



June 30, 2017

Honourable J. Fubbs
Member of Parliament
Portfolio Committee on Trade and Industry
For Attention: Mr A. Hermans, ahermans@parliament.gov.za

Dear Honourable J. Fubbs

RE: Google South Africa Submission on the Copyright Amendment Bill (B13-2017) (“the Bill”)

Google South Africa (Pty) Ltd (“Google”) welcomes the opportunity to comment on the latest version of B13-2017, the Copyright Amendment Bill. In September 2015, we submitted comments on the initial proposal, and congratulate the government on the progress made in the current draft in crafting fit-for-purpose legislation in the digital age.

This submission comments on the following areas: (1) fair use; (2) the quotation right; (3) non-commercial remix right; (4) communication to the public; (5) technological protection measures; and, (6) droit moral.

1. Fair use/fair dealing

We respectfully suggest that the latest draft revert to the 2015 draft’s inclusion of the phrase “such as” in describing fair use purposes.

The 2015 draft bill proposed a new section 12A authorizing the raising of a fair use defence. The proposed section consisted of eight subsections of purposes and factors. Importantly, in subsections (1) and (2), the draft ensured, through the terms “includes” (in (1)) and “such as” (in (2)), that the flexibility inherent in fair use would apply. These terms are also found in Section 107 of the U.S. Copyright Act:

*“Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as
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 . . . “*

The terms are defined in Section 101 of the U.S. Act as not being limitative:

“The terms ‘including’ and ‘such as’ are illustrative and not limitative.”

Section 107 of the U.S. Act was not intended to “codify” or freeze the common law fair use doctrine, but instead merely to statutorily recognize the defense¹. The distinction is important: rather than drafting a statutory provision that set out the metes-and-bounds of fair use, the U.S. legislators chose to encourage the common law evolution of fair use, and to include a number of principles and purposes that reflected the almost 300 history of the doctrine. The terms “including” and “such as” were an important part of the

¹ This occurred as part of an omnibus reform, and given that context, it seemed appropriate to Congress to give statutory recognition for such an important defense.

flexibility that the U.S. legislators desired courts to continue to exercise. Flexibility is the heart of a modern copyright law because creativity, innovation, and technological change are dynamic. One cannot have a dynamic, creative environment if our copyright laws are static. No legislature can decide *a priori* the only forms of expression that authors must use. No legislature can decide *a priori* when a particular song will infringe another song. And to the point of fair use, no legislature can foresee future all socially beneficial uses; thus, flexibility is as essential to fair use as it is in all other foundational elements of copyright law.

Fair use admirably provides the “breathing space” required for a dynamic society. One does not have to guess whether fair use lives up to its billing: the data, gathered over almost 300 years, is there for all to see. Fair use has directly led to the creation of more and richer content works, increased knowledge (through commentary and criticism); entire industries with innovative products, including the video cassette recorder, the iPod, Internet search engines, text and data mining, and cloud computing have been made possible because of fair use.

This does not mean that legislatures should condone a free-for-all or that one group of authors should subsidize another group of authors. Through the illustrative fair use factors, it is ensured this doesn't occur. No better testament to the healthy balance achieved by fair use can be found than in the following comments by Ben Sheffner, counsel for the Motion Picture Association of America, on the MPAA blog:

[W]e do want to push back a bit on the suggestion in some of the commentary ... that the MPAA and its members somehow “oppose” fair use That’s simply false, a notion that doesn’t survive even a casual encounter with the facts. Our members rely on the fair use doctrine every day when producing their movies and television shows – especially those that involve parody and news and documentary programs. And it’s routine for our members to raise fair use – successfully – in court.²

Fair use provisions provide legislators with the best of both worlds: encouragement of creativity without disadvantaging earlier authors, while still allowing legislators to determine the principles by which disputes will be resolved.

It was for this reason that we were happy the 2015 draft included the flexible language “such as” in section 12A(2) when referring to the **purposes** for which fair use may apply. We regret that in the latest draft “such as” was deleted. We do note that in enumerating the **factors** to be considered, the latest draft adds the flexible “including but not limited to.” The 2015 version said the factors “shall be” the ones enumerated, inferring other factors could not be considered. We appreciate this addition, but believe that without re-inserting “such as” when referring to **purposes**, the legislation will fail to achieve its laudable goals. We explain this in more detail below.

Fair use is the result of centuries of Anglo-American case law. The doctrine of fair use did not spring forth fully formed from the minds of early 18th century British common law jurists. Experience, from real world disputes, was required. Yet, while the scope of fair use and the contours of its features were filled in gradually, still the basic rationale was established remarkably early. In the century from 1740 to 1839, English judges developed a relatively coherent set of principles governing the unconsented-to-use of a first author's work by a subsequent author, by a critic, or scholar. English judges were quite explicit in

² Ben Sheffner, “MPAA and Fair Use: A Quick History,” MPAA Blog, October 22, 2013, available at: http://www.mpa.org/mpaa-and-fair-use-a-quick-history/#.WUq_9xPytAY.

