

**Ms J Fubbs, Chairperson: PC on Trade and Industry**

**For Attention: Mr A Hermans, [ahermans@parliament.gov.za](mailto:ahermans@parliament.gov.za)**

**PO Box 15**

**Parliament**

**Cape Town, 8000**

**Cape Town, 7 July 2017**

## **Written comments on the Copyright Amendment Bill 2017**

Dear Mr. Hermans:

Please find attached the comments prepared by UCT's IP Unit (faculty of law) on the proposed Copyright Amendment Bill 2017. We thank you for the opportunity to share our views on the Bill.

Kind regards,



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## **COPYRIGHT AMENDMENT BILL 2017**

### **COMMENTS**

7 July 2017

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## Introduction

We welcome this opportunity to provide comments on the proposed Copyright Amendment Bill 2017 (the “Bill”). As with our comments concerning the 2015 Copyright Amendment Bill, we have, in preparation for this submission, again conducted an in-depth collaborative analysis carried out by a group of leading international and domestic experts and scholars working in the field of copyright law.<sup>1</sup>

To start with, we would like to quote a paragraph from our 2015 submission that hasn’t lost its relevance two years later:

*It is important to recognise that an assumption that if some protection is good for creativity, more is even better, is not only obsolete but potentially harmful, especially in the developing country context. In the same vein, it is now clear that global one-size-fits-all approaches to issues concerning copyright law are often ill-suited and that, instead, we need context appropriate and tailored approaches to copyright law that are responsive to local conditions. All this, together with the unprecedented opportunities for commercial and non-commercial creativity brought about by digital technologies, requires a creativity-friendly re-calibration of our copyright law as much of digitally-enabled creativity is now, at least partially, based on copying. Currently, there is a significant gap between our outdated copyright laws in the books and the way creativity actually happens “on the streets”. This is especially true as far as non-commercial creativity is concerned. This is worrisome if one considers that probably more than 99% of copyrighted works created today are created by individuals who create without any commercial purpose. Balancing features such as copyright exceptions and limitations play a key role in this context. Moreover, one needs to be mindful of the growing perception of creatives in South Africa that the current copyright system unjustly favours middlemen and multinationals.*

This submission aims to speak to most of the issues introduced by the Bill, and where appropriate suggestions and model language are provided for further improvement.

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<sup>1</sup> Scholars and experts involved in the process included: Prof Caroline Ncube (UCT); Prof Sean Flynn (American University, Washington DC); Prof Peter Jaszi (American University, Washington DC); Prof Coenraad Visser (UNISA) Dr. Andrew Rens (Duke University); Ms Denise Nicholson (WITS); Ms Eve Gray (UCT), Mr Ben Cashdan (Johannesburg) and Mr Desmond Oriakhogba (UCT). Some of these contributors have also submitted their own submissions, and not all contributors commented on every part of the bill nor do they necessarily agree with every comment included herein.

In addition, we wish draw the Committee's attention to the following important written submissions submitted by other stakeholders:

- UNISA
- WITS Library
- The South African Council of the Blind / SA Disability Alliance
- The Freedom of Expression Institute
- South African national Editors Forum (SANEF)
- EndCode
- The South African Screen Federation (SASFED)
- amaBhungane Centre for Investigative Journalism
- American University, Washington D.C.
- The Documentary Filmmakers Association South Africa (DFA)
- Wikimedia South Africa
- Fire Worx Media
- Big World Media
- Tribeca Film Institute
- Library Copyright Alliance
- Loyola Law School

We remain available to attend any consultations to elaborate on any of the issues raised in this document to support the finalisation of the Copyright Bill.

In closing, we once again wish to commend the DTI and Parliament on a transparent and open stakeholder consultation process and their desire to tackle the difficult task of amending our Copyright Act.

## General Comments

We note that the 2017 Bill is, as far as the drafting is concerned -- and subject to our specific comments below -- a marked improvement to the 2015 Copyright Amendment Bill. Some technical drafting errors do, however, remain. In particular, in many sections of the Bill, the word "author" is used, sometimes with a list of others, instead of the term "rights owner" being used.

In our comments concerning the 2015 Bill, we expressly welcomed the proposed introduction of a more flexible and open fair use provision. We note with concern that the lawmaker has since decided to significantly reduce the provision's utility by limiting its applicability to a closed list of permitted purposes. We strongly urge the lawmaker to reconsider this decision and amend s12 of the 2017 Bill in line with our suggestions in this submission.

## Specific Comments

### *Definitions, clause 1 of the Bill / s1 of the Act*

#### **"Commercial"**

The Bill now contains the following definition for **'commercial'**:

*'Commercial' means to obtain direct economic advantage or financial gain in connection with the business or trade of the user of the work in question.*

We welcome the introduction of this definition of "commercial". Through focusing on *direct* commercial advantage or financial gain, the proposed definition appropriately guards against applying commercial conduct standards (with heightened penalties, reduced

exceptions, etc.) to user generated content, created with no intent for financial gain of the user. The proposed definition is similar to that of the Singapore Copyright Act, Chapter 63, Part V, Division 5, S.136 (6B) (“a person does an act for the purpose of obtaining a commercial advantage if the act is done to obtain a direct advantage, benefit or financial gain for a business or trade carried on by him.”).

### “Person with a disability”

The Bill now defines a ‘person with a disability’ to

*‘include a person who has a perceived or actual physical, intellectual, neurological or sensory impairment which, as a result of communication, physical or information barriers, requires an accessible format copy in order to access and use a work;’*

This definition still appears unnecessarily complex, even though the proposed definition is an improvement when compared to the definition contained in the 2015 Bill. The first part of the current definition requires a "physical, intellectual, neurological or sensory impairment" and the second part of the same sentence refers to "communication, physical or information barriers." Courts may apply interpretive rules to require that the two different sets of criteria be read as having different meanings with unclear impacts.

A simpler definition that would be more likely to cover all those who need it may be one that returns to the definition of disability from Section 19D of the 2015 bill or crafts a new definition based on the South African Employment Equity Act<sup>2</sup>, e.g.:

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<sup>2</sup> The South African Employment Equity Act 55 of 1998 defines disability in broad terms as “people with disabilities means people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment”.

**Model language:**

*"People with disabilities" means people who have a long-term or recurring physical or mental impairment which substantially limits their ability to access and use a work without an accessible format."*

**"Technological protection measure"**

Importantly, the new definition of 'technological protection measure' (TPM) now excludes devices, technologies etc. that control access to a work for non-infringing purposes, e.g. uses permitted through copyright exceptions and limitations. This is important in serving the Bill's objective of enabling circumvention of TPMs for any non-infringing use under the user rights protected in the Bill. The definition is consistent with other laws, e.g. New Zealand's Copyright (New Technologies) Amendment Act 2008.<sup>3</sup>

*Scope of Copyright Protection, clause 2 of the Bill / s2A of the Act*

We welcome that the Bill, in s2A (1), clearly states that specific items lacking original expression (ideas, procedures, etc.) are not within the scope of copyright protection.

