

Written submissions on Copyright Amendment Bill B13B-2017

The Anton Mostert Chair of Intellectual Property Law

The Anton Mostert Chair of Intellectual Property Law (the “Chair”) is an independently financed unit that forms part of the Department of Mercantile Law of the Law Faculty at Stellenbosch University. Further details of the Chair, its objectives and its activities can be obtained from its website, which can be accessed at www.sun.ac.za/iplaw. Its focus is on intellectual property law and achieving excellence in that regard. Two of its members, Professors Owen Dean and Sadulla Karjiker, are the authors of the *Handbook of South African Copyright Law*, the standard work on South African copyright law, which has been quoted as authority in the South African courts, including the Supreme Court of Appeal. Accordingly, it can speak with authority on matters pertaining to intellectual property, and, in particular, concerning copyright law.

The Chair’s functions include developing intellectual property law in South Africa and playing a role as custodian of this branch of the law, with a view to fostering lucid, coherent, fair, up-to-date, effective and high-quality legislation, which is in harmony with the principles of intellectual property law and is compliant with South Africa’s international obligations in that regard.

The Chair has no clients or any private interests that it serves or seeks to benefit. The views that it holds and expresses concerning matters of intellectual property law are the consequence of its considered and balanced considerations. It seeks only to promote and safeguard the integrity and quality of South African intellectual property law with a view to having it compare favourably with the best laws elsewhere in the world, having regard to the South African context. Its goal in pursuing this objective is the welfare of South Africa and all its people.

Introduction

These comments are submitted pursuant to the invitation extended by the Western Cape Provincial Parliament’s Standing Committee on Finance, Economic

Opportunities and Tourism (“Standing Committee”) to submit written comments on two Bills: Copyright Amendment Bill [B 13D – 2017] (the “Copyright Amendment Bill” or the “Bill”) and the Performers Protection Amendment Bill [B 24D – 2016]. These written submissions will be confined to the Copyright Amendment Bill, and separate submission have been made concerning the proposed amendments to the Performers Protection Act.

Initial remarks concerning the process

It really is difficult to be restrained (let alone complimentary) about the Bill, given the amount of resources that continue to be wasted in trying to fix something that should never have been considered by the Trade and Industry Parliamentary Portfolio Committee (“Portfolio Committee”) (let alone parliament), because of its fundamentally flawed nature, substantively and procedurally. So much time and effort could have been saved if the Portfolio Committee — from the time of the Honourable Jo Fubbs’ term as chair of the Portfolio Committee — performed its oversight roll of the Department of Trade and Industry (“DTI”) in an appropriate and responsible manner.

It remains a matter of grave concern that there is a dogged determination to “panel beat” the Bill, which, from the first draft released to the public for comment in 2015, was very poorly drafted, and contained some deeply problematic proposals. Since then, the fundamental concerns regarding the proposed changes continue. For example, in the letter to the National Assembly Speaker, dated 16 June 2020, President Cyril Ramaphosa referred the Copyright Amendment Bill B13B-2017 (the “Bill”) back to the National Assembly. Amongst the reasons cited by the President for doing so were concerns about the constitutionality of the Bill and the negative effects on the rights of authors and copyright owners.

In December 2021, the Portfolio Committee on Trade and Industry (the “Portfolio Committee”) again invited stakeholders and interested parties to submit written submissions with reference only to specific clauses of the Bill, namely, clause 1 (proposed new definitions), “new clause” (amending sections 11A and 11B), clause 13 (proposed new sections 12A, 12B, 12C and 12D), clause 20 (proposed new section

19C), clause 27 (amending section 27), clause 33 (amending section 39). Given the President's action of (and reasons for) referring the Bill back to the National Assembly, there was no valid reason why the public's right to submit comments was limited to specific clauses. Whose interests are being served by this deeply flawed process? This is certainly not in the best interest of the country.

In a constitutional democracy, legislation needs to follow a credible and inclusive process, and should evidence a balanced and considered approach. Instead, the DTI appears to have followed a highly questionable process. For example, the passage of the Bill appears to have come about in the absence of the involvement of the Statutory Advisory Committee on Intellectual Property, which is provided for in the Copyright Act 1978 (the "Copyright Act"). The lack of expert involvement has been more than evident. Apart from the questionable substantive provisions, the technical quality of that first draft — which was pointed out in previous submissions — should *itself* have led the Portfolio Committee to demand accountability from the DTI about how such a shoddy, and skewed, piece of draft legislation was even put into the public domain.

The Portfolio Committee has been made aware of the serious concerns regarding the process to date by the Chair in its previous written submissions and during the public hearings held by the Portfolio Committee. These concerns have not only been raised by the Chair. For example, on 15 November 2021, the Copyright Coalition of South Africa addressed an open letter to the late Honourable Mr Duma Nkosi, the previous chair of the Portfolio Committee, which detailed serious concerns about the legislative process either having been captured by a particular lobby or being seriously biased as a consequence of such lobbying.

In summary, the process thus far has been so problematic that any reasonable person should have, by now, found it difficult to ignore the concerns, and refuse to put his or her weight behind the legislation. Instead, the Portfolio Committee (through its persistent and protracted involvement in the Bill) is, in effect, condoning the DTI's failures (or, worse still, the possible capture of the DTI in relation to the Bill) by itself acting in a highly problematic fashion, namely, trying to force through an ill-considered

and damaging amendment, in a high-handed and highly questionable manner. To date, neither the DTI, nor the Portfolio Committee, has provided a credible account of the origin of the Bill. Why?

As far as can be ascertained, the Bill was not the product of any policy decision, following a comprehensive review process. The only recognised review of copyright law leading up to the draft Bill was the Copyright Review Commission Report (2011) (“Farlam Report”), which was focused on the regulation of collecting societies. If anything, the Farlam Report and government remarks leading up to the Bill suggested that the overriding concern was to protect South African artists and creatives so as to ensure that they receive their due entitlements under copyright law. The Bill, if anything, only pays lip service to those objectives, and neither does it lay the foundation for us to meaningfully enter the so-called fourth industrial revolution, which the government also claims we seek to do.

We are all now painfully aware of the consequences of the erosion of good government over the past 15 years, and the failure to ensure a functioning, properly staffed Statutory Advisory Committee is yet another casualty of a dysfunctional system. That kind of vacuum leaves the custodianship of our intellectual property legislation vulnerable to abuse, and possible capture by particular interests. The DTI has not been held accountable for its dereliction of duty, but, on the contrary, is currently being supported by the Portfolio Committee in its attempt to have the fundamentally flawed Bill passed by parliament. To compound matters, the drafting process followed by the Portfolio Committee itself, arguably, raises serious concerns. First, the parliamentary legal advisers are not recognised copyright experts (if they are subject experts at all), which is an esoteric area of the law. Second, to the extent that can be ascertained, the particular group of outsiders who have been “consulted” by the Portfolio Committee (and permitted access and opportunities to influence the Portfolio Committee not afforded to others) clearly represent a particular lobby, and hardly constitute a balanced, representative cross-section of stakeholders. For convenience, this group of outsiders, who were named in the aforementioned open letter to the chair of the Portfolio Committee will be referred to as “the Lobbyists”.

As already mentioned, despite the President having, effectively, rejected the Bill, for very good reasons, the Portfolio Committee has doggedly continued its efforts to pass the Bill. Instead of appreciating the significance and essence of the issues raised by the President, the Portfolio Committee continued to defend the Bill in the face of what any reasonable person would recognise as an emphatic rejection of the Bill.

Given the aforementioned, one cannot help but think that, through these calls for written submissions, the Select Committee is simply going through the motions, and seeking to create a veneer of legality. If this is indeed the case, it would be regrettable, given the legal developments that have taken place elsewhere, which only serve to suggest that critics of the Bill have largely been vindicated in their condemnation of the most problematic aspects of Bill.

Since its first written submissions in 2015, the Chair's views in opposing the Bill have been confirmed elsewhere; the challenges posed by the digitisation of copyright works and the Internet require enhanced copyright protection, not the erosion of protection, which is evident in the Bill. For example, the European Union — which comprises 27 countries — has passed the Directive on Copyright in the Digital Single Market (2019), which provides copyright owners with enhanced protection and fairer remuneration, in an attempt to address the so-called “value gap”. Similarly, Google's attempt to hold Australia to ransom for also seeking to address the value gap failed, and Google was forced to agree to pay media outlets for news content that it was using.

In contrast, under the Bill, our creatives and copyright owners are left at the mercy of technology companies, such as, Google, and they will have little to no chance of receiving remuneration comparable to those of their European and Australian counterparts. So much for a promise to improve the lives of South African artists. There is no justification for eroding the rights of South African (and more broadly, black African) authors and owners, when compared to the legal protection afforded to their counterparts in Europe and the US. What is the basis for this distinction? Race: do

South African authors and owners not deserve equivalent protection to their European counterparts?

A good rule of thumb to determine whether the proposed provisions in the draft Bill are appropriate is to ask what their likely effect will be on the incentives of authors or copyright owners to create or invest in copyright works in the future. Against that yardstick, there are plenty of issues of concern in the Bill.

It should be noted that the comments below are by no means comprehensive of the problems in the Bill. Quite frankly, much ink has been used to indicate the numerous flaws in the Bill in respect of the various drafts, with only incremental improvements, which begs the question whether the concerns raised over the years have been taken seriously. Why have calls for a thorough, credible review of the Copyright Act been refused? Accordingly, these written submissions will focus on those aspects of the Bill that are emblematic of the damaging nature of the amendments proposed by the Bill.

Clause 1 - Insertion of proposed new definitions in section 1 of the Copyright Act

“audiovisual work”

The effect of this definition and the use of the term in the Bill is to create a new category of work eligible for copyright, with no corresponding change to section 2 of the Copyright Act, which lists the eligible works. The term as defined is largely synonymous with “cinematograph film” as defined. However, the definition creates a new *genus* of work of which “cinematograph film” is a *species*. The term “cinematograph film” as currently used in the Act can now have two possible meanings. The term indicating the equivalent of the new *genus* must be changed to “audiovisual work” while the one denoting the species must remain unchanged. The Bill as it is presently worded will have the effect that, when it is operative, many of the provisions of the amended Act dealing with cinematograph film will have the limited

meaning of the species whereas it is probably intended that they should have the wider meaning of the *genus*. This will be at variance with the apparent intention of the Bill. Since “cinematograph film” is presently widely defined in the Copyright Act (and covers everything that is covered by the new definition), it is probably better to stay with the existing terminology and delete this definition or possibly have it indicate that it means “cinematograph film”, in which case no further changes are necessary.

“authorized entity”

What the Constitutional Court had to say in refusing to simply “read in” the Bill’s proposed section 19D into the Copyright Act in *Blind SA v Minister of Trade, Industry and Competition & Others* [2022] ZACC 33 cannot be ignored. There appears to be no analysis of the *Blind SA* case, and how the concerns raised by the court have been addressed.

“broadcast”

The proposed amendment of the definition of “broadcast” is a good illustration of the lack of technical competence of the drafters of the Bill in the field of copyright law. First, there is no recognition of the relationship between the definitions of “broadcast” and that of “programme-carrying signal”. At present, the so-called “up-leg” of a broadcast to a satellite is, for copyright purposes, a broadcast (see the definition of “broadcast” in s 1(1) of the Copyright Act), while the so-called “down-leg” of a broadcast from a satellite is a programme-carrying signal (see the definition of “programme-carrying signal” in s 1(1) of the Copyright Act).¹ In fact, a programme-carrying signal is a distinct category of copyright work.² Given the fact that paragraph (b) of the proposed definition states that a broadcast includes a “transmission, partially or wholly, by satellite”, does this suggest that the definition of “programme-carrying signal” is now redundant, and that programme-carrying signals will no longer be a distinct form of copyright work? This cannot be the case. The provisions of the Copyright Act relating to programme-carrying signals cannot simply be ignored. The

¹ O Dean & S Karjiker *Handbook of South African Copyright Law* ed (2015) 5-16.

² Section 2(1) Copyright Act 98 of 1978.

effect of the proposed amendment is to cause an overlap between these two categories of works. Amongst the problematic consequences of this aberration is the fact that the two categories of works can have different authors, and, thus, different copyright owners. Thus, two different parties could own the copyright in the same work. This cannot fail to cause manifest confusion and chaos.