The ellipses in the quote concern MPAA's brief in a particular case, where MPAA supported fair use.

articulating their rationale for permitting the unconsented-to-use of one author's work by others. That rationale was that the second author, through a good faith productive use of the first author's work, had created a new work that would itself benefit the public. A critic or scholar had similarly presented new knowledge for the public benefit. Since the 1710 English Statute of Anne gave no guidance on the standards to be applied in determining infringement, the English courts looked to the statute's purpose of encouraging authors to "Compose and Write Useful Books." Fair use was believed to be necessary to fulfill that purpose. English judges acted boldly to achieve that purpose.

By 1841, U.S. Supreme Court Justice Joseph Story, sitting as a circuit justice in the case of *Folsom v. Marsh*,³ was able to gather these principles together into a formulation of fair use that served as the bedrock for future decision making and legislation on the subject. So well did Justice Story synthesize the doctrine that later English courts looked to his expression of the concept for guidance,⁴ while the U.S. Congress, in the 1976 Copyright Act, distilled his principles into the four fair use factors enumerated in Section 107. The four factors have stood the test of time.

But what about the purposes for fair use? There are no "four purposes," and for good reason: If one were to ask a group of thoughtful law students anywhere in the world studying under any legal regime to develop a list of factors to be considered in determining when the unauthorized use of a work should be permitted for society's good without harming the previous author's interests, more often than not one would come up with the same four factors or ones quite close to them: (1) why did the second author/innovator do what he or she did? (2) what kind of copyrighted work did they use (factual or fiction); (3) how much did they take? (4) did the taking hurt the first author's market? One could think of other factors, and that is why the latest draft's "including but not limited to" language is helpful, but there is no denying these four factors are critical in any system's development of limitations and exceptions regardless of what those limitations or exceptions are called.

Not so for fair use purposes. One can think of purposes that should be allowed: scholarship, education, comment and criticism, news reporting, parody, satire. Most fair use *and* fair dealing laws call these purposes out, and appropriately so. But there have always been new types of uses because there are always new types of creativity and new technologies enabling new uses. That indeed is the promise of creativity and technology: to innovate, to create new works, new products, new services that you hadn't thought of. Fair use is a critical component of any innovation agenda.⁵

It is for this reason courts and the U.S. Congress never attempted to develop the equivalent list of fair use purposes as they did for the factors to be applied. When Internet search engines were developed and returned search queries of thumbnails of photographs, courts were able to find this to be fair use even though this was a new purpose.⁶ When issues surrounding the need for interoperability and compatibility of computer programs arose due to efforts by original equipment manufacturers to lock in consumers, the courts were able, through fair use, to ensure that consumer choice and innovation remained.⁷ As machine learning and artificial intelligence have become an important resource for medical researchers,

³ 9 F. Cas. 342, No. 4901 (C.C.D. Mass. 1841).

⁴ *Scott v. Stanford*, L.R. 3 Eq. 718, 722 (1867).

⁵ See Fred von Lohmann, "Fair Use as Innovation Policy," 23 *Berkeley Technology Law Journal* 829 (2008), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1273385

⁶ *Kelly v. Arriba Soft Corporation*, 336 F.3d 811 (9th Cir. 2003).

⁷ See, e.g., *Sega Enterprises, Ltd. v. Accolade, Inc.*, 977 F.2d 1510, (9th Cir. 1992), amended 1993 U.S. App. LEXIS 78 (9th Cir. Jan. 6, 1993),.

translation services, and other scientific uses, courts have been able to find fair use even though this too is a new purpose.⁸

All of these court opinions permitting socially beneficial, pro-competitive, and innovative uses were possible without having to find a statutory purpose that expressly allowed them, but only because of the flexible “including and such as” terms in the list of purposes. We question whether new, innovative uses, critical for growing any digital economy, could be allowed under the latest draft with its non-flexible list of government approved purposes.

Is there any doubt that this type of flexibility will be beneficial to South Africa and to South African authors? No. We therefore urge that “such as” be re-inserted into Section 12 in order to make the list of purposes illustrative, but not limitative. Not so that South Africa can mimic U.S. or other law, but so that South African artists, scientists, scholars, and consumers can enrich South African culture and society.

As a drafting matter, in our first submission, we endorsed the 2015 draft's proposal to adopt fair use, but noted that the draft somewhat confusingly proposed layering the fair use provision next to an existing fair dealing provision, resulting in overlap. This is continued in the latest draft, and in one instance a conflict is created with proposed new Section 12A: current Section 12(3) covers quotations from newspapers. Our reading of the latest draft is that this section has not been deleted, and Section 12A of the latest draft covers the exact same issue, with almost the same language but for an unfortunately placed comma, which we discuss immediately below. On top of this, quotation from magazines could easily fit within some of the fair use purposes in proposed amended Section 12. It would be helpful to have a single provision dealing with such uses.