It is unclear whether s2A (2) is meant to afford copyright protection to non-original tables and compilations, such as databases. Whether or not non-original databases should enjoy copyright protection continues to be the subject of heated debate on the international level - and the decision to afford such protection should not be taken lightly against the

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<sup>3</sup> According to Art. 226. of New Zealand's Copyright (New Technologies) Amendment Act 2008: "TPM or technological protection measure— (a) means any process, treatment, mechanism, device, or system that in the normal course of its operation prevents or inhibits the infringement of copyright in a TPM work; but (b) for the avoidance of doubt, does not include a process, treatment, mechanism, device, or system to the extent that, in the normal course of operation, it only controls any access to a work for non-infringing purposes (for example, it does not include a process, treatment, mechanism, device, or system to the extent that it controls geographic market segmentation by preventing the playback in New Zealand of a non-infringing copy of a work)."

backdrop of the U.S.' thriving database industry in spite of (or because of) lack of copyright protection. To clarify that tables and compilations must be original to receive protection, s2A (2) could be worded as follows:

**Model language**

*"(2) Tables and compilations which, by reason of the [originality of the] selection or arrangement of their contents, constitute the author's own intellectual creation shall be protected as such by copyright."*

We welcome the inclusion of what is usually referred to as the 'merger doctrine' in s2A(4) -- the lack of copyright extended to expressions "inextricably merged with an idea such that the idea can be expressed intelligibly only in one or a limited number of ways" or "when the particular expression is directed by law or regulation." This provision would be useful in combatting any claim of copyright in labels of drugs, for example. There have been cases in other countries where drug suppliers have attempted to prevent generics from entering the market by asserting copyright in labeling requirements, even though by regulation there could be no other way to express the content of the label.

*State-funded IP, clause 3 of the Bill / s5 of the Act*

The 2017 Bill retains s5(2), which grants the government all copyright in works that are, among other things, "funded by" the state. We encourage the revision of this section of the Act for the following reasons:

Government ownership in state-funded works can be a good mechanism to facilitate the broad dissemination of and access to works that were created with taxpayers' money. This is because copyright ownership allows government to licence and distribute works openly and widely, e.g. under an open licence regime such as Creative Commons. We believe that this is the public-interest-focused intention of this provision. However, while we are in

support of the general principle behind the provision, mandating state ownership for all "funded" works strikes far too broadly, and will likely be counter to the public interest in many respects. Instead, the goals of promoting public access to government-funded works can be effected better and more efficiently through open access policies for government-funded activities, especially research. Such policies can require, as a default, that directly funded works must be subject to an open license for public use, for example through a creative commons license. Ownership is not required to meet these goals. If there is to be any ownership in government works, it should be limited to works in which the government is the true author -- i.e., in which it controls the creation of the work, not merely funds it. This can easily be accomplished by changing the 'or' to an 'and', thereby connecting funding and control, i.e.:

**Model language:**

*"Copyright shall be conferred by this section on every work which is eligible for copyright and which is made by, or funded and [emphasis added] made under the direction or control, of the state. . ."*

However, a better approach for government-funded works could be to follow the general example of other countries<sup>4</sup> and make such works part of the public domain -- i.e., exclude them from copyright protection entirely (see s2A(4)(b) of the proposed Bill for other works) - so that they are free for use by all. Again, this should be limited to works that the government has either 'authored' or 'funded and directed', not merely funded (directly or indirectly, e.g., through university support).

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<sup>4</sup> E.g., the U.S., where s105 of the 1976 Copyright Act bars protection for government works, i.e. those made by federal government employees in the course of their employment.

### *Communication to the Public, clauses 4-7 of the Bill / ss6-9 of the Act*

In general terms, we do not oppose the introduction of a “communication to the public” right; however, we wish to alert the lawmaker to the fact that since the introduction of a similar right in the EU (see Art 3 of the EU InfoSoc Directive), numerous cases have reached the Court of Justice of the European Union regarding the interpretation of that right, which is indicative of the complexity of the matter.

### *Royalties and Resale Royalty Rights, clauses 8-9 of the Bill / ss9A-9F of the Act*

While we understand the reasoning behind introducing resale royalty rights -- i.e., to ensure that creators receive their fair share in the bounty that stems from their creativity -- we recommend that the provisions on resale royalty rights throughout the Bill be omitted and reserved for further consideration.

Resale royalty rights are a peculiar exception to a general public interest and market-reinforcing rule that intellectual property rights “exhaust” after their first sale. The rule promotes used goods markets. Once a book is sold, for example, one can normally resell it without permission of or royalty to the author, e.g. in a used book store.

Resale royalties are an exception to this general rule. Where resale rights exist, they are generally limited to works of fine art that cause a particular problem with later sales being made at very high levels with no benefit to the artist. They are not universal, in part because they create new problems. To transmit downstream royalties based on subsequent purchases an institutional structure needs to be created to track further sales and in effect tax them to distribute the proceeds of the tax to artists. This is not easy to do for the grand scale of works that are traded after their first sale on a daily basis. Thus, where they occur,

resale rights are generally cabined to costly works of art that are sold through galleries and auction houses that have the capacity to administer this new tax.

But even when limited to artworks only, the resale right is not free from problems. It is a complex and probably unworkable matter to figure out how every sale of an artwork -- from a street craft to a fine art work -- will be taxed, collected and distributed. This issue appears to not be fully worked out in the present Bill.

## *Copyright exceptions and limitations – users rights*

### **Introductory remarks**

Copyright exceptions and limitations (or “users rights”) are by far the single-most important legislative tool for fairly balancing the legitimate interest of copyright owners on the one hand and users of their works on the other. It is important to remind ourselves right from the outset that copyright protection is not an end itself; rather, the overarching purpose of copyright law is to reward creators but also, perhaps even more importantly, to provide a balanced law and policy framework that maximises creativity in the country for the benefit of all people living within our borders. We now know, after decades of research in this area - that in order to maximise creativity we must put emphasis on both robust copyright protection and reliable access mechanisms, especially copyright exceptions and limitations. We also now know that in order to maximise creativity, copyright laws need to be context-specific to ensure that, for instance, developmental needs are sufficiently considered, e.g., in the area of education.