Secondly, the drafters have displayed their conceptual confusion. One of the exclusive rights given to copyright owners by the Berne Convention is the right to broadcast their works or to communicate them to the public, as provided for in Article 11*bis*. These rights were specifically defined and proved challenging with the transmission of copyright works via the Internet. Indeed, the Copyright Act is currently still based on giving effect to the right of communication (or broadcast) to the public, although it does not do so by explicitly referencing such exclusive right in the broad terms of the Berne Convention. Instead, the Copyright Act provides for specific grants of exclusive rights that would be covered by the more general right of communication to the public. For example, the Copyright Act grants the copyright owner the exclusive right to distribute its work by broadcasting it,³ and to transmit its work in a diffusion service.⁴

The advent of digital technology, and the on-demand and interactive nature of the Internet, have blurred the lines between transmission, publishing, and broadcasting.⁵ This led to the *expansion* of the exclusive right of communication to the public, pursuant to Article 8 of the WIPO Copyright Treaty, so as to include the so-called “making available” right.⁶

In contrast, the Bill proposes to introduce a right of communication to the public *and* a making available right.⁷ Thus, the Bill regards the making available right as an

³ Ss 6(d), 8(c), 9(c), 10(b), 11B(d) Copyright Act 98 of 1978 ('Copyright Act').

⁴ Ss 6(e), 7(d), 8(d), 9(d), 10(c), and 11B(e) *ibid*.

⁵ Iftikhar Hussian Bhat 'Right of Communication to the Public in Digital Environment' (2013) 2 *International Journal of Engineering Science Invention* 7 at 7.

⁶ Alexander Tsoutsanis 'Why Copyright and Linking can Tango' (2014) 9 *Journal of Intellectual Property Law & Practice* 495 at 499; Eleonora Rosati 'Linking and Copyright: Easier at Last? First National Applications of the CJEU GS Media Judgment' in Tatiana-Eleni Synodinou, Philippe Jougoux, Christiana Markou & Thalia Prastitou (ed) *EU Internet Law in the Digital Era : Regulation and Enforcement* (2020) at 62.

⁷ Cl 4(a), 6(a), 8(1)(dA) and (dB) and 10 of the Bill.

exclusive right that is distinct from the right of communication to the public, rather than simply being a particular manner of communication to the public. In other words, the WIPO Copyright Treaty introduced the making available right as part of the right of communication to the public (which could include the right to broadcast), but that is not what the Bill proposes. It is, therefore, not clear what the right of communication is intended to cover (given the fact that the right to broadcast is being retained), as distinct from the making available right. In other words, even though the Bill will include a distinct right of communication to the public, it will still retain the specific exclusive rights in the Copyright Act that could be considered as falling under that umbrella right, such as, the broadcasting right⁸ (and, of course, the making available right). This, at best, results in unnecessary duplication, but there is a real possibility that it may result in a lack of legal (or conceptual) distinction between the different exclusive rights. There is a danger that, in time, a court may consider that a given situation falls between the separately enumerated exclusive rights, or will draw artificial distinctions between the relevant exclusive rights, rather than recognising the umbrella, or overarching, nature of the right of communication to the public.

“orphan work”

The whole point about regulating orphan works is to facilitate the use of these works. The current definition creates too onerous a standard. It should be an orphan work if reasonable efforts have been made to identify or locate the copyright owner, without success.

Clause 5 – Proposed introduction of new section 6A

This section shows that the drafters do not understand some of the most fundamental principles of copyright law, which has led to garbled drafting. Apart from some very practical problems with interfering with the contractual freedom of copyright owners, it is unclear when this section would even be applicable, given the exclusions pursuant to section 6A(6). Assignments are often in respect of the world-wide copyright and it

⁸ Ss 6(d), 8(c), 9(c), 10(b), 11B(d) Copyright Act.

is most unlikely that parties will be willing to go into this degree of detail for one country (very few, if any other countries have similar provisions in their laws).

Clause 7 – Proposed introduction of new sections 7A, 7B, 7C, 7D, 7E and 7F

Section 7A

This section again shows that the drafters do not understand some of the most fundamental principles of copyright law, which has led to garbled drafting. In the Copyright Act, the term “work” denotes the intellectual (intangible) creation of intellectual property, which is the subject of the copyright. That work must be embodied in a material form, e.g., an artwork painted on canvas. The material embodiment (e.g., the canvas carrying a painting) constitutes two separate and distinct items of property, namely, the intellectual property (copyright), and the physical property (the canvass to which paint has been applied, possibly in a frame). Ordinarily, when the painting is sold, the transaction entails the transfer of ownership of the physical property only. A sale of the item of physical property does not entail the transfer of the copyright subsisting in the painting: this can only be accomplished by the assignment of the copyright in a written agreement.

This section contemplates and regulates the sale of the item of physical property. What it should say is that, for the duration of copyright protection, each and every time the item of physical property (that is, the piece of canvas carrying the painting) is sold, a proportion of the proceeds of such sale should be paid to the author of the copyright work.

Section 7C and section 7E

Who is to determine whether a work contains an indigenous cultural expression and which community is to benefit? The costs of this exercise will erode any benefit which an artist may derive from it. This provision amply demonstrates the minefield that needs to be navigated when blurring the lines between copyright protection and TK/IP.

It also seeks to give any TK/IP provisions retrospective effect, which is highly problematic.

Given the fact that section 7E provides that the provisions apply to visual artistic works that were created before the provision comes into force, it leads to an anomaly that an indigenous community may be considered to be the co-author of an artistic work that no one in the community even knew existed!

Clause 9 – Proposed introduction of new section 8A

See the comments above regarding royalties in respect of literary and musical works, i.e., the proposed section 6A. The proposed section is very likely to be unworkable and could lead to South Africa being avoided as a jurisdiction for the creation of films.

Clause 11 – Proposed amendment to section 9A

Section 9A(1)(a) should be amended to include the act of making available, now provided for in the proposed section 9(f) to include the use of protected works by, for example, users of online music streaming services. Having said that, you are referred to the earlier comments relating the conceptual confusion concerning the right of communication to the public, and the making available right.

It is important that the amended Copyright Act addresses interactive communication made possible by new technologies. It is accepted that users of online streaming services may be performing both an act of communication to the public and making available in the operation of those services. By omitting acts covered by the making available right from the eligibility to this royalty right – often referred to as a ‘needletime royalty right’ – the proposed legislation potentially deprives the copyright owner the possibility of earning an important source of potential revenue.

Bearing in mind the severe penalties that can be imposed for non-compliance with the registration requirement provided for in proposed section 9A(1)(aA), section 9A(4) is unduly draconian as it currently reads. A disc-jockey who plays recorded

music at a party or at a church fete, possibly for no charge, would fall within the ambit of this provision. With respect, it is excessive to make such a person potentially liable to five years imprisonment if he fails to register or report the music played at such an event. One can understand the justification for such a provision in the case of a radio station and the like, but to inflict such consequences on a private person is unreasonable. It is suggested that some appropriate exceptions should be made to this rule.

It is important that this provision dovetails with the Performers' Protection Act. The Performers' Protection Amendment Bill provides economic rights to performers, which could conflict with the royalty rights provided for in section 9A. Furthermore, the Performers' Protection Amendment Bill proposes additional economic rights to the producers of sound recordings. Section 9A does not refer to such producers at all. This anomaly may lead to confusion as to who is entitled to which royalties and how such royalties must be shared among the relevant right holders.

Clause 12 - Proposed amendment to section 11A in the Copyright Act

First, in relation to paragraphs (b) and (c), you are referred to the comments relating to the proposed definition of "broadcast" above, more specifically, the conceptual confusion concerning the right of communication to the public, the making available right, right to broadcast and the right to emit a programme-carrying signal.

Second, it should immediately be noted that "original" is a technical term in copyright law, whereas it is clearly being used here in its lay sense, which is problematic. Is the issue not that it is the unauthorised disclosure of the "original" that is sought to be prohibited?

Third, in relation to paragraph (d), it is not clear how, factually, an "original" published edition could be distributed (as there should presumably only be one such item). "Distribution" suggests that there are multiple copies of something. Accordingly, paragraph (d) should only deal with publishing (or making available) the work to the public, as with, for example, literary works. In any event, distribution of an

unauthorised copy — namely, an infringing copy — currently already constitutes secondary infringement, regulated by section 23(2) of the Copyright Act. An unauthorised copy of a published edition is already defined as an “infringing copy”.⁹

Proposed amendment to section 11B in the Copyright Act

First, in relation to paragraphs (dA) and (dB), you are referred to the comments relating to the proposed definition of “broadcast” above, more specifically, the conceptual confusion concerning the right of communication to the public, the making available right, right to broadcast and the right emit a programme-carrying signal. The same concern also affects paragraph (e), namely, transmission by diffusion service, which is, in essence, a broadcast by non-wireless means.

Secondly, it should immediately be noted that “original” is a technical term in copyright law, whereas it is clearly being used here in its lay sense, which is problematic. Is the issue not that it is the unauthorised disclosure of the “original” that is sought to be prohibited?

Thirdly, as in the case of the new proposed section 11A, in relation to paragraph (dC), it is not clear how, factually, an “original” computer program could be distributed. “Distribution” suggests that there needs to be multiple copies of something (as there should presumably only be one such item). Accordingly, paragraph (d) should only deal with publishing the work to the public, as with, for example, literary works. In any event, distribution of an unauthorised copy — namely, an infringing copy — currently already constitutes secondary infringement, regulated by section 23(2) of the Copyright Act. An unauthorised copy of a computer program is already defined as an “infringing copy”.¹⁰

Clauses 14 and 15- Insertion of new sections 12A, 12B, 12C and 12D in the Copyright Act

⁹ Section 1 sv “infringing copy” Copyright Act.

¹⁰ Section 1 sv “infringing copy” Copyright Act.

The proposals in this clause are probably of most concern and have been the subject of a large amount criticism and opposition, and it bears all the hallmarks of the Lobbyists' efforts in capturing the agenda on the Bill. The submissions below have been repeated, and it can only be hoped that there will now — at last — be greater willingness to acknowledge the potential harm that the proposed amendments will have on our economy, should they be enacted.

General remarks concerning fair use

Before dealing with the specific provisions, a few general remarks would be in order. It is clear that the Bill seeks to introduce the American fair-use approach to exceptions. There are two approaches by which the exceptions to the exclusive rights granted to copyright owners are provided for in copyright legislation in different countries, namely, fair dealing and fair use. It should immediately be noted that — despite the rhetoric of supporters of fair use, notably the Lobbyists — the overwhelming majority of jurisdictions employ a system of fair dealing, so it would be inappropriate (and, quite frankly, dishonest) to suggest that fair use is a readily-accepted alternative to fair dealing. The fact that the Bill continues to seek the introduction of fair use is no doubt attributable to the skewed picture to which the Portfolio Committee (and the DTI) has been led by the Lobbyists.

Under a system of fair dealing, such as that which currently exists in South African law (and also in the overwhelming majority of countries in the world), there are a limited number (or a *numerus clausus*) of exceptions for specified purposes in respect of each category (or type) of copyright work. In contrast to the fair-dealing approach to copyright exceptions, fair use is an open-ended approach to possible exceptions to copyright protection. The fair-use approach is not confined to specified uses (or purposes) that are provided for in the legislation, and *any* unauthorised use of copyright works may be considered to be permissible, if a *court* (rather than the legislature) considers that the particular use amounts to fair use. In other words, copyright policy is, effectively, devolved onto the courts rather than being determined by parliament.

The introduction of fair use is highly problematic, and questionable, for two main reasons. First, fair use creates a level of uncertainty amongst copyright stakeholders that does not exist with fair dealing. In comparison with fair dealing, fair use greatly increases the threat of (and need for) litigation, and the costs associated with it, as it does not provide sufficiently clear guidelines about what is permissible. If anything, it simply favours parties who have the greatest financial resources to litigate. Very significantly, even in the country of its origin, the United States, the fair-use doctrine has been the subject of sustained criticism. For example, it is said that “the doctrine of fair use is impervious to generalization and that attempts to derive its meaning from careful analysis of specific cases are futile.”¹¹ On what basis is it then considered to be a superior approach to copyright exceptions than our current system of fair dealing?

