



27 January 2022

The Portfolio Committee on Trade and Industry

By email:

ahermans@parliament.gov.za

tmadima@parliament.gov.za

msheldon@parliament.gov.za

ymanakaza@parliament.gov.za

Google – Submissions on the on the Copyright Amendment Bill (B13B-2017)

1. Introduction

- 1.1. Google LLC (**Google**) welcomes the opportunity afforded to it by the Portfolio Committee on Trade and Industry (**Committee**) to submit written submissions on the further proposed amendments to the Copyright Amendment Bill, B13B-2017 (**Copyright Bill**).
- 1.2. Google is a multinational technology company offering Internet related services and products to users in various jurisdictions around the world, including South Africa. Google submitted comments on previous iterations of the Copyright Bill in September 2015, June 2017, August 2021 and acknowledges the progress made by the government and the Committee in the current draft Copyright Bill in drafting fit-for-purpose legislation in the digital age.
- 1.3. Google appreciates the unique nature of South Africa's copyright landscape and recognises the importance that legislation can have to advance inclusive economic growth, ensuring participation of small businesses and historically disadvantaged persons in the development of the economy. To this end, we believe that a copyright framework aimed at safeguarding competition, fostering creativity, and creating an environment conducive to innovation and investment is critical to the growth and success of South Africa's innovation and technology sectors.



1.4. A copyright framework for the digital era must support an environment that fosters innovation for those companies that wish to conduct business in South Africa so as to enable users to benefit fully from such services and contribute to new inventions and creative works. We acknowledge that regulatory changes may be needed in light of the digital transformation of the last two decades. However, in doing so, it will be important to ensure that a copyright framework is put in place which (i) optimally harnesses the benefits and opportunities associated with the 4th Industrial Revolution (**4IR**); (ii) does not stifle innovation and creativity; and (iii) optimises social economic development, economic growth and investment, with a particular emphasis on the technology industry and small medium and micro enterprises (**SMMEs**).

2. Summary of issues

2.1. Google is supportive of the Copyright Bill's adoption of fair use in Section 12A, as the way to best achieve the Department of Trade, Industry and Competition's (**DTIC**) objectives. This approach follows those countries with the most innovative economies and is fully consistent with South Africa's international treaty obligations. A flexible fair use regime, through the inclusion of illustrative terms "such as" and "including," allows uses that are consistent with traditional fair use principles but which may be new and innovative.

2.2. At the same time, we respectfully suggest that the proposed deletion of the illustrative uses in green font in Sections (i), (iv), and (v) not be made. These uses are traditional fair uses. Their inclusion provides courts and the public with an understanding of the types of uses that fair use is intended to cover. For example, "research" need not be understood as academic research, but could include research that members of the public do with search engines. We appreciate that the proposed deletions may have been made out of a belief they are no longer necessary given the more open nature of Section 12A. We believe, though, that their inclusion, as traditional examples of fair use, is highly desirable as giving substance to what fair use is about, and to show that fair use is not vague or anything goes as some critics have wrongly asserted

2.3. Mindful of the above, Google wishes to put forward its submissions before the Committee on the relevant sections as circumscribed in the Committee's amendments published on 24 November 2021 (**Proposed Amendments**). Since we have already commented on the previous iterations of the Copyright Bill, we do not repeat our



previous submissions here and ask that the Committee incorporate our previous submissions, to the extent necessary and relevant to the Proposed Amendments. In these submissions, we have focussed on the amendments in the Copyright Bill relating to:

- 2.3.1. copyright vested in a published edition (section 11A);
- 2.3.2. copyright in a computer programme (section 11B);
- 2.3.3. the general exceptions (section 12A);
- 2.3.4. the "*fair use*" provision (section 12A);
- 2.3.5. the "*quotation*" exception (section 12B(1)(a));
- 2.3.6. the "*translations*" exception (section 12B(1)(f));
- 2.3.7. the "*transient copies*" exception (section 12C);
- 2.3.8. the "*educational use*" exception (section 12D);
- 2.3.9. the "*library uses*" exception (section 19C);
- 2.3.10. the "*disabilities*" exception (section 19D); and
- 2.3.11. the penalties and proceedings in respect of copyright infringements (section 27).

