

SUBMISSION OF
GLOBAL EXPERT NETWORK ON COPYRIGHT USER RIGHTS
COMMUNIA, CENTRUM CYFROWE, CREATIVE COMMONS
TO
PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA
PORTFOLIO COMMITTEE ON TRADE AND INDUSTRY
REGARDING
THE COPYRIGHT AMENDMENT BILL (B13-2017)

July 7, 2017

Honorable Joanmariae Louise Fubbs
Member of Parliament
Portfolio Committee on Trade and Industry
For Attention: Mr. A Hermans, ahermans@parliament.gov.za

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STATEMENT OF INTEREST

We appreciate the opportunity to offer these comments on the Copyright Amendment Bill (B13-2017).

This submission is made on behalf of the Global Expert Network on Copyright User Rights (aka "User Rights Network"). The User Rights Network is composed of over 80 academics and experts from over 30 countries around the world. The User Rights Network was formed in 2011 to coordinate research and provide technical assistance on employing 'open-ended' limitations in national copyright legislation, in addition to specific exceptions. This submission was shared throughout the network and it benefits from the insights and comments of many members.

This submission is also supported by organizational partners of the User Rights Network -- Communia, Centrum Cyfrowe, and Creative Commons. Communia is a Belgium-based international association that consists of activists, researchers and practitioners from ten Member States. Communia aims to expand the public domain and to increase access to culture and knowledge. Poland's Centrum Cyfrowe (Digital Center) advocates for open access to data, knowledge, and digital culture. Headquartered in Mountain View, California, Creative Commons promotes the sharing of knowledge and access to education through public copyright licenses to foster innovation. Creative Commons develops and supports legal and technical infrastructure that maximizes digital creativity. This submission was shared throughout the Creative Commons network of over 80 affiliate organizations around the world.

One of the first activities of the User Rights Network was to draft a model open

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and flexible general exception that contained all of the major features that the network members believed would be useful in such an exception.¹

The Network has also published other resources that may aid the Committee, and to which we refer throughout this submission:

- a “Master List” of examples of limitations and exceptions from around the world,²
- a survey of the varied purposes protected by copyright user rights,³
- examples of open and flexible limitations from other countries,⁴ and
- a set of answers to frequently asked questions about fair use.⁵

REQUEST FOR ORAL SUBMISSION

We request an opportunity to present at the oral hearing on the Bill. Professor Sean Flynn will be available to testify on the bill, preferably on August 1 or the earliest possible date in the testimony calendar. He can be contacted at sflynn@wcl.american.edu, +1 202 294 5749.

COMMENT ON SECTIONS 12-12A: GENERAL EXCEPTIONS

We write to support the inclusion of a modern general exception in section 12 of the South African Copyright Act, and to offer refinements to the 2017 Bill’s proposal that we think would make it better serve the interests it promotes.

General exceptions apply a single flexible balancing test (often defining what is “fair”) to authorise uses of copyrighted works for either an “open” or “closed” list of purposes. By open, we mean that the exception can apply to potentially any purpose, as in the United States, Israel, Malaysia and other countries. Closed list systems can only be applied to a purpose listed in the clause.

¹ See Program on Information Justice and Intellectual Property, *Model Flexible Copyright Exception* (2012), <http://infojustice.org/wp-content/uploads/2012/12/Model-Flexible-Copyright-Exception-Version-4.0.pdf>

² See Program on Information Justice and Intellectual Property, *Master list: Excerpts of Representative Copyright Limitations and Exceptions* (2015), <http://infojustice.org/wp-content/uploads/2015/09/Master-List-Version-09162015.pdf>.

³ See Program on Information Justice and Intellectual Property, *Appendix I: Presumptively Lawful Purposes* (2012), <http://infojustice.org/wp-content/uploads/2012/12/Appendix-I.pdf>.

⁴ See Program on Information Justice and Intellectual Property, *Appendix II: Examples of Flexible Limitations and Exceptions from Existing and Proposed Laws* (2012), <http://infojustice.org/wp-content/uploads/2012/12/Appendix-II.pdf>.

⁵ See Program on Information Justice and Intellectual Property, *Appendix III: Responding to Frequently Asked Questions About Flexible Use Provisions* (2012), <http://infojustice.org/wp-content/uploads/2012/12/Appendix-III.pdf>.

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Often, general exceptions authorise “fair dealing” or “fair use” with protected works. More than 40 countries with over one-third of the world’s population have either a fair use or fair dealing provision in their copyright law.⁶

The use of one common fairness test in a general exception promotes predictability and transparency in application because courts and users can refer to the same set of factors to be considered in individual cases. In this sense, a copyright general exception can operate much like the limitations clause in section 39 of the Constitution.

