



SOUTH AFRICAN CULTURAL OBSERVATORY

Fair Use versus Fair Dealing: Implications for the Cultural and Creative Industries (CCI) in South Africa

Submitted to:

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Nelson Mandela University

In Partnership with:

Rhodes University, University of Fort Hare and University of KwaZulu-Natal

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South African Cultural Observatory

**Fair Use versus Fair Dealing: Implications
for the Cultural and Creative Industries
(CCI) in South Africa**

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Researchers

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EXECUTIVE SUMMARY

This research report explored which of the two models of exceptions and limitations in copyright- fair dealing and fair use is appropriate for South Africa in the aftermath of the Copyright Amendment Bill (CAB) that is an outcome of the reform of the Copyright Act 1978 (CA 1978). Section 12A of the CAB that provides for fair use of copyright works will replace section 12(1) of the CA that provides for a fair dealing of copyright works as an exception and limitation.

The inadequacies of the Copyright Act 1978 in general and the fair dealing provision to provide adequate access to copyright works; promote and protect human rights and effectively respond to the challenges of the digital era led to the introduction of the Copyright Amendment Bill (CAB) and the fair use clause.

The inadequacies of the fair dealing provision CA 1978 stem from the fact that the fair dealing provision contains a closed list of exceptions and limitations. Any use for which fair dealing is claimed must fall within these enumerated purposes before the fairness of the use is determined. Any reform of the fair dealing provision that increases the purposes for which fair use is claimed will not remedy a fundamental defect of the limited capacity of fair dealing provisions to ensure that human rights issues are addressed. Countries such as Canada and the United Kingdom have responded to the limited effect of fair dealing by the development of a user's right and the public interest defence respectively.

The introduction of the fair use clause in the CAB has generated considerable controversy of supporters and opponents. Opponents of the clause raise any legitimate concerns including the fact that the clause will lead to loss of revenue; a shrinking of the value of the copyright industries and constitute arbitrary deprivation in breach of section 25 of the Constitution. Proponents of the fair use clause point to the catalytic effect that the fair use clause will bring to South Africa's copyright industries enabling all stakeholders to engage in transformative and other uses that will lead to more creative works that will increase the value of the sector and its contribution to the South African economy. Fair use is part of the copyright regimes of the United States, Israel, Taiwan, and the Philippines.

The open-ended nature of the fair use clause and its catalytic feature make the fair use clause ideal for the cultural and creative industries (CCIs) in South Africa. To address many of the legitimate concerns of stakeholders, it is important to elaborate on the jurisdiction practice and procedure of the Copyright Tribunals to deliberate on disputes about fair use in an informal and less expensive manner. To further guide negotiations about fair use, as well as assist the Copyright Tribunal, the Department of Arts and Culture should assist different copyright sectors to engage and produce standards of best practices in fair use.

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1. Introduction: Aims and Objectives

One of the controversial amendments in the ongoing reform of the copyright law in South Africa is the introduction of the fair use clause as a general exception and limitation to copyright protection in the Copyright Act 1978. While many stakeholders oppose the clause, many others support the clause and it appears as part of the Bill currently awaiting the assent of the President. This report examines the fair dealing provision in the Copyright Act 1978 (as amended) which the fair use clause is intended to change; examine the arguments advanced for and against the fair use clause; compares how the fair dealing and fair use clause are implemented in other States as well as make appropriate recommendations.

The copyright reform process commenced officially on 18 November 2010 when the Minister of Trade and Industry established a Copyright Review Commission (The Farlam Commission) to assess the challenges faced by collecting societies in the distribution of royalties to musicians and composers of music. The Farlam Commission Report¹ recommended that:

“ ... [t]he Copyright Act and the Performers’ Protection Act be amended to govern effectively the digital exploitation of copyright works. The CRC believes that an overall impact study should be conducted and finalised to determine the appropriateness for the country to ratify and implement the World Intellectual Property Organisation (WIPO) Internet treaties.”²

The push for reform of the copyright regime received a significant boost from the 2013 “Draft National Policy on Intellectual Property: A Policy Framework”³ in published by the Department of Trade and Industry for public comments. A key recommendation was that:

“ To enhance access to copyrighted materials and achieve developmental goals for education and knowledge transfer, South Africa must adopt pro-competitive measures under copyright legislation. The legislation must provide the

¹ See Copyright Review Commission Report, p.4 2011. Available at <http://publishsa.co.za/files/1532283873rsg-copyrightreviewcommissionreport2011.pdf> .

² Note 1 at p.4.

³ Notice 918 of 2013

maintenance and adoption of broad exemptions for educational, research and library uses.”⁴

On 16 May 2017, the Minister of Trade and Industry introduced the CAB to Parliament which after parliamentary and public consultation processes now sits before the President for his assent.

Copyright is a significant part of intellectual property rights protected by States that provides protection for cultural and creative works through a limited monopoly that enables the copyright owner to determine how such copyright work is accessed by third parties often for a fee. The essence of intellectual property protection including copyright is to incentivise innovation and creativity and resolve the problems of free riding. Without limited protection, stakeholders in the creative and cultural industries would feel little urge to create.

Copyright protection is crucial for the South African economy. A 2011 World Intellectual Property Organisation (WIPO) Report on *The Economic Contribution of Copyright-Based Industries in South Africa*⁵ concludes that these industries contribute 4.11% to South Africa’s GDP and 4.08% to employment. A 2018 South African Cultural Observatory (SACO) Report states that the Cultural and Creative industries (CCIs) contributed 1.7% to South Africa’s GDP.⁶ Whether the copyright-based industries are able to contribute more to the South African economy is predicated on many factors including an appropriate copyright regime that is constructed on a number of factors that are reviewed below.

A significant feature of copyright, like all intellectual property rights, is that it is not absolute protection, a feature expressed in three ways. First, copyright protects expression while ideas are free⁷ which ensures that the manner in which ideas are expressed is what is protected. Different persons may have the same idea but express them in different ways. Even though the distinction between ideas and expression is often difficult to establish copyright protection requires a medium that contains the

⁴ Note 3, at p. 29.

⁵ Available at https://thedti.gov.za/industrial_development/docs/Economic_Contribution.pdf

⁶ SACO. The mapping of the South African creative economy: A baseline. South African Cultural Observatory, 2018. Available online at <http://southafricanculturalobservatory.org.za>

⁷ In *Williams v Crichton*, 84 F. 3d 581, 585 the Court stated that “ It is a principle fundamental to copyright law that a copyright does not protect an idea, but only the expression of the idea.

expression.⁸ Secondly, copyright is a balance between protection and access. On one hand, the rights of a copyright owner to extract value from the work is protected, while on the other hand, access to copyright works through limitations and exceptions is crucial to ensure that copyright works are available to inspire more innovation and creativity as well as enable and assist citizens to realise their human rights. These human rights include the freedom of expression; equality; access to learning and lifestyle materials and the promotion of disability rights. Thirdly, the term of protection of copyright is limited often to the life of the author plus 70-50 years. The limited term of protection is designed to ensure does not last forever and the public has access to copyright works.

Copyright authorship is often different from copyright ownership.⁹ Considerable investment is needed to make copyright works available and accessible to the public making the cultural and creative industries who may not be copyright authors, key drivers of economic activity in terms of employment; foreign investment and taxation. In recent times, studies have begun to quantify the contribution of copyright industries in particular and the creative and cultural industries to the economy. Accordingly, what is protected by copyright are the rights of creators and those of copyright industries/intermediaries such as sound recording companies; publishing houses; music companies; broadcasting houses; software and internet companies. Without the intervention of the copyright industries, copyright production by authors, would not be readily available and there may not be much incentive to produce.

The introduction of the internet has brought considerable impact on copyright production enabling creativity but also facilitating piracy. Concerns of the ubiquitous nature of the digital framework led to a conclusion of two (2) treaties¹⁰ that provide a framework to enable States to grapple with how the digital era affects copyright protection. The distinction between authorship and ownership did not disappear with the digital era. Arguably, the digital era reinforces the different interests that are present under the copyright umbrella and suggest a nuanced understanding of 'copyright'. For example,

⁸ For example section 2(2) Copyright Act 1978 (CA 1978) provides that a work except a broadcast or programme carrying signal shall be not eligible for copyright unless the work has been written down, recorded, represented in digital data or signals or otherwise reduced to material form.

⁹ See for example how the CA 1978 makes the distinction between 'authorship' and 'ownership' in section 21 (1)(c). This section provides that if a person commissions the taking of a photograph, the painting or drawing of a portrait, the making of a gravure, the making of a cinematograph film, or the making of a sound recording and pays or agrees to pay for it, such a person is the copyright owner except there is an agreement to the contrary.

¹⁰ The WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)

what may be important to a creator is the ability to create and recreate while a copyright intermediary/industry may be interested in maintaining legal/economic structures that assure and continue value creation.

