
JOINT ACADEMIC SUBMISSION

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We write in response to your request for public comments on South Africa's planned copyright legislation reform. We're grateful for the chance to make a contribution in support of this extraordinary effort on the part of the Department of Trade and Industry to modernize South African copyright law and – in so doing – to make South Africa an international leader in the field at a critical moment in its history.

We enclose (1) a separate statement on Balanced Copyright and the Importance of Flexible Exceptions, and (2) Joint Academic Comments on the South African Copyright Amendment Bill, 2015 in table form. Excerpts of the provisions of other laws cited in our comments and available for your research purposes can be found in *Masterlist: Limitations and Exceptions Provisions in National Laws*, available at <http://infojustice.org/flexible-use>. We also make extensive reference to EIFL's DRAFT LAW ON COPYRIGHT INCLUDING MODEL EXCEPTIONS AND LIMITATIONS FOR LIBRARIES AND THEIR USERS (2014), available at <http://www.eifl.net/resources/eifl-draft-law-copyright-including-model-exceptions-and-limitations-libraries-and-their>. The University of Cape Town Intellectual Property Unit is separately providing a clean version of our proposed sections 12 and 12A, along with other of our proposals. We have also shared our draft comments with other organizations in South Africa, who will be submitting separate comments with their views on both our proposals and the DTI Bill.

The Joint Academic Comments we attach herein were created through a collaborative comment and review process by an international team of academics from South Africa and the U.S.A., undersigned below. We solicited comments and proposals from the Global Expert Network on Copyright User Rights, whose members are listed at <http://infojustice.org/flexible-use>. The comments and proposals are informed by a workshop hosted with Coenraad Visser, University of South Africa, on August 11, 2015. At the workshop we heard a variety of interests, concerns and questions from a broad

range of stakeholders, as well as from officials in the South African Department of Trade and Industry, Department of Arts and Culture, Department of Higher Education and Training, Department of Science & Technology, National Film and Video Foundation, the National Film, Video & Sound Archives, and the National Research Foundation. The table includes references to the relevant language of the Bill (or, in some cases, the present Act) in the left-hand column, narrative comments in the centre column, and amended language we propose in the right-hand one.

As reflected in our suggestions for a substantive Preamble to the revised Act, we are in agreement on the following basic points about the direction of South Africa's legislative reform.

- First, that the goal of the reform should be to achieve an appropriate balance between the rights of authors and those of users and the public as a means to promote creativity, innovation and the cultural arts and expand opportunity to access and use information to promote the full development of all South Africans.
- Second, that the means by which such balance can be achieved is the inclusion in revised law of both strong protections for the fruits of creative labour and robust exceptions that assure access to essential information for the next generations of South African students, creators, and innovators.

In the attached documents, we detail specific adjustments in language and structure of the Copyright Act that we believe will better promote these goals. Ultimately, we believe that the final bill should reflect the following principles to enable it to be considered a modern copyright law fit for the digital age.

- a. First and foremost, as we describe in greater detail in the attached statement, the law should be amended to include a flexible exception that can be applied to any use not specifically enabled by enumerated limitations and exceptions, and is applied through a flexible proportionality test that balances factors such as nature and importance of the new use, the interests of the author or copyright holder, and the impacts on third parties and society at large.
- b. To assure against the overprotection of fundamental building blocks of knowledge, the law should follow the modern global trend and refer to an originality threshold that excludes copyright protection for works of minimal creative or expressive value, including to ideas as such, procedures, methods of operation or mathematical concepts, and, in the case of computer programs, to interface specifications.
- c. To assure the development of robust, fair markets for information, the law should minimize state ownership of copyright, including for state-funded

works (where the makers of works have a strong motivation to make them publicly available, and the state can generally meet its needs with a full license), and for orphan works (where state ownership is likely to decrease, rather than enable, use of such works).

