conflict Norms in Human Rights Law: Approaches of European Courts to Address Intersections with Intellectual Property Rights* (Max Planck Institute for Intellectual Property & Competition Law Research Paper No. 18, 2013) (same); UNESCO, *Approaching Intellectual Property as a Human Right* (2001) (advising that copyright laws with insufficient exceptions violate human rights); *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (referring to fair use as one of copyright's "traditional First Amendment safeguards"); Pamela Samuelson, *Justifications for Copyright Limitations and Exceptions*, in COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS, at 12 (discussing policy justifications for fair use including those promoting freedom of expression).

¹⁰ See, e.g., Peter Jaszi et al., *Report on Copyright, Permissions, and Fair Use among Visual Artists and the Academic and Museum Visual Arts Communities* (2014); Sean Flynn, *Copyright Legal and Practical Reform for the South African Film Industry*, Afr. J. Info. & Comm., Issue 16 (2015) (reporting on survey of South African filmmakers).

¹¹ See Flynn, Sean and Geiger, Christophe and Quintais, João and Margoni, Thomas and Sag, Matthew and Guibault, L. and Carroll, Michael W., *Implementing User Rights for Research in the Field of Artificial Intelligence: A Call for International Action*, European Intellectual Property Review 42 (2020) (explaining that "[m]any of the most useful TDM and AI projects involve the use of copyright protected works" and rely on copyright exceptions); Hargraves Report, 41 ("[T]he law can block valuable new technologies, like text and data mining, simply because those technologies were not imagined when the law was formed."). See generally Matthew Sag, *The New Legal Landscape for Text Mining and Machine Learning*, 66 J. OF THE COPYRIGHT SOC'Y OF THE USA (2019) (discussing the utility of fair use rights for authorizing text and data mining); Michael W. Carroll, *Copyright and the Progress of Science: Why Text and Data Mining is Lawful*, 53 U.C. DAVIS L. REV. 893 (2019) (same); Thomas Margoni, *Text and Data Mining in Intellectual Property Law: Towards an Autonomous classification of Computational Legal Methods*, CREATE working paper (explaining recent European approaches); Josef Drexler et al., *Technical Aspects of Artificial Intelligence: An Understanding from an Intellectual Property Law Perspective*, Max Planck Institute.

technologies from the videocassette recorder to cloud storage.¹²

B. Economic analysis supports benefits of fair use

A series of South African government reports called for adopting fair use to aid the economy and society.¹³ The impact study commissioned by the Department of Trade and Industry found that the benefits to South African government, education and the public at large from fair use override the main potential cost in the form of greater use of excerpts of published works in schools.¹⁴

Official reports on the potential benefits of fair use in other countries, such as the UK and Australia, support the South African government's conclusions.¹⁵ Academic analysis supports these conclusions as well. Recent economic analysis, for example, shows the potential for more flexible copyright exceptions to assist increases in foreign direct investment, technology industry growth, and the production of scholarship.¹⁶

¹² See *Sony Corp. v. Universal Studios, Inc.*, 464 U.S. 417 (1984) (denying copyright challenge to sale of the video cassette recorders); *Cartoon Network, LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) (holding cable television company not liable for providing remote storage facility to enable consumers to tape and play back content at later time); Josh Lerner and Greg Rafert, *Lost in the Clouds: The Impact of Changing Property Rights on Investment in Cloud Computing Ventures*, Harvard Business School Working Paper 15-082 (2015) (finding that the Cartoon Network decision led to a rise in venture capital investment in cloud storage technology companies); Fred von Lohmann, *Fair Use as Innovation Policy*, 23 BERKELEY TECH. L.J. 829 (2008) (describing numerous technologies originally introduced in the U.S. in reliance on fair use).

¹³ See Department of Science and Technology (August 2002). "SOUTH AFRICA'S NATIONAL RESEARCH AND DEVELOPMENT STRATEGY" (PDF). p. 33; Farlam, Ian (2011). Copyright Review Commission Report 2011. et. al. South Africa: Department of Trade and Industry; Department of Trade and Industry (2013). "Draft National Policy on Intellectual Property" (PDF). Notice 918 of 2013. Government Gazette. p. Policy p. 29-30; Gazette p. 32-33.