Copyright is closely related to a States' national interest since it facilitates cultural and economic production. A favourable copyright policy and law ensure considerable cultural production that adds refine and facilitate values principles goods and services that drive entertainment revenue nationally and internationally. For example, the United States entertainment industries are crucial drivers of the American economy ensuring that these industries earn revenue from all over the world.¹¹ States actively seek favourable copyright framework to enable their firms to compete. In this regard, States also think carefully of how to achieve an optimum balance of the protection of and access to copyright works for national development. South Africa is not an exception. Her national interest is founded on the 1996 Constitution that enacts a republic based on freedom equality and dignity; the Revised White Paper on Arts and Culture¹² and the draft White Paper on Science, Technology and Innovation.¹³ These documents, it can be submitted, collectively urge the development of the CCIs to reduce unemployment; address poverty and fight inequality.¹⁴ In sum, the CAB is evidence that the CA 1978 does not adequately promote South Africa's national interest in seeking a balanced copyright regime of protection and access. One of the shortcomings of the CA 1978 is its provision for fair dealing as a general exception and limitation. The CAB as the product of a reform process includes a new fair use provision that has generated substantial debate in the country. In the context of the above discussion, the overall goals of this report are to:

1. Undertake a brief overview of the fair dealing exception in the Copyright Act 1978.

¹¹ A good example is the Generalised System of Preferences (GSP) authorized by Title V of the Trade Act of 1974 which links the duty-free importation of designated beneficiary developing countries subject to satisfactory trade conditions in such countries which include appropriate standards of intellectual property rights. The International Intellectual Property Alliance has petitioned the United States Trade Representative (USTR) to review the GSP eligibility of South Africa because of the inability of the CAB to provide adequate and effective protection to American copyrighted works and sound recordings and to provide "equitable and reasonable access" to its markets for American producers and distributors of creative materials.

¹² See *Revised White Paper on Arts and Culture*. Department of Arts and Culture (2018) . Available at <http://www.dac.gov.za/content/revised-white-paper-arts-culture-and-heritage-fourth-draft-0>

¹³ See the draft White Paper on Science, Technology and Innovation. Department of Science and Technology. (2019) Available at https://www.gov.za/sites/default/files/gcis_document/201809/41909gon954.pdf

¹⁴ See National Development Plan 2030 Our Future-make it work. (2012) National Planning Commission. Available at <https://www.gov.za/issues/national-development-plan-2030>

2. Examine the fair use clause in the Copyright Amendment Bill and the implications thereof in the light of proponents and opponents of the clause including alternatives to the fair use clause;
3. Examine challenges and opportunities to implement fair use and fair dealing in South Africa, with a specific focus on protecting individuals and works in the CCI;
4. Undertake case studies of the Implementation of fair dealing in Canada and the United Kingdom; fair use in the United States; and exceptions and limitations in bilateral and multilateral treaties;
5. Put forward recommendations, including noting legislative and policy issues as well as areas for research and training.

2. Literature Review: Fair Dealing and Fair Use in Copyright Reform in South Africa

In this section, the report examines South African literature on fair dealing as the current provision for a general exception and limitation. A brief overview of fair use as a model of exceptions and limitations in the United States is also undertaken since there is very little South African literature on the subject until the fair use clause appeared in the CAB. The recognition that copyright is constitutional property protected by s. 25 of the Constitution predates the CAB. Accordingly, a section of the literature review provides an appropriate context for a consideration of the fair use clause in the CAB.

2.1 Copyright Reform in South Africa

There is an overwhelming consensus of the deficiencies of the Copyright Act 1978 which necessitated the CA necessitated the CAB . The process of the review has been considered above in the introduction.

2.2 Fair Dealing in South Africa

An overwhelming conclusion of stakeholders is that the fair dealing provision of the CA 1978 is inadequate. Many stakeholders such as A Rens et al,¹⁵ and Tana Pistorius¹⁶

¹⁵ A Rens, P Chetty, T Schonwetter, R Khan, P Jacobson & U Maistry “ Report on the South African open Copyright Review” Available at ip-unit.org/wp-content/uploads/2010/07/opencopyrightreport1.pdf

¹⁶ See T Pistorius “Developing Countries and Copyright in the Information Age: The Functional Equivalent Implementation of the WCT” 2006(2) PER 149-197.

draw attention to the inadequacy of the Copyright Act to deal with the challenges of the digital era. For example, A Rens et al argue with respect to fair dealing and other exceptions and limitations that:

“ South Africa’s system of copyright exceptions is in many respects outdated. Current copyright exceptions and limitations do not sufficiently take into account new technologies.”¹⁷

Section 12(1) of the CA 1978 provides that”

Copyright shall not be infringed by the use of literary or musical work for research, private study; personal or private study; criticism or review of that work or of another work; reporting current events in a newspaper, magazine, or similar periodical; or by means of broadcasting or in a cinematograph film

It is consensus, that section 12(1) of CA 1978 is a closed class (in terms of the copyright works and purposes) that are interpreted strictly but provides clarity.¹⁸ RM Shay in his article¹⁹ concludes that the fair dealing provision is a “numerus clausus” of permitted purposes²⁰ that caters for ‘worthy social uses of copyright works and caters for instances of market failure.’²¹ Shay argued that factors such as (i) the purpose and character of use (ii) Nature of the copyright work; (iii) amount and substantiality of use; and (iv) effect of the dealing on the potential market for, or value of the original are standard factors used in s.107 of the US Copyright Act and which many foreign courts regularly use.²² Whether South African courts would use such factors in determining fair dealing remained a matter of conjecture until the case of *Moneyweb (Pty) Limited v Media 24*

¹⁷ Note 15, 15.

¹⁸ See R M Shay” Fair deuce: an uneasy fair dealing-fair use duality” 2016 *De Jure* 105-117.

¹⁹ R. M Shay “Exclusive rights in news and the application of fair dealing” (2014) 16 SA Merc LJ 587

²⁰ Note 19, p. 593.

²¹ Note 19 p. 592.

²² Note 19 p.595.

Limited.²³ RM Shay²⁴ and other authors²⁵ in their analysis of *Moneyweb*, which is the only South African case to deal with fair dealing, identify two issues established by this case. The first issue is the two-stage analysis a South African court must engage in an assessment of a claim of fair dealing which emphasises the closed nature of the fair dealing exception. The first step is to determine that the intended use is part of the enumerated purposes in section 12(1) of the CA 1978. The second step of the analysis is for the court to determine whether the intended use is fair. The second issue relates to the use of foreign jurisprudence to interpret the fair dealing provision. Since the factors to determine fairness are not listed in the CA 1978, the authors agree that South African courts will resort to the use of foreign precedents in the evaluation of the ‘fairness’ in the asserted fair dealing. In this regard, the authors approve of the reliance on English authorities to interpret the fair dealing exception in *Moneyweb*.²⁶ Thirdly, the authors also point out that Berger AJ was correct in *Moneyweb* that the fair dealing exception in section 12(1) of CA 1978, should be interpreted in a manner consistent with the right of freedom of expression, a point which is explored, in section 2.4, below.

It is interesting to note that the deficiencies of the fair dealing exception were not part of the scholarly commentary on *Moneyweb* perhaps because the claimed exception fell within the enumerated purposes in section 12(1) of the CA 1978. Be that as it may, it is important to note that the manner in which (if at all) fair dealing facilitates creativity was not explored in *Moneyweb* or in the ensuing commentary. In contrast, as will be evident in the next section, proponents of fair use urge that one of its strengths is its catalytic function towards greater creativity and innovation. Since *Moneyweb* is the only South African case on fair dealing, it is fitting to suggest two likely scenarios. First, South

²³ 2016(4) SA 591(GJ) (Hereafter *Moneyweb*). *Moneyweb* concerns two online publication outfits and was brought by Moneyweb who claimed that Media24 under the banner of *Fin24* unlawfully published seven of her articles and breached their copyright. Media 24 claimed that the Moneyweb could not prove the originality in respect of the seven stories. They further contended that even if Moneyweb could prove that the stories were original and entitled to copyright protection, their use of the articles was not an infringing reproduction because of a lack of substantial similarity between the stories. Media24 also contended that Moneyweb’s articles were excluded from copyright protection in terms of section 12(8) of the Copyright Act because they were ‘mere items of press information’. They further contended that should the court find that Moneyweb’s stories were entitled to copyright protection and that they had substantially infringed these stories, they were entitled to an exemption by the fair dealing provisions of s. 12(1) of the CA 1978.

²⁴ See RM Shay “Moneyweb (Pty) Ltd v Media 24 Ltd [2016] 3 All SA193 (GJ); 2016 (4) SA 591 (GJ)” 2017 (5) *South African Intellectual Property Law Journal* 159-171.

²⁵ See for example S Karjiker “News reports and fair dealing” Available at <https://blogs.sun.ac.za/2016/05/17/>; K Kriel “ What is Determined as Copyright Infringement” 2016 *De Rebus*; ME Rostoll “ Copyright in News?: Moneyweb (Pty) Ltd v Media 24 Ltd 2017(2) *TSAR* 425-442.

²⁶

Africa's copyright industries or some parts of it found it adequate. Secondly, the necessity of judicial interpretation discouraged stakeholders from litigation on the meaning of 'fair dealing.'