An open exception can serve as a kind of flexible catch-all -- permitting decision-makers to justify uses of copyright that do not harm owner’s interests according to a common public interest test, regardless of whether the specific use in question was specifically foreseen by the legislature. Closed exceptions lack this element of flexibility, meaning that it is crucial that the list of authorized purposes be complete, and composed with an element of foresight into what the future may hold. Present South African law and the proposed law in the 2017 Bill apply only to a closed list of purposes. We advocate using an open list instead.

For the purpose of this submission, we generally use the term “fair use” to refer to an open general exception. In fact, the term is indeterminate. Many countries that have open general exceptions that we and others often refer to as “fair use” in fact use the term “fair dealing.” Malaysia and Singapore are prominent examples.

I. 2017 BILL’S IMPROVEMENTS TO CURRENT SECTION 12

South African law has long had a general exception for “fair dealing” for a limited number of purposes. The list of purposes in the 1978 Act is narrow – including only research or private study, personal or private use, criticism or review, and reporting current events. The exception allows uses only if they are “fair”. There are no enumerated factors for determining fairness.

The 2017 Bill amends Section 12 to provide a right of “fair use”:

(1) (a) In addition to uses specifically authorised, fair use in respect of a work or the performance of that work, for the following purposes, does not infringe copyright in that work:

- (i) Research, private study or personal use, including the use of a lawfully possessed work at a different time or with a different device;
- (ii) criticism or review of that work or of another work;
- (iii) reporting current events;

⁶ See Jonathan Band, The Fair Use/Fair Dealing Handbook, at <http://infojustice.org/archives/29136> (quoting examples).

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- (iv) scholarship, teaching and education;
- (v) comment, illustration, parody, satire, caricature or pastiche;
- (vi) preservation of and access to the collections of libraries, archives and museums;
- (vii) expanding access for underserved populations; and
- (viii) ensuring proper performance of public administration.

(b) In determining whether an act done in relation to a work constitutes fair dealing or fair use, all relevant factors shall be taken into account, including but not limited to—

- (i) the nature of the work in question;
- (ii) the amount and substantiality of the part of the work affected by the act in relation to the whole of the work;
- (iii) the purpose and character of the use, including whether—
 - (aa) such use serves a purpose different from that of the work affected; and
 - (bb) it is of a commercial nature or for non-profit research, library or educational purposes; and
- (iv) the substitution effect of the act upon the potential market for the work in question.

(c) For the purposes of paragraphs (a) and (b) and to the extent reasonably practicable and appropriate, the source and the name of the author shall be mentioned.”

The 2017 proposal improves current law in two major ways:

- It adds a much fuller list of protected purposes of fair use, canvassing most (but as we explain below, not all) of the categories of use that have been approved around the world by various statutes and court decisions.
- It adds a modern and progressive multi-factor test to determine fairness, including a helpful clarification that protection from market substitution effects is the core of copyright protection.

II. ADDING OPENNESS TO PURPOSE

Our primary recommendation in this submission is to amend the general exception in Section 12 so that is open to other analogous purposes. This change would serve both the need to broaden the exception to other uses in the artistic and technology communities that are important and that the current clause does not protect (see submissions by Peter Jaszi and Matt Sag respectively), and to permit authorisation of fair uses of copyrighted materials for new purposes that cannot be envisioned today. Parliament can easily open the current draft by inserting the words “such as” before the proposed list of purposes, or through other means.

A. The utility of open purposes

One reason to include an open exception is to allow the clause to be applied to specific fair uses of copyrighted materials that exist today but do not appear to be

addressed in the Bill presently. For example:

- **Non-expressive uses.** As described more fully in the submission by Professor Matthew Sag, there are a number of modern technologies that use machines to read vast amounts of copyrighted material on the Internet or elsewhere in order to create other products and services that do not compete with the copyright holder. These include, for example, text and data mining, Internet indexing to facilitate search, artificial intelligence, computer assisted translation, and many other modern technological uses. Many of these uses have been upheld as fair uses under open clauses, others are assumed to be fair uses and undertaken in fair use countries with knowledge that they could be defended as such if a dispute arose. Importantly, many global technology companies will only undertake research and development of these kinds of cutting edge technologies in countries with fair use or some other exception making clear their legality.⁷

- **Transformative expression.** As described more fully in the submission by Professor Peter Jaszi, some kinds of expressive uses involve transformation that is so significant that they do not compete with the author's work in the same market. Examples might include a "mashup" video like the "7 Minute Sopranos"⁸ or a mural painting that incorporates images drawn from advertising photographs, which was approved of as a fair use in the U.S. in *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006). If copyright holders can prevent such artistic expression by refusing to license their material – including because they do not approve of the content of the new expression – core free expression values are implicated.⁹