The comments and suggestions in this section are meant to assist government in finding the right balance between adequate protection and sufficient access in South Africa.

As far as copyright exceptions and limitations are concerned, lawmakers around the world follow, broadly, one of two major approaches: Some countries, especially civil law countries in continental Europe, introduced long lists of rather specific copyright exceptions and limitations into their copyright laws, often without general exceptions that apply to multiple purposes. Other countries, particularly those in the common law tradition, provide in addition to specific exceptions general fair dealing or fair use provisions that allow for “fair” use of protected works based on a balancing test to ascertain fairness. Among countries with general exceptions, there is a trend toward framing them as open to analogous purposes, e.g. through inclusion of the words “such as” or “including” before illustrative lists of fair purposes.

In this submission -- for the reasons previously shared with the portfolio committee (see the Annexure to this submission) -- we advocate for the introduction of an open-ended, flexible, and future-proof fair use provision in section 12. It is important to state upfront that even though the 2017 Bill uses the term “fair use” in section 12, the provision is -- different to the 2015 Bill -- now limited to a closed list of purposes and therefore not a true fair use provision. We urge government to return to its initial plan of introducing an open-ended provision that will not be outdated in the near future as a result of rapid technological advances. For example, the present purposes do not include machine learning, artificial intelligence, indexing and search on the Internet, and other modern purposes. Nor can it apply to purposes of the future that we cannot know at present. ...

A true fair use provision is essential to assure that South African artists and entrepreneurs can make their full potential contributions to national culture and economic life. We are aware, however, of the concern raised by some rights holders that the introduction of a broad and open-ended fair use provision would compromise their business models through eroding existing markets. We wish to emphasise, however, that under fair use the effect on the market is one of the key factors when determining whether or not the use in question is

indeed fair or not. And so-called “transformative” fair uses are, by definition, those that do not provide market substitutes for the pre-existing works that they incorporate.

### **“Fair use”, clause 10 of the Bill / s12 of the Act**

As indicated above, our main comment on the fair use provision in Section 12 of the Act is that it should include an opening clause (e.g. “such as,” “including but not limited to,”) before the list of authorised purposes so that any use of a copyright work that that is fair under the progressive test proposed by the Bill would be legal. A fuller submission on this issue is made by the Global Expert Network on Copyright User Rights.

#### **Model language**

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

### **General exceptions from copyright protection (incl. parallel importation), clause 11 of the Bill / ss12A & 12B of the Act**

Section 12A of the 2017 Bill contains a number of helpful clarifications of the user rights in the Act, and throughout, the exceptions now apply to any “work” rather than creating, rather confusingly, specific exceptions for specific kinds of works. Parliament should, however, consider combining the general exceptions in Sections 12 and 12A into a single exception. An example of how to do so is included in the submission of the Global Expert Network on Copyright User Rights (reproduced, for your convenience, as Annexure 1).

S.12A(1)(a) - quotations

The quotation right now requires attribution "to the extent that it is practicable." This accommodates for the fact that sometimes attribution is not possible or appropriate, as in the case of anonymous works or orphan works.

However, by adding an errant comma, the Bill would have the effect of gutting the existing "quotation right" as it now exists in s12(3) of the 1978 Copyright Act, making a section that might once have supported various artistic practices effectively useless to the creative community. Specifically, the 2017 Bill proposes to change the quotation right by inserting a comma after the word "periodical." The effect would be that only quotations "in the form of a summary of that work" would be protected by the exception. Unless the quotation right is subsumed into the s12 fair use provision, as suggested above. To protect the current scope of the quotation right, the Bill should delete the comma after the word "periodical" to read:

Model language:

*"(a) Any quotation, including a quotation from articles in a newspaper or periodical that is in the form of a summary of that work:"*

S.12A(1)(b) - teaching and illustration

12A(1)(b) now extends the exception for "illustration" beyond the limited confines of teaching. An exception of this kind is essential if the public discourse is to be carried on in South Africa. Whether in the context of political discussion, or cultural commentary, or educational programming, the ability to illustrate an argument with appropriate examples is close to the heart of free expression.

S.12A(1)(d) - reproductions in the press for information purposes

12A(1)(d) contains an exception for reproductions in the press for "information" purposes. This exception is appropriate to the present situation in South Africa, where the ability of

the media to cover public events and public debates comprehensively is so critical to the democratic political process.

S.12A(1)(e)(iii) - certain reproductions in the newspaper of periodical, or the broadcasting or communication to the public

The relationship between s12A(1)(e)(iii) and the proposed s2A(4)(b)(ii) needs to be clarified. It seems that as a result of s2A(4)(b)(ii) no copyright would subsist in some of the works mentioned in s12A(1)(e)(iii) in the first place. Addressing unprotected works in an exception would not make sense.

S.12A(1)(f) - translations by a person giving or receiving instruction

We generally support this exception, especially as far as translations for personal, educational and research purposes are concerned (s12A(1)(f)(i) and (ii)). We are, however, uncertain as to meaning of the phrase “public information purposes” in s12A(1)(f). We assume that something rather narrow is intended (although we wonder why this clause would then be necessary in light of s12A(1)(f)(i)) and therefore suggest a definition of this term, not least to ensure that the scope of the provisions concerning Translation Licences (Schedule 2 - Part A) is not compromised. In our view, it should not be read that teachers and students have a general authorisation to make unauthorised translations broadly available to the general public.

S.12A(1)(j), s12(2) - individual copying and personal use

We welcome the introduction of this exception. It is progressive, provides legal certainty and is modelled on modern legislation from overseas, i.e. s28B (1) and (5) of the UK CDPA. We are therefore unable to relate to the criticism of this provision expressed in other publicly available submissions.

S.12B - parallel importation

Section 12B clarifies that parallel importation, whereby a consumer or distributor legally purchases overseas and imports that good into South Africa -- is lawful in South Africa.

Parallel importation can be a key means to combat excessive pricing of goods in South Africa. Previous contradictory interpretations by the courts of s23(2) should therefore be obsolete.

### **Temporary reproduction and adaptation & Reproduction for educational and academic activities, clause 12 of the Bill / ss13A & 13B of the Act**

#### S.13A - temporary reproduction and adaptation

Section 13A adopts the growing international standard to exempt "transient or incidental" copies from copyright protection. Such exceptions are indeed necessary to enable, e.g., buffering, cache copies and other copies that are part of technological processes.