Secondly, adoption of fair use may cause South Africa to breach its international treaty obligations under the Berne Convention and the TRIPs Agreement, in particular, the mandatory so-called “three-step test”. The three-step test provides that the exclusive rights of a copyright owner can be limited, provided the limitations satisfy the following requirements: they are confined to certain *special cases*; they do not conflict with the normal exploitation of the copyright work; and, they do not unreasonably prejudice the legitimate interests of the copyright owner. A broad, open-ended exception — which is what fair use amounts to — will not satisfy the first step of the test.

For the aforementioned reasons alone, the proposed introduction of fair use should be rejected. A more detailed critique of fair use has been provided in a peer-reviewed article on the topic (S Karjiker, “Should South Africa adopt fair use? Cutting through the rhetoric” 2021 *TSAR* 2 240), which has been attached to these written submissions, and should be considered to form part thereof. The aforementioned article has also been included in a subsequent publication (O Dean, *A Gift of Multiplication: Essays on the Copyright Amendment Bill* (2021, Juta) containing a compilation of Prof Dean’s blog articles, which were published on the Chair’s blog (<https://blogs.sun.ac.za/iplaw/news-3/from-ipstell/>), concerning the proposed

¹¹ B Sookman & D Glover “Why Canada Should Not Adopt Fair Use: A Joint Submission to the Copyright Consultations” (2009) 2 *Osgoode Hall Review of Law and Policy* 139 at 151 quoting Gideon Parchomovsky *et al* “Fair Use Harbors” (2007) *Virginia Law Review* 1483 at 1484-1486

introduction of fair use and the Bill, which casts further light on the possible harmful consequences of the amendments. Nonetheless, specific submissions will now follow on the particular proposed provisions.

Proposed section 12A

Before dealing with some specific aspects of the new proposed section 12A, it is necessary to make some general observations. As already indicated, while the overwhelming majority of countries provide exceptions on the basis of fair dealing, far fewer have a system of fair use. While the Bill seems to adopt *both* of these forms of exceptions, it now, in essence, introduces an open-ended, fair-use system. This fair-use approach cannot be supported, and the Bill should remove any attempt to introduce a system of fair use, for the reasons already stated. Any grounds for the expansion of the current list of exceptions, such as, for the purposes of parody or pastiche, should be expressly provided for. No other exceptions should be allowed to be created by the courts under an open-ended fair-use system.

Neither the DTI, nor the Portfolio Committee, has provided any basis to suggest that the adoption of fair use is in compliance with South Africa's treaty obligations. In fact, despite support amongst the Lobbyists for the introduction of fair use, there is no detailed analysis — other than bald assertions about its alleged compliance with the Berne Convention or the TRIPs Agreement. On the contrary, as detailed in the attached article, it has been rejected, inter alia, in the UK, Australia, New Zealand and the EU. The DTI and the Portfolio Committee have either been misled, or are now willingly accepting a problematic narrative about the merits (and lawfulness) of fair use, and its level of acceptance internationally. In light of the aforesaid, simple questions need to be answered: Who is seeking this change, and why? It is not difficult to see that certain big technology corporations will be the immediate principal beneficiaries, at the cost of the livelihoods of South African authors and copyright owners.

Fair use in respect of a work covers all the restricted acts for literary (or musical) works included in section 6 and the corresponding sections for other categories of

work. So, for instance it will cover acts, such as, reproducing, publishing, performing, and broadcasting, a copyright work. While performing the copyright work may be an exclusive act given to the copyright owner (for example, section 6(c) of the Copyright Act), this is clearly not what is being referred to, as there is no good reason why only one specific exclusive right is mentioned. It is, therefore, unnecessary — and wrong — to make specific reference to the performance of a work as that creates the anomaly that an exemption is given in the Copyright Act to performances protected under the Performers Protection Act.

The proposed section corresponds, to some extent, with the present section 12 of the Act, but with one important difference. It is clear that, as a consequence of the words “such as” in 12A(a), the specific examples of fair use listed are simply illustrative (and not a closed list), and gives a court an extremely wide discretion to exempt any use of whatever nature of a copyright work. This is very far reaching and will probably make our range of exemptions from copyright infringement one of the widest in the world. The situation is now only aggravated by the proposed new section 12A(d).

The new proposed section 12A(d) now undermines the express limitations that are provided in relation to the permitted uses in section 12B. The effect of section 12A (d) is to render those limitations nugatory because, ultimately, any use of a copyright work will have to be measured by the factors in 12A(b). This underscores the fact that the Bill is not introducing some “hybrid system” of exceptions between fair use and fair dealing, but is a fully blown fair-use system. The net result is that tremendous uncertainty is created as to what a copyright owner can actually prevent others from doing with its copyright work. This uncertainty does not benefit copyright owners and creatives, and especially not South African copyright owners and creatives (who are — if the rhetoric is to be believed — purportedly among the main beneficiaries of the Bill). If anything, it only serves the interest of certain large technology companies, who have an interest in diluting the rights of copyright owners and authors.

An example (and this is but one of many examples) of the significant widening of the possible exceptions is paragraph (a)(i), which allows for the making of a personal copy of a work, without qualification, and irrespective of whether the individual acts

are reasonable or fair. In other words, the individual can legitimately make an exact reproduction of an entire book that they have borrowed, or taken out on loan from a library, in order to avoid having to purchase a copy. If every potential reader (or a large number of readers) of a book were to adopt this approach (which is contemplated by the section), the author's potential market would be destroyed (if a court goes on to suggest that such conduct is permissible). This renders the whole purpose of copyright largely nugatory. Such conduct is clearly unreasonably prejudicial to the legitimate interests of copyright owners. This situation is avoided under the present fair-dealing approach because the use has to be for the specified exempted purpose, and also has to be reasonable (or fair) in the circumstances.

For completeness, the portion of paragraph (a)(i) that, presumably, seeks to facilitate so-called "time shifting" and "format shifting" only causes confusion as to the scope of this exemption. Time shifting and format shifting should be regulated by separate provisions. For example, there is no requirement that the persons engaging in such acts must have lawful access to the relevant copyright works.

Section 12A(a)(iv)

While a fair-use exception for scholarship and illustrative purposes in teaching may be appropriate, the exception for "education" could have disastrous consequences for educational authors and publishers, depending on how wide this exception will be. It is the long-term impact of legislation that should be considered, rather than seeking to achieve populist (short-sighted) goals. Simplistic rhetoric, devoid of proper analysis is, unfortunately, the political *zeitgeist* of our times, whether in the US or elsewhere. There is a failure (or refusal) to analyse issues thoroughly, and to consider the interests of *all* stakeholders. Where is the economic impact assessment that supports this exception? In time to come, we should not be surprised if we, as a country, fail to produce sufficient academics, experts, authors and creatives, because we have failed to provide copyright owners with adequate copyright protection.

Section 12A(a)(v)

What is meant by “cartoon” in this context? At present, the owner of a literary work has the right to make an adaptation of the literary work. For example, the copyright owner of a literary work of fiction has the exclusive right to convey the story “wholly or mainly by means of pictures in a form suitable for reproduction”.¹² The latter picture-form version would include converting the story into a cartoon. Thus, unless it is clear what “cartoon” in section 12A(a)(v) refers to, and that such definition is sufficiently restrictive, there does not appear to be any justifiable reason for this unwarranted exception. Similarly, the inclusion of “tribute” and “homage” provide unwarranted grounds for allowing the use of another’s copyright work.

Proposed section 12B

The new proposed paragraph 12A(b) really illustrates the garbled thinking (if not outright deviousness) at work concerning the approach to copyright exceptions contained in the Bill. Without paragraph 12A(b), the exceptions provided by section 12B have the usual express, internal, fair-dealing limitations. For example, sections 12B(1)(a) and (e) require that the use be for the specified purpose and should be fair, as is currently the case under our system of fair dealing. For example, the exception for the purposes of quotation or translation is only exercisable to the extent that it is justifiable (or fair). However, in the absence of an express indication of the interplay between section 12A and the rest of the exceptions, the effect of section 12A is to render those — more specific — limited exceptions nugatory because, ultimately, any use of a copyright work will have to be measured by the factors in 12A(b). What then is the purpose of section 12B, other than possible indicating that certain uses are prima facie permissible? Why should two sets of factors be considered to determine if the particular use is lawful? This underscores the fact that the Bill is not introducing some “hybrid system” of exceptions between fair use and fair dealing, but is, in essence, simply a US-style fair-use system.

Section 12B(3)

¹² Section 1 *sv* “adaptation” Copyright Act.

What is the purpose of this provision? It either creates uncertainty, or an even wider, unwarranted, dilution of copyright. For example, why should someone who translates a work for non-commercial purposes have the right to make adaptations of the work, or use the work in any other language? This is far-reaching as such other uses of the work are also not limited to only non-commercial use. This provision should be deleted.

Section 12B(6)

This subsection remains incomprehensible in its present form and should be re-drafted. It demonstrates that the drafters' lack understanding of the applicable law and the relevant legal principles. The drafters clearly do not understand the operation of the so-called first-sale doctrine (or exhaustion).

A possibly simpler solution to deal with the problem of parallel importation would be to amend section 23(2) of the Copyright Act. However, it does require the drafters to know what the current law in South Africa is, which does not appear to be the case.

Proposed section 12C

First, the section is cast in the form of giving someone the right to make transient copies, which should not be the case. It should entitle the beneficiary to immunity from liability (or an exemption from liability), not a positive right.

Second, the exception should be limited to "reproductions", and should not extend to "adaptations". The purpose of an exception of this nature should be to facilitate reproductions made as a consequence of a technological process and must be interpreted strictly so as to ensure fair balance between the rights and interests of rights holders and of users of protected works, because it is a derogation from the general rule that the copyright holder must authorise any reproduction of its work.¹³ As alluded to earlier, the EU passed the Directive on Copyright in the Digital Single

¹³ *Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd & Others* 2014 C-360/13 (5 June 2014) [23] and [24].

Market (2019) to narrow the exemptions that aggregators and intermediaries were previously afforded, which now provides copyright owners with enhanced protection and possible (fairer) remuneration, by addressing the value gap.

Last, but by no means the least, as already mentioned, the effect of section 12A is to render the “limitations” in section 12C nugatory because, ultimately, any use of a copyright work will have to be measured by the factors in 12A. This highlights the problem of having a general fair-use exception as provided for in section 12A, alongside specific exceptions, and no indication of the interplay.

Proposed section 12D

Section 12D(1)

Again, as already mentioned, the effect of section 12A is to render the “limitations” in section 12D nugatory because, ultimately, any use of a copyright work will have to be measured by the factors in 12A. At best, the purpose of section 12D simply indicates that certain uses are prima facie permissible, because, after all, the proposed section is presumably subject to section 12A (and 12D(3)!). Who knows what that actually means in the end?

The exception for education could have disastrous consequences for educational authors and publishers, if the cannibalisation of educational material is permitted without any compensation to the copyright owners. Something less than “substantially the whole of a work” could still amount to a substantial part of the work for copyright law. It is not very difficult to see how a cynical use of this section could result in an institution (or students themselves) reproducing parts of copyright works in such a manner as to totally avoid the need for students to purchase any books at all, or for the institution to pay no compensation to copyright owners (because it is argued that the portion copied does not conflict with the normal exploitation of that copyright work). While currently such owners may be entitled to compensation, this may not be the case if the Bill is enacted in its current form. Where is the economic impact assessment that supports this exception?

This is a great example of a provision that appeals to the simplistic, “feel good” rhetoric that is devoid of proper analysis. On a more cynical note, it scapegoats intellectual property protection in relation to the government’s service-delivery failures in education over two decades. Briefly put, it now gives educational institutions (and students) a free hand to copy educational material protected by copyright, without regard to the long-term effects.

This does not build a knowledge economy because the message it sends is clear: academic (or educational) intellectual endeavours are not compensated. The ironic consequence of provisions such as the proposed section is that it devalues what it purports to promote. In other words, while these measures purport to make educational materials more accessible and improve the intellectual abilities of our young people, they also send a clear message that intellectual endeavours will not be rewarded and protected in this country to the extent that they are protected elsewhere.

If this type of erosion of copyright is permitted, the long-term consequences for us as a country is intellectual impoverishment, which may also mean economic impoverishment in an increasing technologically sophisticated world. We may not even be regarded as cheap labour.