Even though South African courts have not expanded the closed nature of the 'fair dealing' provision, it remained a distinct possibility they would imitate the manner in which the Canadian 'fair dealing' provisions has through interpretation and recognition of a users' right to copyright²⁷ become similar to the American 'fair use' provision. Michael Geist²⁸ and Ariel Katz²⁹ point out that through a number of judicial decisions Canadian courts have narrowed the difference between the two concepts because of a broad interpretation such that the two-stage analysis that a use claimed as a fair dealing passes through. The first stage of analysis examines whether the intended use falls within the enumerated purposes of s. 29 of the Canadian Copyright Law. The second stage that examines the fairness of the intended use is now the stage that Canadian Courts after CCH concentrate on rather than the first stage which ordinarily differentiated 'fair dealing' from 'fair use'. The approach of Canadian Courts is important because no one can deny the possibility that constitutional values and the demands of human rights would not have led South African courts to walk down the path of Canadian courts in interpreting fair dealing to be much closer to fair use. Other countries seek to Michael Geist points out that Singapore and Malaysia adopt a 'fair dealing' language but retain the flexibility of 'fair use'.³⁰

2.3 Fair Use in South Africa

The preponderance of the commentary on the fair use clause has arisen in the aftermath of the CAB. As noted above South African courts have not commented on fair use as an alternative to fair dealing as an appropriate general provision of exceptions and limitations. On the other hand, South African scholarly commentary about fair use before

²⁷ See *CCH Canadian Ltd. v Law Society of Upper Canada [CCH]*, [2004] 1 SCR 339; *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, 2012 SCC 36, *Alberta (Education) v Canadian Copyright Licensing Agency*.

²⁸ "Fairness Found: How Canada shifted from Fair Dealing to Fair Use" in M. Geist (ed) *The Copyright Pentology* University of Ottawa Press 2013 157- 186.

²⁹ "Fair Use 2.0: The Rebirth of Fair Use in Canada in M. Geist (ed) *The Copyright Pentology* University of Ottawa Press 2013 93- 156.

³⁰ Note 28 pp.163-164.

the CAB does exist. For example commentators such as Owen Dean³¹ asserted that 'fair dealing' and 'fair use' as the same because they are vague and fact-specific. Other commentators such as Visser³² disagree.

Outside South Africa, fair use has been in operation for decades in the United States where there appears to be widespread agreement on its social function. Patry³³ For example, argues that it is a means of facilitating innovation and creativity. American scholars point approvingly to the opinion of the US Supreme Court in *Campbell v. Acuff-Rose Music, Inc*³⁴ that fair use "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." Patry points out that: "Fair use arose, and still functions, as a way to encourage learning through the judicious use of an earlier work for a socially beneficial purpose, most typically in a second author's work."³⁵ Mathew Sag contends further that:

"In the digital age, innovation and freedom of expression increasingly require the use, reinterpretation, and remixing of copyrighted content; the fair use doctrine is often the only aspect of copyright law that makes these activities possible. It is not simply end-users who rely on fair use: the doctrine is an essential part of the legal architecture of Internet search, Web 2.0 enterprises, and social networking technologies."³⁶

On the other hand, the flexible nature of fair use is also ground for complaints that fair use is unpredictable and therefore leads to litigation according to Lawrence Lessig³⁷ as well as Heins and Beckles.³⁸ Pratt also points out that a fair use defence is not automatic³⁹ but depends of the circumstances of each case making fair use a flexible doctrine that ultimately depends on adjudication. Apart from the United States, other countries such as Israel; Taiwan; and the Philippines have adopted a fair use model.

³¹ OH Dean *Handbook of South African Copyright Law*, Service 13, 2006 at 1-42.

³² C. Visser " Copyright in works created in the course of employment: The Supreme Court of Appeal gives guidance: King v. SA Weather Service" 2009 SAMLJ 591.

³³ See B. Patry "Fair Use is Good for Creativity and Innovation" 2017. PIJIP Research Paper Series, Paper no. 2017-01.

³⁴ 510 U.S. 569, 577.

³⁵ Note 33 p. 7

³⁶ See M Sag "Predicting Fair Use" 73 *Ohio State Law Journal* 47, 49.

³⁷ See Lawrence Lessig "Free Culture: Version 2004-02-10" Available at <http://www.sslug.dk/~chlor/lessig/freeculture/index.html>

³⁸ See Marjorie Heins and Tricia Beckles, "Will Fair Use Survive? Free Expression in the Age of Copyright Control", A Public Policy Report, The Brennan Center for Justice, 2005. Available at <http://www.fepproject.org/policyreports/WillFairUseSurvive.pdf>

³⁹ Note 33, p.7.

2.4 Copyright As Constitutional Property

The Bill of Rights in national constitutions affects the choice made by States such as South Africa between 'fair dealing' or 'fair use' models of exceptions and limitations. In section 2.2 dealing with fair dealing, it was noted, that the Court in *Moneyweb* stressed the importance of interpreting the fair dealing provision in line with the freedom of expression. The protection of human rights that guarantee access to copyright works is also important for fair use. Thus, the widespread recognition that copyright is constitutional property protected by section 25 of the 1996 Constitution requires a number of engagements with the enforcement of rights that is important for 'fair dealing' and 'fair use'. An appropriate question is the nature of copyright as constitutional property and whether the rights of the copyright owner and that of the public to access copyright works are protected by section 25? The answer to this question is that both interests are recognised by section 25 of the Constitution. To urge that only the interests of the copyright owner is protected by section 25 is to miss the essence of the constitutional property clause which is the objective of balancing the protection of private property interests and the amplification of social justice. For example, the allegation that legislation such as the CA 1978 or its successors (including the CAB) breach section 25(1) of the Constitution, because it is an arbitrary deprivation of property, is often founded on the assumption that section 25 protects the private interests of the copyright owner. Copyright is, therefore, an ideal example of section 25 of the Constitution because it protects the rights of authors and creators of copyright works as well ensuring that through exceptions and limitations members of the public have access to these works. Other rights in the Bill of Rights such as the right to freedom of expression (section 16); the right to privacy (s. 14); the right to dignity (s. 10); the right to equality (s. 9) and the right to access to basic education (S.29(1) (a) amplify the rights of the public to access to copyright works and impact the interpretation of copyright as constitutional property. For example, the right of access to basic education is a veritable ground for demanding access to copyright materials because this right is immediately realisable and South African courts have held that infrastructure including textbooks⁴⁰ should be available to learners. The obligation to supply basic learners with school textbooks raises the issue of whether fair dealing provisions are adequate to ventilate

⁴⁰ See *Minister of Basic Education v Basic Education for All* (2016) (4) SA 63 (SCA).

this constitutional entitlement. The same consideration applies to the demands of the right to freedom of expression and fair dealing. Thus even though, Richard Shay points out that Berger AJ, in *Moneyweb* correctly recognised the right to freedom of expression as an appropriate context for interpreting the fair dealing provision,⁴¹ he points out that his cursory treatment of the relationship between the fair dealing provision and the right to freedom of expression leaves unanswered the question "...whether the fair dealing provision is sufficient to give effect to the rights guaranteed by s. 16 of the Constitution".⁴² A number of options are feasible to ensure that the interpretation of the fair dealing provision aligns with the right to freedom of expression including resort to the fair use provisions. Karjiker asserts that the fair dealing exception does not adequately amplify the freedom of expression because of its limitations and inability to cover other public policy concerns.⁴³ Karjiker advocates a public interest defence as an appropriate response to remedy this defect even though his conception of the public interest defence is narrowly conceived and would not contemplate the fair use model. Nwauche, on the other hand, asserts that the public interest in South African copyright law requires a robust public interest defence that is anchored on the constitution and impliedly could accommodate the fair use provision.⁴⁴ Shay does not base his analysis on the interplay between fair dealing and the freedom of expression, but recommends the adoption of a fair use clause to enable the use of copyright works for the transformative creation of derivative content.⁴⁵

3. Research Methods

This report is prepared through a desktop doctrinal analysis making use of reports; cases; legislation; and scholarly commentary.

⁴¹ Note 19, p.169.

⁴² At p. 170

⁴³ See S Karjiker "The Case for the recognition of a public-interest defence in copyright" 2017(3) *TSAR* 451-469.

⁴⁴ See ES Nwauche "The judicial construction of the public interest in South African Copyright Law" 2008 39 *International Review of Intellectual Property and Competition Law* 917-

⁴⁵ Note 18.

4. The Fair Use Clause in the Copyright Amendment Bill

4.1 Overview of the Copyright Amendment Bill

4.1.1 Objectives of the CAB

The objectives of the CAB gleaned from the Preamble to the Bill, the explanatory memorandum to the Bill and the 2013 Draft National Policy on Intellectual Policy: A Policy Framework include the following:

- (i) To update the 1978 Act, and ensure that it meets international obligations
- (ii) To ensure that copyright protection responds to the challenges of the digital age.
- (iii) To facilitate the socio-economic development of South Africa through a balanced copyright regime that incentivize creativity and knowledge development with facilitates access to copyright works to promote the public interest;
- (iv) To ensure that the public interest includes the promotion and protection of the rights of ordinary South Africans.

The provisions of the CAB seek to enable stakeholders in the creative and culture industry to create copyright works; own copyright works and earn Income from copyright works. The CAB also enables access to copyright works as well as providing a forum in addition to the regular courts for the adjudication of disputes arising from rights and processes it protects.

4.1.2 Access to Copyright Works

The CAB ensures access to copyright works for the fulfillment of the rights of citizens and to engage in more innovation and creativity by providing a general exception in a fair use clause in clause 12A as well as specific exceptions and limitations in clauses. These specific clauses include 12B for all copyright works ranging from quotation; illustration; personal use; use for judicial proceedings; and reproduction of public lectures. Clause 12C of the CAB permits temporary reproduction and adaptation; Clause 12D has extensive provisions for educational and academic activities; Clause 19B makes provisions for exceptions regarding computer programs while Clauses 19C

inserts general exceptions for libraries, archives, museums, and galleries. Clause 19D recognises exceptions regarding the protection of copyright for persons with disabilities.

