

Friday, 22 February 2019

Attention Mr. Hlupheka Mtileni
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Copyright Amendment Bill [B13B - 2017]

We write on behalf of the Global Expert Network on Copyright User Rights, which is a coalition of copyright academics and researchers who offer technical assistance to governments and stakeholders on the reform of copyright limitations and exceptions to promote the public interest.¹

Separate submissions on specific issues will be submitted by User Rights Network members from South Africa Andrew Rens and the University of Cape Town's IP Unit.

By way of background, Sean Flynn, Counsel of Record, has been working in South Africa for 20 years, including as a Clerk for the late Chief Justice Arthur Chaskalson and a lecturer and researcher at the University of Witwatersrand. Professor Peter Jaszi, who joins this submission, and Professor Flynn have been working with filmmakers in South Africa for over a decade.

We commend the Copyright Amendment Bill's proposed introduction of an innovative, forward-thinking and South Africa-specific open general exception for "fair use."

The enclosed comments make the following main points:

- Fair use promotes innovation and free expression -- as shown in the experience of other countries who have adopted it.
- The fair use provision, and the other limitations and exceptions in the bill, are fully compliant with the international "three step test."
- The fair use clause will increase predictability under the law by adding an

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

Program on Information Justice and Intellectual Property

explicit fairness test.

- Experience in other countries does not support allegations that adopting fair use will increase litigation, shift burdens of proof onto copyright holders, decimate the publishing industry or authorize widespread piracy.

Included below are further explanations of each of these points.

I request to give oral testimony if a hearing is scheduled a time I can be present. I can be contacted at sflynn@wcl.american.edu

Signed,

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

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Copyright Amendment Bill

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I. FAIR USE PROMOTES INNOVATION AND FREE EXPRESSION

The main aspect of current law that would change under fair use is to open the purposes to which the current fair dealing standard can apply. Under fair use, one can use a work for any purpose, as long as the use itself is fair. The test for fairness is essentially that the use be no more than needed and not create a substitute for the original work in the market. This is the same test now applied by South African courts to determine a fair dealing.

Adopting fair use means that any new creator and innovator can know that they can make use of another work in their creation as long as the use meets the fairness test. The specific purpose of the use need not be envisioned by the legislator. This fact opens the door for new creations that add value to the new work and to the South African economy.

Fair use promotes free expression. The result of fair use is that all forms of expression that do not harm markets of the original are permitted. Parody, remixing, transformation of all sorts - are liberated, along with other essential forms of speech, such as journalism, scholarship, teaching and filmmaking.

The close link between fair use and free expression has led courts, scholars and human rights agencies to find that fair use can be constitutionally necessary.²

² 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 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

The flexibility of fair use also provides a needed topic for innovation. Technologies like machine learning and artificial intelligence rely on fair use to allow machines to read and learn from the Internet. And fair use allows the next great innovation that uses knowledge without harming markets to occur without needing to change the law first.

II. EXPERIENCE IN OTHER COUNTRIES DEMONSTRATES THAT FAIR USE WILL BENEFIT – NOT HARM – SOUTH AFRICA’S ECONOMY

Fair use rights are creators’ rights. They permit new creators to sample, remix and quote others to serve expressive purposes such as to comment, criticize, review, and illustrate. Media makers, video game producers, software designers, graphic artists – all creators benefit from the ability to make fair uses of other works.³

For example, South African filmmakers often need to quote audio-visual works to illustrate history and culture. Fair use rights assure them the ability to make reasonable uses of other works for this purpose – increasing free expression as well as production values.⁴

Empirical evidence demonstrates that adopting fair use is correlated with information technology industry growth, increased production of works of knowledge creation, and rising production in the publishing and entertainment industries.⁵

III. FAIR USE COMPLIES WITH INTERNATIONAL COPYRIGHT LAW

The academic opinion is settled that countries may comply with international obligations through a flexible fair use approach.⁶

To the extent that the Bill would authorize fair use in response to excessive

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”).

³ 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).

⁴ See Sean Flynn, *Copyright Legal and Practical Reform for the South African Film Industry*, Afr. J. Info. & Comm., Issue 16 (2015).