Section 12D(3)

The Act contains no reference to “indigenous communities” and confers no rights on such groups. This problem is exemplary of a wider fundamental problem, namely, that the Bill is based on the erroneous premise that the Copyright Act has already been amended by the Intellectual Property Law Amendment Act 2013 (“IPLAA”). This misconception has the effect, inter alia, that the numbering of the new sections sought to be introduced by the Bill is awry and the entire numbering system in the Copyright Act, once amended by the Bill, will be confusing and nonsensical.

The IPLAA has not, and should never, be brought into operation as it fundamentally distorts the legal principles in the statutes it seeks to amend. All

references and allusions in the Bill to the IPLAA should be eradicated. IPLAA is yet another example of the DTI's failure as the custodian of intellectual property law in South Africa, and its potentially damaging consequences for innovation.

Section 12D(6)

The "instruction" should take place at a recognised educational institution. "Incorporate" is not a restricted act under Act. "Reproduce", which is a restricted act, should be substituted for it. The effect of an exemption is to authorise the performance of a restricted act under Act.

"Assignment" has a recognised specific meaning in copyright law, namely, to transfer the ownership of copyright. It should ideally not be used in this context as it is potentially misleading and could cause confusion. Maybe it is best to try to distinguish it from the legal concept with the necessary qualification, for example, "educational assignment".

Section 12D(7)

It should be noted that the impact of the proposed section on the viability of South African academic publishing needs to be properly investigated. Given the fact the income stream from academic publications form a significant part of the funding of tertiary institutions, which is funded by the state, it is important that there remain viable publications to promote such academic publishing. Of course, arguably, the greatest beneficiary of this proposed provision are websites like Google Scholar and SSRN, who have not invested in the academic publications, but will benefit from them. Unless a service like Google Scholar financially contributes directly to academic publishing in South Africa, why should it be granted this type of benefit? Also, it appears that those employed by private institutions will have their copyright protected to a greater extent than those at public institutions! Then there is issue of the calculation of the relevant 50% state funding. How is this to be calculated? Are researchers expected to constantly monitor the levels of state funding?

Clause 22 - Insertion of proposed section 19C in the Copyright Act

Section 19C(1)

What is meant by “library”, “archive” or “gallery” in this context? These terms should be construed strictly as recognised institutions, so as to prevent the wholesale abuse of these provisions by so-called “digital” libraries, archives or galleries that are in the business of harvested data for profit.

However, there should probably also be an exception for “art market professionals” to enable them to market or advertise the artworks that they are selling. For example, they should be able to display photographs of these artworks on their websites or other marketing material. This is particularly the case now that it is proposed that a resale royalty right be introduced (see section 7B).

Section 19C(2) and (3)

If one of the listed institutions owns a tangible article embodying a copy of a copyright work (such as, a book), this activity is not restricted by copyright, and, consequently, no exception is required. In fact, that is what the listed institutions, such as, libraries, have been doing for centuries! As already mentioned, if the terms “library”, “archive” or “gallery” in this context are not narrowly construed, this provision may be used for rampant piracy. Accordingly, the aforementioned terms should be narrowly defined.

Section 19C(7)

The passage “without the consent of the copyright owner” is redundant and should be deleted as it may cause confusion. First, the point has already been made in subsection (1) and does not need to be repeated. Second, the phrase is not repeated in the other relevant subsections, and this makes the current subsection (confusingly) different for no apparent reason. This may give rise to serious issues of interpretation of the section.

Section 19C(9)

The Copyright Act contains no reference to “indigenous community”, nor does it confer any right on such group. This is a consequence of the IPLAA not being in force. The phrase should be deleted.

Section 19C(10)

The opening to the subsection, namely, “Notwithstanding any other section” is most inelegant and unusual drafting. The conventional, and better, expression would be to substitute it with “Notwithstanding the provisions of this Act”.

Section 19C(13)

The subsection creates a necessary exception in favour of the dispatching library: it is authorised to make a reproduction of a work. However, the receiving library also makes a reproduction of the work and requires a similar exception in its favour. This should be provided. Also, the subsection appears to place an obligation on the dispatching library to ensure that the receiving library carries out the requirements of paragraph (b), and that the dispatching library’s right to rely on the exception is conditional upon this being done. If this is the intention, it should be stated more clearly. What is the dispatching library’s liability if the receiving library fails to carry out the requirements of paragraph (b)?

Section 19C(14)

The phrase “protected from any claim for damages, from criminal liability and from copyright infringement” is contorted and should be simplified. It can simply be provided that those persons are “absolved from [or, have immunity against] any claims of copyright infringement”. If they are absolved from any claims of copyright infringement, there can be no question of damages or criminal liability being incurred.

As for paragraph (b), if the work is in the public domain, there is no copyright protection, and it is incorrect to make reference to “the copyright work”. In addition, the Copyright Act only protects copyright and not “related rights” (whatever this may mean in this context) and such reference is inappropriate and should be deleted. Accordingly, the phrase “the copyright work, or material protected by related rights” should simply be replaced by “the work”.

Section 19D

As indicated in previous submissions, the introduction of the proposed section is to be welcomed. However, from a technical drafting perspective, this is another example of failure. In fact, looking past the rhetoric concerning the *Blind SA* case, the Constitutional Court refused to accede to Blind SA’s request that proposed the section to be read into the Copyright Act. There were two reasons for this. Section 19D could not be read in as interim relief because it would provide an exception that goes beyond the challenge established by Blind SA, and, more importantly, it was not clear that it would allow South Africa to ratify the Marrakesh Treaty.¹⁴

Given the fact that South Africa wants to be a party to the Marrakesh Treaty and ratify the treaty, there does not appear to have been any amendment of section 19D in light of the issues raised by the Constitutional Court, or any explanation for why section 19D allows South Africa to ratify the treaty, despite the Constitutional Court’s reservations in that regard. As already indicated, instead, there is just a dogged determination to force through the Bill, which, once again, begs the question as to whose interests are being served? Should we not ensure that the proposed amendment serves the best interests of those with the relevant disabilities (while protecting authors and copyright owners), and that it is drafted in a technically proficient manner?

Clause 24 – Proposed amendment of section 21

Section 21(1)(c) and section 21(3)

¹⁴ *Blind SA v Minister of Trade, Industry and Competition & Others* [105].

A perfectly understandable provision has been rendered incomprehensible by the proposed amendment by the attempt to deal with cinematograph films differently. Not only do the proposed changes introduce an unwarranted level of complexity, it proceeds to confuse issues of ownership in other types of copyright work, namely, artistic works and sound recordings.

There is clearly an attempt to reverse the court's decision in *South African Broadcasting Corporation SOC Ltd v Via Vollenhoven and Appollis Independent CC & Others* (2016 4 All SA 623 (GJ)). A better approach to deal with exceptional cases is to introduce a public interest defence, rather than creating an unworkable statutory provision.

Clause 25 – Proposed amendment of section 22

Section 22(1)

It is not clear why there is an absolute prohibition on the assignment of copyright by the state. Would it not be beneficial to give the state unfettered copyright?

Section 22(3)

The way in which it is drafted creates the imprecision (contrary to what is stated in the proposed section 22(4)) that all licences – not just exclusive licence – now have to be in writing, which would potentially create a huge problem. A perfectly understandable provision has been rendered incomprehensible by the proposed amendment. Also, why is the Bill being prescriptive about the terms of licences? Have the suggested restrictions imposed on contracting been the result of a thorough review of issues in the area of copyright licensing? If so, who conducted the review and where are the findings of that review?

It is difficult to see why the assignment of literary and musical works is limited to 25 years. There does not appear to be any sound reason why these categories of works should be singled out from all the other categories of works. It would seem that the

draftsman has been influenced by the renowned *Lion Sleeps Tonight* case (*Disney Enterprises Inc v Griesel NO and Others* 895 JOC (T)) which dealt with a musical work and confirmed that under the 1965 Copyright Act (and its predecessor the 1916 Act) assigned copyright reverted to the author's heirs 25 years after his death (the so-called 'reversionary interest'). This is a far cry from limiting an assignment to 25 years. The draftsman appears to have misunderstood the circumstances of this case and to have wrongly elevated them to an erroneous principle.

Under the existing law, parties can, if they choose, limit an assignment to 25 years, or any other period. There does not appear to be any good reason why their freedom of contract should be curtailed in the case of literary and musical works. Even more concerning, there is no indication of whether this provision is intended to have retrospective effect. The provision is not sensible and should be deleted from the Bill.

Clause 29 - Insertion of proposed section 27(5A) and section 27(6) in the Copyright Act

Section 27(5A)

You are referred to the earlier comments relating to the conceptual confusion concerning the right of communication to the public, and the making available right. The same concern also affects section 27(4), which deals with broadcasts, and section 27(5), which deals with programme-carrying signals.

Section 27(6)

The concerns relating to section 27(6) bear repeating. The fines imposed on juristic persons in this, and other paragraphs, are draconian, bearing in mind that they are minimum penalties. While strong copyright protection is to be welcomed, a balance needs to be maintained. This also clearly demonstrates that there is no consistency in the Bill. While, on the one hand, the draft Bill threatens to seriously dilute copyright protection, on the other hand, it introduces draconian minimum

penalties for copyright infringement. It will no doubt leave these measures open to constitutional challenge, and may also lead to a reluctance to convict persons.

Clause 27 - Proposed inclusion of Chapter 1A: Collecting Societies

The Bill omits the “one society one right” system recommended by the Farlam Report, in terms of which only one society may be accredited to administer a certain right. A provision to this effect was initially included in the first iteration of the Bill; however, it was removed due to successful opposition by the National Association of Broadcasters (“NAB”), which is arguably one of the largest user groups in South Africa. The NAB’s biggest concern was that implementing a “once society one right” system “will result in a further entrenchment of the monopoly powers currently enjoyed by collecting societies.” However, collective management organisations require this natural monopoly to operate effectively, and a strong regulatory framework can effectively prevent any abuse of such monopoly power. The “one society one right” system would improve the efficiency of the copyright market and prevent situations, such as, the disputes between the South African Music Performance Rights Association and the Independent Music Performance Rights Association.

Regarding the administration costs of the collecting society, it is only mentioned that it may deduct “a prescribed amount from the collected royalties for its own expenses,” not setting a limit or providing any further restrictions on such deductions. It is submitted that the Collecting Society Regulations limit of 20% of its royalty income should be incorporated into the Act to ensure that the relevant right holders receive as fair a share as possible of the royalties for the use of their works.

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Should South Africa adopt fair use? Cutting through the rhetoric

S KARJIKER*

SAMEVATTING

MOET SUID-AFRIKA BILLIKE GEBRUIK AANNEEM? RETORIEK OMSEIL

Die wetgewer poog om met die Wysigingswetsontwerp op Outeursreg ingrypende veranderinge in die Wet op Outeursreg aan te bring, waarby die instelling van billike gebruik (“fair use”) ingesluit word. Hierdie voorgestelde wysiging blyk nie die resultaat te wees van enige erkende hersieningsproses nie, en vereis ’n deeglike ontleding van die gevolge daarvan. Hierdie radikale afwyking van ons huidige benadering ten opsigte van die uitsonderings in outeursreg is deur sommige bekende tegnologie maatskappye ondersteun, nie net in Suid-Afrika nie, maar ook in ander regsgebiede soos die Verenigde Koninkryk, Australië en Nieu-Seeland. Die artikel spreek ernstige kommer uit oor die implikasies van die instelling van billike gebruik in die Suid-Afrikaanse reg. Sodra verby die retoriek van die beweerde meerderwaardigheid van billike gebruik beweeg word, is die prentjie wat ontstaan verontrustend. Alhoewel daar entoesiastiese ondersteuning blyk te wees vir die instelling van billike gebruik vanuit sekere oorde, is die geskiedenis daarvan om regsekerheid te vestig in die regsgebied van sy statutêre oorsprong, die Verenigde State, minder bemoedigend. Billike gebruik vereis ’n litigasieproses tussen die verskillende partye om die toelaatbare uitsonderings op outeursreg te bepaal. Daar is geen noodwendige rede waarom billike gebruik meer responsief is op tegnologiese verandering as wetgewende hervorming nie.

