



## Before the Portfolio Committee on Trade and Industry

### COMMENTS OF THE LIBRARY COPYRIGHT ALLIANCE REGARDING COPYRIGHT AMENDMENT BILL

The Library Copyright Alliance (“LCA”) consists of three major U.S. library associations: the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries. These associations represent over 100,000 libraries in the United States employing more than 350,000 librarians and other personnel.

LCA is grateful for the opportunity to comment on the alignment of the Copyright Amendment Bill (“CAB”) with South Africa’s obligations set out in international treaties. Because of the abstract nature of these obligations, the most concrete way to demonstrate the CAB’s alignment with these obligations is to show the CAB’s alignment with the long-standing copyright laws of other countries, which presumably themselves are in alignment with international obligations. LCA primarily represents libraries in the United States; accordingly, these comments will focus on the similarities between the exceptions and limitations in the U.S. Copyright Act and those proposed in the CAB.

#### **I. Fair Use (Section 12A)**

Through its exceptions and limitations, the CAB seeks to achieve a balance among the interests of different stakeholders in the copyright system. A central element of the CAB’s architecture is the fair use provision, Section 12A. This provision is based on the fair use right in the U.S. Copyright Act, 17 U.S.C. § 107. In April 2021, the U.S. Supreme Court issued a decision based on fair use in *Google v. Oracle America*, 141 S. Ct. 1183 (2021). The policy rationales for fair use articulated in the Supreme Court’s opinion match those of the CAB.

#### ***A. Striking a Balance in Copyright***

The Supreme Court provided an overview of copyright that stressed the balances and tradeoffs inherent in the system. The Court stated that copyright grants authors exclusive rights “not as a special reward, but in order to encourage the production of works that others might reproduce more cheaply.” *Oracle*, 141 S. Ct. at 1195. The Court acknowledged that “copyright has negative features. Protection can raise costs to consumers.... And the exclusive rights it awards can sometimes stand in the way of others exercising their own creative powers.” *Id.* In a similar vein, the Court quoted Thomas Macaulay’s statement that copyright is a “tax on readers for the purpose of giving a bounty to writers.” *Id.* (Citation omitted.) The Court added that the legislature, “weighing advantages and disadvantages, will determine the more specific nature of the tax, its boundaries and conditions, [and] the existence of exceptions and exemptions.” *Id.* This is precisely what the CAB does.

## ***B. The Role of Fair Use***

The Court explained that “fair use is an equitable rule of reason that permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which the law is designed to foster.” *Id.* The Court added that “the concept is flexible” and “courts must apply it in light of the sometimes conflicting aims of copyright law.” *Id.* In particular, fair use “could prevent holders from using copyright to stifle innovation.” *Id.* The Court observed that fair use “can focus on the legitimate need to promote incentives to produce copyrighted material while examining the extent to which yet further protection creates unrelated or illegitimate harms in other markets or to the development of other products.” The Court stressed that fair use’s “basic purpose” is “providing a context-based check that can help to keep a copyright monopoly within its lawful bounds.”

## ***C. Fair Use Promoting Creativity in Google v. Oracle***

Turning to the specific facts of the case, the Court found that fair use permitted Google to reimplement 11,500 lines of declaring code from the Sun Java application programming interface (“API”) in the Android operating system for the purpose of enabling Java programmers to write programs in the new Android environment. The Court stated, “Google’s use of the Sun Java API seeks to create new products. It seeks to expand the use and usefulness of Android-based smartphones. Its new product offers programmers a highly creative and innovative tool for a smartphone environment. To the extent that Google used parts of the Sun Java API to create a new platform that could be readily used by programmers, its use was consistent with that creative ‘progress’ that is the basic constitutional objective of copyright itself.” *Id.* at 1203 (citations omitted).

The Court further explained that Google’s objective “was to permit programmers to make use of their knowledge and experience using the Sun Java API when they wrote new programs for the smartphones with the Android platform.” *Id.* at 1205. The Sun declaring code “was the key that [Google] needed to unlock the programmers’ creative energies.” *Id.*

Later in the decision, the Court returned to the lock analogy: “allowing enforcement here would make of the Sun Java API’s declaring code a lock limiting the future creativity of new programs.” *Id.* at 1208. Because the lock would restrict “creative improvements, new applications, and new uses developed by users who have learned to work” with the Java APIs, “the lock would interfere with, not further, copyright’s basic creativity objectives.” *Id.*

In short, the Supreme Court in *Oracle* underscored that fair use promotes the creation of new works, and thereby advances the objectives of the copyright system. CAB Section 12A would have the same effect, and thus is in alignment with South Africa’s international treaty obligations.