There is no current exception in the Bill for *permanent* copies that are nevertheless incidental to uses of works for technological processes and which do not substitute for the work of the author. For example, Internet search relies on making copies of content on the Internet and searching that copy. Machine learning and artificial intelligence rely on massive amounts of incidental copying. To authorise such uses and to improve the general framing of the provision, this provision could be re-written to state:

#### **Model language**

*"13A Technological reproduction and adaptation*  
*(1) Anyone is permitted to make transient or incidental copies of a work, including reformatting, where such copies are an integral and essential part of a technical process and have no independent economic significance, including acts such as:*  
*(a) to enable a transmission of a work in a network between third parties by an intermediary or a lawful use of work; or*  
*(b) to adapt the work to allow use on different technological devices,*

*(c) to undertake computational analysis, indexing, search, data mining or to enable other uses of works that do not express the work or otherwise compete with the work in the same market as the original. "*

#### S.13B - reproduction for educational and academic activities

Section 13B proposes a fuller exception for educational uses. This exception is one of the notable improvements in the Bill, especially because it aims to address modern modes of educational service delivery (such as electronic course packs and virtual learning and research environments). It could, however, be further improved to authorise the full range of fair uses for educational uses. In particular, s13(B)(1) is currently only open to "copies" or "reproduction." The term "use" as it occurs in the general exception in s12, however, is broader in that it accommodates the full range of uses (display, performance, etc.) that educators need to teach students.

The general aspect of the right in 13B(1) should thus be amended to state:

#### **Model language**

*"13B. Uses for educational and academic activities*

*(1) Any person may [use] works, recordings of works[, performances] and broadcasts in radio and television for the purposes of educational and academic activities if the [amount of the use] does not exceed the extent justified by the purpose."*

Alternatively, or in addition, educational uses could be added as among the set of fair use purposes protected by s12, subject to the fairness test in that section.

Lastly, while we strongly support the general approach taken in s13B(4), we wonder how it will be determined whether research activity was publicly-funded by at least 50 per cent.

### **Exception for Incidental Use, s15 of the Act**

The present incidental use exception in s15(1) is unduly restricted because it does not apply to the use of *any work in any other work*.

The present law, unamended by the Bill, thus fails, for example, to authorise the incidental capture of audiovisual works (a television or radio in the background), photographs, or performances (e.g. a street band) of the kind commonly captured in cinematographic film. The exception also leaves out key works that commonly and incidentally capture background material, such as photographs and paintings.

A better incidental use exception would apply to the use of any work, in any other type of work. The 2001 EU Directive on Copyright (Art. 3), for example, permits “incidental inclusion of a work or other subject-matter in other material.”

Section 15(1) of the Act should be changed to apply to all works, e.g.:

#### **Model language**

*“15 General exceptions from protection of artistic works*

*(1) The copyright in a work shall not be infringed by its inclusion in another work if such inclusion is merely by way of background, or incidental, to the principal matters represented in the new work.”*

Current law also fails to incorporate an open, comprehensive and modern “panorama right”, which is the right to make use of works situated in public spaces. The current right of panorama in s15(3) is unduly limited. It should be expanded to include photographs and other images (such as paintings). This has been a major issue for Wikipedia in South Africa, for example, resulting in less information about South Africa being available to a global audience as access to photographs of public buildings and public art in South Africa is unduly restricted by South African copyright law.

An improved panorama right in s15 could read:

**Model language**

*“(3) The copyright in a work permanently situated in a street, square or a similar public place shall not be infringed by its reproduction or inclusion in another work.”*

**General exceptions regarding protection of computer programmes, clause 17 of the Bill / s19B of the Act**

We note that the exceptions stipulated in s19B shall apply, with regards to computer programs, in addition to the other exceptions contained elsewhere in the Act, especially in ss12, 12A. However, the exceptions for use of computer programs should be expanded to include a broader range of legitimate uses, including:

- reverse engineering to create interoperable hardware (only software is now covered)
- to repair products subject to copyrighted software, e.g. in the case of John Deere tractors that farmers in some countries cannot legally repair on their own because of software copyrights.

More broadly, however, this is an area where the principles of flexibility and openness discussed in relation to the fair use clause apply. We cannot today envision all the possible implementations of computer technology that may be fair to the rights holder but nonetheless technically reproduce copyrighted material. Thus, in addition to any specifically listed uses, the section should contain an opening clause, e.g. “such as”, or “including.”

For example:

**Model language**

*“19B. General exceptions regarding protection of computer programs  
(1) A person having a right to use a copy of a computer program, or owning a product or device subject to a computer program, may, without the authorisation of the rights holder, may make fair use of the program for any purpose, including to facilitate the use of the program, to make back up copies of the program, to create interoperable products or software, to repair the product or software, and for other purposes.”*

Given the formulation, locating language relating to this purpose within the fair use provision in s12 would be appropriate as an alternative.

**General exceptions regarding protection of copyright work for archives, libraries, museums and galleries / General exceptions regarding protection of copyright work for persons with disabilities, clause 18 of the Bill / ss19C & 19D of the Act**

S19C is an excellent updating of the statute, consistent with and utilising terminology of international models.<sup>5</sup> It would need to be established, however, if and to what extent this provision makes superfluous the unduly restrictive, outdated and underutilised Copyright Regulations, 1978, made under s13 of the current Copyright Act.

S19D represents a further strong response to the general international trend toward recognising copyright exceptions in favour of persons who cannot conveniently read texts

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<sup>5</sup> See, for instance, EIFL's 2016 draft law on copyright: [http://www.eifl.net/system/files/resources/201607/eifl\\_draft\\_law\\_2016\\_online.pdf](http://www.eifl.net/system/files/resources/201607/eifl_draft_law_2016_online.pdf), which in turn is based on WIPO's Draft Law on Copyright and Related Rights (2005).

in conventional formats. It will also facilitate South Africa's speedy ratification of or accession to the Marrakesh Treaty<sup>6</sup>.

We recommend, however, that throughout this section the phrase "A person with a disability or an organisation that serves persons with disabilities" should be used to make clear that organisations serving persons with disabilities, including libraries, may assist in making accessible copies.

In s19(D), the language should refer to "rights owner" since many right holders are not the author, e.g.:

**Model language**

"(1) Any person or organisation may, without the authorisation of the right owner of a work, make an accessible format copy for the benefit of a person with a disability, supply that accessible format copy to a person with a disability by any means, including by non-commercial lending or by electronic communication by wire or wireless means, and undertake any intermediate steps to achieve these objectives, if the following conditions are met: ..."

*Moral Rights, clause 19 of the Bill / s20 of the Act*

The proposed provision provides some much-needed clarity, especially with regards to the duration (s20(3)) and transferability of moral rights as well as the applicability of copyright exceptions and limitations (s20(4)). However, we fail to see the value added by the changes made to s20(2).

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<sup>6</sup> The 2013 Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled entered into force on 30 September 2016.