Daar is beduidende verskille in ons regstelsel en die litigasieproses wanneer dit vergelyk word met dié van die Verenigde State. Versuim om die verskille te erken, kan tot onvoorspelbare en onbedoelde gevolge lei. Uitsonderings op die outeursreg behels aspekte van openbare beleid. Dit moet nie deur regters beslis word ooreenkomstig ’n agenda wat daargestel is deur private litigante nie. In ’n demokratiese samelewing moet openbare beleidskwessies deur die parlement bepaal word en dit mag openbare deelname insluit.

Billike gebruik, of enige vorm van oop uitsonderings, kan daartoe lei dat Suid-Afrika sy verdragsverpligtinge kragtens die Bernkonvensie, die TRIPs-ooreenkoms en in die besonder die sogenaamde “drie-stap-toets” mag oortree. Dit is ook duidelik dat die houding van die Europese Unie en die Verenigde State teenoor die groot tegnologie maatskappye minder uiteenlopend is, en dat wetgewende maatreëls ingestel word, of oorweeg word, om die uitbuiting van die regte van outeursreghebbendes te beperk. Voorstanders vir die instelling van billike gebruik het nog geen regverdiging verskaf waarom Suid-Afrika dit só moet gedra oor sy internasionale verpligtinge nie.

1 Introduction

In 2015, the department of trade and industry introduced the Copyright Amendment Bill (the bill),¹ which will amend the Copyright Act,² in an attempt to update South African copyright law. Although the bill, and the process followed in its development, have been subjects of much scrutiny and criticism, arguably, the most concerning proposal – amongst a number of deeply problematic provisions –

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¹ GN 646 of 2015 in GG 39028 (27-07-2015). Subsequent reference to the bill will be to the latest draft: Minister of Trade and Industry “13B-2017 Final Draft 15.11.2018” Parliamentary Monitoring Group http://pmg-assets.s3-website-eu-west-1.amazonaws.com/B13B-2017_Copyright.pdf (20-05-2020).

² 98 of 1978.

is the introduction of fair use.³ The proposed introduction of fair use, as is the case with other far-reaching proposed changes, has not been the result of any recognised review process concerning the Copyright Act. In fact, the only review of the Copyright Act was that undertaken by Farlam J, which did not concern itself with the vast majority of the proposed changes in the bill, including the departure from our current system of fair-dealing exceptions.⁴

Reports indicate that the department of trade and industry realises that this would be a significant shift in policy, and has “likely ... far-reaching unintended consequences”, but this has not deterred the department from reconsidering its proposed amendments in this regard.⁵ It is not difficult to determine the impetus for the department of trade and industry’s proposal to depart from our current fair-dealing system, or to figure out who is likely to benefit from this departure. The departure from fair dealing to fair use has been lobbied for by technology companies, not only in South Africa, but also in other jurisdictions, such as the United Kingdom,⁶ Australia⁷ and New Zealand.⁸

The purpose of this article is to consider the case for the adoption of fair use, and to subject fair use to the type of scrutiny that appears to be lacking, despite it receiving enthusiastic academic support in certain quarters. This article seeks to demonstrate that those supporting the adoption of fair use are doing so either as a consequence of their ignorance of (or a blind spot concerning) its consequences, or – worse still – they are part of a lobbying campaign, notwithstanding any concerns about its introduction. Once you get beyond the rhetoric of the claimed superiority of fair use, the emerging picture concerning fair use is a rather bleak one.

2 Exceptions to copyright protection

The exclusive rights that copyright legislation grants to copyright owners are subject to limitations (or exceptions) that allow others (namely, third parties) to use copyright works in certain circumstances, without having to obtain the copyright owners’ consent.⁹ There are two approaches by which the exceptions are provided for in copyright legislation in various jurisdictions, namely, fair dealing and fair use.¹⁰ It should immediately be noted that the overwhelming majority of jurisdictions employ a system of fair dealing, so it would hardly be appropriate to create the impression that fair use is a readily-accepted alternative to fair dealing.¹¹ However, given the

³ cl 12A of the bill.

⁴ Copyright Review Commission Report 2011 (Farlam Review) par 4.8 https://www.gov.za/sites/default/files/gcis_document/201409/crc-report.pdf (20-05-2020).

⁵ “Legislation: Copyright Bill process reaches cross roads” *Legalbriefs* 4446 (25-04-2018) <http://legalbrief.co.za/diary/legalbrief-today/policy-watch/legislation-copyright-bill-process-reaches-cross-roads/#redirect> (25-04-2018).

⁶ Hargreaves *Digital Opportunity: A Review of Intellectual Property and Growth* (2011) 52.

⁷ Australian Law Reform Commission *Copyright and the Digital Economy: Final Report* (2013) (ALRC Report) 95 n 41.

⁸ Deloitte *Copyright in the Digital Age: An Economic Assessment of Fair Use in New Zealand* (2018) (Deloitte Report) <https://www2.deloitte.com/content/dam/Deloitte/nz/Documents/Economics/dae-nz-copyright-fair-use.pdf> (29-11-2020).

⁹ Some subject matter may be devoid of any copyright protection. See eg s 12(8) of the Copyright Act.

¹⁰ There is no point to viewing a so-called “hybrid” approach to exceptions as being anything other than a fair-use approach. If there are defined exceptions, but there is also an open-ended exception that typifies the fair-use approach, for all intents and purposes, it amounts to fair use.

¹¹ Besides the United States, the other jurisdictions that have adopted fair use are Israel, Singapore, South Korea and the Philippines. See the ALRC Report (n 7) 89 and the Deloitte Report (n 8) 15.

volume of the rhetoric concerning fair use, one could be forgiven for thinking that fair use is as prevalent as fair dealing.

Under a system of fair dealing, such as that which currently exists in South African law, there are a limited number (or *numerus clausus*) of exceptions in respect of each category (or type) of copyright work. “Dealing” in this context does not refer to dealing in the commercial sense, but rather to “use” of the copyright work. For example, the most well-known exceptions are those applicable to literary (or artistic) works, namely, the right to use the works for purposes of research or private study, or for personal or private use; for criticism or review; or, for reporting current events.¹² The fair-dealing exceptions act as a defence against conduct that would otherwise constitute copyright infringement.¹³ In other words, if there is no copyright infringement, there is no need to consider the exceptions.¹⁴ Whether a defendant is able to rely on any of these exceptions involves a two-stage enquiry: first, establishing whether the particular use (eg reproduction) was for the exempted purpose (eg research), and, second, whether the use was fair.¹⁵ If the particular use of copyright material was not for the exempted purpose, there can be no question of such use being exempted. Importantly, as mentioned, the list of exempted purposes is an exhaustive, or closed, list. The determination of whether a particular use is fair is for the court to determine – objectively – and involves a value judgment, depending on the particular facts or circumstances, determined at the time of dealing.¹⁶ It is a matter of fact, degree and impression.¹⁷

In contrast to the fair-dealing approach to copyright exceptions, fair use, most notably, applicable (and having its legislative origin) in the United States, is an open-ended approach to possible exceptions to copyright protection. While the United States system lists specific exceptions (or exemptions) similar to those found in the current South African legislation,¹⁸ they are simply illustrative exceptions as to what is permissible; any other use may be allowed, provided that such use is considered to amount to fair use when assessed against the criteria stipulated in the United States legislation.¹⁹ In other words, the fair-use approach is not confined to uses that are specifically provided for in the legislation, and any unauthorised use of copyright works may be considered to be permissible, if a court considers the particular use to amount to fair use, in accordance with the stipulated four factors. The four factors against which a particular use will be assessed are the following: the purpose and character of use; the nature of the copyright work; the amount and substantiality of the portion used; and the effect on the potential market of the copyright owner.²⁰

¹² s 12(1) Copyright Act (n 2). See also s 29, 30(1) and 30(2) of the Copyright, Designs and Patents Act 1988 (UK CDPA).

¹³ *Moneyweb (Pty) Ltd v Media 24 Ltd* 2016 4 SA 591 (GJ) par 111.

¹⁴ This is also the case in the US. See LaFrance *Copyright Law: In a Nutshell* (2011) 309 and 310. In the US, it is also a defence against infringement of moral rights (LaFrance 310).

¹⁵ the *Moneyweb* case (n 13) par 102.

¹⁶ the *Moneyweb* case (n 13) par 112, 114 and 121.

¹⁷ the *Moneyweb* case (n 13) par 114. See also *Hyde Park Residence Ltd v Yelland* 2001 Ch 143 158 and 171.

¹⁸ s 108 to 122 Copyright Act 1976, Title 17 USC (US Copyright Act).

¹⁹ s 107 US Copyright Act (n 18). See also ALRC Report (n 7) 89.

²⁰ s 107 US Copyright Act (n 18).

The principal argument advanced by proponents of fair use is not a particularly complicated or nuanced argument.²¹ It is claimed that fair use provides greater flexibility than fair dealing: given the fact that there are no *numerus clausus* of exceptions, fair use enables the creation of exceptions that are necessitated by technological developments.²² In a fast-moving world of technological innovations, the law is simply too slow at responding to the challenges posed by technological changes, which require the creation of further exceptions. There is also the suggestion that fair use will lead to increased economic growth, because it allows for greater innovation.²³ In addition to subjecting this claimed benefit of fair use to critical analysis, this article will also express a view on whether fair use complies with South Africa's obligations under international treaties, namely, the Berne Convention²⁴ and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement).²⁵

It is important to note something at the outset. In the criticism of fair use that follows, it is in no way being suggested that our present fair-dealing exceptions are currently adequate, and that they do not require revision. Quite the contrary, it is recognised that the fair-dealing exceptions require revision. For example, there may be problems that those who seek to archive valuable musical collections are encountering, due to the inadequate provisions relating to libraries and archives.

3 *The case against fair use*

Despite the fact that flexibility is the strongest argument for fair use, even some of its proponents are wary about such a claim and are simply prepared to state that a fair-dealing system "may not be" the best when it comes to the issue of flexibility, without expressly stating that fair use is superior in this regard compared to fair dealing.²⁶ This is hardly a ringing endorsement of the supposed greatest advantage of fair use. The reason for this mealy-mouthed support for fair use should become clear from what follows.

The claimed flexibility that fair use may offer comes at a price. That price is uncertainty, and is too high a price, not to mention that fair use may breach South Africa's international obligations. Most copyright stakeholders would prefer certainty about the extent of the permissible uses, rather than having to speculate about the types of uses that would require the copyright owners' authorisation, and those which may be performed without such authorisation.²⁷ Of course, that laws provide certainty is generally considered desirable by society, not simply in the context of copyright exceptions. Even the Australian Law Reform Commission

²¹ There is also the hint of jingoism about the superiority of fair use (and United States law in general), which will, no doubt, become evident to anyone who has engaged with the literature on the topic. There is the not-so-subtle suggestion that the world would be a better place if every other legal system resembled the American legal system in this regard. See *eg* the following quote (ALRC Report (n 7) 106): "The copyright industries in the United States remain without peer. These industries have achieved global dominance against the backdrop of a domestic fair use defence."

²² ALRC Report (n 7) 92 and 95.

²³ ALRC Report (n 7) 104.

²⁴ Berne Convention for the Protection of Literary and Artistic Works 1161 UNTS 3 (Berne Convention).

²⁵ Agreement on trade-related aspects of intellectual property rights including trade in counterfeit goods, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 ILM 1125, 1197 ("TRIPs Agreement").

²⁶ Deloitte Report (n 8) 20.

²⁷ Sookman and Glover "Why Canada should not adopt fair use: a joint submission to the copyright consultations" 2009 *Osgoode Hall Review of Law and Policy* 139 141.

Report, which recommended the adoption of fair use in Australia, acknowledged the importance of “[c]opyright exceptions be[ing] certain and predictable”.²⁸ Fair use results in a level of uncertainty that is at least an order of magnitude greater than that under fair dealing.