3. Copyright in a published edition (section 11A)

3.1. Google supports the Proposed Amendments to section 11A. As long as the amendments do not dilute the benefits of free and unfettered access to information, Google welcomes the additional text to the section.

3.2. As many South Africans do not have access to schools, libraries and internet to access published works, especially in light of the COVID-19 pandemic, the fair use regime will undeniably support and improve access to information.

4. Copyright in a computer program (section 11B)

4.1. Similarly, Google wishes to express its support of the Proposed Amendments to section 11B. As long as the amendments do not negatively impact the development of



new technologies and computer programs, Google welcomes the additional text to the section.

- 4.2. As it is crucial for economic competitiveness in the digital economy, businesses ought to be allowed and have access to publicly available information and program information to enable new products and technologies.

5. General exceptions (section 12A)

- 5.1. Google believes that the exceptions to copyright, as provided for in the Proposed Amendments, are important legislative instruments required to balance the various interests of copyright owners, creators, and the public at large. Many sectors, including both the technology and creative sectors, rely on limitations and exceptions to function -driving economic development and growth, including those in the SMME sector.
- 5.2. In sectors such as computer systems development, scientific R&D and software, it is important for businesses to access and use information in order to develop new products. In a digital economy, it is crucial for economic competitiveness that copyright law does not prevent the development of new technologies. For technological advances to succeed, a flexible copyright structure which does not slow down innovation in the dynamic and entrepreneurial technology sector with outdated legislative frameworks is necessary.
- 5.3. Google lauds the strides made by the Committee in this regard and supports the expansion of the closed list of fair dealing purposes as contained in the Copyright Act, 1978 (**Copyright Act**). As such, we believe that altogether, the proposed exceptions and limitations as set out in the Copyright Bill are reasonable, justifiable and necessary in terms of the South African Constitution.

6. Fair use (section 12A)

6.1. Regulation

- 6.1.1. There have been concerns expressed regarding the constitutionality of the introduction of the "*fair use*" provisions as contained in section 12A of the Copyright Bill. The existing position under the Copyright Act only provides for a limited number of examples of "*fair dealing*" in relation to a copyright work.



- 6.1.2. In accordance with our previous submissions dated 30 June 2017, we support the use of the phrase "*such as*" in the context of the fair use regime. The use of words "*such as*" before the list of permitted purposes makes it clear that: (i) it is open to other purposes of use; (ii) it is not a closed list of examples; and (iii) there may be other instances as long as the use of the work is done in a fair manner. One of the main policy reasons for using the term "*such as*" is the promotion and continued development of creative works on the internet. Flexibility is at the heart of a modern copyright law because creativity, innovation, and technological change are dynamic. Given the rapid advancement of various technologies, there will always be new types of users.
- 6.1.3. Fair use is also a critical component to the advancement of the 4IR and of any innovation agenda. We are of the view that technology, software and other industries that rely on copyright exceptions grow faster in countries with a fair use regime and with open copyright exceptions. In South Africa, the addition of a fair use provision creates an opportunity to build in more exceptions, which could assist the government with access to information and education.
- 6.1.4. Similar openness is present in a number of other countries. For instance, section 107 of the U.S. Copyright Act (as it is used in the context of the fair use regime) states (with emphasis added) that:
- "Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, **including such use** by reproduction in copies or phonorecords or by any other means specified by that section, for purposes **such as***
- In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—*
- (1) the purpose and character of the use, **including** . . ."*
- 6.1.5. As we discussed in Section 2.2, the proposed deletion of certain illustrative uses in subsections (i), (iv), and (v) is ill-advised in our opinion. Fair use provisions in other countries helpfully provide the proposed deleted uses as illustrative examples of traditional fair uses. An open list still has to be a list. To be a helpful list, one that gives guidance to courts and the public, traditional fair uses should be



listed. Doing so provides an important measure of certainty, both for the uses included, and to rebut the argument that fair use is vague.