¹⁴ Genesis Analytics, *Assessment of the Regulatory Proposals on the Intellectual Property Policy Framework for South Africa* (July 31, 2014). p. 86-89, available at [https://libguides.wits.ac.za/Copyright and Related Issues/DTI Impact Study](https://libguides.wits.ac.za/Copyright%20and%20Related%20Issues/DTI%20Impact%20Study) (finding benefits to the government, the public, education, and libraries, and a primary negative effect in decreases of licensing revenue to publishers which are rarely passed on to authors).

¹⁵ See DIGITAL OPPORTUNITY: A REVIEW OF INTELLECTUAL PROPERTY AND GROWTH, AN INDEPENDENT REPORT BY PROFESSOR IAN HARGRAVES, 1 (May 2011) ("Copyright, once the exclusive concern of authors and their publishers, is today preventing medical researchers studying data and text in pursuit of new treatments. Copying has become basic to numerous industrial processes, as well as to a burgeoning service economy based upon the internet. The UK cannot afford to let a legal framework designed around artists impede vigorous participation in these emerging business sectors."); AUSTRALIAN GOVERNMENT PRODUCTIVITY COMMISSION, INTELLECTUAL PROPERTY ARRANGEMENTS, *Overview*, 2 (2016) ("Copyright is broader in scope and longer in duration than needed — innovative firms, universities and schools, and consumers bear the cost. — Introducing a system of user rights, including the (well-established) principles-based fair use exception, would go some way to redress this imbalance."); . See generally AUSTRALIA LAW REFORM COMM'N, COPYRIGHT AND THE DIGITAL ECONOMY: FINAL REPORT 104-08 (2013) (describing fair use as an engine for innovation).

¹⁶ See Sean Flynn & Michael Palmedo, *The User Rights Database: Measuring the Impact of Opening*

C. Industry studies claiming negative impacts are flawed

We do not find credible the estimate of costs of fair use by PriceWaterhouseCoopers in a study commissioned by the copyright industry. A similar study was rejected by the Australian Productivity Commission.¹⁷ Its estimate of a R2.1 bn cost to the publishing industry (out of a total present market of R5 bn) is based in large part on subjective estimates of business executives in the publishing industry who are members of the trade association that commissioned the study.¹⁸ Based on this survey of the subjective beliefs of publishers, the study fantastically assumes that introducing fair use in South Africa would lead to a 33% decrease in publishing sales.¹⁹ The PWC study is not a credible account of the costs and benefits of fair use. It does not review the dozen or so countries that have fair use; it does not conduct econometric analysis to attempt to identify the impact of policy change controlling other factors; and it does not estimate benefits. It is an accurate study only of the subjective views of publishers.²⁰

Interestingly, the PWC report references some facts that are very relevant in assessing the *benefits* of the bill. For example:

- The majority of publishing expenditure in South Africa takes place in

Copyright Exceptions (PIJIP Working Paper, 2018), <http://infojustice.org/flexible-use/research>; Christian Handke, Lucie Guibault, and Joan-Josep Vallbé. *Copyright's Impact on Data Mining in Academic Research*. MANAGERIAL AND DECISION ECONOMICS. (Forthcoming, 2021) (finding that publications utilizing datamining research methods make up a significantly lower share of total research output in countries where academic DM requires specific rights holder consent.); Lucie Guibault et al., *Is Europe Falling Behind in Data Mining? Copyright's Impact on Data Mining in Academic Research*, Int'l Conf. on Elec. Publ'g (2015) (linking recognition of data mining rights to increases in scholarly production using data mining techniques); Roya Ghafele & Benjamin Gibert, *The Economic Value of Fair Use in Copyright Law: Counterfactual Impact of Analysis of Fair Use Policy on Private Copying Technology and Copyright Markets in Singapore* (2012) (finding net economic benefits of fair use adoption in Singapore). Michael Palmedo, *The Impact of Copyright Exceptions for Researchers on Scholarly Output*. 2 EFIL J. OF ECONOMIC RES. 6, 114-139. (2019) (finding that scientists residing in countries that implement more robust research exceptions publish more papers and books in subsequent years); Josh Lerner and Greg Rafert. *Lost in the Clouds: The Impact of Changing Property Rights on Investment in Cloud Computing Ventures*. NBER Working Paper No. w21140. (May 2015) (finding that the allocation of property rights can have economically and statistically significant impacts on investment in innovative enterprises.).

¹⁷ Australia Productivity Commission, *Intellectual Property Arrangements*, 179 (2016) (finding the PWC “cost benefit analysis was methodologically flawed”).