4.1.3 Enabling Stakeholders to Create Own and Earn Value from their Works

For authors and creators, the CAB enables stakeholders to create copyright works by ensuring they have access to copyright works through the fair use clause. The CAB enables stakeholders to own copyright works through a number of provisions. Clause 39B restricts assignments to 25 years. In addition, clause 23 enables sub-licensees to conclude contracts without the consent of Licensees. Stakeholders are enabled to earn Income from the exploitation of copyright works. Clause 6A-9A provides for resale royalties; ensure more royalties from the commercialisation of copyright works. Clauses 27(a), 28(2); 28O, 28P, 28Q, 28R, and 28S recognizes mechanisms for the protection of works and rights of authors in the digital environment and provides for enhanced membership and participation of stakeholders in collective management organisations.

4.1.4 An Enhanced Copyright Tribunal

Clause 29 of the CAB establishes a Copyright Tribunal whose function provided for by Clause 29A of the CAB includes settling any dispute relating to copyright.

4.2 Fair Use in the CAB

The CAB contemplates that section 12(1) of the Copyright Act 1978 will be replaced by section 12A that provides for a general exception to copyright protection that contains a fair use exception and provides as follows:

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

- (i) Research, private study or personal use, including the use of a lawful copy of the work at a different time or with a different device;*
- (ii) criticism or review of that work or of another work;*
- (iii) reporting current events;*
- (iv) scholarship, teaching and education;*
- (v) comment, illustration, parody, satire, caricature, cartoon, tribute, homage or pastiche;*

- (vi) *preservation of and access to the collections of libraries, archives and museums; and*
- (vii) *ensuring proper performance of public administration.*

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

(i) the nature of the work in question;

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

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

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

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

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

(c) For the purposes of paragraphs (a) and (b) the source and the name of the author shall be mentioned.”

In general, section 12A introduces a fair use provision that introduces a general provision for exceptions and limitations with a non-exhaustive list of intended uses because of the phrase ‘such as’ to be governed by a four-factor test in the determination of whether a claimed exception and limitation qualified.

4.2.1 Opposition to the Fair Use Clause

In the course of public consultations on the CAB, a number of organisations opposed the inclusion of the fair use clause. What appears below is a summary of these views and their proponents.

Free Use of Copyright Works; Revenue Loss and Loss of Creativity

A study titled “The Expected Impact of the ‘fair use’ Provisions and Exceptions in the Copyright Amendment Bill on the South African Publishing Industry”⁴⁶ produced by PriceWaterhouseCoopers on behalf of the Publishers Association of South Africa (PASA) stresses the point that the fair use provisions will enable free riding and allow free use of copyright works. According to the Report, the fair use clause will consequently lead to the publishing industry experiencing significant negative consequences including a weighted average decline of 33% sales; an increase in the relative share of imports of domestic sales; a reduction in the relative share of exports of total sales of the sector; and a weighted decline in employment of 30%. In a similar

⁴⁶ Available at www.publishsa.co.za/file/1501662149slp-pwcreportonthecopyrightbill2017.pdf

vein, Spoor and Fisher note that the inclusion of “scholarship, teaching and education” as exceptions under fair use, will lead to loss of sales and revenue, by allowing enrichment at the expense of authors and copyright owners, to the extent that it will act as a disincentive to academic writing.⁴⁷ A similar view is echoed by Puku Children’s Literature Foundation that notes the inability of the fair use provision to sustain the book sector because of its broad terms. In support, it argues that in its current form, fair use will promote copying in a way that can engender copying an entire book for the whole institution at no fee.⁴⁸

Legal Uncertainty and Endless Litigation

The argument that the historical foundation of fair use in the US jurisprudence is unsuitable for South Africa’s economy was raised by stakeholders such as the Law Society of South Africa (LSSA). LSSA was of the view that the introduction of fair use doctrine originating in the United States is incompatible with South Africa’s legal history-founded on English law.⁴⁹ To reinforce this argument, LSSA points to the warning given and caution exercised by Berger AJ in *Moneyweb* regarding the significance and influence of foreign law in evaluating a local claim.⁵⁰ Along the same line, the South African Institute of International Property Law (SAIPL) argues that the introduction of fair use (originating from the US) will necessitate reliance on international precedents and the consequential interpretational problems that could arise from this will increase litigation.⁵¹ DALRO notes that the legal uncertainty will be exacerbated by the proposal to ban contractual terms that override acts permitted by the Act.⁵² To Kagiso Media, the application of a new and untested fair use doctrine within the South African economy could be abused leading to endless litigation, a common scenario in the United States.⁵³ This preference for litigation as a means to enforce copyrights is one of the reasons Southern African Music Rights Organisation (SAMRO) disagrees with the proposed

⁴⁷ Spoor & Fisher *The Copyright Amendment Bill [B13-2017]* (7 July 2017), 9-10.

⁴⁸ Puku Children’s Literature Foundation *submission to the Portfolio Committee on Trade and Industry: Copyright Amendment Bill 2017* (30 June 2017).

⁴⁹ LSSA *Submission* (7 July 2019) para IV; Sasol *Sasol Comments on the Copyright Amendment Bill 2017 [B13-2017]*, (30 June 2017) 8.

⁵⁰ Note 23 para 103.

⁵¹ South African Institute of Intellectual Property Law Copyright Law Committee, *Submissions on the Copyright Amendment Bill b13-2017*, (Tabled in Parliament 16 May 2017) para 12.4.

⁵² DALRO *Copyright Amendment Bill, No 13 of 2017: Submission by the Dramatic Artistic and Literary Rights Organisation (Pty) Ltd*, (7 July 2017) 9.

⁵³ Kagiso Media *Kagiso Media’s Submission on the Copyright Amendment Bill [b13-2017]* (07 July 2017) .

introduction of fair use.⁵⁴ In the same context Music Publishers' Association of South Africa (MPASA), rejects the introduction of fair use arguing that litigation is not the most suitable approach for copyright protection in South Africa given the limited financial strength of South African creators and copyright owners, who will be unable to access the courts of law against financially stronger users.⁵⁵

Lack of a proposal on copyright levy

It is argued that copyright levy would counter the negative effect of copying, yet, there the CAB has not made provision for this contrary to the practice in foreign jurisdictions such as continental Europe where exceptions are subject to payment of specific fees or copyright levy, collected by the respective collective societies.⁵⁶

Lack of evaluation of fair use doctrine against the three-step test under the Berne Convention

Myburgh analyses the fair use provisions against the three-step test provided in section 9(2) of the Berne Convention, and finds that there was no evaluation of the provision against the three-step test, and for that reason, he concludes that the CAB is at risk of being non-compliant with the Berne Convention.⁵⁷

Fair use is deprivation of property in breach of s. 25 of the Constitution:

One of the major complaints about the CAB is that the fair use provisions constitute an arbitrary deprivation of property and breach section 25 of the Constitution.⁵⁸ The argument in furtherance of this point is that the effect of section 12A of the CAB is to substantially reduce the degree of protection a copyright owner has over his property (copyright) because of the four new purposes in the fair use clause as well as the use of

⁵⁴ Southern African Music Rights Organisation *Submission in Respect of the Copyright Amendment Bill of 2017 (General Notice B13-2017)* 21.

⁵⁵ Music Publishers Association of South Africa *Submission Relating to the Copyright Amendment Bill (7 July 2017)* 2.

⁵⁶ PASA *Copyright Amendment Bill, No 13 OF 2017 and Performers Protection Amendment Bill, No. 24 OF 2016: Submission of Comments by the Publishers Association of South Africa (7 July 2017)* 13; DALRO *Copyright Amendment Bill, No 13 of 2017: Submission by the Dramatic Artistic and Literary Rights Organisation (Pty) Ltd, (7 July 2017)* 6, 8 & 13.

⁵⁷ Myburgh André *Advice on the Copyright Amendment Bill, No 13 of 2017, Revised as at 3 September 2018 for the Portfolio Committee on Trade and Industry of the Parliament of the Republic of South Africa (1 October 2018)* 58-62 & 65.

⁵⁸ S. 25(1) provides that no one should be deprived of a property in terms of a law of general application and no law may permit arbitrary deprivation of property.

the word 'such as' in enumerating the purposes. It is argued that the determination of 'arbitrary deprivation' falls within the framework set out by the Constitutional Court in *FNB First National Bank of South Africa Limited trading as Wesbank v Commissioner, South African Revenue Service and another; National Bank of South Africa Limited trading as Wesbank v Minister of Finance*⁵⁹ which is

“(a) Does the property amount to ‘property’ for purpose of section 25? (b) Has there been a deprivation of such property? (c) If there has, is such deprivation consistent with the provisions of section 25(1)? (d) If not, is such deprivation justified under section 36 of the Constitution? (e) If it is, does it amount to expropriation for purpose of section 25(2)? (f) If so, does the deprivation comply with the requirements of sections 25(2)(a) and (b)? (g) If not, is the expropriation justified under section 36?”

It is further alleged that to determine 'arbitrary deprivation, the Constitutional Court in *FNB*⁶⁰ introduced the test of 'sufficient reason' or 'sufficient purpose' as a threshold for proof that the intended use of the property does not constitute arbitrary deprivation.

“(a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question and ends sought to be achieved, namely the purpose of the law in question; A complexity of relationships has to be considered; In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected; In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property; Generally speaking, where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation than in the case when the property is something different and the property right something less extensive. This judgment is not concerned at all with incorporeal property. Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially. Depending on such interplay between variable means and ends the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by section 36(1) of the Constitution.”

⁵⁹ 2002(4) SA 768 (CC)

⁶⁰ Note 59 para 100.

