

17 April 2020

I write today on behalf of the Electronic Frontier Foundation in regards to troubling recent developments in the development of South African copyright law, with serious implications for foundational human rights, cultural development, trade parity and national self-determination.

The Electronic Frontier Foundation is the leading nonprofit organization defending civil liberties in the digital world. Founded in 1990, EFF champions user privacy, free expression, and innovation through impact litigation, policy analysis, grassroots activism, and technology development. With over 30,000 dues-paying members and well over 1 million followers on social networks, we focus on promoting policies that benefit Internet users. We work to ensure that rights and freedoms are enhanced and protected as our use of technology grows.

We were alarmed to note that President Ramaphosa had sent back all the limitations and exceptions related to libraries, archives, museums, galleries, education, and research, as well as the broader fair use framework that had been previously proposed. It is our understanding that

President Ramaphosa took this decision based on advice that these limitations and exceptions are incompatible with the "Three-Step Test" in the Berne Convention and the instruments that incorporate it by reference, such as the WTO TRIPS Agreement and the WIPO Copyright Treaty.

That advice was incorrect. South Africa's proposed copyright flexibilities had been modeled on those in use in the U.S.A. – provisions that have not attracted any enforcement actions under Berne, TRIPPS, the WCT or any of the other several frameworks 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.

By foregoing these flexibilities, South Africa is also foregoing the opportunities for both free expression and economic development that they offer to the South African people and South African firms competing on a global stage.

Fair use, as codified in the U.S. Copyright Act, allows for circumstances in which the use of creative work without advance permission furthers the goals of copyright. Evaluating uses case-by-case by balancing four non-exclusive factors allows for important, socially valuable uses of creative work that were never anticipated by the legislature, policymakers, or the original authors. Fair use contributes significantly to the U.S. economy, including the creative industries.¹ Industries that depend on fair use contribute about 16% of U.S. GDP, and fair use benefits about 1 in 8 U.S. workers.²

Fair use is flexible by design. Courts in the U.S. can and do consider factors beyond the four specified in the statute.³ The language in South Africa's Copyright Amendment Bill that instructs courts to consider "all relevant factors" when evaluating fair use does not differ significantly from U.S. practice.⁴

In the U.S. and elsewhere, fair use exists alongside other more precisely defined exceptions and limitations to copyright. In addition to fair use, U.S. law includes specific exceptions for library use, educational use, accessibility, and use by various businesses, to name only a few. Likewise, Israel's copyright law consists of "an American *Fair Use* framework, accompanied by an additional list of exceptions."⁵ The combination of a flexible fair use doctrine that allows for creative experimentation and specific exceptions that provide certainty for specific, socially beneficial uses is a key feature of U.S. copyright law. South Africa's proposal, patterned after the U.S. law, is no less clear nor is it more expansive than the U.S. system.⁶

¹ See Computer and Communications Industry Association, *Fair Use in the US Economy: Economic Contribution of Industries Relying on Fair Use* (2017), <https://www.cciainet.org/wp-content/uploads/2017/06/Fair-Use-in-the-U.S.-Economy-2017.pdf>.

² *Id.*

³ See *Peter Letterese & Assocs. v. World Inst. of Scientology Enters.*, 533 F.3d 1287, 1308 (11th Cir. 2008) ("[I]t is conceivable that an unenumerated factor may, in an exceptional case, outweigh the four nonexhaustive factors listed in the statute.")

⁴ IIPA Written Comments at 6-7.

⁵ *Limitations and Exceptions to Copyright in Israel*, PIJIP Blog (May 7, 2012), <http://infojustice.org/archives/20276>.

⁶ IIPA Written Comments at 5.

Nor does the addition of “ensuring proper performance of public administration” as a factor to consider depart from U.S. law.⁷ U.S. courts have determined that copying copyrighted documents when necessary for use in governmental proceedings is fair use.⁸ Moreover, in evaluating whether copying documents incorporated into government regulations is fair use, the Court of Appeals for the D.C. Circuit “put[] a heavy thumb on the scale in favor of an unrestrained ability” to copy such documents.⁹

The suggestion by rightsholder interests that South Africa (and presumably other countries) cannot hope to introduce a fair use provision without first recreating the U.S.’s “150 years of fair use jurisprudence” is facially absurd. The same 150 years of jurisprudence, and that of other countries, will be available to South Africa’s courts as a reference. Other countries, notably Israel and South Korea, have successfully adopted fair use in recent decades, without any of the chaos that IIPA hyperbolically predicts.¹⁰

Fair use provisions, including South Africa’s proposal, are entirely consistent with the “three-step test” of the Berne Convention¹¹ and the TRIPS agreement.¹² That test allows for limitations and exceptions to copyright “in certain special cases,” where such uses do not “conflict with a normal exploitation of the work and do[] not unreasonably prejudice the legitimate interests of the author.”¹³ The U.S. Copyright Act, including fair use, has long been determined to be consistent with the three-step test.¹⁴ While rightsholder interests claim that the South African CAB’s version of fair use is not, the reasons they give, discussed above, simply don’t implicate the three-step test. The CAB’s fair use provisions, though broader in some respects than U.S. law, are still limited to certain special cases. They still require a transformation of form or purpose, or an overriding public purpose. And they still contain an evaluation of the author’s financial and other interests.

Finally, rightsholder groups’ argument that the CAB should be condemned because it would “increase unlicensed uses of copyrighted content” amounts to a tautology. Fair use, which is consistent with U.S. and international norms, enables unlicensed uses of copyrighted content when such uses further the goals of copyright. Copyright has never required that every use of a work be licensed, and such a requirement would undermine the economic and moral values that copyright furthers.

⁷ *Id.* at 6.

⁸ *See, e.g., Am. Inst. of Physics v. Winstead PC*, No. 3:12-CV-1230-M, 2013 WL 6242843, at *1 (N.D. Tex. Dec. 3, 2013) (copying copyrighted articles to submit to the U.S. Patent Office as part of a patent application was fair use).

⁹ *Am. Soc’y for Testing & Materials v. Public.Resource.Org, Inc.*, 896 F.3d 437, 459 (D.C. Cir. 2018) (Katsas, J., concurring).

¹⁰ Jonathan Band and Jonathan Gerafi, “The Fair Use/Fair Dealing Handbook” (March 2015), <http://infojustice.org/wp-content/uploads/2015/03/fair-use-handbook-march-2015.pdf>.

¹¹ Berne Convention for the Protection of Literary and Artistic Works, Article 9(2) (1979)

¹² World Trade Organization, Uruguay Round Amendments, Trade-Related Aspects of Intellectual Property Rights, Article 13 (1994).

¹³ *Id.*

¹⁴ Pamela Samuelson, “Justifications for Copyright Limitations & Exceptions” 35-37, *in* Ruth L. Okediji, *Copyright Law in an Age of Limitations and Exceptions* (Cambridge Univ. Press 2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2476669.

In summary, South Africa need not remove fair use and other enumerated limitations and exceptions from its copyright system to comply with international law or trade obligations. These limitations and exceptions are key to the promotion of human rights, industry, and trade.

We would be delighted to discuss this further with you at your convenience.

Thank you,