⁵ See Sean Flynn & Mike Palmedo, *The User Rights Database: Measuring the Impact of Copyright Balance* (PIJIP Working Paper, 2017), <http://infojustice.org/flexible-use/research>; Deloitte, *Copyright in the Digital Age: An Economic Assessment of Fair Use in New Zealand* (2018), <https://www2.deloitte.com/content/dam/Deloitte/nz/Documents/Economics/dae-nz-copyright-fair-use.pdf>; 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).

⁶ See Pamela Samuelson & Kathryn Hashimoto, *Is the U.S. Fair Use Doctrine Compatible with Berne and TRIPS Obligations?* (UC Berkeley Public Law Research Paper, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3228052; 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), <https://bit.ly/2pYExLa>.

pricing of textbooks, it receives additional support from the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) Article 40(2) (permitting remedies for “abuse of intellectual property rights having an adverse effect on competition”).

IV. THE FAIR USE PROVISION WILL INCREASE PREDICTABILITY IN THE LAW

The four fair use factors in the Bill add to the predictability of the law. South Africa’s current fair dealing provision has no definition of how to consider when a dealing is fair. South African courts generally have applied the four-part test for fair use and fair dealing applied in many jurisdictions. The bill would codify this well-known test in the Copyright Act itself, making the law more transparent and predictable.

V. SINGAPORE IS ADOPTING A SIMILAR SET OF CREATOR RIGHTS

South Africa should take comfort that most of the major reforms it is considering now are being paralleled in Singapore – another rapidly growing high technology and creative industry center.

Like South Africa, Singapore’s reforms are targeted to promote the interests of individual creators. These include expanding the recognition of copyright law rights of original creators to create (through fair use), own and earn from works. As in South Africa, the pillars of Singapore’s reform involve expanding fair use, shifting the background rules to favor the ownership rights of authors in respect of commissioned works, and regulating collective management organizations.⁷

VI. MANY MYTHS ARE BEING PROPAGATED ABOUT FAIR USE

A. Fair use is not *carte blanche* to use other people’s work without paying.

The test for whether a use is fair includes asking whether the use would deprive the author of revenue by substituting for the work in the market. For example, if someone makes a copy of a recorded song and puts it online without permission, people could listen without paying the composer or the musician. Such “substitutional” uses are not fair uses.

Because fair use only applies where the use is not substituting in the market for the work, fair use should have no effect on music royalty streams. Fair use would not affect revenues that musicians and others receive for broadcasting, audiovisual synchronization, the playing of recordings in public venues, etc. -- all of which are

⁷ See Press Release, Ministry of Law Singapore, Singapore Copyright Review – Enhancing Creators’ Rights and Users’ Access to Copyrighted Works (Jan. 17, 2019), www.mlaw.gov.sg/content/minlaw/en/news/press-releases/singapore-copyright-review-report-2019.html; Annex A <https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Press%20Release/Singapore%20Copyright%20Review%20Report%202019/Annex%20A%20-%20Copyright%20Review%20Report%2016%20Jan%202019.pdf>.

substitutional uses. Likewise, photographer revenues from sales for promotional and advertising use, illustrations in print and on websites, etc., would be undiminished.

B. Fair use will not increase litigation.

Some claim that fair use will cause more copyright litigation or that litigation costs will rise. There is no evidence for this assertion.

Many countries have added fair use in recent years – including Israel, South Korea, Singapore, Malaysia and others. We have not seen litigation spikes in those countries. In the United States, copyright cases are just 0.75% of the federal docket, and fair use rulings make up just 0.004% of cases.

C. Fair use does not give free content to YouTube and similar entertainment platforms.

Fair use doesn't let corporations - or anyone else - avoid paying a license to play, perform, or copy a work in a way that substitutes for the market of the copyright owner. Fair use is not a right to compete directly and unfairly with rights holders. Music and other entertainment content on YouTube must be licensed or it can be taken down under U.S. and other copyright laws. Indeed, YouTube uses sophisticated "content ID" systems to detect and license all copyrighted music and other works on their platform. Fair use would not change that.