Another reason to use an open list of purposes is to provide the means for the law to protect uses for purposes that are as of yet unknown. This is key toward enabling innovation and access to its products. Particularly in the computer, software, Internet, and related industries, copyright serves as an important branch of innovation policy. More open copyright exceptions provide space for innovation – they give an entrepreneur the opportunity to develop new technologies before they

⁷ See Copyright laws 'a hindrance to innovation': Google, February 23, 2017 ("If you are a company like Google who wants to store information in the cloud, or internet searches or text and data mining, we can do that safely in the US. We can't do it here"); Diffusing Fair Use, the global trend and What it Means for Australia, https://www.youtube.com/watch?v=I8_yabkiOyQ

⁸ See Virginia Heffernan, Gotta Minute? So, There's This Guy Tony ..., New York Times (Apr. 6, 2007), <http://www.nytimes.com/2007/04/06/arts/television/06sopr.html>.

⁹ See Submission by Freedom of Expression Institute.

are specifically authorized by law. It is this openness of U.S. fair use law that is the “secret sauce” for promoting the growth of its entertainment, media and high technology industries. There is a long history of examples of technologies that were introduced in the U.S. first, and developed there, because of the openness of fair use to technological change. Examples include:

- **The video cassette recorder (VCR).** Very few if any copyright laws around the world authorized the use of private copies to “time shift” programming for playback at a future date before the introduction of the VCR. The content industry opposed its introduction when the technology was first released, and sued its makers for copyright violation. The US Supreme Court decision in *Sony Corp. v. Universal Studios, Inc.*, 464 U.S. 417 (1984), which green-lighted the technology, relies on the existence of a fair use exception for the private copying of protected materials for the purpose of time shifting. Although such private copying rights are now reasonably commonplace, at the time the technology had to rely on the openness of fair use for its introduction.

- **Internet search technology.** In order to provide Internet search, service providers must make copies of essentially the entire Internet. Development and initial uses of the technology relied on the openness of fair use in the U.S., and was approved of in cases like *Kelly v. Arriba Soft*, 336 F.3d 811 (9th Cir. 2003). But such essential technology in our digital world is on uncertain footing in many countries that lack general open exceptions. This is an excellent example where the speed with which the technology developed outstripped the ability of legislatures to provide specific exceptions to deal with it. Indeed, there is little in the existing South Africa statute or in the 2017 Bill that deals with the legal status of the Internet search.

- **Cloud storage.** Cloud storage relies on rights to shift the formats of lawfully possessed materials to outside services that the consumer does not own. This technology was developed in the U.S., in reliance on the assumption of developers that the technology would survive any challenge based on the openness of the fair use clause that applies to uses of any work, by any user (including the third party platform), for any purpose. *Cf Cartoon Network, LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) (approving technology on different grounds). The clarification of the lawfulness of cloud storage by U.S. courts has been linked to billions of dollars of investment into the cloud storage industry

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in the U.S.¹⁰ Narrow exceptions in Australia have led to contrary rulings, leading to capital flight there. South Africa's bill contains an expansion of the private use right to include format shifting, which clearly authorizes this use. But if it had an open fair use clause before, that clarification would be unnecessary. The question becomes whether the current law sufficiently anticipates what is next in our technological revolution.

The openness of fair use to such technological innovation is one reason high technology companies locate their most innovative software engineering and other projects in the United States and other fair use jurisdictions. This has a demonstrable economic impact. A separate submission being filed by PIJIP's Mike Palmedo explains new empirical research from American University's Program on Information Justice and Intellectual Property on the economic impact of copyright limitations and exceptions. PIJIP created a User Rights Database with measurements of the openness of copyright user rights in over 40 countries spanning a 40 year period. Linear regressions using that database show that more open copyright exceptions are more prevalent in wealthier countries and, controlled for firm size and GDP per capita of the economy, are correlated with higher firm revenue in high technology as well as entertainment and publishing industries.

B. The mechanics of opening Section 12's fair use exception

There are several ways that the bill could open its currently closed list of purposes for fair use.¹¹

- In Israel's law, as in the United States, the list of enumerated purposes is made open by virtue of the words "such as" before an illustrative list of common uses of copyrighted works.
- Other laws use other opening clauses before illustrative lists of purposes. *See, e.g.,* The Philippines 199 ("and similar purposes", Malaysia 2012 ("including"), and, Korea Art 35 ("among other things").
- Still other examples do away with illustrative lists of purposes all together. Singapore's 2006 amendment authorized "fair dealing . . . for any purpose"; Taiwan's 2007 law included an exception stating simply "Fair use of a work shall not constitute infringement" with no reference to

¹⁰ See Josh Lerner and Greg Rafert, *Lost in the Clouds: The Impact of Changing Property Rights on Investment in Cloud Computing Ventures* (Harv. Bus. Sch., Working Paper No. 15-082, 2015) , http://www.hbs.edu/faculty/Publication%20Files/15-082_ce76cd68-19d3-4328-9df0-fb74913cd5db.pdf.