2. Quotation Right

The right of quotation is mandated by Article 10 of the Berne Convention. That right is not limited to summaries of newspaper and periodicals, but is of general application. Prior to the latest draft, both existing South African copyright law and the 2015 draft were compliant with the Convention. Through the misplacement of a comma, the current draft is not. We suggest that the draft either return to the 2015 formulation or copy the Berne formulation:

“(1) It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.”

The latest draft, by what we hope was a drafting error, limits permissible quotations to those that are summaries of the work:

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

⁸ See generally, Pam Samuleson, “Unbundling Fair Uses,” 77 Fordham Law Review 2537, 2602-2610 (2008) available at: <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=2521&context=facpubs>

mentioned in the quotation;

The error lies in the insertion of a new comma between “periodical” and “that is in the form of ...” The comma makes the provision read as if it is limited to “any quotation that is in the form of a summary of [a] work.” The error may be corrected by simply deleting the comma after “periodical” or, as we noted above copying the Berne formulation. Without correcting the error in the current draft, the draft would be inconsistent with Article 10 since that article is a mandatory provision.

3. Noncommercial Remix exception

Our 2015 submission proposed a Canadian style remix exception, due to the importance of such an exception for South African creativity, which is vibrant in its constructive use of other authors’ works in the creation of a new work with a new message. We continue to believe that such an exception would be of great benefit to South African creators and therefore urge its adoption. The U.S. Copyright Office, in its 2012 and 2015 proceedings on exceptions to technological protection measures, agreed that remixes can represent a transformative, socially important method of expression.⁹

Remixes are an integral part of the current, creative society. For example, African artists have joined together to create the African Digital Network, described as “an online collective, a creative space, where digital artist, enthusiasts and professionals can seek inspiration, showcase their artistry and connect with emerging artists.” For a young artist, “digital collage is a way to create a new aesthetic by revising representations from the past to make a context for the present and future,” says Alexander Ikhide. “As an African, as well as an artist, it’s important for me to create new representations that draw influence from the past, but are looking toward the future.”¹⁰

Nomusa Makhubu is a South African visual artist from the Vaal Triangle.¹¹ She is particularly concerned with issues of identity and history. As she explains:

“We have been made to believe that the languages we speak signify something more about our identities and the diversity of those languages have been used by colonialists to divide Africans and foster violent tribalism. In the photographs, I pose as various ‘ethnicities’: where the original photograph might have been titled “A Chokwe Woman”, I have re-titled it in Zulu. A title like “A Chokwe Woman” distances the subject such that the photograph does not function the same way a photograph in a family album (where the names of the subject might be known) functions. Titles such as these masquerade as truthful scientific categories. By changing the title and altering the image, I also intend to question the contextual ‘truthfulness’ of the photograph.

By re-enacting representations of a troubled past, I realized that this thing held so dearly by those oppressed called ‘tradition’ is a reflection of people’s loss and of dispossession.”¹²

⁹ The 2012 recommendations may be found here:

https://www.copyright.gov/1201/2012/Section_1201_Rulemaking_2012_Recommendation.pdf

The 2015 recommendations may be found here: <https://www.copyright.gov/1201/2015/registers-recommendation.pdf>

¹⁰ See the February 11, 2015 Guardian newspaper article “Africa remix: the artists subverting colonial imagery,” available at: <https://www.theguardian.com/world/2015/feb/11/africa-remix-artists-reinvent-colonial-imagery>

¹¹ See her website: <http://nomusa.makhubu.free.fr/>. Here is a short biography of her:

<http://www.erdmanncontemporary.co.za/artists/nomusa-makhubu/>

¹² See

<http://10and5.com/2014/10/27/featured-nomusa-makhubu-the-contemporary-politics-of-identity-tradition-and-culture/>

Typically, she will make her artistic and political points by weaving two different photographs together.¹³ She is far from alone in doing so. A 2005 book, “Africa Remix: Contemporary Art of a Continent,”¹⁴ is a 224 page examination of how 80 African creators from 30 countries (including South Africa) working in film, documentary photography, fashion, sculpture, painting, and music, literature, use other works as a source of inspiration for their new, remixed or mashed-up works. The book also operated as a guide to an exhibit of the same name that was the largest exhibition of contemporary African art ever seen in Europe.

