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Legal Opinion on the Copyright Amendment Bill [B13B – 2017] and the latest Amendments

May we introduce ourselves: Since its foundation in 1997, the Institute for Information, Telecommunications and Media Law at the University of Münster has been an established research center with a reputation that extends beyond national borders, including in particular the area of copyright law. Public and civil law expertise and perspectives on media law meet profitably on site. Head of the civil law department is Prof. Dr. Thomas Hoeren, who devotes himself to researching and communicating media law issues as part of his work at the Institute and as a professor with a university lectureship. His many years of work as a judge at the Higher Regional Court of Düsseldorf (1996-2011) gave him a practical understanding of current disputes in copyright law and the challenges of conflicting interests among the disputing parties. Due to the expertise he has accumulated over the years, he is also actively involved in legal policy debates, for example as a legal advisor to the European Commission. In doing so, he is always concerned with advancing the adaptation of copyright law to the realities of modern society and the cultural industry, balancing the interests of creators and the public in a fair and constitutionally just manner.

Our institute has the great privilege of being in close and constant contact to academics of the University of Stellenbosch and other eminent personalities invested in South African copyright law. For a shorter period, we have been following with great interest the legislative process of copyright reform in South Africa. The Copyright Amendment Bill [B13B – 2017] ("**CAB**") in its final version from 2019 is one of the most progressive and most innovative Copyright Bills in the world. It addresses all affected interests and manages to create an appropriate balance between them. We strongly believe that it will bring growth to the South African economy, provide access to education and information to many South Africans, and strengthen legal certainty in the country for a long time to come. It can also serve, at least in part, as a blueprint for further copyright reforms in countries around the world.

However, we would like to address the reservations to the constitutionality of the Bill by the President Mr. Ramaphosa and the latest amendments released by the Portfolio Committee on Trade and Industry ("**Amendments**"). Therefore, we narrow down the approach in our review on the question: Are the new provisions in the Bill compatible with South African constitutional

and international law?

We proceed in two steps: First (**A.**), we examine if the new provisions in the Bill are compatible with the South African constitutional and international law. Second (**B.**), we comment the latest Amendments and want to give some ideas.

A. Comments on matters constitutional

While a detailed constitutional review is beyond the scope of this Opinion and is better left to constitutional law experts anyway, we would like to address a few of the reservations raised by the President. Since, as outsiders, we do not feel in the position to do so, we have excluded all legal questions regarding the national legislative process from our review.

I. Retrospective and arbitrary deprivation of property

Even though we are by far no experts in constitutional law, we would like to consider some questions regarding the compatibility of some Sections with Section 25(1) of the Constitution. Although the Constitutional Court has not yet definitively decided whether copyright is subject to constitutional property protection at all[1], and we assume that it is, Sections 6A(7), 7A(7) and 8A(5) of the Bill do not constitute retrospective and arbitrary deprivations of property. According to Section 25(1) *"*[…] *no law may permit arbitrary deprivation of property."* The Constitutional Court of South Africa established in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) the principles of an arbitrary deprivation of property.

1. Deprivation

The Court sets out that *"*[…] *any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned."*[2] In case of the royalty rights, the right of exploitation of the already assigned copyright is partially deprived by allowing the original author to make a claim for royalties, provided the copyright is constitutionally protected under Section 25(1).

2. Arbitrary

The Constitutional Court engages in a broad balancing exercise to determine whether there has been an arbitrary deprivation of property. In general speaking, a deprivation of property is not arbitrary if there is

> "*[…] sufficient reason for the particular deprivation*"[3]

provided by the law referred to in Section 25(1). The Constitutional Court explicitly excluded "*incorporeal property*"[4] in the judgement. Therefore, the established requirements for

[1] *Cowen SC/Berger/Nxumalo,* Legal Opinon for ReCreate ZA, para 117; See also: *Laugh It Off Promotions CC v SAB International (Finance) BV t/a SABMark International and Another* 2006 (1) SA 144 (CC) para 17.

[2] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC), para 57.

[3] Ibid para 100.

[4] Ibid para 100.

determining whether a deprivation of property is arbitrary are to be applied, if at all, only in the principles. To determine if there is sufficient reason for the deprivation, all the interests of the persons affected must be considered and weighed against each other.

