

The Chairperson, Select Committee on Trade and International Relations

National Council of Provinces, Parliament

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Written comments on the Copyright Amendment Bill [B13B – 2017]

I am writing these comments in support of the Copyright Amendment Bill in my capacity as Director of the University of Cape Town's Intellectual Property (IP) Law & Policy Research Unit (faculty of law).

It is one of the key purposes of the unit to contribute – through evidence-based research and capacity building – to positive, adequate and context-specific law and policy change that benefits the people of South Africa. As an academic research unit in a publicly-funded university, we do not represent specific stakeholder interests! Instead, our aim is to assist law and policy makers in their difficult task to create frameworks that *fairly balance* the conflicting interests of the relevant stakeholders in the country: in this case, those of creators and copyright owners on the one hand (NB: creators and copyright owners are often not the same!), and users of copyrighted cultural goods on the other.

We do, however, recognise the limitations of academic desk-research to practically solve real-world problems. It is for this reason that most of our research work involves engaging with grassroots stakeholders, and our research networks typically comprise of researchers from different disciplines (incl. economists, statisticians and anthropologists) to avoid siloed *legal* approaches that do not reflect the full picture of what is at stake. In particular, IP law experts and economists often disagree about what IP systems such as copyright should and should not protect. It is my impression that some of the submissions on the Bill we have seen in the past, while raising technically sound concerns, unfortunately miss the bigger picture.

The ultimate aim of copyright legislation is to maximise creativity in South Africa – because it is our people’s creativity that propels us forward as a country. This requires adequate protection for creators so that they are sufficiently incentivised and rewarded for their creative efforts. As digital technologies now allow for wide-spread unauthorised copying, we must adjust our laws to ensure that creators remain adequately protected. We have all heard the very valid concerns of creators in this context and these must be taken seriously!

This, however, is subject to three important considerations: First, many – if not most – forms of unauthorised copying that we all wish to prevent are already illegal under our current copyright law, and the real problem here is not the level of protection but the way that existing laws are *enforced*. Increased protection through adding new rights to the Copyright Act cannot solve this problem. It seems worth mentioning here that the current Copyright Act, as far as protection is concerned, already complies with the international IP instruments that South Africa is bound by, especially the TRIPS Agreement.

Secondly, and linked to the first point, we now know as a result of our research work that overzealous copyright protection can also stifle creativity. Progressive IP scholarship supports this view. The advent of digital technologies in particular has brought about exciting new forms of (transformative) creativity – but these new forms of creativity often

build upon the work of others. The extent to which we want to make such creativity subject to permissions and royalty payments is an important policy decision, but I would like to suggest that losing out on such creativity because the artist cannot afford paying royalties or because permission is not granted is not in South Africa's best interest.

Thirdly, our focus on ensuring sufficient rights holder protection in the digital age must not distract us from the fact that user rights (or copyright exceptions and limitations) are also at risk as a result of digital technologies. These provisions are indeed key for fairly balancing the interests of rights owners and users. If user rights are not sufficiently safeguarded, copyright can quickly become a bottle neck for what is otherwise an unprecedented access-mechanism for knowledge material: the Internet. Copyright law has always specified instances where users can make use of copyrighted material without having to pay royalties or asking for permission, for instance for educational purposes. We have all relied on such provisions, eg during our studies at school or university. If anything, we have seen an expansion of copyright as a result of digital technologies, so the law maker's intention to now also pay some attention to broadening the scope of user rights – in particular by introducing a flexible and future-proof fair use provision instead of the more limited current fair dealing regime – must be welcomed.

This copyright reform process has been a lengthy one. But amending our copyright law is now of the essence as the current Copyright Act came into operation more than 40 years ago. Further delays should be avoided. Since the first version of the Bill was circulated, stakeholders had ample opportunity to contribute, and the lawmaker's efforts to engage the various stakeholder groupings and experts are laudable. It is submitted here that as a result the Copyright Bill has vastly improved and it aligns well, in my view, with the general policy direction recently taken by government in the area of Intellectual Property (see the DTI's IP Policy Phase 1 (2018)). I am, however, aware of some remaining concerns, mainly put forward by international rights holder organisations and their domestic allies. I also note, with regret, that the debate is increasingly becoming politicised and heated.