As already indicated, fair use “offers no bright-line test and no per se rules.”²⁹ Unlike fair dealing, fair use provides no certainty concerning the type of use that may be permissible. “Every case turns on its specific facts ... [which] makes its likelihood of success difficult to predict in specific cases.”³⁰ As already noted, in the case of fair dealing, the first leg of the fair-dealing enquiry concerns establishing whether the particular use is for the permitted purpose. While there may be some dispute about whether a particular use of a copyright work falls within the exempted purpose, there is no uncertainty about what the permitted exempted uses are. The contentious issue tends to be whether the particular use is fair, which is something that would have to be considered under fair use too, whereas under fair use the particular use may also be contentious. Fair use is not confined to specific uses. In fact, it has been suggested that the four factors for the determination of whether a particular use constitutes fair use under United States law could be considered in assessing whether a specific exempted use was fair under South African law.³¹ Given the aforementioned, it becomes patently clear how absurd the following claim of superiority of fair use over fair dealing is: “US fair use is notably *more specific* than the UK fair dealing provision by its articulation of other factors besides purposes that should be taken into account when making a judgment about whether a challenged use is fair.”³²

Curiously, the Australian Law Reform Commission Report states that the absence of defined permitted purposes does not make fair use uncertain, but rather flexible.³³ There is ample evidence in the United States confirming the greater uncertainty that results from fair use, when compared to fair dealing. This, of course, lays bare any claims by proponents for the adoption of fair use in South Africa concerning the alleged ease with which fair use can be applied; it is simply not a view shared by noted American scholars. Halpern says the following about fair use in the United States: “What are not clear are the boundaries, standards, and parameters of the doctrine necessary to a reasonable degree of predictability.”³⁴ There has been “an enormous amount of scholarly attention” given to the United States’ fair use provision, “nearly all” of which “has been highly critical” thereof.³⁵ Even United States commentators who seek to restore some confidence in the United States’ fair-use approach concede that it “has to some extent run off the rails”.³⁶

The aforementioned criticisms, while damning enough, are by no means the harshest criticisms levelled at the United States’ fair-use doctrine. No lesser a commentator than Nimmer has been extremely critical of the fair-use test as embodied in the United States Copyright Act. He says that the United States statutory

²⁸ ALRC Report (n 7) 88.

²⁹ LaFrance (n 14) 309.

³⁰ LaFrance (n 14) 309.

³¹ Dean and Karjiker *Handbook of South African Copyright Law* (2015) 1-96.

³² Samuelson and Hashimoto “Is the US fair use doctrine compatible with Berne and TRIPS obligations?” 2018 *SSRN* 6 – italics added.

³³ ALRC Report (n 7) 94.

³⁴ Halpern *et al Fundamentals of United States Intellectual Property Law* (2012) 92.

³⁵ Beebe “An empirical study of US copyright fair use opinions, 1978-2005” 2008 *University of Pennsylvania Law Review* 549 552.

³⁶ Beebe (n 35) 596.

provision is as useful as a dartboard in determining whether a particular use would be considered to be fair use.³⁷ Lessig, who actually seeks more far-reaching changes to copyright, echoes this dismal account of fair use in the United States:

“[F]air use in America simply means the right to hire a lawyer to defend your right to create. And as lawyers love to forget, our system for defending rights such as fair use is astonishingly bad — in practically every context, but especially here. It costs too much, it delivers too slowly, and what it delivers often has little connection to the justice underlying the claim. The legal system may be tolerable for the very rich. For everyone else, it is an embarrassment to a tradition that prides itself on the rule of law.”³⁸

Nimmer’s reason for his damning criticism is that each of the listed four factors leaves too much room for subjective determination. He provides support for his view by indicating that there have been cases where a lower court has come to an opposite conclusion on each of the four factors to that reached by the particular appeal court. It is suggested that courts tend to first decide whether a particular use constitutes fair use, and then proceed to rationalise their decision to conform to that predetermined result, rather than that conclusion being the outcome of the cumulative result of the assessment of each of the four factors.³⁹ While some courts appear to have a tendency to make their assessments of each of the four factors conform with the relevant outcome,⁴⁰ other courts’ assessments appear to show conflicts with their assessments of each of the four factors.⁴¹ In other words, there have been court decisions in which courts have assessed the use in relation to each of the factors to be fair, but concluded that there was no fair use.⁴² The converse has also occurred: a court appears to have assessed the use in relation to each of the factors to be unfair, yet concluded that there was fair use.⁴³ Nimmer, therefore, says “it is largely a fairy tale to conclude that the four factors determine the resolution of concrete fair use cases”.⁴⁴ Even at the level of the United States supreme court, there has been a decision where the court was split straight down the middle.⁴⁵

Proponents of fair use, such as Samuelson, are acutely aware that critics of fair use point to its indeterminacy and uncertainty, and its failure to satisfy the three-step test.⁴⁶ Thus, in order to counter those criticisms, it is suggested that the fair-use case law “falls into numerous predictable patterns ... several meaningful ‘clusters’ of fair use cases”.⁴⁷ Fair use, in practice, is said to pertain to “certain special cases”.⁴⁸ If that is indeed the case, would it not provide greater certainty to specifically enumerate those “special cases” in legislation, in the manner that fair dealing does? That should provide more certainty than having matters resolved by

³⁷ Nimmer “‘Fairest of them all’ and other fairy tales of fair use” 2003 *Law and Contemporary Problems* 263 280.

³⁸ Lessig *Free Culture: The Nature and Future of Creativity* (2004) 187.

³⁹ Nimmer (n 37) 281. This phenomenon, so-called stampeding, has been claimed by Beebe to “generally” not exist (Beebe (n 35) 590), but he also admits that the application of the four-factor test has become formulaic (Beebe 562).

⁴⁰ Nimmer (n 37) 282.

⁴¹ Nimmer (n 37) 282-3.

⁴² Nimmer (n 37) 282-3.

⁴³ Nimmer (n 37) 283.

⁴⁴ Nimmer (n 37) 282.

⁴⁵ Nimmer (n 37) 282.

⁴⁶ Samuelson and Hashimoto (n 32) 1-2.

⁴⁷ Samuelson and Hashimoto (n 32) 6. It is probably also the source for the same claim in the Deloitte Report (n 8) 42.

⁴⁸ Samuelson and Hashimoto (n 32) 7.

litigation, which necessarily is highly fact-specific, as a court can only deal with the facts of the matter before it. In fact, it is conceded that the United States' courts best avoid "more categorical" rulings, by, for example, holding that "posting book chapters online is per se fair use".⁴⁹

In fact, the contrary view has been strongly expressed about fair use. It has been claimed that "the doctrine of fair use is impervious to generalization and that attempts to derive its meaning from careful analysis of specific cases are futile".⁵⁰ Of course, if there is uncertainty, it increases the likelihood of litigation, which, arguably, makes fair use a more costly and inefficient system. The evidence would suggest that it is the latter view that may be a more accurate reflection of the true state of affairs concerning fair use. It is, no doubt, because of this concern that the Deloitte Report seeks to point out that government regulation, having to periodically update fair-dealing exceptions, is not costless.⁵¹ Rather tellingly, the Deloitte Report is careful not to make a definitive statement, namely, that such costs would be greater than the costs of a fair-use approach.⁵² The authors of the report probably hoped that that is the conclusion the reader of the report would come to. Before considering the evidence, it should be noted that, to the extent that a form of exceptions necessarily involves costs, the costs of government regulation are socially preferable as those costs are, effectively, spread over society, whereas under fair use the costs of litigation have to be borne by the relevant litigating parties. Fair use requires private litigation to determine the permissible exceptions to copyright. Of course, the extent that the outcome of private litigation, which is necessarily fact specific, and unpredictable, can – and ought to – serve to establish general exceptions, is questionable, and considered further below.

It is not difficult to see why proponents of fair use have such a tough time convincing us that fair use will not result in greater uncertainty, and concomitant increased litigation. While this is not an empirical study, it is necessary to comment on the difference in the respective levels of litigation in the United States and the United Kingdom. This is because proponents of fair use are eager to placate concerns about increased litigation, as a consequence of the greater uncertainty. There is evidence to indicate that fair use may result in increased litigation, which should not come as a surprise, given the increased uncertainty. An empirical study on United States fair-use cases between 1978 and 2005 (namely, a period of 28 years) done by Beebe indicates that there were 215 federal cases, which yielded 306 judgments (opinions).⁵³ During the same time period there were 23 reported cases in the United Kingdom concerned with fair dealing. Of course, the United States' economy is larger, and it is necessary to factor that into the comparison. According to the World Economic Forum, in 2017 the United States' share of the global economy was 24.32 per cent and the United Kingdom's was 3.85 per cent.⁵⁴ That makes the United States economy roughly 6.32 times bigger than the United Kingdom economy, a ratio that can be assumed to have remained relatively similar over the aforementioned period. All things being equal, and on the assumption that the fair-use approach does not result in increased litigation, we would expect there

⁴⁹ Samuelson and Hashimoto (n 32) 19.

⁵⁰ Sookman and Glover (n 27) 151 quoting Parchomovsky *et al* "Fair use harbors" 2007 *Virginia Law Review* 1483 at 1484-1486.

⁵¹ the Deloitte Report (n 8) xi.

⁵² the Deloitte Report (n 8) xi.

⁵³ Beebe (n 35) 565.

⁵⁴ <https://www.weforum.org/agenda/2017/03/worlds-biggest-economies-in-2017/> (14-06-2018).

to be about 34 fair-dealing cases in the United Kingdom, and not 23 cases. However, the level of litigation in the United Kingdom is significantly lower than that in the United States, by almost one third.

In fact, another study by Nimmer lists at least 60 cases in a period of just eight years (1994-2002); interestingly, this period followed the United States' supreme court's fourth fair-use decision in 1994.⁵⁵ The Deloitte Report also indicates that there were 60 cases in a period of seven years (2009-2016).⁵⁶ While the Deloitte Report seeks to reduce the significance of the number of cases, by stating that only six proceeded to a full trial,⁵⁷ it clearly shows that the fair-use system results in a consistently greater number of cases, which proponents of fair use find difficult to deny.

The risk associated with the uncertainty created by conflicting court decisions is not simply theoretical (or statistical), as the United States' legislature has had to amend section 107 of the United States' Copyright Act to clarify confusion caused by decided cases. For example, congress amended the wording of the section in 1992 to provide that the fact that the relevant copyright work is unpublished is not dispositive of the issue of whether there may be fair use in respect of such a work.⁵⁸ Moreover, as a consequence of the prevailing uncertainty, industry guidelines have been developed to provide the necessary certainty that businesses require.⁵⁹

Even if there is a threat of increased litigation under a fair-use system, we are urged not to be concerned about this; courts in foreign jurisdictions "will be able to rely upon the established principles of fair use in the body of the United States law, along with existing precedents surrounding the fair-dealing exceptions".⁶⁰ Given the poor track record of fair use in the United States, this appears to be the kind of generosity we would be well-advised to decline. Moreover, there are significant differences between our system of litigation and that which exists in the United States. A failure to appreciate these differences may have ramifications that are difficult to predict. Thus, even if, for argument's sake, fair use may be working well in the United States of America, it is not a forgone conclusion that it will similarly work well in South Africa, which has a different system of litigation. For example, in United States civil litigation, a successful litigant is generally not allowed to recover its costs from the losing litigant.⁶¹ In other words, costs tend not to follow the event. Moreover, in copyright litigation, if the plaintiff copyright owner seeks damages for infringement, either party to the litigation may demand a trial by jury.⁶² Notwithstanding the problems created by disproportionately large damages awards (even outside awards of punitive damages),⁶³ juries, as finders of fact, are considered to be desirable because they ensure that there is a form of democratic participation in the determination of copyright disputes.⁶⁴ Juries must be impartial and, due to random selection, must consist of a cross-section of the population.⁶⁵ This should be borne in mind when considering the following issue.

⁵⁵ Nimmer (n 37) 267 and 278.

⁵⁶ the Deloitte Report (n 8) xi.

⁵⁷ the Deloitte Report (n 8) 46.

⁵⁸ LaFrance (n 14) 317.

⁵⁹ Sookman and Glover (n 27) 159.

⁶⁰ the Deloitte Report (n 8) 47.

⁶¹ Bonfield *American Law and the American Legal System* (2006) 66.

⁶² LaFrance (n 14) 307.

⁶³ LaFrance (n 14) 349.

⁶⁴ Bonfield (n 61) 82.

⁶⁵ Bonfield (n 61) 71.

4 *Who should determine public policy?*

While the principal claimed advantage of fair use is its flexibility and responsiveness, it is important to be mindful of the fact that it is a *post hoc* and *ad hoc* system, and does not provide a level of certainty comparable to a fair-dealing system. This point is acknowledged by the Deloitte Report when it states that “as an ad hoc analysis, even a finding of fair use in one case has no bearing on whether another use, even of the same work, will be considered fair”.⁶⁶ It, thus, begs the question of how such a system is more efficient and how it facilitates creativity when it creates inherent uncertainty. Any perceived positive effect on creativity, to the extent that such exists, is, at best, coincidental.