- d. Because authors have the strongest economic and non-economic motives to share their productions with others, the law should maximize the ability of all authors to own rights to works they create, including where such work is commissioned by another but the commissioning party does not direct the creative choices of the author.
- e. To promote certainty, in addition to general exceptions the law should include as well specific exceptions with regard to common and socially significant uses of copyrighted works, including for quotation, for uses by libraries and archives, for people with disabilities, and other purposes. It is also important that the relationship between specific exceptions and a general, flexible exception be understood as fully complementary, rather than competitive or exclusive.
- f. The law should enable the making of accessible copies of any work for people with any disability. Regardless of its decision concerning ratification of the Marrakesh Treaty for the Visually Impaired, South Africa has an opportunity to be one of the first countries to meet the standards that agreement incorporates, and to surpass them by giving recognition to the needs of the deaf as well as the blind and other print-disabled communities.
- g. To assure that in years to come South Africa can claim its place as a centre of technological innovation (in both hardware and software) the law should include an exception for transient copies of works that are necessary to carry on technological processes, including on the internet.
- h. In recognition of the growing trend among creators to share information widely rather than attempting to restrict its circulation, the law should promote, and not hamper, the use of public (or “open”) licenses, including those that are employed in the FLOSS software movement, and the various Creative Commons licenses. In addition, sharing of publications with the public should be required where the content is government funded.
- i. The law should include a right of panorama that applies to uses of any image or object (including buildings) located in a public place. This right should apply to such use in any work, including works explaining, commenting on or criticizing the work. At our workshop, this was identified as a crucial concern

of photographers, journalists, filmmakers and information portals like Wikipedia.

- j. Whatever the array of limitations and exceptions represented in the revised Act, there should be a parallel exception to anti-circumvention provisions. Authorising the use of a locked digital product for any purpose permitted under copyright law will ensure simplicity and consistency of application, and will guarantee that users will not be caught in a “double bind,” i.e. prohibited by the anti-circumvention provisions from undertaking otherwise legal (and socially beneficial) actions.
- k. While recognizing the problem of so-called “orphan works,” we recommend that the issue be subjected to further study rather than made the topic of legislation at this time. In the mean time, a specific exception for use of orphan works by libraries and similar institutions, and a flexible exception that can apply to other uses, should be sufficient to overcome immediate copyright barriers in this area.
- l. Criminal offenses should be limited to exceptional cases involving intentional and commercial infringement, so as to avoid chilling legitimate educational, creative and innovative activities in South Africa.

We thank you for your time and effort and invite you to contact us to lend any other assistance we can.

Respectfully,

South Africa

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Attachments

1. Statement on balanced copyright and the importance of flexible exceptions.
2. Joint Academic Comments on the South African Copyright Amendment Bill, 2015 (table)

BALANCED COPYRIGHT AND THE IMPORTANCE OF FLEXIBLE EXCEPTIONS

We support the Bill's foresighted incorporation of a flexible exception, currently labelled "fair use" and included in Section 12A of the draft. The most important contribution toward a properly balanced copyright act from the perspective of creators, innovators and consumers is to enact a final law that contains a flexible "fair dealing" or "fair use" exception with the following elements:

(1) it can be applied to any use not specifically enabled by enumerated limitations and exceptions, as well as to supplement provisions relating to such enumerated uses, and

(2) it is applied through a flexible proportionality test that balances factors such as nature and importance of the new use, the interests of the author or copyright holder, and the impacts on third parties and society at large.

Applying a flexible exception to all uses and purposes is necessary to ensure that today's copyright law is adaptable to tomorrow's technologies and practices. This aspect of flexibility is often described as the reason that technology and creative industries thrive under systems with an exception that is flexible in this way, without harming traditional content industries. This positive economic impact of flexibility has been demonstrated in a series of recent empirical studies. The most recent of such studies, performed by economists at American University, found:

[A]doption 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. In other words, this is not an "internet technology" vs. "big content" debate — both internet firms and content providers can benefit in fair use systems.¹

The factor-based inquiry restrains the test from impeding on the legitimate interests of authors and aids predictability by grounding the test within an international tradition. A clear statement of proportionality factors produces an internal balance between the interests of copyright owners and those of innovators who build on existing knowledge and add new value to it. Such factors can also guide interpreters and users, contextualize the law within a corpus of comparative jurisprudence, and ensure compliance with international norms, such as the "three-step test." See Christophe Geiger, Daniel J. Gervais, & Martin Senftleben, *The Three-Step-Test Revisited: How to Use the Test's Flexibility in National Copyright Law*, 29 *Am. U. Int'l L. Rev.* 3 (2014), available at

¹ Mike Palmedo, *Firm Performance in Countries With & Without Open Copyright Exceptions*, Infojustice.org (May 18, 2015), available at <http://infojustice.org/archives/34386>

<http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1816&context=auilr>.