In the remainder of this submission, I will address what I believe are three of the most frequent concerns.

Introducing a fair use provision and some of the other proposed copyright exceptions will be in violation of South Africa’s obligations under the TRIPS agreement.¹

Both the Berne Convention and TRIPS contain a mechanism commonly referred to as the three-step test. The test narrows down national lawmakers’ abilities to freely legislate in the area of copyright exceptions and limitations. Put differently, the three-step test sets limits to copyright exceptions and limitations, thereby creating an international standard against which national copyright exceptions and limitations are to be judged.

Broadly, the three-step test puts forward three cumulative conditions for national copyright exceptions and limitations and prescribes that such exceptions and limitations must:

1. be confined to certain special cases;
2. not conflict with the normal exploitation of the copyright work; and
3. not unreasonably prejudice the legitimate interests of the rights holder / author.

The question of whether fair use provisions comply with the three-step test is not new to lawmakers and legal experts, and has been discussed many times over. What is noticeable, however, is that the number of commentators criticising fair use for being in conflict with the three-step test is on the decline as the views of previously critical authors such as Ruth Okediji, Sam Ricketson and Mihaly Fiscor have evolved (even though their older writings are still frequently cited in support of criticism against fair use provisions). This may have to do with more flexible interpretations of the three-step test in recent times as, for instance, proposed in the Max Planck Institute’s Declaration on a Balanced Interpretation of the ‘Three-Step Test (see below).

¹ The content of this section is a shortened and lightly edited version of an opinion on the topic which I provided for the Portfolio Committee on Trade and Industry in October 2018.

The wording of the proposed South African fair use provision sufficiently aligns with the wording of its U.S. equivalent so that arguments made by commentators with regards to the U.S. provision can be applied to the South African fair use provision. In particular, the factors for assessing fairness are strikingly similar. If anything, the South African provision is more detailed and there should thus be less tension between s12A and the three-step test (especially the test's first step).

In recent years, the conflict between fair use and the three-step test was addressed by lawmakers and many legal commentators. Those interested may find the following two more recent contributions particularly helpful in that they examine numerous contributions by others to reach their conclusions:

P Samuelson Is the U.S. Fair Use Doctrine Compatible with Berne and TRIPS Obligations? (2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3228052

C Geiger; D Gervais and M Senftleben The Three-Step-Test Revisited: How to Use the Test's Flexibility in National Copyright Law (2014), available at <https://bit.ly/2pYExLa>

In 2014, the Australian Law Reform Commission (ALRC) published a report based on a 18-month inquiry during which the ALRC carried out more than 100 consultations and received close to 900 submissions. In that report, the ALRC concluded with regards to the compatibility of fair use and the three-step test:

The ALRC considers that fair use is consistent with the three-step test. [...]

The ALRC further stated:

To deny Australia the significant economic and social benefits of a fair use exception, the arguments that fair use is inconsistent with international law should be strong and persuasive, particularly considering other countries are enjoying the benefits of the exception. The ALRC does not find these arguments persuasive, and considers fair use to be consistent with international law.

The ALRC emphasised that the “question of whether fair use is compatible with the three-step test is really a question of whether it meets the first step” and it based its conclusion on, among other things:

- the fact that the US and other countries that have introduced fair use exceptions, such as the Philippines, Israel and the Republic of Korea, consider their exceptions to be compliant, and have not been challenged in international forums⁶;
- the argument that a fair use exception would be a ‘special case’ because fairness itself is a special case; and
- a statement by the US Trade Representative, Ambassador Ronald Kirk, in September 2012, confirming that “[t]he United States takes the position that nothing in existing US copyright law, as interpreted by the federal courts of appeals, would be inconsistent with its proposed three-step test [for the Trans Pacific Partnership Agreement].”