6.2. Recommendation

- 6.2.1. Consequently, Google supports the Proposed Amendments and use of the words, "*such as*". If a closed list were to be retained (as is the case with the current Copyright Act), it would necessitate the requirement to have frequent updates to the legislation which would be administratively cumbersome. South Africa will not be able to attain a dynamic, creative environment if its copyright laws remain static. This may result in the stifling of a copyright framework that promotes innovation and optimises social economic development, economic growth and investment in the sector with a particular emphasis on the technology industry and SMMEs.
- 6.2.2. Despite a common misconception to the contrary, we submit that "*fair use*" can be used in a responsible manner. There is no evidence that this is the case. In fact, the opposite is true. Studies over the years have shown how important fair use is to creativity, innovation, and investment - driving economic growth and increased access to information.¹ Indeed, fair use has fueled economic growth, innovation, and creativity around the world.
- 6.2.3. Accordingly, we endorse the retention of the phrase "*such as*" in the context of the fair use regime in order to maintain the flexibility that is required for the heart of a modern copyright law. Furthermore we advise that subsections (i), (iv) and (v) be retained.

7. The "quotation" exception (Section 12B(1)(a))

- 7.1. The Copyright Bill provides that a work shall not be infringed by any quotation provided that the extent of the use of the quotation shall not exceed the extent that is reasonably justified by the purpose. This is to be read with section 12B(1)(a)(ii), which also requires, where practical, that the source and name of the author, if it appears on or in the work, be mentioned in the quotation.

¹ See: CCIA, "Fair Use in the Economy 2017" (June 9, 2017), available at: <https://www.ccianet.org/2017/06/study-shows-fair-use-industries-make-up-one-sixth-of-the-economy/>.



7.2. The Proposed Amendment to section 12A(d), also makes this exception subject to the principle of "fair use".

7.3. Within the context of the proposed section 12, Google wishes to express its support to the Proposed Amendments as they are in line with the provisions of the Berne Convention.

8. Translations (section 12B(1)(f))

8.1. Regulation

8.1.1. Section 12B(1)(f) of the Copyright Bill states that exceptions can include translations:

8.1.1.1. not done for commercial purposes;

8.1.1.2. personal, education, teaching, judicial proceedings, research and profession advice; and

8.1.1.3. for the public for non-commercial purposes.

8.1.2. At present, section 12(11) of the Copyright Act provides that a right of translation is available on the following basis:

"The provisions of subsections (1) to (4) inclusive and (6), (7) and (10) shall be construed as embracing the right to use the work in question either in its original language or in a different language, and the right of translation of the author shall, in the latter event, be deemed not to have been infringed."

8.2. Concern

8.2.1. The President previously noted that the exception for translation in the context of teaching may not be in accordance with the Constitution or international law.

8.2.2. The translation provision in the Copyright Act is much broader than that set out in the Copyright Bill, and it is Google's view that the proposed amendment envisages a very narrow application for this exception. This may require redress given that



the right to translation will assist in the promotion of certain Constitutional rights, including:

- 8.2.2.1. the right of South Africans "*to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable*" (section 29(2) of the Constitution);
 - 8.2.2.2. the right of everyone "*to use the language and to participate in the cultural life of their choice*" (section 30 of the Constitution); and
 - 8.2.2.3. the right of linguistic communities not to be denied the right "*to enjoy their culture*" and "*use their language*" (section 31(a) of the Constitution).
- 8.2.3. The limitation of the translation right to "*teaching*" is too narrow to protect the above-mentioned rights. We are of the view that, in a multi-cultural society such as South Africa, it is strategically imperative to ensure that all citizens are able to fully participate in the cultural and economic affairs of the country.

8.3. Recommendation

- 8.3.1. We are therefore of the view that, at present, the Copyright Bill will not significantly amend the position under the Copyright Act, and that the relevant section should be amended to provide for more flexibility in relation to the translation of copyright works. In particular, we propose that the narrow application for translation be expanded to extend beyond education purposes and to reflect the full range of purposes for which a lawful translation may be made.
- 8.3.2. By way of suggestion, we propose that the wording of section 12B(1)(f) be amended to read that "*the translations of such work into any language provided that such translation is done for a non-commercial purposes, which is consistent with fair practice, and does not exceed the extent justified by the purpose*". This would cater for the inclusion of any translation for non-commercial purposes, as long as it was consistent with fair practice and justifiable in the circumstances.