D. Fair use does not shift a burden of proof to a copyright owner.

Some are arguing that adopting fair use somehow shifts the onus on the copyright owner to prove that a use is not fair. This criticism betrays lack of basic copyright knowledge. All copyright laws place the onus on right holders to sue infringers for alleged violations of the law. But the onus is always on the defendant to prove any defense, including fair use. A shift from fair dealing to fair use in South Africa would change nothing in this regard.

E. Fair use will not harm local publishing (and did not in Canada).

Some argue that Canada proves that fair use will harm publishing. In Canadian publishing markets, there have been three key trends since the legislature clarified the application of fair dealing to education in 2012: "educational spending on licensing has increased, publisher profit margins have increased with increased sales of Canadian educational texts, and distributions from the Access Copyright licence have declined."⁸ In other words – there was a shift in spending from

⁸ See Michael Geist, *Canadian Copyright, Fair Dealing and Education, Part One: Making Sense of the Spending* (May 22, 2018), <http://www.michaelgeist.ca/2018/05/copyrightfairdealingeducationpartone/>; Michael Geist, *Inside Views: Why Fair Dealing Is Not Destroying Canada Publishing*, IP-Watch (July 25, 2018), <https://www.ip-watch.org/2017/07/25/fair-dealing-not-destroying-canada-publishing/>; Statutory Review of the Copyright Act: Hearing Before the H. Commons' Standing Comm. on Indus., Sci. & Tech., 42nd Parliament, Sess. 1, Meeting 141 (Dec. 3, 2018) (statement of Ariel Katz, Assoc. Professor, Univ. of Toronto Faculty of Law), <https://arielkatz.org/statutory-review-of-the-copyright-act-my->

licensing (often foreign works) to book purchases (of often Canadian works). A similar trend may help South African publishers given that over 60 percent of books used in schools are locally published. (PASA 2013), but over 60 percent of DALRO licensing revenue goes to foreign publishers. (Copyright Review Commission).

F. Fair use will not mean “if anyone writes a song and another person uses it in a school or an educational documentary, the artist that wrote the music will not get any royalties”⁹

It is not true that under the act any use for education will automatically be free from obligation to a copyright holder. The test is whether no more is used than is necessary to serve the purpose and that it not substitute for the work in the primary market. Could a teacher play part of a song in the classroom to illustrate a point, without paying the rights owner? Absolutely. Use of a work to illustrate a point to students – rather than to entertain – is a clear fair use. And such a use is also permitted under South Africa’s law right now. Likewise, the use of songs for historical examples in learning materials is not a primary market and the use there would not displace hurt a sale that would have otherwise taken place.

By contrast, using someone’s music to create a free soundtrack for a film would not be a fair use. This is because licensing soundtracks for films is a primary market for music.

G. Fair use will not mean “a university buys one copy . . . and makes free copies for its 2000 students”¹⁰

As the experience of countries around the world demonstrates, fair use is not a threat to the market for texts and other school books. The idea that fair use would allow a school to make thousands of copies of a book for its students is absurd. Fair use does not provide this right, because the act would clearly be substitutional. The only situations fair use might allow copying a whole book for student use would arise if it was not made available in the market or there was a violation of competition principles.¹¹

[testimony-before-the-house-of-commons-indu-committee/#more-4229](#);
<https://arielkatz.org/statutory-review-of-the-copyright-act-my-testimony-before-the-house-of-commons-standing-committee-on-canadian-heritage/>.

⁹ SAMRO, *Are You Aware of Copyright Amendment Bill and How, If Passed, Affects You as a Creator?*, Facebook Post (July 24, 2017), <https://www.facebook.com/SAMROSouthAfrica/posts/are-you-aware-of-copyright-amendment-bill-and-how-if-passed-affects-you-as-a-cre/10155560825200859/>.

¹⁰ SAMRO, *Musicians Fight For Their Royalties “Parliament Please Protect Us”*, Petition to the South African Parliament’s Portfolio Committee on Trade and Industry (July 20, 2017), <https://www.gopetition.com/petitions/musicians-fight-for-their-royalties-parliament-please-protect-us.html>.

¹¹ See Copyright Amendment Bill § 12D(3)-(4) (2018) (authorising copying of full works only if “a licence to do so is not available from the copyright owner . . . on reasonable terms and conditions”; “where the textbook is out of print” or “where the owner of the right cannot be found”).