The view of the US Trade Representative is echoed by the Copyright Alliance, a US-based group representing the interests of rightsholders. In a blogpost on their website dated 28 September 2017, they state that “[t]he three-step test is the international consensus for ensuring balanced copyright law. It is appropriately tailored, provides legal certainty, and is consistent with U.S. law”.

In addition, the ALRC also referred to a declaration published by the Max Planck Institute for Innovation and Competition in Germany which addressed a potential conflict between fair use provisions and the three-step test. This Declaration on a Balanced Interpretation of the ‘Three-Step Test’ in Copyright Law, endorsed by dozens of copyright scholars from around the world, advocated a more permissible interpretation of the three-step test and concluded that “[t]he Three-Step Test’s restriction of limitations and exceptions to exclusive rights to certain special cases does not prevent legislatures from introducing open ended limitations and exceptions, so long as the scope of such limitations and exceptions is reasonably foreseeable”.

In her 2018 book chapter, Prof Samuelson of the University of Berkley, California, and her co-author carried out a very detailed analysis under consideration of all U.S. fair use case

law and most literature available on the topic. Her conclusions are instructive for the current debate in South Africa. The authors concluded:

“that the U.S. fair use doctrine does satisfy Berne and TRIPS three-step tests for permissible L&Es, the doubts of some commentators notwithstanding. Indeed, there has been growing recognition that open-ended L&Es such as fair use allows copyright law to be adapted to a wide range of new uses of protected works made possible by the extraordinary technological advancements in the digital age.”

In reaching this conclusion, the authors state:

“First, the U.S. fair use doctrine was accepted as consistent with the three-step test when the U.S. joined the Berne Convention in 1989. Its statutory embodiment recites several specific criteria that provide guidance to its interpretation, and the fair use caselaw has evolved to refine the types of special cases to which it applies, in accord with the first step of the test. Because fair use cases carefully assess harms that challenged uses to markets for protected works and other legitimate interests, the fair use doctrine satisfies the second and third steps of the test. Second, the U.S. fair use doctrine has remained consistent with the three-step test since the U.S. joined the World Trade Organization (WTO) in 1994. Several developments since then reinforce our conclusion that the U.S. fair use doctrine satisfies the TRIPS three step test notwithstanding certain recent criticisms.”

As far as the existence of U.S. case law is mentioned in support of the fair use doctrine’s compliance with the three-step test (and in light of the fact that similar case law does obviously not yet exist in South Africa), it is important to stress that while foreign court decisions are of course not binding in South Africa, numerous courts in South Africa have indeed considered, and incorporated in their judgements, foreign authorities. U.S. fair use case law may therefore be used, with caution, to determine the scope of fair use in South Africa. Some legal commentators in South Africa have indeed long argued for interpreting South Africa’s current fair dealing provision along the lines of the criteria provided by the U.S. fair use provision – a suggestion which would also require relying on U.S. case law.

It should also be noted that there are obvious parallels between the three-step test criteria and the fair use factors in both the U.S. and the South African versions of fair use. In particular, the test’s prohibition of a conflict with a normal exploitation parallels, in South

Africa, with the requirement in s12A(1)(b)(iv). Such parallels do further mitigate against a conflict between the three-step test and fair use.

Based on the above, I conclude that newer in-depth research on the topic strongly suggests that open-ended, flexible fair use provisions like the one contained in the South African Copyright Amendment Bill are indeed permissible under and consistent with the three-step test – and in fact needed for copyright law to adapt to digital technology.

As for the other exceptions contained in ss12B-19D the Bill, I cannot see any obvious conflicts with the three-step test either: Several of these provisions stem from the current Copyright Act and it is assumed that their compliance with the three-step test is not all of a sudden challenged now. As far as newly introduced exceptions and limitations are concerned, some of these are based on similar provisions in foreign laws. This may not substantiate compliance with the three-step test *per se* but may at least suggest compliance if these provisions have not been challenged in the other country. Overall, the newly introduced exceptions are flexible but appear, on balance, to be specific enough to meet the requirement of the first step (“certain special cases”) as discussed in the context of s12A above. Crucially, most of these exceptions and limitations contain time honoured limits such as “fair practice”, “extent justified by the purpose” which limit their scope effectively.