9. Transient copies (section 12C)

- 9.1.** The Proposed Amendments qualify the exception for transient copies by providing that the transient and or incidental copies or adaptations of work may only be made subject to certain requirements; must not conflict with normal exploitations of the copyright work; and not unreasonably prejudice the legitimate interests of the copyright owner flowing from their copyright in that work.
- 9.2.** In a digital economy, it is important that copyright laws make adequate provision for digital activities, which includes, amongst others, the streaming of content, online forms of reading and the distribution of email correspondence. However, for South Africa to embrace the digital era, it is important that the Copyright Act be amended to make provision for technological processes such as transient and incidental copies.
- 9.3.** Google wishes to express its support of the Proposed Amendments as these are in line with legislation in other jurisdictions in which Google operates. Section 12C has been prepared in accordance with international best practice, and as is the case under the European legislation,² the proposed section also provides that the temporary act should be an integral and essential part of a technical process.

10. Educational use (section 12D)

10.1. Regulation

- 10.1.1.** Section 12D(1) expressly records that a person may make copies of works for the purpose of educational and academic activities, provided that the copying does not exceed the extent justified by the purpose. The Proposed Amendments add the following qualifications to this section, namely, that:
- 10.1.1.1.** a reproduction may only be made in the cases stipulated in the section;

² Under the EU Directive 2001/29/EC (on the harmonisation of certain aspects of copyright and related rights in the information society), article 5(1), it is provided that:

[t]emporary acts of reproduction (referred to in article 2) which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable: (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use, of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in article 2."



- 10.1.1.2. the reproduction does not conflict with the normal exploitation of the copyright work; and
 - 10.1.1.3. the reproduction does not unreasonably prejudice the legitimate interests of the copyright owner flowing from their copyright in that work.
- 10.1.2. This means that any form of copying that extends the purpose (of the education requirements) or may unreasonably prejudice the interest of the copyright owners is not permitted. Further, section 12D(3) states that "*[e]ducational institutions shall not incorporate the whole or substantially the whole of a book or journal issue, or a recording of a work, unless a licence to do so is not available from the copyright owner, collecting society or an indigenous community on reasonable terms and conditions*", while section 12D(4) provides that the right to make copies extends to the reproduction of a whole textbook in the circumstances where:
- 10.1.2.1. the textbook is out of print;
 - 10.1.2.2. the owner of the right cannot be found; or
 - 10.1.2.3. authorized copies of the same edition of the textbook are not for sale in South Africa or cannot be obtained at a price reasonably related to that normally charged in South Africa for comparable works.

10.2. Concerns

- 10.2.1. The Proposed Amendments to section 12D do not necessarily speak to the proposed revisions to section 19C, with the former providing exceptions for the copying of works (as canvassed above) and the latter strictly limiting the reproduction of works. Asides from this possible inconsistency, Google is in support of the Proposed Amendments to section 12D for the following reasons:
- 10.2.1.1. a person must first try and secure a license from the copyright owner and *only* if this is not possible, can they incorporate whole works; and
 - 10.2.1.2. sections 12D(3) and 12D(4) have a narrow ambit in that they are both qualified and subject to 12D(1), which clarifies that the only purposes



for which a book can be copied is for non-commercial "*educational and academic activities*".

10.2.2. Further, Google respectfully submits that this limitation is defensible since it gives effect to numerous Constitutional rights. In South Africa, where considerable effort is required to improve education and access to information, we are of the view that an exception for educational and academic activities is reasonable and justifiable. The proposed section is also in alignment with South Africa's international obligations.

10.3. Recommendation

10.3.1. We recommend that this provision should be retained in its present form as it is defensible in terms of the South African government's underlying policies and aims.