It is urged, that the CAB fair use clause should be assessed by a rationality standard that examines whether there is a 'sufficient reason for the deprivations that the fair use clause imposes on a copyright owner. It is further argued that the fair use clause does not meet the 'sufficient reason' standard because of the extent of the deprivation and the fact that the extent of this deprivation is not justified by the purpose of enhancing access to copyright material. Access it is further argued, can be achieved through less restrictive means.

4.2.2 Support for the Fair Use Clause

The Fair Use Clause is not an Arbitrary Deprivation and Complies with s.25 of the Constitution:

The argument that the fair use clause is not arbitrary deprivation and in breach of s. 25 of the Constitution is justified on the jurisprudence of the threshold of arbitrary deprivation. Proponents of this view argue that deprivation is one of the two ways the other being expropriation through which state may limit or take away property in the public interest. It is the State's power to regulate the use, enjoyment, and exploitation of property in the public interest. Along this line, it is argued that the fair use clause satisfies the *FNB* test of 'sufficient purpose' because it is a reasonable exercise of the State's police power to ensure that there is adequate access to copyright works and to protect other human rights. It is further pointed out, that the *FNB*'s sufficient purpose' test is no longer valid. Subsequent to *FNB*, South African courts have simplified the meaning of 'sufficient reason' or 'sufficient purpose' to a question of "significant interference". Simply stated, the new test requires a significant interference with a property right, to establish arbitrariness and an unlawful deprivation. A number of cases are urged in support of the test of 'significant interference including *Mkontwana v Nelson Mandela Metropolitan Municipality*⁶¹ where the Court stated the test of substantial interference as the test of deprivation:

⁶¹ [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) at para 32. See also *Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd* [2010] ZACC 20; 2011 (1) SA 293 (CC); 2011 (2) BCLR 189 (CC) (Offit) at para 41. " Our jurisprudence is clear that the physical taking of property is not required to constitute a deprivation, and it suffices for one or more of the entitlements of ownership to be impacted upon. Whilst direct or physical interference is not necessary, the impact must be of sufficient magnitude to warrant constitutional engagement. A court must give consideration to the extent to which the use and the enjoyment of land have been diminished" In *Tshwane City v Link Africa* [2015] ZACC

“ Whether there has been a deprivation depends on the *extent of the interference* with or limitation of use, enjoyment or exploitation. It is not necessary in this case to determine precisely what constitutes deprivation. No more need be said than that at the very least, *substantial interference* or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation.”

In *South African Diamond Producers Organisation v Minister of Minerals and Energy*⁶², the Court summarised the jurisprudence of South African courts by stating that:

“there will be a deprivation only where the interference is “substantial” – meaning that the intrusion must be so extensive that it has a legally relevant impact on the rights of the affected party.”

Many argue that the test in FNB is wider than the test articulated by *South African Diamond Producers*. It is argued, that while the former is considered broad and simple, the latter is considered narrow. Be that as it may, it is the ‘narrow’ test that has become the dominant test of arbitrary deprivation in South Africa. A narrow test would seem to preserve the state police regulatory power designed to protect rights and other values. Such a test recognises that even though there will be interference with a property when the state interferes with the use and enjoyment of property, it is only a significant interference that will attract the characterisation of arbitrary deprivation. For example in *South African Diamond Producers*, the South African government changed Court held that “ A property holder does not generally have a legally protectable interest either in obtaining a specific value for his goods, or in valuing his goods according to a particular method.”⁶³

Applying the ‘significant interference test’ to the fair use clause in the CAB, it may be urged successfully, that the CAB does not strip copyright owners of their property, but imposes insubstantial deprivations in accordance with the police power of the state to ensure that other public interests and rights of others are protected. First, there is

29; 2015 (6) SA 440 (CC); 2015 (11) BCLR 1265 (CC) (Link Africa) at paras 166-73. : "Does section 22 inflict a deprivation? This depends on the extent of the intrusion in the property or limitation of its use or enjoyment. There must be interference with the property that is significant enough to 'have a legally relevant impact on the rights of the affected party before deprivation of property under section 25 is established'."

⁶² 2017 (6) SA 331 (CC) (para 48). See also *Jordaan v City of Tshwane Metropolitan Authority* 2017(6) SA 287(CC) the substantial interference test was affirmed. The Court stated that substantial means “ the extent of the intrusion must be extensive to have a legally significant impact on the rights on the affected parties.” (para 59).

⁶³ *Ibid*, at para 53.

inconclusive evidence that fair use will lead to a loss since there is also widespread agreement that fair use is also designed to encourage and facilitate innovation and creativity. Secondly, it is clear from the analysis in the next section that the Fair use clause facilitates negotiations between copyright stakeholders towards an amicable licensing of copyright works. Thirdly, the provision of section 36 of the Constitution that specifically provides for limitations that reasonable and justifiable in a democratic society would apply to the fair use clause of the CAB because copyright is constitutional property and the fair use clause is reasonable and justifiable because it protects and promotes the following rights: right of access to basic education (S. 29(1), dignity (persons with disabilities- On the contrary, the right to equality and freedom from unfair discrimination (in section 9(3) of the Constitution) requires Parliament to ensure that protection for persons with visual disabilities. Section 9(2) expressly authorises the state to take *“legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination”*. Moreover freedom of expression (fair use of works for reporting current events, scholarship, teaching and education, comment, illustration, parody, satire, caricature, cartoon, tribute, homage or pastiche. The right to freedom of expression is closely linked to education and includes the important objective of ensuring that people including educators receive information.

The Fair Use Clause Promotes Transformative Uses

Many commentators argue that the fair use clause is crucial for the copyright industries in South Africa to facilitate creativity and innovation. Many sectors in the creative industry rely on the ideas of previous work of art, literature or music.⁶⁴ Uhuru production, argues for an open flexible fair use so that the company can freely and easily access existing works necessary to support its documentary film production.⁶⁵ This is the kind of argument put forward by Google South Africa in support of fair use, if young artists are to effectively make reference to, and be influenced by existing copyright works for to make new inventions or creations.⁶⁶ The Legal Deposit Committee suggests that fair use

⁶⁴ Global Expert Network *Copyright User Rights*, (7 July 2017) at 6, Roya Ghafel & Benjamin Gibert ‘A Counterfactual Impact Analysis of Fair Use Policy on Copyright Related Industries in S2.ingapore’ 3 (2014) LAWS 331; Ministry of Law & Intellectual Property Office of Singapore, *Singapore Copyright Review Report* (17 Jan 2019) 3 & 11.

⁶⁵ Rehad Desai, Uhuru Productions.

⁶⁶ Google *Re: Google South Africa Submission on the Copyright Amendment Bill (B13-2017)* (“the Bill”) (30 June 2017) 5-7; see also Peter Jaszi *Submission to the Portfolio Committee on Trade and Industry Regarding the Copyright Amendment Bill (B13-2017)* (7, July 2017) 2-3 & 6.

provisions should be made broader and open enough than its current form so as to accommodate transformative purposes of the future⁶⁷ since these transformative uses do not provide a market substitute, by definition, for the original copyright material.⁶⁸ It is also important to note that many of these transformative purposes represent human rights recognised by South Africa's Constitution.

Fair use will accommodate future uses:

Fair use is supported by stakeholders as a doctrine that supports future use.⁶⁹ Mathew Sag notes that the flexibility in United States fair use doctrine has enabled it effectively regulate new unforeseen uses that had not been envisaged, at the time the doctrine was formulated in the sense that it has not had to amend its provisions to accommodate the new changes affecting copyright matters.⁷⁰ Mathew Sag⁷¹ argues that that the flexibilities provided under the fair use doctrine enables technologists to lead the development of data mining applications and text mining in a way that does not infringe on the rights of copyright holders.⁷² In support, the Australian Digital Alliance also submitted that it is the best model for promoting innovation and cultural growth. Because, fair use establishes a copyright system that “adapts to technological change and new uses of copyright material, without compromising incentives to create”.⁷³ The Global Expert Network argued that “in the computer, software, internet and related industries, copyright serves as an important branch of innovation policy...it is this openness of US fair use law that

⁶⁷ Legal Deposit Committee Copyright Amendment Bill [B13-2017]: Submission and Request from the Legal Deposit Committee (27 June 2017); see also National Council For Library and Information Services Submission from the National Council for Library and Information Services (NCLIS) 4.

⁶⁸ University of Cape Town *Written comments on the Copyright Amendment Bill 2017* (7 July 2017) 12-13.

⁶⁹ Witwatersrand University Department Of Digital Arts (Wits Digital Arts) Comments by Wits Digital Arts on Specific Clauses of the Copyright Amendment Bill [B13-2017] 17 July 2018 at 5; ReCreate South Africa *Written Submission by Recreate South Africa: Comment on Specific Clauses of Working Draft of the Copyright Amendment Bill* [B13-2017] (18 July 2018) 2; Reddam House South Africa *Copyright Amendment Bill 2017* at 1; Global Expert Network *Copyright User Rights*, (7 July 2017) 6; Roya Ghafel & Benjamin Gibert 'A Counterfactual Impact Analysis of Fair Use Policy on Copyright Related Industries in Singapore' 3 (2014) *LAWS* 330.

⁷⁰ Mathew Sag *Comments on the Copyright Amendment Bill [B1-2017]* (June 28 2017) 4.

⁷¹ Mathew Sag *Comments on the Copyright Amendment Bill [B1-2017]*, Loyola University Chicago School of Law (28 June 2017) 6.