There are three main arguments why Sections 6A(7), 7A(7) and 8A(5) do not constitute arbitrary deprivations. First, the provisions only apply if the copyright work is still exploited for profit. That means the authors will be entitled to an even bigger (not a lesser) share of royalties, because it only applies to copyright that already has been assigned. The remuneration has already been paid but the authors shall be compensated even more, due to the retrospective royalty right. That the royalty right may have a negative effect on copyright owners revenue is a question regarding Sections 6A, 7A and 8A in general, not specifically the retrospectivity of the royalty right implemented in 6A(7), 7A(7) and 8A(5). In conclusion, the provisions protect authors in their economic rights. It is not apparent why an author should not profit economically from his work if it continues to be exploited. Second, according to Subsection (7)(b)(i) the Minister must develop draft regulations setting out the process to the application of this section to a work contemplated in paragraph (a) and conduct an impact assessment thereof (ii). The Minister must table both in the National Assembly for approval, before he or she may make the regulations in accordance with the process envisaged in Section 39 (iii). This elaborate procedure with reservation of the National Assembly shall guarantee a fair and reasonable balance between the affected parties' interests. Third, according to Section 6A(7)(c) only the royalties received after the commencement date of the Bill are affected by the provision. This limits the scope of application considerably. It does not apply to all assignments made before the commencement date. The Bill does not provide for royalties be paid for previous uses of works.

Various legal mechanisms have been chosen to balance the affected interests as gently as possible. The scope of application is very limited, so that it is predictable which rights are affected.

II. Copyright exceptions

The copyright exceptions in the Bill are broad, but reasonable and they do not violate any provision of the South African constitution.

1. Section 12A – Fair Use

One of the most, if not the most, discussed clause is Section 12A – Fair Use. In general, the fair use provision is a widely accepted rule in many legal systems around the world. It is known for a regulation that allows extensive free use of copyrighted work and thus is established in innovative jurisdictions to promote business and creativity.

a) No arbitrary deprivation

Sections 12A, 12B(1)(a)(i), 12B(1)(c), 12B(1)(e)(i), 12B(1)(f), 12D, 19C(4) do not constitute arbitrary deprivation. These exceptions intend to strike a balance between the public's interest in copyrighted works and the author's right to exploit her or his work. There are without a doubt many legitimate and important public purposes for these limitations. The exceptions and limitations mentioned advance the rights granted and sought by the Constitution significantly. This includes the right of access to freedom of expression (including to receive and impart information and the freedom of artistic and cultural creativity), the right of access to education and the right of access to information. Considering not only the number of constitutionally protected interests affected, but also their democratic significance, there is already a preference for rejecting an arbitrary deprivation of property.

If one follows the debate, the impression is often given that authors would no longer generate any revenue at all as a result of the exceptions and limitations. This is clearly not the case. The exceptions are limited to the extent that they serve solely to preserve the above-mentioned constitutional purposes. The deprivation is limited mostly to educational purposes and to access to information.

The concerns regarding fair use are not justified. The clause is, even with the open-end list ("such as"), not applicable indefinitely. Rather it is determined by the four-factor test in Section 12A(b). Each new use case must pass this test to be considered as an exception from copyright under the fair use doctrine. This is another justifiable tool to balance the author's copyright protection and the public interest in using the work. Furthermore, the authors will not be

deprived uncertainly. The deprivation of "property" is mainly focused on educational or purposes regarding the freedom of expression (ct. Section 12A(a)(ii)). Additionally, an open fair use clause can be seen as a great economic chance. The value added to the U.S. economy by faire use industries was $2.8 trillion in 2014 alone.[5]

In conclusion, the deprivation of property is not generally permitted by the fair use exception. There always has to be a reasonable ground. If these reasons serve the protection of constitutional interests (e.g., freedom of expression, access to education), they are of great importance and are to be considered to a special degree. In the intended cases of application, these therefore also outweigh the limited restriction of the remaining relevant economic interests of authors in the exploitation of their works.

b) No violation of the Berne Convention or the Trade-Related Aspects of Intellectual Property Rights Agreement ("**TRIPS**")