11. Library uses (section 19C)

11.1. Regulation

11.1.1. Section 19C is substantially similar to other provisions found in international law which focus on promoting the interests of libraries.³ Further, many libraries and educational institutions in the US, Canada and Europe provide remote access to at least some works via secure computer networks.

11.2. Concern

11.2.1. The section promotes a key Constitutional right of all South Africans to information and education.⁴

11.2.2. Google's concern is that should this right be amended, it may limit the constitutional rights afforded to South Africans, many of whom do not have access to schools and libraries, especially in light of the COVID-19 pandemic.

11.2.3. While the fair use regime is meant to support the education sector and improve access to information, the section as currently drafted is biased in favour of those who already have access to these resources. The section prefers academics who

³ EIFL Draft Law on Copyright Including Model Exceptions and Limitations for Libraries and Their Users

⁴ Sections 29 and 32 of the Constitution.



work on site (at the premises) as opposed to those who work elsewhere or from home and presupposes that a person accessing the archive has an uninterrupted connection to the relevant computer network, which is not always possible in the South African context. It may also inadvertently perpetuate the gender gap in terms of the trend for individuals to work from home.

11.3. Recommendation

11.3.1. In light of the above, we recommend that this exception be expanded to cater for the temporary downloads of work and recordings for use in the educational and academic sectors.

12. Disabilities (section 19D)

12.1. Section 19D has been amended to include "*an authorised entity*" to the list of persons that serve persons with disabilities that may, without the authorisation of the copyright owner, make an accessible format copy for the benefit of a person with a disability, provided a number of conditions are met.

12.2. The inclusion of an "*authorised entity*" expands the category of persons that may make an accessible format copy for the benefit of a person with a disability. Although, this may further limit the rights afforded to copyright owners, Google submits that this limitation is defensible since it gives effect to numerous Constitutional rights, including the right to equality, education and access to information.

13. Penalties and proceedings (Section 27)

13.1. Regulation

13.1.1. Section 27 deals with the penalties and proceedings in respect of dealings which infringe copyright. This section has been amended to include the communication of and the making publically available of a work by wire or wireless means, knowing it to be an infringement of copyright, to be an offence.

13.1.2. Further, section 27(5B), which deals with copyright that subsists in a work that is protected by a technological protection measure, expands the test to make the offence applicable where "*such person knows or should reasonably have known, that the device or service will or is likely to be used to infringe copyright in a work*



protected by an effective technology protection measure". This is amended from the wording "such person knows or has reason to believe...".

13.2. Concerns

- 13.2.1. The Proposed Amendments to section 27(5B) purport to expand the offence to persons that *"should reasonably have known, that the device or service will or is likely to be used to infringe copyright in a work protected by an effective technology protection measure"*. This is amended from the wording that *"such person knows or has reason to believe..."*.
- 13.2.2. This test is perhaps more onerous and the past tense of the Proposed Amendment implies that it applies retrospectively to when that person actually *"makes, imports, sells, distributes, lets for hire, offers or exposes for sale or hire, a technological protection measure circumvention device or service"* as opposed to allowing a person to be informed of the contravention and ceasing the activity from the time it *"has reason to believe"*.
- 13.2.3. As such, a person is more likely to be found guilty of an offence. The amended wording is far-reaching and unreasonable as it expects someone to know at the time that the device or service is likely to be used to infringe copyright, without a warning to cease any offending activities.

13.3. Recommendations

- 13.3.1. In light of the above, we recommend that the previous proposed wording be used, namely that *"such person knows or has reason to believe"*.

14. Conclusion

- 14.1. Google believes that a *"fair use"* regime as proposed in certain provisions of the Proposed Amendments will create the legislative framework necessary to give effect to the societal and constitutional benefits of a free and open internet and robust technology sector.
- 14.2. With this in mind, we ask that our above concerns and recommendations be taken into consideration by the Committee in the finalisation of the Copyright Bill, particularly our recommendations which support the creation of an environment that is conducive to



innovation and investment that is critical to the growth and success of South Africa's innovation and technology sectors.

Yours faithfully

Sipho Mtombeni

Government Affairs and Public Policy Manager

Submitted for and on behalf of Google LLC.

[By email]