As already noted, most stakeholders desire certainty, and that is not what fair use provides. This could result in disruptions to licensing arrangements and other possible uses of copyright.⁶⁷ Unscrupulous users of copyright content could easily seek to use the uncertainty created by fair use, and the threat of litigation, to avoid paying royalties, or to use it as a wedge to reduce the royalty payments.⁶⁸ Companies like Google and YouTube could easily use – and, arguably, have used – the leverage which fair use provides, because of uncertainty, to impose royalty rates on copyright owners on a “take it or see you in court” basis. For example, it may, in part,⁶⁹ account for the so-called value gap, namely, the fact that YouTube undercompensates copyright owners in the music industry, while it earns significant revenue from copyright content uploaded to its platform.⁷⁰

How much room for negotiation would fair use (along with its attendant litigation costs) provide South African copyright owners vis-à-vis Google in relation to its YouTube service? Interestingly, when New Zealand rejected fair use in 2002, one of the specific concerns was the fragility of its market, given its small size.⁷¹ The size of the Canadian market was also raised as a reason for rejecting fair use because “overbroad exceptions and limitations can have adverse effects on the ability to earn adequate remuneration from creative endeavours”.⁷² The introduction of fair use does not simply involve changing the text of our legislation; it could have serious economic consequences for our copyright owners, artists and musicians, who the government claims need more protection, but would potentially expose them to increased risk of litigation, and lower levels of remuneration.

All the arguments in favour of fair use are premised on a fundamental, underlying assumption, namely, that courts will always get matters of policy right, and that important issues that require clarification will be litigated. Even if the finding of a court is potentially applicable to other comparable situations, fair use will not necessarily produce the advantages that it is claimed to offer over fair dealing. Judges do not choose the cases that come before them. The effect of fair use is to allow policy decisions to be determined by individual litigants and the courts, which is “a far less effective, less democratic and less principled way to approach

⁶⁶ the Deloitte Report (n 8) 24-25.

⁶⁷ Sookman and Glover (n 27) 145.

⁶⁸ Sookman and Glover (n 27) 154-155.

⁶⁹ Another reason for the value gap is said to be uncertainty caused by the safe-harbour provision in the Digital Millennium Copyright Act 1988, which introduced section 514 into the US Copyright Act.

⁷⁰ Lawrence “Addressing the value gap in the age of digital music streaming” 2019 *Vanderbilt Journal of Transnational Law* 511 514; Bridy “The price of closing the ‘value gap’: how the music industry hacked EU copyright reform” 2020 *Vand J Ent & Tech L* 323 325.

⁷¹ Sookman and Glover (n 27) 147.

⁷² Sookman and Glover (n 27) 164.

copyright reform”.⁷³ First, a court can only determine the particular matter, with reference to the specific parties, before it. It is trite that bad cases make bad law. The Deloitte Report itself recognises this risk when it laments that the United States supreme court in the *Harper & Row Publishers* case⁷⁴ “may have erred in referring to [the] effect of the use upon the potential market for or value of the copyrighted work” as the “most important element of fair use”.⁷⁵ All that can be said about this lamentation is that such a consequence is an inherent risk associated with fair use.

Second, matters that need clarification may never be ventilated in court because of inequality of bargaining power, and the costs of litigation, which may result in socially-undesirable outcomes. For example, should a dispute arise, one of the disputing parties, due to its precarious finances, may decide to avoid costly litigation, and settle on a basis that may be less favourable to its interests, as a consequence of the uncertainty concerning the particular use of copyright material. More importantly, as far as the alleged responsiveness of fair use to technological developments is concerned, given the congested court rolls in South Africa, and the possibilities of appeals, it could be years before there is any legal certainty about a particular use of a copyright work. The required responsiveness to technological advancements and greater certainty can be achieved if the department of trade and industry ensures that there is a properly constituted, functioning, and staffed statutory advisory committee, which is provided for in terms of section 40(1) of the Copyright Act. Such a committee can initiate a review of the statutory provisions, whenever it considers it appropriate.

Third, beyond the concern that two courts can come to different conclusions on questions of public policy, and that the outcome of litigation is not predictable, there is the fundamental concern that fair use amounts to giving the courts – with all due respect to judges – the right to determine public policy in the realm of copyright law.

The fact that the legislation, under fair use, does not provide a *numerus clausus* of permitted uses necessarily means that the courts act in a quasi-legislative capacity. There is no escaping from that fact, as proponents of fair use seek to do.⁷⁶ Since its first legislative enactment in the United Kingdom Statute of Anne,⁷⁷ “[c]opyright has always been concerned with promoting the public interest”.⁷⁸ Accordingly, matters of policy should, ideally, be determined by the legislature. It is not appropriate to relegate the legislature to the position of simply fixing judicial errors concerning copyright policy, as proponents of fair use are comfortable to do. In summary, what is the constitutional basis for giving the courts the competency to determine copyright policy within our constitutional framework? Proponents of fair use need to provide the basis for such an extraordinary step.

5 *Fair use and South Africa’s treaty obligations*

Fair use, or any form of open-ended exception, may cause South Africa to breach its treaty obligations under the Berne Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights, in particular, the so-called “three-

⁷³ Sookman and Glover (n 27) 163.

⁷⁴ *Harper & Row Publishers, Inc v Nation Enters* 1985 471 US 539.

⁷⁵ the Deloitte Report (n 8) 32-33.

⁷⁶ the Deloitte Report (n 8) 54.

⁷⁷ 1710, 8 Anne c 19.

⁷⁸ the ALRC Report (n 7) 100.

step test”.⁷⁹ The three-step test, contained in article 9(2), became part of the Berne Convention following the 1967 revision session held in Stockholm, Sweden.⁸⁰ Originally, article 9(2) pertained only to exceptions to the reproduction right granted to copyright owners,⁸¹ but article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights extended its scope to all the exclusive rights of a copyright owner.⁸² Article 13 simply repeated the three-step test, apart from expanding the scope of exceptions to all exclusive rights. Thus, article 9(2) of the Berne Convention (as extended by article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights) is considered to be the general limitation provision to the exclusive rights provided by copyright, and is the international standard, or norm, for limitations.⁸³ South Africa is a signatory to both the Berne Convention⁸⁴ and the Agreement on Trade-Related Aspects of Intellectual Property Rights.⁸⁵

The three-step test provides that the exclusive rights of a copyright owner can be limited, provided the limitations satisfy the following requirements: they are confined to certain special cases; they do not conflict with the normal exploitation of the copyright work; and they do not unreasonably prejudice the legitimate interests of the copyright owner.⁸⁶ Exceptions to the exclusive rights of a copyright owner may be of two forms, namely, with or without compensation to the relevant copyright owner. Where the exceptions are without compensation to the copyright owner, the exceptions “necessarily will be very limited” because they would, almost invariably, prejudice the legitimate interests of the copyright owner.⁸⁷ Exceptions with compensation would take the form of compulsory licences.⁸⁸

As the name suggests, the steps of the three-step test are three distinct tests, and have to be applied sequentially, in the specified order, to the extent required.⁸⁹ The requirements of the three-step test are cumulative: if the requirements of either step one or step two have not been satisfied, it is not necessary to consider any subsequent

⁷⁹ Sookman and Glover (n 27) 146, 147 and 160-161.

⁸⁰ Samuelson and Hashimoto (n 32) 3.

⁸¹ It is said to be in the spirit of the Berne Convention to have the owner of copyright be a natural person. Therefore, it refers to the “author” as the person who is granted the exclusive rights. It is, however, recognised that member states can have different national approaches to copyright authorship and ownership, which must be respected. In the glossary it is, therefore, noted that the author, as referred to in the Berne Convention, denotes the person that is entitled to the economic and moral rights in relation to a copyright work (Ficor *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* (2003) 32, 89, 268, 300). In South Africa, section 21 of the Copyright Act provides that the author shall be deemed the owner of the economic rights in relation to a copyright work, subject to several exceptions. References to the “author” in the context of international law shall, thus, be construed as the copyright owner in the South African context.

⁸² Newby “What’s fair here is not fair everywhere: does the American fair use doctrine violate international copyright law?” 1999 *Stan L Rev* 1633 1648; Samuelson and Hashimoto (n 32) 10; Jehoram “Restrictions on copyright and their abuse” 2005 *EIPR* 359 361.

⁸³ Dworkin “Exceptions to copyright exclusivity: is fair use consistent with article 9.2 Berne and the new international order” 2000 *International Intellectual Property Law & Policy* 66-1 66-20.

⁸⁴ World Intellectual Property Organisation “WIPO-administered Treaties” http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15 (accessed 20-05-2020). https://wipolex.wipo.int/en/treaties/ShowResults?start_year=ANY&end_year=ANY&search_what=C&code=ALL&treaty_id=15 (30-12-2020).

⁸⁵ World Trade Organization “South Africa and the World Trade Organisation” https://www.wto.org/english/thewto_e/countries_e/south_africa_e.htm (30-12-2020).

⁸⁶ a 9(2) Berne Convention, as read with a 13 TRIPs Agreement.

⁸⁷ Dworkin (n 83) 66-5.

⁸⁸ Dworkin (n 83) 66-5.

⁸⁹ Jehoram (n 82) 361; Lucas “For a reasonable interpretation of the three-step test” 2010 *EIPR* 277 281.

step; the three-step test will not have been satisfied in those circumstances.⁹⁰ In fact, it has been suggested that the three steps are arranged in a hierarchy of their respective importance, which makes the first requirement the most important.⁹¹

The first requirement, namely, that exceptions have to be confined to special cases, will be the subject of specific enquiry, as it is said to be the requirement that fails to be satisfied by fair use. While it should by now be obvious that the fair-dealing approach provides greater certainty than the fair-use approach,⁹² the issue is really whether fair use is, notwithstanding its open-ended nature, sufficiently certain to satisfy the first requirement of the three-step test, namely, that exceptions be confined to certain special cases. It is “quite questionable” whether fair use satisfies the first requirement of the three-step test.⁹³ The purpose of the first requirement is to provide copyright owners and third parties with legal certainty.⁹⁴ It has been submitted that the first step of the three-step test embodies two requirements, namely, an exception must be for a specific purpose, and must serve a clear (“special”) public purpose.⁹⁵ In other words, a broad, open-ended exception will not satisfy the first step of the test.⁹⁶ This position appears to have been recognised by a panel of the Agreement on Trade-Related Aspects of Intellectual Property Rights Dispute Settlement Body (World Trade Organisation Panel),⁹⁷ which indicated that an exception must provide sufficient certainty and be clearly and specifically defined.⁹⁸

The dispute before the World Trade Organisation Panel indirectly concerned the effect and import of the first step of the three-step test. However, as will become clear, the dispute is also illustrative of the *realpolitik* at play concerning the United States and its ability to act unilaterally, without significant sanction, and raises serious concerns about the legality of aspects of United States’ copyright law, particularly fair use. The European Union, on behalf of its composers, initiated the dispute and claimed that, as a consequence of the United States’ business exception (see below), the United States was in violation of its obligations under article 9(1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights, which requires that signatories to the agreement comply with the Berne Convention (other than the obligation in respect of moral rights).⁹⁹

At issue in the aforementioned dispute was the amended section 110(5) of the United States’ Copyright Act, which placed limitations on the exclusive rights granted to copyright owners pursuant to section 106 of the United States’ Copyright Act. More particularly, it concerned the exceptions to the performance rights of composers. Pursuant to the so-called “business exception” in section 110(5)(B), in effect, an exception was granted in respect of the performance rights of composers in non-dramatic musical works embodied in radio or television broadcasts that were transmitted in the majority of restaurants, cafes and retail businesses. No compensation was paid to composers for the lost revenue due to the business exception. In essence, the European Union’s claim was that the business exception

⁹⁰ Jehoram (n 82) 361; Lucas (n 89) 281.

⁹¹ Jehoram (n 82) 361.

⁹² Rostoll “Copyright in news?” 2017 *TSAR* 425 437.

⁹³ Lucas (n 89) 278-9. See also Jehoram (n 82) 360.

⁹⁴ Jehoram (n 82) 360.