While there are some critics who argue that fair use is not compatible with the so called „three-step test" according to Article 9(2) of the Berne Convention, established through the Berne Convention for the Protection of Literary and Artistic Works in 1967, there is no contradiction with the provisions. According to Article 9(2) limitations or exceptions to exclusive rights must be confined to (i) certain special cases; (ii) which do not conflict with a normal exploitation of the work and (iii) do not unreasonably prejudice the legitimate interests of the author. It is argued that the broad exception in Section 12A of the Bill ("such as the following") does not satisfy these three steps.[6] The opposite is the case.

i. Interpretation of the World Trade Organization ("**WTO**") Panel

The wording of Article 9(2) is far from certain. However, according to the WTO it does not mean that all cases are set in stone. There has been only one WTO Panel report on the three-

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[5] https://www.ccianet.org/wp-content/uploads/2017/06/Fair-Use-in-the-U.S.-Economy-2017.pdf accessed 17.12.2021.

[6] *Anton Mostert Chair of IP Law, Stellenbosch University*, Written submissions on Copyright Amendment Bill B13B-2017, 2021, page 5.

step test as it relates to copyright under TRIPS. In this report, the panel explained the meaning of the word "certain" in Article 9(2) as

> *"[…] there is no need to identify explicitly and each and every possible situation to which the exception could apply, provided that the scope of the exception is known and particularized. This guarantees a sufficient degree of legal certainty."*[7]

Furthermore, it explained the meaning of the word "special" as

> *"[…] an exception or limitation must be limited in its field of application or exceptional in its scope. In other words, an exception or limitation should be narrow in quantitative as well as a qualitative sense."*[8]

Even if Section 12A of the Bill implements a fair use clause with a broader scope, it is still limited. Even if this is to a certain extent openly designed, it is not without any contours. The seven examples provide a specific scope of application. They all refer to already existing limitations of copyright. Use cases not covered by the examples in Section 12A need to approximate. The advantage is that the clause is open for new cases and a flexible tool for the fast-changing world of technology and practices.

Many contracting parties and a dozen countries in total were adopting faire use clauses in their copyright law (United States, Singapore, South Korea, The Philippines, Malaysia, Taiwan, Israel, Liberia, Sri Lanka, Canada, Kenya, Ecuador)[9]. Furthermore, the Australian Law Reform Commission ("**ALRC**") approved the compatibility of fair use with the three-step test.[10]

ii. No prejudice of TRIPS Agreement and World Intellectual Property Organization ("**WIPO**") Copyright Treaty

The three-step test is also implemented in Article 13 TRIPS and in the WIPO Copyright Treaty. While the wording is almost the same, as Article 13 TRIPS states:

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[7] WTO Panel Report on United States-Section 110(5) of the US Copyright Act, WT/DS160/R (2000), 6.108.

[8] Ibid 6.109.

[9] *Flynn*, The African Journal of Information and Communication (ACIJ), Issue 16, 2015, page 43; *Elkin-Koren,/Netanel*, Transplanting Fair Use Across the Globe: A Case Study Testing the Credibility of U.S. Opposition, Joint PIJIP/TLS Research Paper Series #50, 2020, page 3 et seq.

[10] ALRC Report 122, 2013, 4.134 et seq.

"Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder",

TRIPS applies to all exceptions and limitations of copyright (not just to exceptions to the reproduction right) and protects right holders (not just authors). However, the wording of the actual test is the same. The same applies to Article 10(1) of the WIPO Copyright Treaty. Thus, the above mentioned applies.

2. Section 12B(1)(a) – Quotation

The right to quote in Section 12B(1)(a) is compliant with the South African constitution. The president does not have specific reservations, but one could suggest to adapt the clause that the right is "*compatible with fair practice*"[11] to meet the standards of the Berne Convention. Even if the fair practice clause is not directly required by the Berne Convention, the actual South African copyright law does. To make sure that the South African law is align with international law and follows the current system, it is reasonable to include a fair practice clause (in the latest Amendments a fair practice clause is proposed)[12].

3. Section 12B(1)(c) – Broadcasting

The president complains that the standard may violate the Constitution. However, he does not explain his reservations. Section 12B(1)(c) of the CAB got renewed completely in the Amendments. Therefore, we comment this section later in this opinion.