### *Commissioned Works, clause 20 of the Bill / s21 of the Act*

The proposed language for s21 of the Act continues to make the default position in copyright for limited classes of works -- including films and art -- that the buyer instead of the artist owns copyright. This is a provision in current law that disadvantages artists, especially less established and economically vulnerable artists who may lack bargaining power to change the default through contract. Filmmakers, for example, have long complained that for all their work they rarely own the films they make.

The general rule in copyright that absent a contractual work-for-hire relationship, authors of works own copyright and are free to sell those rights a buyer wishes. This rule favors artists and should be the rule for all works in a law that seeks to promote their interests.

Even though we would like to see an even stronger position favouring artists (i.e., by changing the default to artist ownership, see above), we acknowledge the intention to somewhat strengthen the artists' rights vis-a-vis the commissioning party through providing that "the author of the work shall have a licence to exercise any right which by virtue of this Act would, apart from the licence, be exercisable exclusively by such author." A problem with this formulation is that it is not clear whether it gives the author as licensee the ability to re-sell the work or license it to other parties. For example, if the SABC owns the rights to a film it funded, can the author of the film sell a right to show the film on a foreign television station or in a film festival or theatre? It would appear not.

Regardless, if the intention is to have authors enjoy a licence concerning the *economic* rights that come with copyright ownership - and not just in relation to moral rights contained in s20 of the Act - the wording of the provision requires fixing in that the last word of the provision would need to change from "author" to "owner".

## *Assignment and licences in respect of copyright, clause 21 of the Bill / s22 of the Act*

We note that according to the proposed wording of s22(1), copyright owned by, vested in or under the custody of the state may no longer be assigned. This appears to be a sensible general principle. However, there might be instances where such an absolute rule is inadequate and leads to unforeseen consequences. We encourage further investigation of how similar provisions have worked elsewhere around the world and whether some flexibility could be added to the provision to prevent unwanted results.

It is unclear why s22(3) refers to Schedule 2.

Most importantly, however, we would like to express our concern that the revocability of non-exclusive licences stipulated in s22(4) may interfere with the operation of open / public licence schemes such as Creative Commons. Such licences are the legal backbone for most open access initiatives around the world, including South Africa -- with more than a billion works openly licensed globally -- and these open / public licences must be irrevocable in order to work as intended. If these licences are considered contracts, the proposed wording could suggest that existing licences may be revoked by choosing another licence at a later stage ("a further contract"). We therefore propose replace the phrase "a further contract" with "agreement" s22(4) - and to fix what we believe is a technical error (replacing "contract" with "licence"):

### **Model language**

*"... Provided that such a licence granted in writing or its electronic equivalent shall not be revoked, either by the person who granted the licence or his or her successor in title, except, as the licence [contract] may provide, by [a further contract] agreement or by operation of law; and"*

### *Assignment and licenses in respect of orphan works, clause 22 of the Bill / s22A of the Act*

Works that are subject to copyright but whose rights owners cannot be identified or who no longer exist are known as “orphan works.” Without rights to use such works without a licence, the works may cease to be available to the public. It is laudable that the Bill seeks to address this issue.

This said, the 2017 Bill proposes an unduly complicated, onerous and somewhat impractical process to clarify rights to use orphan works. A better solution would be to add the use of orphan works as one of the purposes for which the fair use factors in s12 apply. By definition, the use of orphan works does not harm rights holder interests since such rights holders cannot be located and licensed from. It thus becomes a rather clear category of fair use.

Alternatively, a simple authorisation could be drafted, e.g. along the lines of Jamaica’s Copyright Act of 1993, Article 71 (providing that copyright “is not infringed by an act done at a time when, or under arrangements made at a time when (a) it was not possible by reasonable inquiry to ascertain the identity of the author; and (b) it was reasonable to assume — (i) that copyright had expired; or (ii) that the author had died fifty years or more before the beginning of the year in which the act was done or the arrangements were made.”).

#### **Model Language**

Add to list of purposes in Section 12:

*Use of a work if it is not possible by reasonable inquiry to ascertain the identity of the rights owner and it was reasonable to assume that no copyright exists in the work.*

### *Collecting Societies, clause 23 of the Bill / Chapter 1A (ss22B - 22F) of the Act*

The proposed Chapter 1A seeks to bring all collecting societies operating in South Africa under the supervision of the Company and Intellectual Properties Commission (the Commission). If passed into law, it will transform the South African regulatory framework for collecting societies from *intermediate regulation* to *strict regulation*. *Strict regulation* subjects all collecting societies within a territory to a supervisory framework, which compulsorily requires the collecting societies to apply for approval or accreditation from a supervisory agency.<sup>7</sup> On the other hand, the *intermediate regulation* subjects only particular class of collecting societies within a territory to a supervisory framework. There is also the *de minimis* regulation under which the supervision of collecting societies only relates to matters like tariffs, under the powers of a tariff setting agency, tribunal, arbitration panel or judicial body. United Kingdom and Canada are examples of countries with such system.

Although they are mostly private entities, collecting societies perform functions that are public in nature. Also, because of the nature of rights being managed by collecting societies and the nature of the copyright market within which they operate, collecting societies have significant market power. Thus, the prevailing argument is in favour of a

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<sup>7</sup> Examples of such regulation can be found in Germany, Nigeria and Kenya among others. See Article 1 of the German Law on the Administration of Copyright and Neighbouring Rights, 1995; section 39 of the Copyright Act, Cap C28, Laws of the Federation of Nigeria, 2004; section 46 of the Copyright Act, CAP 130, Laws of Kenya, 2014.

system of regulation that will prevent abuse of market power and ensure transparency, accountability and efficiency on the part of collecting societies.

In view of the foregoing, the proposed Chapter 1A is highly commendable, subject to the following observations and recommendations:

### **Registration, s22B of the Act**

On a general note, this section proposes mandatory registration and accreditation of collecting societies by the Commission, among others. But it does not propose the consequence of failure/refusal by collecting societies to apply for registration and accreditation. Neither does it propose the consequence of refusal by the Commission to register and accredit a collecting society. As it is, the section can be easily flouted. To ensure compliance with similar provisions in countries like Nigeria and Germany, restrictions are placed on the right of non-compliant collecting societies to operate and even institute actions in court. Non-compliance has even been criminalised in Nigeria. Thus, the following subsection, after subsection (7), is recommended.