And as far as the test’s third step is concerned, it should also be remembered that this step does not state that an exception must never prejudice any interest of an author; instead it only provides that limitations or exceptions must not ‘unreasonably’ prejudice the ‘legitimate’ interests of the rights holder, thereby giving the lawmaker more leeway in this area than acknowledged by some commentators. If doubts remain, however, one interesting consideration could be to expressly integrate the wording / requirements of the second and third steps of the three-step test into the Act so that it is clear that the proposed exceptions and limitations are subject to these conditions as well.

The Bill does not sufficiently address digital issues, including digitisation, online licensing, safe harbours, etc.

While the Copyright Bill in its current form may indeed not expressly address all possible scenarios and issues brought about by digital technology and the Internet, one should generally be cautious when it comes to referring to state-of-the-art technology in legislation. Instead, the use of technology-neutral language is often preferable as this reduces the need for further amendments should a certain technology be replaced by another. Having said this, it should also be noted that South Africa's Electronic Communications and Transactions (ECT) Act of 2002 already provides additional clarity on how offline principles contained in domestic legislation (such as "in writing", "signature" etc.) can be applied in the digital context. This minimises the need for repetition in the Copyright Bill. The ECT Act also contains provisions concerning safe harbour. Finally, remaining issues may also be addressed in subsequent amendments of the Copyright Act (or in Regulations), and it may indeed be premature and inadvisable at this point to tackle some of those issues for which international best practices are yet to be developed. For instance, the EU has just gone ahead with approving highly controversial provisions in their Copyright Directive, and before introducing a similar regime here it seems only prudent to first analyse the impact if these provisions.

The Copyright Amendment Bill's provisions will be harmful for authors who can't afford to defend their rights in court and they jeopardise local publishing.

It is a general concern when access to justice is unaffordable; regardless of whether authors or users of copyrighted materials are unable to defend their rights because they are unable to afford litigation. On the authors' side, however, this might be remedied by the fact that in order to publish authors are often required to assign their copyright to the publisher. And the publisher would thus need to litigate in such cases as the author no longer owns copyright in her work. It is also important to acknowledge that even in the US, fair use court cases remain rare. And the few cases decided by courts, together with best practice

guidelines, provide ample guidance – in spite of the broad wording of the law – as to what is and what is not allowed. It is hard to imagine that risk-adverse institutions such as universities would willfully act outside these parameters in the hope that rights holders would just not be able to defend themselves in court.

Some concerns have been raised over s12D of the Bill, to the extent that it allows the copying of entire works. The following slight tweaking of the provision may help address these concerns:

- (1) Subject to subsection (3), a person may make copies of works or recordings of works, including broadcasts, for the purposes of educational and academic activities: Provided that the copying is compatible with fair practice and does not exceed the extent justified by the purpose.
- (2) *[remains as is]*
- (3) Educational 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 and subject to remuneration set by the Commission where a rights holder can be identified.
- (4) The right to make copies contemplated in subsection (1) extends to the reproduction of a whole textbook—
 - (a) where the textbook is out of print;
 - (b) where the owner of the right cannot be found; or
 - (5) (c) where authorized copies of the same edition of the textbook are not for sale in the Republic or cannot be obtained at a price reasonably related to that normally charged in the Republic for comparable works and subject to remuneration set by the Commission where a rights holder can be identified.

Lastly, as far as the impact of ss12 et seq. on local publishing is concerned, I refer to the submission by Gray & Oriakhogba. In particular, I wish to reiterate that claims that the broadening of educational exceptions in Canada have led to a demise of the Canadian academic publishing industry seem to be unfounded as explained in that submission.

I wish to conclude by thanking the honourable members of the NCOP for the opportunity to share my views on the Bill. I am available to respond to specific questions and I offer to make representations if needed.

Kind regards,



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