4. Section 12B(1)(f) – Translations

The president does not explain his reservations against this provision. The exception in Section 12B(1)(f) applies to the translation of copyright works for educational purposes. According to Section 29(2) of the Constitution every South African has the right *"to receive education in the*

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11 Article 10(1) Berne Convention.

12 Section 12B(1)(a)(i) of the Amendments.

official language or languages of their choice". This scope of application was very narrow and is now extended to *"non-commercial purposes"*[13].

5. Section 12C – Temporary reproduction and adaptation

Section 12C allows temporary reproduction and adaption of a work as an integral and essential part of a technical process. This provision is especially important for software and computer-based processes. However, the president has reservations against it but does not explain them. A temporary reproduction of copyright works is indispensable for a modern and innovative copyright law and should be integrated in the South African jurisdiction.

6. Section 12D – Education

In our opinion, Section 12D is align with the Constitution. The president does not explain his reservations. Section 12D(3) and (4) allow the copy of a whole textbook under specific circumstances. However, according to Section 12D(4) it is only permitted to copy the whole book if there is no other possibility to purchase it and to compensate the owner of the right. A violation of Section 25(1) of the Constitution is not to be assumed. Additionally, the copy of the book is for educational and not for commercial reasons. It implements the constitutionally guaranteed right to an appropriate basic education and expands access to information.

7. Section 19B – Reverse Engineering

Reverse Engineering is a central method to find out more about the work, especially the basic ideas and functionality. It is widely used for software. In the German law it is implemented in Section 69d(3) and Section 69e of the German Copyright law. Within a limited scope, it shall be permitted to obtain the information necessary to establish the interoperability of an independently created computer program with other programs. The provision serves the development of computer programs allowed competition.[14] Comparable to fair use, it is a

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[13] Section 12B(1)(f) of the amendments.

[14] *Dreier* in: Dreier/Schulze, UrhG, 6th ed., Sec. 69d marginal number 20.

provision to promote innovation and technological progress. It is broadly accepted and in accordance with the South African Constitution.

8. Section 19C – Library uses

Section 19C implements a general exception from copyright protection of works for libraries, archives, museums and galleries. The president has reservations against it but does not explain them. In almost every jurisdiction there is an exception from copyright for those institutions. In German copyright law one finds such clauses for libraries, archives and museums in §§ 60e, f UrhG.

These institutions provide broad access to information and education and serve to archive books, and are therefore essential for the formation of the democratic will and the preservation of cultural tradition.

III. International Treaty Implications

The Copyright Amendment Bill is aligned with all relevant treaties, namely the WIPO Copyright Treaty, the WIPO Performance and Phonograms Treaty and the Marrakesh Treaty. No specific reservations were pointed out. Even after a detailed review, we were unable to identify any violations of international law triggered by provisions of the Bill.

1. Section 19D is align with the Marrakesh Treaty

Against the reservations of the President (see Paragraph 21), Section 19D does not violate provisions of the Marrakesh Treaty. Although, no specific violation is pointed out in the letter, some voices have been claimed that the Bill does not enable international trade of accessible format copies of works. According to Article 5 of the Marrakesh Treaty an "accessible format copy may be distributed or made available by an authorized entity to a beneficiary person or an authorized entity in another Contracting Party." In the latest Amendments the "authorized

party" is added as a person permitted to import or export accessible format copies on a non-profit basis.[15]

2. The CAB is in accordance with the WIPO Copyright Treaty

The CAB does not violate the WIPO Copyright Treaty. The president states that the Treaty *"provides legal remedies against circumvention of technological measures used by authors to protect their works."* The president referred to Article 11 of the Treaty according to which *"adequate legal protection and effective legal remedies against the circumvention of effective technological measures"* are required. The legislator established in Section 1(i) a new definition for "technological protection measure" and a "technological protection measure circumvention device". These serve as a protection for a "technological protected work". According to Section 27(a) of the CAB the trade or the use of a technological protection measure circumvention is prohibited. The trade or use of such a device is a criminal offence and is punishable by a fine or imprisonment. Therefore, the CAB provides legal remedies against the circumvention of technological measures and is in accordance with Article 11 of the WIPO Treaty.