#### **Model language**

*“(8) (a) It shall be unlawful for any person or group of persons to operate as a collecting society without registration and approval of the Commission.*

*(b) Any person operating as a collecting society without registration and approval is liable to a fine of up to [tbd]*

*(c) An unregistered and non accredited collecting society cannot enforce an infringement claim or claim any right or entitlement under the Copyright Act, the Performers’ Protection Act, 1967 (Act No. 11 of 1967) and any other law relating to copyright in South Africa.*

*(d) The Commission shall take necessary steps under the Companies Act to dissolve a collecting society that failed or refused to apply for registration and*

*accreditation or whose application for registration and accreditation has been refused by the Commission.”*

It is unclear why the proposed s22B(2) limits the requirement for registration to only collecting societies mentioned in s22B(1)(b); it seems that this requirement should apply to all collecting societies as there is no reason why collecting societies representing copyright owners under the Copyright Act should be exempted from registration and accreditation.

**Model language**

*“Any person contemplated in subsection (1) may, in the prescribed manner, lodge a written application with the Commission for registration.”*

In line with South Africa’s current practice of addressing copyrights and performers rights in separate pieces of legislation, s22B(6) should be redrafted as follows:

**Model language**

*“The Commission shall only register one collecting society for each right granted under the Act or the Performers Protection Act.”*

S22B(7) seems superfluous. It is self-evident that copyright owners can execute licensing contracts under the Copyright Act, especially since authorisation of collecting societies by copyright owners is voluntary. Thus, copyright owners are not necessarily deprived by the absence of a collecting society administering their kind of right except where individual right management is practically difficult or impossible. Thus, the following replacement for the subsection is recommended:

**Model language**

*“Where there is no collecting society for a right granted under the Act or the Performers Protection Act, the Commission may, if it finds it expedient, assist in establishing a collecting society for that right.”*

**Administration of rights by collecting society, s22C of the Act**

According to its title, the proposed chapter 1A is about ‘Collecting Societies’. Introducing ‘Community Trust’ in this section (as well as sections 22D and 22E) is therefore confusing, especially since ‘Community Trust’ and collecting societies are not synonymous and the terms are not defined. It is recommended that the phrase ‘Community Trust’ be deleted from this (and the other) section(s).

Further, s22C(1), (2) and (3)(c) appear to erroneously refer to “users” and it is also questionable whether “authors” should be mentioned in this context. It would seem preferable to simply refer to ‘right owners’ as a generic term for the list of right owners mentioned in the original proposed draft.

**Control of collecting society or Community Trust by users, performers, owners, and producers or authors of rights, s22D of the Act**

It was already suggested to remove the reference to ‘Community Trust’ in this section (see our comment regarding s22C above). And in line with our other comments regarding s22C, we suggest that (a) no reference is made to users, and (b) the more generic term ‘right owners’ is used instead of listing the various types of rights owners.

### Submission of returns and reports, s22E of the Act

We recommend to delete 'Community Trust' from s22E(1).

### Suspension and cancellation of registration of collecting society, s22F of the Act

We recommend that throughout the provision the phrase 'authors of rights' is replaced with the term 'right owners'.

### *Technological Protection Measures & Copyright Management Information, clauses 25-27 of the Bill / ss27-28S of the Act*

Section 27(7) proposes to criminalise the circumvention of technological protection measures (TPMs). Copyright violation is normally a civil offence. Criminalisation risks deterring lawful conduct. Circumventing TPMs is often required for free speech activities, and thus criminalisation measures in this area should be carefully considered. We propose that this section exclude *criminal* penalties.

Section 28O should exclude penalties for anyone repairing their own goods or offering repair as a service.

#### **Model Language**

*"Nothing in this section shall prohibit any repair of any vehicle, machine, device, instrument or the like by the owner or any person acting on the request of the owner."*

Section 28P is a very welcome addition but should its scope should be expanded to also protect someone who circumvents on behalf of someone else.

**Model Language**

*"(4) No person who assists any other person to engage in any act authorised by (2) (b) shall liable under this Act or section 86 of the Electronic Communications and Transactions Act 2002( Act.No. 25 of 2002) for such assistance.*

Section 28P(2) and (3) should be deleted. Subsections 2 and 3 create an onerous and unnecessary process for using rights to circumvent TPMS. This is not required by any international law and is not good practice. TPMs should be subject to circumvention for any lawful purpose without burdensome process.

*Unenforceable contractual term, clause 33 of the Bill / s39B of the Act*

Section 39B(1) contains an important protection ensuring that contractual terms cannot negate and override the copyright exceptions and limitations ("users rights") in the act. Some terms of service or sales agreements, for example, attempt to prohibit making private copies even where that right is clearly one of the user under copyright.

The first part of the clause is based on UK law, which states in reference to data-mining and parody/pastiche rights:

*"To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright, that term is unenforceable."*

The UK version of this provision does, however, not ban any "renouncement" of rights. The inclusion of this term raises difficult issues as to how authors may contract out their rights in order to profit from them. It would be better to delete this aspect of the section.

Section 39B(2) has been added, making clear that s31B(1) does not interfere with the effectiveness of public and open licences (Creative Commons, FLOSS, etc.). This is a critical addition to facilitate all open access activities in the country by ensuring that those who wish to disseminate their works openly and freely can do this -- voluntarily -- on the basis of existing and legally sound public/open licence schemes such as Creative Commons; without s39B(2), voluntary sharing and dedications to the public domain would be in jeopardy.

This said, the section needs some fixing and should be simplified as it currently seems to provide: "this section does not prohibit . . . open licences to do any act which is subject to . . . settlement agreements, terms of service licences and the voluntary dedication of a work to the public domain." That does not grammatically make sense.

**Model language**

*"(2) This section does not prohibit or otherwise interfere with public and open licences or voluntary dedications of a work to the public domain."*

Terms of service licenses and settlement agreements should be dealt with separately, either by a definition or by a separate clause which permits all the acts necessary to render the service.

While the term "public and open licences" can be expected to be understood by both copyright experts and the general public due to their success and proliferation, it may be useful to add a basic definition to the act for further clarity.

