

Comments
of
Global Expert Network on Copyright User Rights
Creative Commons Corporation (HQ)
On
Copyright Amendment Bill (2017) [B13-2017]

Prepared by

Sean Flynn, American University Washington
College of Law

Peter Jaszi, American University Washington
College of Law

Ariel Katz, University of Toronto, Faculty of
Law

Allan Rocha de Souza, Federal R University of
Rio de Janeiro (UFRRJ)

Leandro Mendonça, Universidade Federal
Fluminense (UFF), Cultural Production
Department

Diane Peters, Creative Commons Corporation
(HQ)

Michael W. Carroll, American University
Washington College of Law

Presented to

Hon J Fubbs, Chairperson of the Portfolio Committee on Trade and Industry

Hon LC Theko, Chair, Sub-Committee on the Copyright Amendment Bill

Parliament of the Republic of South Africa

Care of:

Mr. A. Hermans, ahermans@parliament.gov.za

Mr T Madima, tmadima@parliament.gov.za

Ms Y Madikanza, ymanakaza@parliament.gov.za

STATEMENT OF INTEREST

The Global Expert Network on Copyright User Rights formed in 2011 by a group of leading copyright academics from around the world. The objective of the Network was originally framed in the Washington Declaration on Intellectual Property and the Public Interest, which called for “discussion of employing ‘open-ended’ limitations in national copyright legislation, in addition to specific exceptions.”

The work of the Network focuses on the publication of research and provision of technical assistance to explain how adopting more open, flexible and general user rights – both by adopting fair use-like open, flexible, general provisions, and by increasing the openness and flexibility of specific (non-general) exceptions – can promote social and economic interests.

Creative Commons develops, supports, and stewards legal and technical infrastructure that maximizes digital creativity, sharing, and innovation. Our vision is nothing less than realizing the full potential of the Internet — universal access to research and education, full participation in culture — to drive a new era of development, growth, and productivity.

COMMENTS

We commend Parliament for its forward-looking copyright amendments that will assist South African creators and users of copyrighted works benefit from the digital age. We commend you as well for the open public process through which you have drafted the bill.

We support the specific textual suggestions included in the ReCreateSA submission.

We provide the following comments focusing on Section 12 of the draft Copyright Amendment Bill, and in particular the “fair use” provision in 12B.

COMMENTS

1. We commend the Parliament for adopting an innovative, forward-thinking and South Africa-specific open general exception for “fair use.”
2. New article 12 (considering A and B together) is a hybrid general exception that combines a set of modern specific exceptions for various purposes (Section 12B) and an open general exception that can be used to assess any use not specifically authorised. Both provisions greatly improve the clarity and balance in the existing law.
3. A key benefit of the Bill is that each exception is generally framed to be open to all works, uses, and users. This is in contrast to current law which provides exceptions for certain works and then in later sections expands coverage to other works. The result is current law is very complex.

4. Providing exceptions that are open to purposes, uses, works and users is correlated with both information technology industry growth and to increased production of works of knowledge creation. See Sean Flynn and Mike Palmedo, The User Rights Database: Measuring the Impact of Copyright Balance. PIJIP Working Paper 2017-03., <http://infojustice.org/flexible-use/research>; Deloitte, Copyright in the digital age: An economic assessment of fair use in New Zealand, <https://www2.deloitte.com/content/dam/Deloitte/nz/Documents/Economics/dae-nz-copyright-fair-use.pdf>;
5. The provision contains several innovations in its phrasing that will make the provision more clear in its application and consistent with modern trends in the interpretation of fair use and fair dealing rights.
6. First, we commend the drafters on the opening phrase -- "*In addition to uses specifically authorised*". This provision makes clear that the fair use clause is intended to cover the open spaces that are often left in specific lists of exceptions, particularly when technology and culture change. It also signals to the interpreter that there exist a full set of specific exceptions (in 12B et seq.), which we commend for adding to the predictability of the law.
7. We commend as well the unique and clear phrasing of the opening clause -- "*for purposes such as the following*." The inclusion of the illustrative purposes in an itemized list, preceded by the opening clause, makes it very clear that the listed purposes are illustrative, not exhaustive.
8. We commend the drafters on the list of illustrative purposes that are included. The list of illustrative purposes is innovative in including both traditional fair dealing purposes (e.g. criticism or review of that work or of another work), as well as more modern purposes that have been recognized by statutes and in case law in other countries (e.g "comment, illustration, parody, satire, caricature, cartoon, tribute, homage or pastiche").
9. The inclusion of the interests of "libraries, archives and museums" ensures that such institutions will be able to utilize fair use in addition to the specific rights they are provided later in the Act.
10. The provision will add to the predictability of its interpretation by reflecting the traditional approach that in interpreting whether a use is fair "*all relevant factors shall be taken into account, including but not limited to*" the listed four factors.
11. The proposal includes a well-considered four factor test that reflects the global trend, but clarifies its application.
12. 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. The Bill proposes to ground the law in a growing international trend toward defining fairness, in both fair use and fair dealing statutes, with the four factor test first included in statute in US law. See Jonathan Band, The Fair Use/ Fair Dealing Handbook,