IV. Summary

With the Bill as a solid legal basis, South Africa has a great chance to become one of the most innovative and advanced country in the world, in terms of copyright. With broad copyright user friendly exceptions and resale royalty rights that protect the authors income in the future, the Bill manages to balance all the affected interests. The Bill is also in accordance with all relevant international law. From our point of view, we recommend to sign the Bill into law.

B. Comments on the latest submissions

I. Amendments related to a person with a disability

1. Clause 1 – CAB

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[15] Section 19D(3)(a) of the CAB.

The implementation and the new definition of an "authorized entity" are very welcome. The wording of the provision corresponds mutatis mutandis to Section 2(c) of the Marrakesh Treaty. Thus, the amendment fulfills the obligation in Section 231(5) of the Constitution to align South African law with international treaties. Furthermore, an additional group is able to make an accessible copy for the benefit of disabled persons without the permission of the copyright owner (see Section 19D). With this, access to copyright works can be granted to people with a disability on a bigger scale. Entities can pool resources and build up an infrastructure to grant this access. We expressly support this amendment.

2. Clause 20 – CAB (Section 19D)

Most amendments relate to the integration of "authorized entities" in the legal text. However, with Section 19D(3)(b) a *bona fide* clause has been introduced:

> *"A person contemplated in paragraph (a) may only so export or import where such person knows, or has reasonable grounds to believe that the accessible format copy, will only be used to aid persons with a disability."*

(3)(a) states that the export or import of an accessible format copy for distribution or to make it available to persons with a disability does not infringe copyright.

The amendment shall align the provision to the provision of the Marrakesh Treaty.[16] However, the wording is different. While Section 19D(3)(b) is worded positively, Article 5(2) Subparagraph 2 is worded negatively:

> *"[...] provided that prior to the distribution or making available the originating authorized entity did not know or have reasonable grounds to know that the accessible format copy would be used for other than beneficiary persons."*

According to Section 19D(3)(b) of the CAB, the entity might have a duty to investigate to safeguard itself. This could have a deterrent effect and less people may export or import accessible format copies. There is also a risk of greater judicial vulnerability as a result of the provision because the entity bears the burden of proof that it does not know or has reasonable grounds to believe that the accessible format copy would only be used to aid persons with a

[16] Article 5(2) Subparagraph 2.

disability. Furthermore, there is no provision for possible consequences if the rule is not observed. Therefore, we do not support this amendment.

II. Amendments related to personal copies (requiring that the work must have been lawfully acquired)

1. Clause 1 – CAB

Clause 1 of the Bill includes a new definition for a "lawfully acquired" copy. Accordingly, a copy is not lawfully acquired if it "*has been borrowed, rented, broadcast or streamed, or […] which has been obtained by means of a download enabling more than temporary access to copy*". This definition narrows the scope of application for exceptions which demand a lawfully acquired copy. The new definition does not differentiate between commercial and non-commercial copies. Even a copy of a borrowed work for entirely personal use is inadmissible under the new definition.

2. Clause 13 – CAB

a) Section 12B(1)(a)(i)

According to this amendment, a quotation is only permitted if it is compatible with fair practice instead of extending justified by the purpose. A clear definition of "fair practice" is missing in the CAB. However, according to Article 10 of the Berne Convention, which South Africa has ratified, a quotation of a copyright work must be "*compatible with fair practice*". In this respect, the amendment aligns South African copyright law with international law.

b) Section 12B(1)(b)

The amendment newly regulates an exception for reproduction or fixation by a broadcaster of a performer's performance or work. The exception however is very restricted in (b)(i) – (vii). These amendments concern primarily ephemeral rights and prohibit the use of the reproduction or fixation for commercial purposes (ii, iv). Furthermore, the performer's rights are protected.