--- end of submission ---

## Annexure 1:

Model language for a combined general copyright exception (merging the general exceptions in Sections 12 and 12A into a single exception) as drafted and submitted by the Global Expert Network on Copyright User Rights

### **12. General Exception**

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

*(a) research, private study or personal use, including the use of a lawfully possessed work at a different time or with a different device, making a backup copy, storage,*

*(b) criticism or review of that work or of another work;*

*(c) reporting current events, including through the reproduction of public lectures and addresses;*

*(d) scholarship, teaching and education;*

*(e) comment, illustration, parody, satire, caricature, cartoon, tribute, homage or pastiche;*

*(f) preservation of and access to the collections of libraries, archives and museums;*

*(g) expanding access for underserved populations;*

*(h) ensuring proper performance of public administration, including for regulatory or judicial proceedings or preparing a report of judicial or regulatory proceedings;*

*(i) quotation;*

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

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

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

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

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

- (o) archiving, preservation, making works accessible to their patrons, and other purposes of libraries, archives, museums and institutions of memory and learning;*
- (p) using works for which, after a diligent search, the rights holder cannot be identified and for which it is reasonably believed that no rights exist in the work;*
- (q) use in a new and independent work with a different audience and different purpose than the original;*
- (r) using works displayed in public spaces, including in photographs, video and other works;*
- (s) use of a lawfully possessed computer program, including to facilitate the use of the program, to make backup copies, to create interoperable products or software, to repair the product or software, and for other purposes,*
- (t) other purposes.*

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

- (a) the nature of the work in question;*
- (b) the amount and substantiality of the part of the work affected by the act in relation to the whole of the work;*
- (c) the purpose and character of the use, including whether—*
  - (aa) such use serves a purpose different from that of the work affected; and*
  - (bb) it is of a commercial nature or for non-profit research, library or educational purposes;*
- and*
- (d) the substitution effect of the act upon the potential market for the work in question.*
- (e) to the extent reasonably practicable and appropriate, the source and the name of the author shall be mentioned.*

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

Annexure 2:

Letter to the Portfolio Committee Trade and Industry regarding fair use (s12)  
and the quotation right (s12A(1)(a))



PROGRAM ON  
INFORMATION JUSTICE AND  
INTELLECTUAL PROPERTY



University of the Witwatersrand, Johannesburg  
Scholarly Communications & Copyright Services Office

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Honorable Joanmariae Louise Fubbs  
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Portfolio Committee on Trade and Industry  
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Dear Ms Fubbs, MP:

We write to commend the Copyright Amendment Bill for its inclusion of a modernised general copyright exception, and for its many other provisions proposing model user rights to fairly balance the copyright system. We write also, however, to urge Parliament to make small but important changes that will ensure that South Africa's copyright exceptions are sufficiently open to the purposes they serve so as to be fully compatible with the digital age and the businesses and creators that work within it.

Specifically, we urge two important changes in the bill:

1. Add the words "such as" to the introductory language in the new proposed general exception in Section 12 of the Act, so that it reads: "In addition to uses specifically authorised, a fair dealing or use with respect to a work or performance for purposes such as the following does not infringe copyright in that work: . . ." This change would follow the examples of the U.S., Israel, Korea and many other countries in enabling the general exception for fair uses to be potentially applicable to fair uses of copyrighted content for any purpose, including those future uses that cannot be foreseen by the legislature at present.

## *SA Copyright Amendment Bill*

2. Delete the second comma in Section 12A(a), the addition of which makes the provision only applicable to “a summary of that work,” instead of to all quotations as the provision has historically operated.

We thank you for the opportunity to comment on the Bill and offer our assistance as an international group of copyright expert in holding workshops or otherwise assisting in the consideration of the Bill going forward.

### I.

We commend the Department of Trade and Industry for its recognition that inclusion of a modernised general exception (or “user right”) is an important part of updating South Africa’s copyright law. The Bill as a whole would modernise many of the law’s specific user rights. The provisions on temporary copies for technological processes, for educational uses, for library and archive uses, and for uses to provide access to people with all disabilities are notable examples where the Bill follows – and indeed establishes – international best practice in the field.<sup>1</sup> We focus here on the general exception in Article 12, which provides a very useful means for authorising rights of users with respect to copyrighted materials that are not authorised by specific exceptions.<sup>2</sup> We request that the general exception be crafted to be open to application to any purpose, kind of work or type of user so that it can function as a catch-all provision for the use of works in ways that are fair to the author, regardless of whether their specific purpose is envisioned today.

### A.

General exceptions, which enable courts to apply a single balancing test to authorise uses for multiple different purposes, are a historical and important aspect of copyright laws derived from the Commonwealth tradition. In UK law, and those of many countries that adopted the terms of its statute, the general exception authorises various types of “fair dealing.” In the US and some other countries, the general exception authorises various types of “fair use.” South Africa proposes to use the phrase “fair dealing or use” in new Section 12. But, at bottom, this distinction in terminology is without a difference. What is important functionally is that the general exception be applicable to any purpose. This is a key feature of the U.S. fair use right,<sup>3</sup> as well as some modernised “fair dealing” rights, such as in Singapore.

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<sup>1</sup> We note that the Bill also includes an exception for orphan works that we have previously criticised as being unduly burdensome. See Academic Comments: South African Copyright Amendment Bill, 2015, <http://infojustice.org/archives/35003>

<sup>2</sup> We have commented elsewhere that a properly constructed general exception could be used to implement reasonable policies and practices with respect to orphan works, negating the need to include a specific provision on that issue.

<sup>3</sup> See 17 USC 107 (emphasis added):

## *The Benefits of Open Fair Dealing and Use*

The 2015 Amendment Bill contained an open general exception. By virtue of inclusion of the words “such as” before its list of enumerated purposes, the Bill would have permitted the general exception to potentially apply to a use for any purpose, as long as that use remains fair to the interests of authors.<sup>4</sup> We request that this key feature of the general exception be retained in the final version of the legislation.

Specifically, we request the following change in the wording of Article 12 (new language underlined):

12 Fair Dealings and Uses (1)(a) In addition to uses specifically authorised, a fair dealing or use with respect to a work or performance for purposes such as the following does not infringe copyright in that work

### B.

Having openness in the purposes of the general exception would enable the clause to be applied to purposes not specifically addressed in the general exception or elsewhere in the Act.

One reason to include an open exception is to allow the clause to be applied to specific fair uses of copyrighted materials that exist today but do not appear to be addressed anywhere in the act. These include:

- **Internet indexing for search**, which literally makes copies of nearly all the content on the Internet into a database that is then searched by users.

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Notwithstanding the provisions of sections [17 U.S.C. § 106](#) and [17 U.S.C. § 106A](#), the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, **for purposes such as** criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

<sup>4</sup> 12(A)(2) of the 2015 Bill stated: “Notwithstanding any provision of this Act, fair use of work for purposes **such as** criticism, comment, news reporting, judicial proceedings, professional advice, teaching which may include, making multiple copies for classroom use, scholarship or research is not an infringement of copyright.” (Emphasis added).

- **Text and data mining**, and other computational (or “non-consumptive”) uses, which enable useful technologies like plagiarism detectors and machine learning necessary to operate language translation software.
- **Transformative works**, which alter works into new products of creativity to serve different audiences for different purposes, including mashups like the “7 Minute Sopranos” video<sup>5</sup> or the historical collection of movie posters approved of as a fair use in the U.S. in *Bill Graham Archives v. Dorling Kindersley, Ltd.*, 448 F.3d 605 (2d Cir. 2006).

