

Dispelling Myths About Fair Use

By Sean Flynn

South Africa and other countries are currently considering proposals to convert from a “fair dealing” to a “fair use” user rights system. Some critics of the change fill their arguments with hyperbole without describing the facts about what is really at stake. This note attempts to dispel some common myths about fair use by describing what fair use is, and what is not.

What fair use is

Fair use is an opening of fair dealing to include additional lawful purposes

The proposed fair use provision is an opening of South Africa’s existing fair dealing right. Both fair use and fair dealing are general exceptions that apply a common test of what is “fair” to a host of different purposes (e.g. criticism, etc.). Fair use is different mainly in including words “such as” before its list of permitted purposes. The effect is to make the list or permissible purposes of the use open to potentially any purpose. But the use still must be fair.

The openness of fair use enables innovation

A key value of opening of the purposes for fair use is to permit new technologies that cannot be foreseen by the legislator. When the first copyright laws were written they did not imagine the VCR, much less the Internet. Flexible fair use systems have been able to accommodate technological change by permitting a new technology developer to know their use can be defended from any challenge as long as long it meets the test of fairness.

Fair use promotes human rights

Copyright laws with insufficient exceptions for modern digital uses conflict with rights to free expression, education and access to culture. See UNESCO, Approaching Intellectual Property as a Human Right, <http://unesdoc.unesco.org/images/0012/001255/125505e.pdf>

Fair use serves creators

Fair use helps creators because it allows them to depict real life, respond to other works, and make new creative works without being censored by the owners of copyright.

Fair use benefits the economy

Empirical research has shown that fair use rights benefit both the creative and high technology industries. See <http://infojustice.org/flexible-use/research>

Fair use will benefit local publishers

In South Africa, over 60 percent of books used in schools are locally published. (PASA 2013). But over 60 percent of DALRO licensing revenue goes to foreign publishers. (Copyright Review Commission). When Canada broadened its fair dealing to include education, school purchases continued but shifted from collective licensing to site licenses and book purchases.

Fair use will benefit students

Fair use and the Act's education rights make it easier for teachers to make materials students can afford. In South Africa University textbook costs frequently exceed R6,000 a year, with bursaries commonly below R4,000. 70 percent of higher education students obtain the majority of their materials through digital sharing.

What fair use is not

Fair use isn't a free-for-all

Fair use is not carte blanche to use other people's work without paying. A key test for whether a use is fair asks whether the use would deprive the author of revenue by substituting for the need to buy the work. Piracy is not fair use.

Educational fair use would not allow schools to give away books

The Bill specifically provides that coursepacks or other forms of copying may not "incorporate the whole or substantially the whole of a book or journal issue, or a recording of a work" under normal circumstances. (12D(2)). It authorizes copying of full works only if "a licence to do so is not available from the copyright owner . . . on reasonable terms and conditions"; "where the textbook is out of print"; or "where the owner of the right cannot be found". (Copyright Amendment Bill Section 12D(3)-(4). In each case, copying is not permitted for commercial gain, (12D(5)), and the copying must be restricted to the "extent justified by the purpose."

Fair use does not shift the burden of proof to the rights holder

There is an odd argument circulating in South Africa that fair use shifts a litigation burden onto a rights holder. This is flatly untrue. Fair use is a defense to infringement. Like other defenses, the user carries the burden of proving the defense -- i.e. showing fairness of the use.

Fair use did not harm the Canadian publishing industry

It is a myth that flexible copyright exceptions undermined educational publishing in Canada. Spending on published works remains strong. Spending on educational materials has not declined. See

<https://www.ip-watch.org/2017/07/25/fair-dealing-not-destroying-canada-publishing/>

Fair use does not drive up litigation or litigation costs

Copyright law in the US is not a major litigation area. A review of a sample of all federal court cases in a recent year found that all copyright cases just 0.75% of the US Federal docket, and fair use rulings make up just 0.004% of cases. There has been no reported explosion in litigation in Korea, Philippines, Israel, Singapore or other countries that recently adopted fair Use.

Fair use is not a giveaway to Youtube

Fair use doesn't let anyone avoid paying a license to play, perform, or copy a work in a way that substitutes for the market of the copyright owner. There is little or no commercial fair use on

Youtube. Content ID allows the copyright holder to monetize (receive the advertising revenue from) any use of their work on YouTube, even for uses that would be a fair use under US law.

Fair use will not cause unpredictability

Under fair use, as today, any use of a work that could substitute for the use of the original in the market would need to be licensed. This is a simple understandable test already applied by South African courts under the current fair dealing standard.