⁷² Mathew Sag *Comments on the Copyright Amendment Bill [B1-2017]*, Loyola University Chicago School of Law (28 June 2017) 6-7; Committee of Higher Education Libraries of South Africa *Endorsement of the Comments by Universities South Africa (USAf) on Specific Clauses of the Copyright Amendment Bill [b13-2017] as Submitted on 17 July 2018* (17 July 2017) 1.

⁷³ Australian Digital Alliance *Copyright Amendment Bill [B13-2017]*.

is the “secret sauce” for promoting the growth of its entertainment, media and high technology industries”.⁷⁴

Fair Use is not free use and does not support piracy

Sean Flynn of the American University of Washington points out that fair use is not free use because of the evaluation that the factors in the fair use clauses require. For example, the fourth factor in the fair use clause requires a court to consider whether the intended use would act as a substitute for the copyrighted work.⁷⁵ Closely allied to the point that fair use is not free use is the fact that fair use is not piracy. Many South African legislation such as the Counterfeit Goods Act prohibits piracy and counterfeiting of copyright works. Fair use is not a defence to criminal and civil proceedings against pirates and counterfeiters.

5. International Comparative Experiences of Fair Dealing and Fair Use

5.1 Case Studies of Fair Dealing/Fair Use (Judicial articulation of User Rights) in Canada

SS. 29 and 29.2 of the Canadian Copyright Act provides that fair dealing for the purposes of research, private study,, education; parody; satire, criticism, review or news reporting is not copyright infringement.⁷⁶ This Canadian provision is a closed list because it is identified with regard to the stated purposes. Thus, a court would first identify that the intended use is part of the enumerated purposes and then engage in whether the intended use meets the criteria of fairness. There are two epochs in the interpretation of the fair dealing provisions in Canadian Copyright law. The first period is before the decision in *CCH Canadian Ltd v Law Society of Upper Canada*⁷⁷ and the period after this decision.

Judicial Interpretation of Fair Dealing Before CCH

⁷⁴ Global Expert Network *Copyright User Rights* (7 July 2017) 6-7.

⁷⁵ S Flynn “Dispelling Myths About Fair Use”. Available at www.infojustice.org/archive/40889

⁷⁶ Parody, satire and education were added as enumerated purposes by Bill C-11, which amended the Copyright Act.

⁷⁷ 2004 1 SCR 339.

In *Michelin v CAW Canada*,⁷⁸ a union's distributed leaflets during a labour dispute that included the image of the Michelin man logo and claimed that the use of the logo was a parody and thus qualified as criticism under the fair dealing exception. The Federal Court rejected that argument, and held that parody was not an enumerated exception within the *Copyright Act* and that further, it was not synonymous with criticism. In reaching this decision the Court stressed the importance of a strict interpretation of the fair dealing provision. *Michelin* represents the strict interpretation of the fair dealing provision in Canada until *CCH*.

*CCH Canadian Ltd. v Law Society of Upper Canada*⁷⁹

The case involved a dispute between the Law Society of Upper Canada and several legal publishers. The Law Society, which maintains the Great Library, a leading law library in Toronto, provided the profession with two methods of copying cases and other legal materials. First, it ran a service whereby lawyers could request a copy of a particular case or article. Second, it maintained several standalone photocopiers that could be used by its members and others. The legal publishers objected to the Law Society's copying practices and sued for copyright infringement. They maintained that copyright infringement occurred through the Law Society's practices. The Court ruled that the Society had neither infringed the publishers' copyright nor authorized others to do so because their practices amounted to fair dealing on the grounds of research and private study. What is significant in the Court's decision is the determination that exceptions to copyright infringement should be regarded as a new copyright right appropriately termed users' rights which must be balanced against the rights of copyright owners and creators. It is the requirement by the *CCH* Court that a users' right must be broadly interpreted⁸⁰ that elevates fair dealing with something more than a defence which traditionally is what an exception is. An example of a broad interpretation of 'research' as a fair dealing use and a user right is the *CCH* court's interpretation that 'research' is not limited to 'non-commercial or private contexts'⁸¹ The *CCH* Court utilised six factors to evaluate the fair dealing claims of the Law Society viz: (i) The purpose of the dealing; (ii) the character of the dealing; (iii) The amount of the dealing; (iv)

⁷⁸ [1997] 2 FC 306.

⁷⁹ Note 77.

⁸⁰ Note 77 para 48.

⁸¹ Note 77 para 51.

Alternatives to the dealing; (v) The nature of the work; and (vi) Effect of the dealing on the work.

After CCH- Broad Interpretation of the Fair Dealing Exception

Canadian Courts have continued a broad interpretation of fair dealing provision. *Alberta (Education) v Canadian Copyright Licensing Agency*⁸² considered the fair dealing exception in education and broadly interpreted the private study exception to include people studying alone or with others. *Society of Composers, Authors and Music Publishers of Canada (SOCAN) v Bell Canada et al.*,⁸³ held that song previews on services such as *Itunes* qualify as research for fair dealing because research should not be confined to creative purposes. Both cases, therefore, continue the recognition of fair dealing as a users' right that requires a broad interpretation advocated by *CCH*. Furthermore, the courts reaffirmed the use of the six factors considered in *CCH*.

The contention that the current fair dealing exception is similar to fair use is because the former through judicial interpretation appears to be as open-ended as fair use. Thus, the Court in *SOCAN*⁸⁴ noted that the *CCH* Court adopted a low threshold in the first step in a fair dealing analysis which is to determine whether an intended use falls within the enumerated purposes. According to the Court, what is significant in the analysis is the determination of what is fair in the fair dealing analysis. A low threshold of what qualifies as a purpose for fair dealing ensures that many claims that intended use falls within enumerated purposes will be successful. It is important to draw attention to *Canadian Copyright Licensing Agency v York University*⁸⁵ which is presently on appeal but which illustrate the fact-specific nature of the fair dealing exception. In this case, the Federal Court of Canada held that organisations seeking to rely on the Fair dealing exceptions are advised to put their thresholds in writing and justify why those thresholds are fair. Furthermore, organisations setting thresholds for fair dealing must engage in a qualitative evaluation of quantitative restrictions. Additionally, these organisations should take steps to enforce these thresholds and limits.

⁸² 2012 SCC 37.

⁸³ 2012 SCC 36.

⁸⁴ Above at para 27.

⁸⁵ 2017 FC 669 (CanLII).

5.2 Case Studies of Fair Dealing in the United Kingdom

Sections 29, 30 and 30A of the United Kingdom Copyrights Designs and Patents Act 1988 has a fair dealing provision which enumerates research, private study, criticism, review, reporting current events, caricature, parody, pastiche and quotation as the purposes for which an intended use can claim to amount to fair dealing. This provision especially its historical pedigree is recognised as a major influence in the fair dealing provisions in the CA 1978. The fair dealing provisions are strictly interpreted in a two stage analysis. The intended use must fall within the enumerated purposes before there is a consideration of whether the use of the copyright work is fair.

Fair dealing and the Public Interest Defence

In 2001 the case of *Ashdown v Telegraph Group Ltd*⁸⁶ decided by the Court of Appeal confirmed that in addition to the fair dealing provisions there is an additional public interest defence to copyright infringement. In this case, the Sunday Telegraph had published verbatim extracts from a lengthy minute of a meeting between Lord Ashdown, the Prime Minister, and other political figures. The extracts contradicted denials emanating from Downing Street of stories in other newspapers concerning the extent of planned co-operation between New Labour and the Liberal Democrats. Lord Ashdown was intending to publish the diaries of which the minute formed part. Although the newspaper did not pay to publish the extracts, the editor of the Sunday Telegraph had clearly understood that the minute was confidential. The Claimant brought proceedings for breach of copyright and breach of confidence. The Vice-Chancellor granted the application and ordered disclosure so that the Claimant could elect between an account of profits or damages. The Defendant appealed and the issues were distilled to be: (i) Whether there was a fair-dealing defence under s.30; (ii) Whether there could be a public interest defence; (iii) Whether summary judgment was properly granted. The Court held that the defendants could not avail themselves of a s.30 defence because they could not bring themselves within any of its parameters but that a separate public interest defence in an appropriate case, is available. Lord Phillips MR, delivering the judgment

⁸⁶ [2001] 3 WLR 1368

of the Court, recognised that the protection of the freedom of expression in s. 10 of the Human Rights Act should in certain circumstances require the use of a copyrighted work to be excused even though such use is not covered by the fair dealing provision in the CDPA's permitted acts. The Court pointed out that the CDPA 1988 did not represent a comprehensive code that balances the competing rights of property interests and freedom of expression leaving no room for a free-standing defence of public interest.

5.3 Case Studies of Fair Use in the United States

In the United States, s. 107 of the Copyright Act provides that:

“ [T]he 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.”

Decades of the judicial articulation of the fair use clause has yielded a considerable number of fair uses cases. A. Beebe asserts that between 1978-2005, Three Hundred and six (306) fair use opinions, were issued by United States Courts.⁸⁷ Another record of considerable judicial opinion is noted by J. Liu, who reviewed Two Hundred and Sixty (260) cases of ‘Transformative use’ in US Courts, through July 1 2017.⁸⁸

Some of the prominent fair use are discussed below:

*Campbell v Acuff-Rose Music*⁸⁹

In *Campbell v. Acuff-Rose Music, Inc* the members of the rap music group *2 Live Crew* composed a song called "Pretty Woman," a parody based on Roy Orbison's rock ballad, "Oh Pretty Woman". The group's manager asked Acuff- Rose Music for a license to use

⁸⁷ See Beebe

⁸⁸ See J Liu “ An Empirical Study of Transformative Use in Copyright Law” 2019 22 Stanford Technology Law Review 163

⁸⁹ Note 34.