III. Amendments to make the Fair Use factors applicable to exceptions in Sections 12B, 12C, 12D, 19B and 19C

1. Section 12A – Fair Use

As mentioned earlier, the South Africa's CAB is one of the most progressive and most innovative Bills in the world. This is mainly due to the fact that it is open and user-friendly one. Therefore, it is of the utmost important to keep broad exceptions on copyright. We do not support the removing of the Subsections 12A(a)(i), (iv), (vi). The removing might have negative consequences for an open and modern copyright law. In our view, it seems that the purpose of the list in Section 12A(a) is misunderstood. The Fair Use provision implemented in Section 12A(a) is open ended ("such as the following"). Therefore, the list in Subsection (a) serves to describe use cases of fair use and as a reference for new use cases. Only because the purposes in the list are also structured as exceptions in other Sections, does not mean they are redundant. Contrary to what is stated in the explanatory memorandum, these are precisely not duplications. The use cases exemplify the scope of application of the Fair Use doctrine. One must keep in mind that by removing these purposes from the Section, the scope of application is narrowed down significantly. If one takes the idea further and removes every purpose on this list, with one exception, fair use would only apply in this specific or like case. Therefore, it is very important to hold this list broad to be able to take on new cases in regards of new technological innovations.

2. Section 12A(d)

This Subsection has a huge impact on the whole scheme of limitations and exceptions by subordinating all exceptions to fair use as it states:

> "*The exceptions authorized by this Act in sections 12B, 12C, 12D and 19C, in respect of a work or the performance of that work, <u>are subject to the principle of fair use</u>, determined by the factors contemplated in paragraph (b).*"[17]

This counteracts the whole system behind the idea of exceptions. Now every exception is subject to the strict four-factor test in (b). The purpose of exceptions is to allow the user to use the work in an uncomplicated manner without fear of legal consequence. The benefit of

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[17] Clause 13 – Section 12A(b) – Copyright AB.

exceptions are the clear requirements under which the work can be used without hesitation. If the usage of a work must be in accordance with the four-factor test a high burden to proof is imposed on the user. The user also exposes himself to a higher litigation risk because these strict requirements must have been met. This also means that the use of a work that falls under one of the exceptions is much more vulnerable for appeal. In many cases a judge must examine if the use of a work is in accordance with the provision. A four-factor test may complicate the usage of works without infringing copyright in an unnecessary way. Therefore, we do not support this amendment.

IV. Amendments related to adding the wording of the three-step test

1. Section 12C(2)

The amendment subjects the temporary reproduction and adaptation to the three-step test in Article 9(2) of the Berne Convention. Similar to the implementation of the principle of fair use in the Sections mentioned above, the three-step test might complicate the application of temporary reproduction and adaption by imposing additional requirements. The requirements for temporary reproduction are already limited to copies which are an integral and essential part of a technical process. The three-step test would undermine the standard. The examination effort will be much higher and additional litigation risk could arise because the three-step test does not provide clear guidance. It must be reviewed by a judge. The rules for transient copies in European Union are like the unmodified ones in the CAB.[18] They also do not include the three-step test and is widely recognized as in accordance with international law. Therefore, there is no need for the implementation of the three-step test.

2. Section 12D

To Section 12D applies the same mentioned under Section 12C(2).

V. Summary

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[18] EU Directive 2001/29/EC, Art. 5 para. 1.

The amendments are important and bring the CAB largely in line with international law. However, some of them significantly narrow the scope of many exceptions of copyright, especially Section 12A – Fair Use. If the CAB is to be modern and innovative, it must be open, and the exceptions must be broad to be applicable on new techonlogies. The restrictions make it difficult to freely use copyrighted works and may act as a deterrent to users in South Africa. We therefore recommend that the exceptions and fair use be retained as implemented in the CAB and that the changes made be deleted.

We are also concerned about the new amendments regarding the fair use factors. It simply does not make sense to us to add them to the exceptions. The same goes for the addition of fair practice and the three step test conditions to some Sections. The addition of the fair use factors thwarts the entire system behind the idea of the copyright exceptions, which is to allow the user to use the work in a straightforward manner without fear of legal consequences. It might be much more difficult to determine if the use falls under the exception. Therefore, we highly recommend the use of fair practice.

The adding of the three step test conditions to Section 12C(2) would complicate the application of temporary reproduction. The examination effort will be much higher and additional litigation risk could arise because the three-step test does not provide clear guidance. The same applies to Section 12D. We also recommend just the use of fair practice in these Section. It is much more user-friendly and keeps the exceptions broad.

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