[04032013.pdf](#) (reporting that over a dozen fair use and fair dealing jurisdictions have adopted a similar four factor test).

13. The four factors in the South African bill contain helpful clarifications that reflect global trends in interpretation. These include:
 - 13.3 In evaluating the purpose and character of the use, the provision helpfully instructs consideration of the core of the transformative use test - whether “*such use serves a purpose different from that of the work affected.*”
 - 13.4 The provision is also helpful in including the commerciality test as one factor to be considered -- namely whether the use “*is of a commercial nature or for non-profit research, library or educational purposes.*” This will ensure that a commercial use -- such as a commercial film, book or search engine -- may still be fair under appropriate circumstances.
 - 13.5 The fourth factor is clarified to focus on “*the substitution effect of the act upon the potential market for the work in question.*” The focus on “substitution effect” is important because copyright law is designed to protect consumer markets for protected works rather than licensing revenue in general.

PARLIAMENT SHOULD REJECT PROPOSALS FOR A “FIFTH FACTOR”

14. We are aware that international publishers often advocate for fair use rights to include a “fifth factor” focusing on whether licenses for the use in question are available at any price. We caution Parliament against including a fifth factor in its fair use right.
15. The four factors in the proposed Bill reflect the common standard adopted in over a dozen of countries around the world. It is the global standard.
16. The fourth factor already adequately protects the economic interests of copyright holders by asking whether there is any substitution effect of a given use in the market. The so-called fifth factor in Singapore asks in addition whether there is a license for the use available on “commercial” terms. This consideration threatens to distort the economic evaluation to the detriment of freedom of expression values. A documentary filmmaker or educational materials producer, for example, should not be forced to pay a license for the use of content for criticism and review merely because such a license is offered. See Peter Jaszi, Michael Carroll, Sean Flynn and Meredith Jacob. Comment to the Intellectual Property Office of Singapore, re: Public Consultation on Proposed Changes to Singapore’s Copyright Regime. Nov 2016, <http://infojustice.org/flexible-use/policy-submissions>
17. Indeed, in Canada, the Supreme Court explained that “[t]he availability of a licence is not relevant to deciding whether a dealing has been fair.” The Supreme Court explained that “fair dealing is an integral part of the scheme of copyright law”. Allowing a copyright owner “to license people to use its work and then point to a person’s decision not to obtain a licence as proof that his or her dealings were not fair, ... would extend the scope of the owner’s monopoly over the use of his or her

work in a manner that would not be consistent with the [Copyright Act](#) 's balance between owner's rights and user's interests." CCH Canadian Ltd. v. Law Society of Upper Canada, [2004] 1 SCR 339, 2004 SCC 13 (CanLII), <<http://canlii.ca/t/1glp0>>, para 70.

18. Adopting a fifth fair use factor would be contrary to the global trend. Singapore is currently proposing to remove the fifth factor from its law. See Public Consultation on Proposed Changes to Singapore's Copyright Regime, issued in 23 August 2016. <https://www.mlaw.gov.sg/content/minlaw/en/news/public-consultations/public-consultation-on-proposed-changes-to-copyright-regime-in-s.html> (proposal 7 to remove fifth factor). Singapore is the only country in the world with a fifth factor focusing on licensing availability. Thus, if South Africa adhered to the calls of some to add the fifth factor, it would likely soon be the only country in the world with such provision.
19. We thank Parliament for the opportunity to give these comments. We commend Parliament on both the openness of this process and on the excellent drafting of the proposed fair use clause. We are confident it will become a model for other countries around the world that seek to modernize their copyright laws for the digital age.