¹¹ Examples of Flexible Limitations and Exceptions from Existing and Proposed Laws, <http://infojustice.org/wp-content/uploads/2012/12/Appendix-II.pdf>

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purposes; China is planning to add the words “other circumstances” to its list of specifically authorized uses.

III. CONSIDERING A SINGLE GENERAL EXCEPTION

The exceptions in sections 12 and 12A follow a similar structure -- leading with an authorized purpose and defining the limits of the exception with references to fairness factors protecting right holders. But the exceptions in 12A often use subtly different formulations, and some are repetitive to the purposes listed in Section 12 (e.g. private use). We believe Sections 12 and 12A (and potentially 13A-C as well) could be combined into a single provision that identifies additional illustrative purposes from those currently covered in 12A, and subjects all of these uses to the fairness test in Section 12. China’s proposed limitation and exception clause for its third revision of its Copyright Act is an example in this regard.

The following example illustrates how this approach might be effectuated. It includes an explicit reference to non-expressive technical uses, much along the lines proposed in the submission by Professor Matt Sag. Also it expressly includes mention of the use of orphan works, providing one avenue to authorize value-added uses of such item, in addition to, or instead of, the complex and perhaps unworkable process proposed in the current Bill. Finally, we add a statement that the clause should not be interpreted narrowly and should promote Constitutional values, to guide future interpretation.

12. General Exception

(1) In addition to uses specifically authorized by law, a fair use of any work or performance does not infringe copyright. The purposes for which a fair use may be made of any work include, but are not limited to:

- (a) research, private study or personal use, including the use of a lawfully possessed work at a different time or with a different device, making a backup copy, storage,
- (b) criticism or review of that work or of another work;
- (c) reporting current events, including through the reproduction of public lectures and addresses;
- (d) scholarship, teaching and education;
- (e) comment, illustration, parody, satire, caricature, cartoon, tribute, homage or pastiche;
- (f) preservation of and access to the collections of libraries, archives and museums;
- (g) expanding access for underserved populations;
- (h) ensuring proper performance of public administration, including for regulatory

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or judicial proceedings or preparing a report of judicial or regulatory proceedings;

(i) quotation;

(j) education, study, research, or teaching;

(k) use of a work that is merely an intermediate technological step in the production of metadata that does not itself embody and is not capable of communicating a copyright owner's original expression, such as data mining, indexing, machine learning, plagiarism detection, automated detection of copyright infringement, etc.

(l) temporary reproductions or other uses that have no independent economic value and are used to facilitate otherwise lawful activity such as to facilitate an authorized broadcast or other communication,

(m) translation for non-commercial purposes, including personal, educational, teaching, judicial proceedings, research and professional advice;

(n) advertisement or demonstration, including demonstration of audio-visual or other equipment;

(o) archiving, preservation, making works accessible to their patrons, and other purposes of libraries, archives, museums and institutions of memory and learning;

(p) using works for which, after a diligent search, the rights holder cannot be identified and for which it is reasonably believed that no rights exist in the work;

(q) use in a new and independent work with a different audience and different purpose than the original;

(r) using works displayed in public spaces, including in photographs, video and other works;

(s) use of a lawfully possessed computer program, including to facilitate the use of the program, to make backup copies, to create interoperable products or software, to repair the product or software, and for other purposes,

(t) other purposes.

(2) In determining whether an act done in relation to a work constitutes fair dealing or fair use, all relevant factors shall be taken into account, including but not limited to—

(a) the nature of the work in question;

(b) the amount and substantiality of the part of the work affected by the act in relation to the whole of the work;

(c) the purpose and character of the use, including whether—

(aa) such use serves a purpose different from that of the work affected; and

(bb) it is of a commercial nature or for non-profit research, library or educational purposes; and

(d) the substitution effect of the act upon the potential market for the work in question.

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(e) to the extent reasonably practicable and appropriate, the source and the name of the author shall be mentioned.

(3) The fair use right must not be interpreted strictly or narrowly, but rather must be interpreted purposefully to enable its effectiveness and fulfill its objectives as well as to promote the rights and values in the Constitution.