An open fair use provision would provide means for these and other purposes to justify themselves under Article 12, despite their not falling explicitly within the enumerated purposes mentioned there.

An open fair dealing or use clause could also provide a means for libraries and others to justify reasonable uses of orphan works, rather than through the burdensome provision of the proposed Bill.

Finally, an open fair dealing or use clause would provide the means for the law to protect uses for purposes that are as of yet unknown. This has been an extremely important role of the open fair use clause in the US. When the US fair use clause was drafted, no one envisioned – and therefore did not seek to protect – the many technological fair uses of protected works that we take for granted today. Some notable technologies that depend on an open fair use clause in the US include:

- **The video cassette recorder**, which was approved of by the Supreme Court in *Sony Corp. v. Universal Studios, Inc.*, 464 U.S. 417 (1984), relies on the existence of an exception for the private use of copyrighted materials for the purpose of time shifting. Australia only adopted such an exception in 2006, and South Africa is proposing to do so explicitly only now.
- **Use of thumbnail photographs in internet search**, approved of in the US in *Kelly v. Arriba Soft*, 77 F. Supp. 2d 1116 (C.D. Cal. 1999), is on uncertain footing in many countries that only allow quotation for restricted purposes, such as for criticism or review of a work. South Africa’s open quotation exception (it applies to a quotation for any purpose) could potentially be used to justify similar practices – but only if a thumbnail is considered an excerpt. Otherwise, there appears to be little in the Act or bill that justifies such a core use of the Internet.
- **Cloud storage** by remote digital video recorders were upheld in the US in *Cartoon Network, LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008).

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<sup>5</sup> See Virginia Heffernan, Gotta Minute? So, There’s This Guy Tony ..., *New York Times* (April 6, 2007) <http://www.nytimes.com/2007/04/06/arts/television/06sopr.html>

## *The Benefits of Open Fair Dealing and Use*

This holding has been linked to billions of dollars of investment into the cloud storage industry in the US.<sup>6</sup>

This final point – that open exceptions allow for innovation – has been supported by numerous studies. Theoretical and empirical economic literature supports the conclusion that high technology, software and other industries that rely on copyright exceptions grow faster in countries with open copyright exceptions; that the traditional copyright dependent industries experience little resulting harm; and the benefits to technology growth from more open user rights systems outweigh any harm to copyright owners.<sup>7</sup> Research, including in South Africa, has also canvassed how creators, such as documentary filmmakers, would benefit from an open general exception in South African law.<sup>8</sup>

### II.

In addition, we would note that the most recent 2017 version of the Copyright Amendment Bill contains an apparently minor change in punctuation – the addition of a comma after the phrase “, including a quotation from articles in a newspaper or periodical,” that significantly curtails the openness of that exception in current South Africa copyright law. In the 1978 version of the exception, there was no second comma, and thus the phrase “that is in the form of a summary of that work” applied only to “a quotation from articles in a newspaper or periodical.” In the 2017 bill, an extra comma is inserted with the result that it appears that the only quotation prevented under the Act are those that are “in the form of a summary”:

(a) Any quotation, including a quotation from articles in a newspaper or periodical, that is in the form of a summary of that work: Provided that the quotation shall be compatible with fair use in that the extent thereof shall not exceed the extent reasonably justified by the purpose: Provided further that, to the extent that it is practicable, the source and the name of the author, if it appears on or in the work, shall be mentioned in

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<sup>6</sup> See Josh Lerner and Greg Rafert, *Lost in the Clouds: The Impact of Changing Property Rights on Investment in Cloud Computing Ventures*, [http://www.hbs.edu/faculty/Publication%20Files/15-082\\_ce76cd68-19d3-4328-9df0-fb74913cd5db.pdf](http://www.hbs.edu/faculty/Publication%20Files/15-082_ce76cd68-19d3-4328-9df0-fb74913cd5db.pdf)

<sup>7</sup> See Thomas Rogers & Andrew Szamosszegi, CCIA, *Fair Use in the U.S. Economy: Economic Contribution of Industries Relying on Fair Use*, 2010, at 8-9; Palmedo 2015 (finding “that adoption of fair use clauses modeled on U.S. law is associated with positive outcomes for the firms in our dataset, both those that may be more dependent on copyright exceptions, and those that may be more dependent on copyright protection.”); Roya Ghafele & Benjamin Gibert, *The Economic Value of Fair Use in Copyright Law: Counterfactual Impact of Analysis of Fair Use Policy on Private Copying Technology and Copyright Markets in Singapore* (2012).

<sup>8</sup> See Sean Flynn, Copyright Legal and Practical Reform for the South African Film Industry, <http://infojustice.org/archives/35712> (summarizing research with South African filmmakers since 2008 to document influences of copyright protections and exceptions on the production of documentary films).

the quotation;

The addition of the highlighted comma in the first line, between “periodical” and “that,” has the effect of limiting the application of the fair quotation right to summaries of copyrighted works, regardless of the format or medium in which they appear. This is because that clause “that is in the form of a summary of that work” now would modify the works “Any quotation,” rather than serving to merely describe a particular kind of qualifying quotation. This would represent a significant step backwards in terms of openness, rendering the quotation right unavailable to most scholars, teachers, authors, students, journalists, artists, and others, who quote for purposes other than summarisation. Happily, if this is an inadvertent change, it is easily corrected by eliminating this new and unnecessary punctuation.

III.

We would like to conclude by offering our assistance in organising workshops or otherwise assisting the technical consideration of the Bill. We are members of the Global Expert Network on Copyright User Rights, an international network of public interest scholars and experts who provide technical assistance in processes such as this.<sup>9</sup> Through this network, we have hosted workshops in South Africa on the utility of copyright user rights to promote social and economic objectives.<sup>10</sup> We are very willing to make ourselves available to host workshops, provide answers to questions and otherwise assist your deliberations.

If we can be of further assistance, including to help host a seminar on copyright reform and the public interest for your Committee’s members or staff, please do not hesitate to contact us through Dr. Tobias Schonwetter at the University of Cape Town, [tobias.schonwetter@uct.ac.za](mailto:tobias.schonwetter@uct.ac.za), and Professor Sean Flynn at American University, [sflynn@wcl.american.edu](mailto:sflynn@wcl.american.edu).

Signed,

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Prof. Caroline Ncube  
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<sup>9</sup> See <http://infojustice.org/flexible-use>

<sup>10</sup> See South Africa Workshops on Copyright Reform, <http://infojustice.org/archives/37420>

*The Benefits of Open Fair Dealing and Use*

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