## **II. Other Exceptions and Limitations**

As the Committee is aware, the International Intellectual Property Alliance (“IIPA”) filed a petition with the Office of the U.S. Trade Representative arguing that the Republic of South Africa should lose its trade preferences because it did not provide adequate and effective

intellectual property protection by virtue of provisions in the CAB. USTR launched a review in response to this petition.

A central thrust of IIPA's petition was that the CAB's exceptions and limitations did not comply with international norms. During the course of the USTR's review, LCA had the opportunity to respond to IIPA's petition. The following section is based on that response.

#### ***A. Personal Uses***

IIPA claimed that the exceptions for personal uses without remuneration in CAB Sections 12B(1) and (2) are "out of step with international norms." They certainly are not in the United States, where personal uses fall within the scope of fair use and are not subject to remuneration. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

#### ***B. Translations for Educational Uses***

IIPA worried that the exception in Section 12B(1)(f) for making translations for educational purposes "could be interpreted too broadly." The solution to this perceived problem is regulations that provide the proper interpretation. The IIPA should act constructively by proposing the interpretative language that would address its concerns.

#### ***C. Temporary Reproductions***

IIPA asserted that the exception in Section 12C for temporary reproductions to enable transmissions "could hinder efforts to work with online intermediaries to put a stop to piracy." The language of section 12C first appeared in Article 5(2) of the EU Information Society Directive, and has been adopted broadly by jurisdictions around the world. IIPA thus seeks to expose service providers in South Africa to significantly greater liability than service providers elsewhere.

#### ***D. Quotations***

IIPA criticized the "broad and circular" exception for quotations in Section 12B(1)(a). The language in Section 12B(1)(a) is virtually identical to the language in Article 10(1) of the Berne Convention; any breadth and circularity is the fault of Berne Convention. Further, IIPA suggested that the exception's lack of specificity renders the exception "incompatible" with the three-step test. However, the quotation right in Article 10(1) of the Berne Convention is not subject to the three-step test. Moreover, this exception is no broader than the quotation exception in many other countries.

#### ***E. Educational Uses***

IIPA attacked subsection 12D7(a) as a threat to "academic freedom" because it gives the author of a scientific article that is the result of a research activity primarily funded by the government the right to make the article available on an open access basis. This is a truly Orwellian argument. How does preserving a scientist's right to make her research publicly available undermine her academic freedom? The statute doesn't obligate her to provide open access, although the Government certainly has the authority to do so as a condition of its

providing the research funding. Indeed, the United States government conditions its research grants on making the resulting articles available on an open access basis. So do the EU and many other research funders around the world.

IIPA also objected to Section 12D(4)(c), which permits the making of a copy of an entire textbook when a copy cannot be obtained “at a price reasonably related to that normally charged in the Republic for comparable works.” The median household income in the United States is over \$70,000. The median household income in South Africa is around \$13,000, and \$9,000 for black families. The higher education textbook market in South Africa is dominated by the UK publisher Pearson. For certain titles, Pearson charges the same prices in South Africa as it does in the UK or the United States, notwithstanding the enormous disparity in income. When a textbook publisher charges prices most students cannot possibly afford, the publisher cannot reasonably expect to make many sales. Accordingly, in such a special case, the copying of the textbook does not unreasonably prejudice the legitimate interests of the rights holder.

Further, the reasonable price standard appears in the U.S. Copyright Act. See 17 U.S.C. § 108(h)(2). *See also* 17 U.S.C. § 108(c)(1) and (e) (“cannot be obtained at a fair price”).

In any event, regulations could provide additional certainty concerning the application of the reasonable price standard.

#### ***F. People With Disabilities***

IIPA argued that the section 19D exception for the making of accessible format copies should apply only to authorized entities, as provided in the Marrakesh Treaty. However, the Marrakesh Treaty is not restricted only to authorized entities. Article 4(1)(a) of the Treaty simply provides that Contracting Parties *shall* provide for an exception to the right of reproduction and distribution “to facilitate the availability of works in accessible formats.” Article 4(2) then states that one way to meet the obligations under Article 4(1) is to permit an authorized entity to make and distribute accessible format copies. But even Article 4(2) isn’t limited to authorized entities. It also permits a person with a print disability, or someone acting on her behalf, to make an accessible copy. Many of the jurisdictions that have implemented the Treaty, including the European Union, have followed the Article 4(2) approach (*i.e.*, extending the exception to authorized entities, people with disabilities, and others acting on their behalf). Some countries, like Chile or the Cook Islands, have taken an even broader approach.

In sum, there was no merit to IIPA’s claims that CAB did not align with South Africa’s treaty obligations. We would be happy to respond to any questions the Committee may have.

Respectfully,

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