A Breakdown of the Copyright Amendment Bill Provisions

Section (1978 Act)	Subject	Provision Summary
2A	Idea/Expression Dichotomy	Clarifies that copyright does not protect ideas or official government texts. This expands the public domain of materials all can use for new creations and expands access to knowledge in society.
6	Right of Communication	Clarifies the copyright protection for communicating or distributing works by wired or wireless means. This provision is required by copyright treaties South Africa intends to join. The provision expands the rights of creators and copyright owners.
6A, 7, 9, 8A, 9A	Royalty sharing	Mandates that publishers and other sellers of works share royalties with creators. The provision will ensure that works that create high revenues after assignment of copyright still benefit the original creator.
7B	Resale royalty	Adopts an artist resale royalty right. The new right will benefit artists whose works appreciate markedly after the original sale.
12A	Fair use	Adopts an open fair use clause that permits free uses of works that do not substitute for the work in the market. Fair use is particularly important to artists, documentary filmmakers, makers of satire and parody, and to innovators who are creating new technologies that read or otherwise use information on the Internet.
12B	Specific exceptions	Updates specific exceptions, including for quotation, illustration, by the press, personal copies, and other purposes. The main change is to make all existing exceptions applicable to all works - simplifying the law.
12C	Temporary copies	Authorizes temporary copies that are made as part of technological processes, such as in video streaming.
12D	Education	Provides exception for the use of extracts for educational use and for full texts of works not in print or not made available in Republic on reasonable terms.

		Creators are both students and educators. Access to learning materials helps create a thriving creative community.
15	Incidental use	Expands incidental and background use rights to include audiovisual works and works in public spaces.
19B	Reverse engineering	Adopts exceptions for use of computer programs in reverse engineering. Reverse engineering rights are crucial for the growing community of technology entrepreneurs.
19C	Libraries, archives and museums	Provides for exceptions to enable the functions of libraries, museums and archives. Creators use libraries and archives for their research.
19D	Disability	Provides exceptions to facilitate creation of accessible format copies for people with disabilities. The makers of accessible materials are themselves creators.
20	Moral rights	Expands moral rights to include all works (including audiovisual works). Previous law did not extend moral rights to all works.
21	Commissioned works	Removes statutory presumption of complete ownership of commissioned works by the paying party, makes ownership subject to written agreement, and provides mechanism for author to demand license to use work if not used for purpose commissioned. Previous law made the commissioner of many works the default owner.
23	Author reversion	Assignments of copyright revert to author after 25 years. Artist reversion rights ensure that publishers do not receive windfall profits from copyright assignments of works that become highly valuable, and cannot prevent an author from re-using an assigned work later in the works' life when the publisher may no longer be marketing the work.
22A	Orphan works	Provides a mechanism for the use of orphan works. Although the provision has been criticised as too complex, it nevertheless provides at least some mechanism to use works when no copyright owner can be identified or no longer exists.
22B-F	Collective management reform	Provides for the accreditation, regulation and member control of collecting societies – including that pay outs of royalties be based on actual reports of use. The provision is crucial to promote the interests of creators who often receive little or no income from royalties collected on their behalf.
23(1)	Technological protection	Provides protection of copyright, technological protection measures and rights management information.
27	Technological protection	Provides criminal sanctions for tampering with technological protection measures.
28	Int'l enforcement	Provides for international enforcement of copyright.
28O	Technological protection	Makes provision of equipment and services to circumvent technological protection measures illegal.

28P	Technological protection exceptions	Provides for exceptions permitting circumvention of technological protection measures to access materials for purposes permitted by fair use and other user rights in the Act.
28Q	Commission	Describes duties of the Commission.
28R	Technological protection exceptions	Prohibits tampering with rights management information.
28S	Technological protection exceptions	Permits altering with rights management information where it would not facilitate violation of copyright.
29	Tribunal	Establishes tribunal. The tribunal provides a lower cost mechanism for enforcement of rights, benefiting smaller creators.
39	Regulations	Expands minister's regulation making authority to include governing tribunal and setting royalty rates.
Schedule 2, Part A	Translation	Provides for process to seek compulsory license to make translation of works into underserved languages. The right serves both the interests of users and of creators who seek to make translated works or use them in new creations.
Schedule 2, Part B	Unavailable works	Provides for process to seek compulsory license to reproduce works not made available in South Africa after a reasonable time. Creates the possibility for local publishers to serve unserved markets for international works.
37	Indigenous rights	Provides for transitional period for indigenous peoples rights under the Act until the Intellectual Property Laws Amendment Act, 2013 (Act No. 28 of 2013) becomes operational.