Orbison's tune to be used as a parody which was rejected but *2 Live Crew* nonetheless produced and released the parody. Almost a year later, after nearly a quarter of a million copies of the recording had been sold, Acuff-Rose sued *2 Live Crew* and its record company, for copyright infringement. The District Court granted summary judgment for *2 Live Crew*, holding that their song was a parody that made fair use of the original song. The Court of Appeal reversed and remanded the case holding that the commercial nature of the parody rendered it presumptively unfair in terms of the first of four factors of s 107. The Court held that by taking the "heart" of the original and making it the "heart" of a new work, *2 Live Crew* had taken too much under the third S. 107 factor; and that market harm for purposes of the fourth S.107 factor had been established by a presumption attaching to commercial uses. The Supreme Court held that *2 Live Crew's* commercial parody may be a fair use within the meaning of S. 107. The Supreme Court then found that the factors listed in s. 107 must be applied to each situation on a case by case basis. Reviewing the facts of the case against the factors listed in s. 107 the Court found that with respect to the purpose and character of *2 Live Crew's* use, the work's commercial nature is not dispositive of the case but only one element of the first-factor enquiry into its purpose and character; the fact that the work is a parody established the artistic value of the work; that *2 Live crew* did not copy excessively but were reasonable; and with respect to whether harm occurred that parodies hardly substitute for the original work, since the two works serve different market functions. The parties settled the case out of court that according to press reports, required Acuff-Rose to dismiss its lawsuit, and *2 Live Crew* agreed to license the sale of its parody of the song.

(ii) *Cariou v Prince*⁹⁰

In *Cariou v. Prince*, photographer Patrick Cariou published in 2000 *Yes, Rasta* a book of photographs of the Rastafrian community in Jamaica. In 2001 Richard Prince created *Canal Zone*, a series of art works incorporating Cariou's photographs. Prince's works involved copying the original photographs and engaging in a variety of transformations such as printing them, increasing them in size, blurring or sharpening, adding content (sometimes in color), and sometimes compositing multiple photographs

⁹⁰ 714 F.3d 694 (2d Cir. 2013)

together or with other works. In 2009, Cariou filed a copyright infringement suit against Richard Prince and other stakeholders. The Southern District of New York (SDNY), in March 2011, held that Prince's works were infringing. In April 2013, an appellate court reversed the SDNY's decision, finding that most of Prince's works were indeed "transformative" and therefore fair use. In particular, the Court found that a work can be transformative even if they were new and did not engage in a commentary of the original work. The court found 25 of 30 works to be transformative fair use under its standard. On March 18, 2014, Cariou and Prince announced that they had settled the case.

*Blanch v Kroons*⁹¹

In *Blanch v Kroons* the Court considered whether the fair use doctrine is applicable when an artist, such as Koons, uses a copyrighted photograph in a collage painting. In this case, the plaintiff Andrea Blanch, a photographer, filed a lawsuit in federal district court against defendant Jeff Koons, a visual artist, for copyright infringement. Blanch alleged that Koons infringed Blanch's copyright in a photograph by incorporating a portion of the photograph into Koons' collage painting. The court found that defendants were not liable for copyright infringement because Koons' incorporation of the photograph in his painting constituted fair use. Blanch appealed. The appellate court affirmed the district court's judgment. The court ruled that Koons' copying of the photograph was indeed reasonable when measured in light of his purpose, to convey the "fact" of the photograph to viewers of the painting, and in light of the quantity, quality, and importance of the material used.

*Authors Guild v. Google, Inc*⁹²

In *Author's Guild v Google Inc*, the plaintiffs, who are authors of published books under copyright, sued Google, Inc. (Google), the defendant, for copyright infringement in the United States District Court for the Southern District of New York. Through its Library Project and its Google Books project, acting without permission of rights holders, Google has made digital copies of tens of millions of books, including Plaintiffs' that were submitted to it for that purpose by major libraries. Google has scanned the digital copies and established a publicly available search function which was alleged to constitute

⁹¹ 467 F.3d 244 (2d Cir. 2006)

⁹² 804 F.3d 202 (2d Cir. 2015)

infringement of Plaintiffs' copyrights. The plaintiffs sought injunctive and declaratory relief as well as damages. Google defended on the ground that its actions constitute "fair use," which, under S. 107 of the US Copyright Act is "not an infringement." The district court agreed; thus, the plaintiffs appealed. The Court held that defendant's unauthorized digitizing of copyright-protected works, creation of a search functionality, and display of snippets from those works were non-infringing fair uses because the purpose of the copying was highly transformative, the public display of text was limited and the revelations did not provide a significant market substitute for the protected aspects of the originals, and defendant's commercial nature and profit motivation did not justify denial of fair use. Moreover, the Court posited that Defendant's provision of digitized copies to the libraries that supplied the books, on the understanding that the libraries would use the copies in a manner consistent with the copyright law, also did not constitute infringement, nor was defendant a contributory infringer. This case is usually advanced as an example of the potential for fair use to advance learning and benefit authors and content owners because the search on Google lists relevant books and links to the sellers.

*American Geophysical Union v. Texaco Inc.*⁹³

In *American Geophysical Union v. Texaco*, a US Appeals Court held that a private, for-profit corporate library could not rely on fair use in systematically making copies of articles for its employees. Texaco which is a for-profit corporation, maintained an internal library and employed a number of scientists. Texaco subscribed to journals by the American Geophysical Union (AGU) a scholarly society that publishes a number of journals. Texaco also purchased a photocopy license from the Copyright Clearance Center (CCC), an entity that licenses academic content to research organizations. Texaco, like many entities with institutional libraries, was in the practice of photocopying articles from its journals to send to employees. The AGU and five other publishers, eventually joined by several dozen other publishers, sued Texaco for copyright infringement. Texaco argued that her activities did not constitute fair use. The Court disagreed and held that Texaco's use is not fair use. Texaco was fined and agreed to retroactively purchase a license from the Copyright Clearance Center. The Second Circuit's fair-use analysis weighed heavily on the "fourth factor", in s. 107 of the US

⁹³ 60 F.3d 913 (2d Cir. 1995).

Copyright Act that considers "the effect of the use upon the potential market for ... the copyrighted work." In view of the CCC that made licenses available for the photocopying, the court held that Texaco's failure to use the CCC licenses for all its photocopying deprived the rights holders of lost licensing revenue.

Liu⁹⁴ asserts that even though transformative use is not mentioned, in s. 107 of the US Copyright Act, it has been used to turn the four- factor test into a single test; making it dominant in the articulation of whether a use is fair use.⁹⁵ Transformative use is defined in *Campbell v Acuff-Rose Music*⁹⁶ as:

The central purpose of this investigation is to see . . . whether the new work merely "supersede[s] the objects" of the original creation, . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is 'transformative'⁹⁷

This definition recognises the importance of fair use in the creation of new works rather than granting access to members of the public to enjoy copyright works. The facilitation of new works underscores how fair use is important in a knowledge economy. It is also evident for a claim of fair use is not automatic and can fail. Furthermore, our brief survey suggests strongly that parties to a fair use proceeding often end up negotiating the terms of a licence. It would even appear plausible that the fair use provision has led to negotiations between copyright stakeholders. This is often an underappreciated point.

A related point that has emerged from the extensive litigation and negotiations on fair use are a number of sectoral statements of best practices in fair use. For example, Documentary Filmmakers in the United States produced the *Documentary Filmmakers Statement of Best Practices in Fair Use*.⁹⁸ In 2012, the Association of Research Libraries issued a statement of best practices titled *Code of Best Practices in Fair Use for Academic and Research Libraries*.⁹⁹

⁹⁴ Note 34.

⁹⁵ Note 34, p. 204.

⁹⁶ 510 US 569

⁹⁷ Note 95 at p. 579

⁹⁸ See the Documentary Filmmakers Statement of Best Practices in Fair Use. 2005. Available at <https://cmsimpact.org/code/documentary-filmmakers-statement-of-best-practices-in-fair-use>

⁹⁹ See Association of Research Libraries., Code of Best Practices in Fair Use for Academic and Research Libraries, 2012. Available at https://cmsimpact.org/wp-content/uploads/2016/01/code_of_best_practices_in_fair_use_for_arl_final.pdf

5.4 Comparative National Provisions of Fair Use

A number of countries such as Israel, Taiwan and the Philippines provide for the fair use of copyright works

Israel

Article 19 of the *Israel Copyright Act, 2007* provides that

- a. Fair use of a work is permitted for purposes such as private study, research, criticism, review, journalistic reporting, quotation, or instruction and examination by an educational institution.
- b. In determining whether a use made of a work is fair within the meaning of this section the factors to be considered shall include, inter alia, all of the following: The purpose and character of the use; the character of the work used; the scope of the use, quantitatively and qualitatively, in relation to the work as a whole; the impact of the use on the value of the work and its potential market

Taiwan

Taiwan's *Copyright Act (Republic Act No. 8293, An Act Prescribing the Intellectual Property Code and Establishing the Intellectual Property Office, Providing for its Powers and Functions, and for Other Purposes) 2007* features a similar fair use provision at Article 65:

“ Fair use of a work shall not constitute infringement on economic rights in the work. In determining whether the exploitation of a work complies with the provisions of Articles 44 through 63, or other conditions of fair use, all circumstances shall be taken into account, and in particular the following facts shall be noted as the basis for determination:

1. The purposes and nature of the exploitation, including whether such exploitation is of a commercial nature or is for nonprofit educational purposes.
2. The nature of the work.
3. The amount and substantiality of the portion exploited in relation to the work as a whole.
4. Effect of the exploitation on the work's current and potential market value.”