With an adequately crafted flexible exception, following the lead of countries including Singapore, Malaysia, Israel, Korea, the United States, Canada (through court interpretation), and others – the legislative task of developing specific exceptions becomes much easier. In simple terms, if there is sufficient flexibility in a general exception, finding the exactly right statutory framework for issues like orphan works, private copying and others becomes less necessary. Those issues can be worked out, at least to a great extent, within the application of the flexible exception. Likewise, the urgency of constantly updating specific exceptions (as, for example, they may exist for libraries and education) in light of social and technological change becomes less urgent. Making a general exception apply to commercial as well as non-commercial uses (assuming that they satisfy the statutory standards, including consideration of any harm to the potential market for the copyrighted work) assures that in years to come, copyright law in South Africa will function to encourage creativity and innovation, rather than to chill these important forms of personal and national development.

As reflected in the enclosed Joint Academic Comments in table form, our considered opinion is that the best way to promote flexibility in the Act is to amend the current fair dealing clause in Section 12 to make it open – i.e. applicable to any purpose – while adding a factor test based on those in other jurisdictions to determine what “uses” or “dealings” are fair. This clause can, in our opinion, use either the term “fair use” (as in Section 12A of the Bill), or the term “fair dealing” (as currently in 12A), or both – which we include in our draft. Any of these approaches should have the same effect. Singapore, for example, has a flexible exception with a factor test called “fair dealing.” Korea, Israel and the United States use the term “fair use” in clauses with a nearly identical structure. Because South Africa has a tradition of “fair dealing,” it seems most helpful here to retain that designation. Again, however, the real issue is the content of the provision, not its title.

We would like to respond to a few common criticisms of flexible exceptions up front.

First, there is no reason to limit a flexible exception or certain other exceptions (such as copies of orphan works) to less than the whole work. There are times when reproducing a whole work, including a whole book, can indeed be fair. For example, if the work is an orphan work (thus assuring that its owners have no expectation of licensing revenue), and the purpose is legitimate – such as ensuring the preservation of a worn work or out-dated format in a public collection – copying the whole work may indeed be necessary for the purposes copyright seeks to serve. Other uses – such as reproducing a whole photograph or poem etc. – may be necessary for purposes of critique, commentary, and – especially – education. The key is to ensure that exceptions are not “wide open” but rather appropriately bounded, which the multi-factor test in

our proposal and in the current Bill's Section 12A does. The consideration of the interests of the author in the balancing formula ensures that the reproduction of whole works will be rare, but permitted where truly needed.

Nor should expanded flexibility in exceptions be considered as contrary to the rights of authors and creators. Creators must quote and reproduce the works of other authors for their own legitimate purposes of re-creation and transformation. Exceptions enable such work – be it in a textbook, a documentary film, a remix or mash-up, a parody or satire, a broadcast program about music or other culture, or any of the myriad of other works created every day that reference and quote prior works. In other words, flexible exceptions promote creation.

Finally, we would note that flexible exceptions are not uncertain or unpredictable. Indeed they are less so than many legal standards (“negligence,” for example) that courts understand and appropriately apply to individual cases. As recent comments to the Australian Law Reform Commission noted:

For a legal doctrine to be predictable does not require an absolute consensus on its application to contested facts in every individual case. Like the common law, it is helpful to think of fair use as both a mechanism for generating decisions about particular issues (i.e., as a system) and as a collection of actual decisions (i.e., as a body of case law). At a system level, the last 30 years of case law have generated a fairly coherent set of principles that lend themselves to forward-looking application. At the level of individual cases, it is true that no copyright expert agrees with every court decision on fair use, but we are not aware that such consensus exists in any other significant area of the law.

The Fair Use Doctrine in the United States — A Response to the Kernochan Report, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2298833

You can find answers to other frequently asked questions about flexible exceptions in *Responding to Frequently Asked Questions About Flexible Use Provisions*, <http://infojustice.org/wp-content/uploads/2012/12/Appendix-III.pdf>. You can also find other resources helpful to your efforts, including a *Masterlist: Limitations and Exceptions Provisions in National Laws*, which provides a great many examples of specific and general exceptions in modern copyright laws around the world.