¹⁸ See PWC Report at 4 (explaining that the estimates of impact were based on “results of a survey of a representative sample of publishing companies”; 89% per cent “believe that the promulgation of the Bill ... will impact negatively on their operations”); *id.* at 20 (18% believed that introducing fair use would lead to losses of over 50% of all sales).

¹⁹ PWC, <https://www.publishsa.co.za/file/1501662149slp-pwcreportonthecopyrightbill2017.pdf> at 21.

²⁰ Cf Peter Yu, *Fair Use and Its Global Paradigm Evolution*, 2019 U. Ill. L. Rev. 111 (critiquing the PWC study as being based in part on a “fictitious paradigm shift from fair dealing to fair use” not applicable to the hybrid model being proposed).

schools (nearly 80%), and is disproportionately spent on imported texts, with publishing imports exceeding exports by about R1bn;²¹

- South African authors receive very little income (under 2%) from licensing of course packs.

These facts support the DTI Impact Study. A main impact of the bill is likely to be to enable teachers to curate their own teaching materials and thereby exert competitive pressure on the prices of unreasonably priced imported texts. This could cause some loss to international publishers who refuse to supply books in South Africa's market on reasonable terms. But it need not harm South African publishers or South Africa's authors. Any harm may be offset by savings to schools, teachers and students, as well as by the other benefits of fair use to the economy and society. If the savings to schools were reinvested in domestic publishing, such as through university publishers to support open licensed texts for schools, the benefits of the bill could be expanded further.

III. FAIR USE COMPLIES WITH INTERNATIONAL COPYRIGHT LAW

International law's "three-step" test requires that countries confine copyright limitations or exceptions "to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."²² The fair use provision in Section 12A defines a set of special cases through a list of illustrative uses and protects the normal exploitation and legitimate interests of authors through a four-part balancing test.²³ The provision thus clearly complies with the three-step test.

A minority view holds that the "such as" language makes fair use so unbounded that it fails the "certain special cases" prong of the test. Most of the original adherents to this view have since recounted their opinions.²⁴ The dominant

²¹ *Id.* at p. 23;

²² WTO TRIPS agreement Art. 13.

²³ See Pamela Samuelson & Kathryn Hashimoto, *Is the U.S. Fair Use Doctrine Compatible with Berne and TRIPS Obligations?* (U.C. Berkeley Public Law Research Paper, 2018); Christophe Geiger, Daniel Gervais & Martin Senftleben, *The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law*, 29 *Am. U. Int'l L. Rev.* 581 (2014); Martin Senftleben, *The International Three-Step Test – A Model Provision for EC Fair Use Legislation*, 1 *Journal of Intellectual Property, Information Technology and E-Commerce Law* 67 (2010); Martin Senftleben, *Copyright, Limitations and the Three-Step Test – An Analysis of the Three-Step Test in International and EC Copyright Law*, Den Haag/London/New York: Kluwer Law International 2004, 162-168.

²⁴ See Mihaly J. Ficsor, *Conflict of the Canadian Legislation and Case Law on Fair Dealing for Educational Purposes with the International Norms* (March 18, 2018) 14, http://www.copyrightseesaw.net/archive/?sw_10_item=77 (opining that U.S. fair use is consistent with three-step test); P. Bernt Hugenholtz & Ruth L. Okediji, *Final Report: Conceiving an International Instrument on Limitations and Exceptions to Copyright* (Mar. 2008) 3, ("The [three-step] test most likely permits both discrete European-style limitations and broader fair-use-style exemptions, or possibly a combination of both."); Sam Ricketson, *WIPO Study on Exceptions and Limitations to Copyright and Related Rights in the Digital Environment*, *SCCR 9/7* (April 5, 2003) 67-69 (some fair

Copyright Amendment Bill

academic opinion today is that fair use fully complies with the three-step test. The compliance of fair use with the three-step test is supported by the history of state practice.²⁵ The U.S. fair use doctrine was accepted as consistent with the three-step test when the U.S. joined the Berne Convention in 1989 and the TRIPS Agreement in 1994. Nine other countries adopted open general exceptions similar to fair use since 1994, without challenge. We emphatically reject the argument that TRIPS members may not adopt fair use rights. Many have and all may.

uses are consistent with the test).

²⁵ See Vienna Convention on the Law of Treaties Art. 31(3)(b) (instructing that treaty interpretation should take into account “Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”).