The Philippines

The Philippines *Copyright Law of 1997* also contains specific fair use language:

“ 185.1. The fair use of a copyrighted work for criticism, comment, news reporting, teaching including multiple copies for classroom use, scholarship, research, and similar purposes is not an infringement of copyright. Decompilation, which is understood here to be the reproduction of the code and translation of the forms of the computer program to achieve the inter-operability of an independently created computer program with other programs may also constitute fair use. In determining

whether the use made of a work in any particular case is fair use, the factors to be considered shall include:

- a. The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit education purposes;
- b. The nature of the copyrighted work;
- c. The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- d. The effect of the use upon the potential market for or value of the copyrighted work.”

6. Exceptions and Limitations in Multilateral Treaties –Is Fair Dealing and Fair Use Compliant with the Three-Step Test

As noted in section 4.2.1 one of the points marshaled against the introduction of the fair use clause is the fact that the clause does not comply with the three-step test. This test is found in many copyright treaties. For example, Article 9(2) of the Berne Convention provides that

“ It shall be a matter of legislation in the countries of the union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author;”

Another example of the three-step test is found in Article 13 of the WTO TRIPS Agreement which provides that “Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.” Article 10 of the 1996 WIPO Copyright Treaty and Article 16 of the WIPO Performances and Phonogram Treaty.

The three-step test consists of and is interpreted in a cumulative manner. It is argued that open-ended exceptions and limitations such as the fair use clause of the CAB fail the test because such tests contemplate all purposes/uses while the first step in the test requires special purposes/uses. Fair dealing, on the other hand, relates to enumerated purposes/uses and would, therefore, pass the first of the three-step test. It would appear in the absence of significant national and international¹⁰⁰ judicial articulation that

¹⁰⁰ See Report of the Panel, United States-Section 110(5) of the US Copyright Act WT/DA/160/R (June 15 2000).

provides guidance on the meaning of the three-step test, it is at best an open question whether the CAB fair use clause breaches the three-step test. Moreover, the fact that s.107 of the US Copyright Act and the fair use clauses of other countries such as Taiwan and the Philippines and Israel has not been challenged for failing the three-step appears to be an indication that the CAB fair use clause will pass treaty scrutiny. Furthermore, there is a growing international consensus that the three-step test should be interpreted in such a way that fair use clauses are found to be compatible with Copyright principles. In the *Declaration on a Balanced Interpretation of the “Three-Step Test” in Copyright Law*¹⁰¹ a diverse group of IP scholars declares in paragraph 2 that “The Three-Step test does not require limitations and exceptions to be interpreted narrowly. They are to be interpreted according to their objectives and purpose”. The Declaration further states in paragraph 5 that “In applying the Three-Step test, account should be taken of the interests of original rightsholders as well as of those of subsequent rightsholders.”¹⁰²

7. Conclusions and Recommendations

This research report explored which of the two models of exceptions and limitations in copyright- fair dealing and fair use is appropriate for South Africa in the aftermath of the Copyright Amendment Bill (CAB) that is an outcome of the reform of the Copyright Act 1978 (CA 1978). Section 12A of the CAB that provides for fair use of copyright works will replace section 12(1) of the CA that provides for a fair dealing of copyright works as an exception and limitation.

The fair dealing provision in the CA 1978 is inadequate to ensure that the public interest in copyright in terms of the promotion of human rights and appropriate access to copyright works to stimulate innovation creativity and to cater for future uses. There is consensus that there ought to be a reform of the fair dealing provision. The controversy is the direction of the reform. One perspective is to enumerate more uses of copyright work that will qualify for fair dealing. It is clear from a review of fair dealing in the United Kingdom and Canada that improved fair dealing provisions have not cured the consequences of its closed nature. The judiciary in Canada and the United Kingdom

¹⁰¹ Declaration available at 2008 *International Review of Intellectual Property and Competition Law* 707.

¹⁰² See C. Geiger; D. Gervais and M. Senftleben “The Three-Step Test Revisited: How to Use the Test’s Flexibility on National Copyright Law” 29 2013 *American University Law Review* 581-626.

have articulated a users' right and a public interest defence respectively to accommodate issues that their fair dealing provision is unable to resolve. In fact, in Canada, there is a consensus that the Canadian judiciary has interpreted their fair dealing provision to resemble a fair use model. It is clear that an improved fair dealing provision in South Africa will require the South African judiciary to step in to accommodate the interests that the new fair dealing is unable to address. The evidence of a single judicial engagement with the fair dealing provision between 1978-2016 (a time span of 36 (thirty-six) years, suggests that many worthy issues of exceptions and limitations may not find ventilation. There

Opponents of the fair use clause raise many legitimate concerns including loss of revenue; a shrinking of the value of the copyright industries and arbitrary deprivation of property in breach of section 25 of the Constitution. Proponents of the fair use clause point to the catalytic effect that the fair use clause will bring to South Africa's copyright industries enabling all stakeholders to engage in transformative and other uses that will lead to more creative works that will increase the value of the sector and its contribution to the South African economy. They also point to the promotion of human rights that fair use will facilitate. In particular, they point to the rights of persons with disabilities; the right of access to basic education; the right to freedom of association amongst others that is in South Africa's national interest which fair use will facilitate.

The inescapable consequence of fair dealing and fair use as models of exceptions and limitations to copyright is an extensive judicial engagement in determining the nature and extent of these models. As stated above the fact that the fair dealing provision in the CA 1978 has received little judicial scrutiny suggests that the courts are not the best site for the resolution of fair dealing issues. Stakeholders who complained of the difficulties of litigating fair use issues forget that the same difficulties have attended litigation of fair dealing issues. Accordingly, we are not better off in knowing how judicial engagement with the fair dealing provision would have responded to concerns about the public interest in copyright, the protection of human rights such as the freedom of expression; equality and non-discrimination and the right of access to basic education. Be that as it may, there is little doubt that the nature of the fair use clause- just like the fair dealing provision- in the CAB will require judicial articulation in determining how the factors listed

as guides to determining fair use apply to different circumstances. The open-ended fair use model appears to better accommodate the interests that fair dealing shuts out.

It is also important to point out that fair use and fair dealing encourages negotiations between stakeholders. It is likely that empirical investigation will demonstrate how fair dealing and fair use impact on licensing negotiations and outcomes between copyright stakeholders. In this regard, the statements of best practices by different sectors of the Copyright industries will assist licensing practices.

Since fair use is not automatic, judicial oversight should address many of the concerns of opponents of fair use. Examples of fair use cases from the US reveal cases where claims of fair use have been unsuccessful when courts apply the factors in s. 107 of the US Copyright Act. On the other hand, there are cases where US Courts have upheld claims of fair use. It appears unfounded to argue therefore that fair use is free use. The loss of revenue from fair use is certain to happen but not at the levels predicted by some sectors of the South African copyright industries, because some fair use claims will not be successful. Rather than view fair use cases as free use, it would appear that they are instances of transformative use that have brought enormous value and growth in the US copyright industry. Such transformative uses appear an ideal objective of the South African CCIs. The Department of Arts and Culture could investigate how transformative uses could contribute to the growth of the South African CCIs.

It is important to reiterate the fact that disputes over the nature and extent of the application of the fair use clause of the CAB are a part of the jurisdiction of the Copyright Tribunal as proposed by the CAB. This jurisdiction will allay the fears of opponents of the fair use clause, and assist the CCIs to achieve the potential of the fair use clause. It is worth noting that the enlarged jurisdiction of the Copyright Tribunal by section 29A(1)(f) of the Copyright Act inserted by clause 31 of the CAB includes “ settling any dispute that relates to Copyright”. The CAB provides for the increase of the size of the Copyright Tribunal from 1 (one) to 8 (eight). A further increase in the size of the Tribunal is recommended as well as an elaboration of the practice and procedure of the Copyright Tribunal through new Copyright Regulations as envisaged by section 39 CA 1978. The Copyright Regulations should elaborate aspects of section 29E of the CAB such as the public hearings; inquisitorial procedure; expeditiously conclusion of proceedings;

informality and fidelity with the principles of natural justice. It is submitted that a proper articulation and elaboration of jurisdiction practice and procedure of the Copyright Tribunals with respect to fair use disputes will ensure that fair use protects all stakeholders in the copyright industries to the benefit of the CCIs.

It is our recommendation, that the Department of Arts and Culture:

1. Support the fair use clause in the CAB;
2. Support in the alternative an enlarged fair dealing provision and a public interest defence as a policy alternative to the fair use clause;
3. Promote and support the drafting of Copyright Regulations to enhance the jurisdiction practice and procedure of the Copyright Tribunal over fair use/fair dealing disputes;
4. Explore and assist in the articulation and development of sectoral standards of best practices in fair use/fair dealing by relevant stakeholders to guide stakeholders in negotiations about fair use/fair dealings. These best practices will also assist the Copyright Tribunal.
5. Commission studies of licensing practices between stakeholders in the CCIs.

8. Bibliography