⁹⁵ Jehoram (n 82) 361.

⁹⁶ Jehoram (n 82) 361.

⁹⁷ Panel of the World Trade Organisation, United States a 110(5) of the Copyright Act (June 15, 2000) WT/DS160R (Panel Decision).

⁹⁸ Lucas (n 89) 278.

⁹⁹ Panel Decision (n 97) 7.

was incompatible with the three-step test, and that the United States should amend its legislation to bring it into conformity with its obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights.¹⁰⁰

The World Trade Organisation Panel agreed with the European Union, and it concluded that the business exception was in contravention of the Agreement on Trade-Related Aspects of Intellectual Property Rights.¹⁰¹ As far as the first step of the three-step test is concerned, the World Trade Organisation Panel had the following to say:¹⁰²

“The term ‘special’ connotes ‘having an individual or limited application or purpose’, ‘containing details; precise, specific’, ‘exceptional in quality or degree; unusual; out of the ordinary’ or ‘distinctive in some way’. This term means that more is needed than a clear definition in order to meet the standard of the first condition. In addition, 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. This suggests a narrow scope as well as an exceptional or distinctive objective. To put this aspect of the first condition into the context of the second condition (‘no conflict with a normal exploitation’), an exception or limitation should be the opposite of a non-special, ie, a normal case.”

It is difficult to see how fair use – an open-ended standard for exceptions to copyright protection – could, in the light of the aforementioned, constitute a special case, as required by the first step of the three-step case. In fact, in the past, “Australia, New Zealand and the United Kingdom have cited international treaty obligations as one of the reasons for not adopting a fair use system”.¹⁰³ No doubt, given the problem of the language of the first step of the three-step test, it has even been suggested that the United States fair use is not itself a copyright exception “within the meaning of the Berne three-step test, and hence does not run afoul of it”.¹⁰⁴ In other words, as the United States fair-use provision provides for an open-ended standard, and no specific exemptions, it does not conflict with the three-step test, because it creates no actual exemptions. While this type of sophistry may seem convincing, it avoids dealing with the consequences of this open-ended standard. That consequence is neatly described by Dworkin when he says that the fair-use doctrine “has to be applied by the courts in a fact intensive way and on a case-by-case basis. The individual approaches and underlying attitudes of some judges in such exercises are unlikely to be as consistent as specific legislative defenses.”¹⁰⁵ In other words, this makes the United States’ system of copyright exceptions distinctly ad hoc, when compared to a fair-dealing approach.

As indicated, there is no peer-reviewed research in South Africa indicating why fair use, as proposed by the bill, would be consistent with South Africa’s obligations under the Berne Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights. Given the clear language of the three-step test, and how different our legislative history and systems of litigation are from those of the United States, it is submitted that there has to be a proper legal basis for the introduction of fair use in South Africa. That simply has not been provided. It is not good enough to rely on the fact that its existence under United States law is a basis

¹⁰⁰ Panel Decision (n 97) 7.

¹⁰¹ Panel Decision (n 97) 69.

¹⁰² Panel Decision (n 97) 33.

¹⁰³ Sookman and Glover (n 27) 162.

¹⁰⁴ Samuelson and Hashimoto (n 32) 8. This is the view of Hughes, and not that of the authors.

¹⁰⁵ Dworkin (n 83) 66-12.

for its adoption in South Africa. If anything, the United States' attitude to the Berne Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights is, arguably, selective and self-serving.

Briefly put, the United States' position concerning whether its fair-use approach complies with the three-step test has been nothing more sophisticated than simply asserting that its system of fair use is compliant with its obligation under article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights.¹⁰⁶ Compared to other developed countries, the United States had eschewed acceding to the Berne Convention for over a century, and its position was anomalous, until it finally joined the Berne Convention in 1989.¹⁰⁷ The United States reluctantly acceded to the Berne Convention: while the United States insisted that developing countries should, via the Agreement on Trade-Related Aspects of Intellectual Property Rights, give effect to the minimum level of copyright protection provided for by the Berne Convention, these countries, in turn, pointed out the United States' lack of consistency – the United States itself was not a signatory to the Berne Convention. Thus, the United States was not left with much of a choice: if its insistence that developing countries give effect to the Berne Convention was going to be tenable, it had to accede to the Berne Convention.¹⁰⁸

Of course, a mere assertion of compliance, together with the fact that the United States has not changed its fair-use approach to copyright exceptions, following its accession to the Berne Convention, does not provide proof of its compatibility with the three-step test. The attempts at justifying why fair use is compatible with the three-step test are unconvincing, ex post facto rationalisations, with the strongest argument being that there has been no direct World Trade Organisation challenge (or “frontal challenge”¹⁰⁹) to the United States' fair-use approach.¹¹⁰ To suggest that the absence of a World Trade Organisation challenge to the legality of the United States' fair-use approach is proof of its compatibility with the three-step test amounts to the logical fallacy of affirming the consequent.¹¹¹ In effect, the argument takes the following form: If the United States' fair-use approach is compatible with the three-step test (that is, it is legal), it implies that there will be no World Trade Organisation challenge to its legality (because it will be futile to question, and challenge, its legality). As there has been no direct World Trade Organisation challenge to the United States' fair-use approach, it must be because it is compatible with the three-step test. This type of argument is clearly fallacious. As a matter of logic, there could be other reasons why there has been no direct World Trade Organisation challenge to the United States' fair-use approach.

There is, in fact, one very good reason why there has been no direct World Trade Organisation challenge to the United States' fair-use approach, namely, realpolitik. It has been suggested by Hughes that “it would be ‘politically disastrous’ for a World Trade Organisation member to make a ‘frontal challenge’ to the US fair use doctrine”.¹¹² The fact that there has been no direct World Trade Organisation challenge to the United States' fair-use approach serves to demonstrate the United States' global influence, rather than suggesting that it complies with the three-step

¹⁰⁶ Newby (n 82) 1649.

¹⁰⁷ Samuelson and Hashimoto (n 32) 4.

¹⁰⁸ Jehoram (n 82) 360 n 6.

¹⁰⁹ Samuelson and Hashimoto (n 32) 10 n 93.

¹¹⁰ See *eg* Samuelson and Hashimoto (n 32) 13.

¹¹¹ Warburton *Thinking from A to Z* (2007) 6-7.

¹¹² Samuelson and Hashimoto (n 32) 10 n 93.

test. Its accession to the Berne Convention was reluctant, and it disregarded aspects of the Berne Convention that it found unsuitable. For example, it used its political influence to insist that the obligation to protect moral rights pursuant to article 6*bis* of the Berne Convention be excluded from the Agreement on Trade-Related Aspects of Intellectual Property Rights.¹¹³ The United States also seems reluctant to jettison its practice of copyright registration, which it had to abandon on acceding to the Berne Convention. In effect, United States copyright owners are still burdened with a registration requirement in order to institute copyright infringement proceedings, whereas foreign copyright owners do not have to do so.¹¹⁴

Even in relation to the Agreement on Trade-Related Aspects of Intellectual Property Rights, the United States' position displays a contradictory approach; despite being instrumental in its adoption, it "is quite prepared to undermine its own creation for the sake of some political convenience".¹¹⁵ For example, following the World Trade Organisation Panel's finding that the United States' section 110(5)(B) business exception was incompatible with the three-step test, and its obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights, the United States, despite an undertaking to remedy its infringement, did not amend the offending statutory provision. Instead, the United States agreed to arbitration to determine the compensation payable for future losses, which, at the time of the award, was determined to be \$1.1bn.¹¹⁶ Thus, rather than changing its law, the United States taxpayer has to make an annual payment to the European Union, which payment "is now the yearly ransom for the maintenance of the infringing business exception in the American law".¹¹⁷

6 Conclusion

Given the concerns about fair use, it certainly requires a comprehensive justification from those who advocate for, and support, the introduction of fair use in South Africa. These concerns have never been acknowledged, and satisfactory counterarguments to these concerns have not been provided. Of course, South Africa could rely on a crude, secondary realpolitik rationalisation. We could adopt the fair-use approach on the basis that as it is unlikely that the United States will be sanctioned for its violation of its treaty obligations,¹¹⁸ and that we could take sanctuary in its shadow. It is suggested that this is not the cavalier attitude that we should be taking to our international obligations, given that fair use does not offer the claimed benefits, and may have unintended consequences in its application.

Given the problems with fair use and the three-step test, it is clear that advocates for fair use are keen to point out that fair use is more responsive to technological changes, as legislative reform is too slow to respond. Of course, this is the line of argument that tends to be promoted by its beneficiaries: technology companies. They have paid for reports, such as the Deloitte's Report, urging the adoption of fair use in New Zealand. This line of argument has even found its way into law commission reports on copyright reform:¹¹⁹ "The ALRC considers that it is not sufficient that

¹¹³ Lucas (n 89) 279.

¹¹⁴ LaFrance (n 14) 301-303.

¹¹⁵ Jehoram (n 82) 362.

¹¹⁶ Jehoram (n 82) 362.

¹¹⁷ Jehoram (n 82) 362.

¹¹⁸ Sookman and Glover (n 27) 162 n 73.

¹¹⁹ the ALRC Report (n 7) 105.

innovative businesses ‘operate free of active threats of litigation’. They should be able to operate confident in the knowledge that they may use copyright material, if that use is fair.¹²⁰

Needless to say, this approach is a licence for technology companies to ignore, prima facie, the rights of copyright owners, as – under fair use – it will be left to the courts to determine whether a particular use is fair. This attitude will expose copyright owners to the flagrant abuses of their rights, as most of them simply do not have the resources to challenge the infringement of their rights and the risks associated with costly litigation that is central to a system of fair use. This is a fact which the Australian law reform commission recognises, but is prepared to discount.¹²¹ The consequences of the deference shown by the Australian law reform commission to the technology companies – imbibing the move-fast-and-break-things attitude – has now been recognised as creating unacceptable societal imbalances.¹²² The tide has since turned against big tech.¹²³

It is clear that the European Union is now trying to claw back ground against technology companies, like Google, because, inter alia, it missed the early warning signs about Google’s exploitation of the rights of copyright owners for its own benefit. An example of this is the value gap. In order to try to address the value gap, the European Union has introduced the Digital Single Market Directive,¹²⁴ in particular, article 17 thereof. Despite much criticism of this move by the European Union, the United States Copyright Office has also recognised the fact that there has been inappropriate protection given to technology companies pursuant to the safe-harbour provisions of section 512 of the American Copyright Act, which was introduced by the Digital Millennium Copyright Act 1998.¹²⁵

More importantly, fair dealing does not necessarily result in copyright law being less responsive to new challenges posed by technology. Whether the law is responsive to changing needs depends more on a well-functioning custodianship of copyright law by the executive and legislative arms of the state. In fact, legislative amendments can be brought about more quickly than a particular matter can be resolved through litigation, which is, in any event, necessarily limited to the particular facts of the case at hand. Then there is the issue of whether it is appropriate for the development of copyright policy to be left to the devices of particular litigants, with their narrow, self-serving interests. In other words, private litigants should not be determining copyright policy. As already mentioned, exceptions to copyright involve issues of public policy, and, it is not appropriate that decisions of that nature be left to judges to make, and the agenda should not be set by private litigants. Issues of public policy must, ideally, involve public participation and debate, and be approved at the appropriate legislative level in a democratic society, namely, parliament.¹²⁶

¹²⁰ the ALRC Report (n 7) 105.

¹²¹ the ALRC Report (n 7) 115.

¹²² Taneja and Hemant “The era of ‘move fast and break things’ is over” *Harvard Business Review* (22-01-2019), <https://hbr.org/2019/01/the-era-of-move-fast-and-break-things-is-over> (1-01-2021).

¹²³ Hern and Alex “New UK tech regulator to limit power of Google and Facebook” *The Guardian* (27-11-2020), <https://www.theguardian.com/technology/2020/nov/27/new-uk-tech-regulator-to-limit-power-of-google-and-facebook> (01-12-2020).

¹²⁴ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the digital single market and amending Directives 96/9/EC and 2001/29/EC.

¹²⁵ Rechartd “Balance lost: the US Copyright Office finds US copyright safe harbour provisions have been tilted askew” 2020 *Journal of Intellectual Property Law & Practice* 571.

¹²⁶ Lucas (n 89) 282.

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