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Such works are the very essence of what is called in fair use terminology a “transformative purpose”: in the case of remix/mashup, the creative use of an earlier work to create a new work. Proposed Section 12A(g) permits reasonable use of a work for “cartoon, parody, satire, pastiche, tribute or homage.” While it is possible that some remixes-mashups could be fitted into one of these categories, not all would fit. The June 9, 2017 U.S. case of *Dr. Seuss Enterprises, L.P. v. ComicMix LLC*,¹⁶ demonstrates the problem of fitting creative works into categories. Defendants created a new work combining, in a transformed way, elements from the famous Dr. Seuss works (think “Cat in the Hat”) and from the Star Trek franchise. Defendants alleged their work was a parody, a claim the court rejected. Importantly though, the court didn’t stop there:

“In the present case, Defendants’ work is most appropriately termed a literary and pictorial “mash-up.” See, e.g., Mash-up, Merriam-Webster, <https://www.merriam-webster.com/dictionary/mash-up> (last visited May 3, 2017) (defining term as “something created by combining elements from two or more sources: such as” underlying-work-specific “characters or situations”). Such works may, of course, also be parodies when they juxtapose the underlying works in such a way that it creates “comic effect or ridicule.” However, there is no such juxtaposition here; Boldly merely uses Go!’s illustration style and story format as a means of conveying particular adventures and tropes from the Star Trek canon. And although Defendants argue generally that “Boldly uses Dr. Seuss’s own works in service of a group-oriented counterpoint to the Go! individualist ideal[.]” the Court cannot conclude that such a “parodic character may reasonably be perceived.”

But although Boldly fails to qualify as a parody it is no doubt transformative. In particular, it combines into a completely unique work the two disparate worlds of Dr. Seuss and Star Trek. Go! tells the tale of a young boy setting out on adventure and discovering and confronting many strange beings and circumstances along his path. Boldly tells the tale of the similarly strange beings and circumstances encountered during the voyages of the Star Trek Enterprise, and it does so through Go!’s communicative style and method. Go!’s rhyming lines and striking images, as well as other Dr. Seuss works, are often copied by Boldly, but the copied elements are always interspersed with original writing and illustrations that transform Go!’s pages into repurposed, Star-Trek—centric ones.

...

¹³ For examples of her work and an interview with the artist, see:

<http://10and5.com/2014/10/27/featured-nomusa-makhubu-the-contemporary-politics-of-identity-tradition-and-culture/>

¹⁴ Hatje Cantz Publishers (January 2, 2005); see

https://www.amazon.com/Africa-Remix-Contemporary-Art-Continent/dp/3775714723/ref=sr_1_1?s=books&ie=UTF8&qid=1498073446&sr=1-1&keywords=africa+remix

¹⁵ The Organization for Transformative Uses similarly advocates for the transformative use by fans, especially female fans, of other works. It provides an archive of such works on its site, see

http://www.transformativeworks.org/what_we_believe/

¹⁶ 2017 Westlaw 250500 (C.D. Cal. June 9, 2017).

This case presents an important question regarding the emerging “mash-up” culture where artists combine two independent works in a new and unique way. See, e.g., Art Term, Postmodernism, Tate, <http://www.tate.org.uk/art/art-terms/p/postmodernism> (last visited Apr. 28, 2017) (“Often mixing different artistic and popular styles and media, postmodernist art can also consciously and self-consciously borrow from or ironically comment on a range of styles from the past.”). Applying the fair use factors in the manner Plaintiff outlines would almost always preclude a finding of fair use under these circumstances. However, if fair use was not viable in a case such as this, an entire body of highly creative work would be effectively foreclosed. Of course that is not to say that all mash-ups will or should succeed on a fair use defense; the level of creativity, variance from the original source materials, resulting commentary, and intended market will necessarily make evaluation particularized. In this regard, mash-ups are no different than the usual fair use case. However, in this particular case the Court has before it a highly transformative work that takes no more than necessary to accomplish its transformative purpose and will not impinge on the original market for Plaintiff’s underlying work.”¹⁷

To ensure there is no question mashups and remixes are permitted, it is preferable to have a separate exception for such transformative mashups or remixes, as in Canada. South African artists deserve the breathing space to create. Failing such a separate provision, remixes and mashups demonstrate once again why the fair use purposes should not be limited, and why, therefore, the illustrative phrase “such as” is so critical. Mashups in the Dr. Seuss case were found a permissible fair use purpose precisely because of this flexibility: even after rejecting the work as a parody, the court was able to base its decision on the transformative nature of the work and application of the four factors. It could do so because of “such as.”¹⁸

4. Communication to the public

The current draft leaves the status of hyperlinks uncertain. Due to their critical role in providing information and to the architecture of the World Wide Web, we respectfully request that the draft be amended to either provide an express exception for linking, or, alternatively, that the communication to the public right be grounded in the **server test** (explained below). South Africa has the benefit of being able to learn from the positive and negative ways that the issue has been addressed in other countries. Positive examples include Canadian Supreme Court decisions, Section 512(d) of the U.S. Copyright Act, as well as U.S. court decisions.

In contrast, uncertainty in Europe has led to a slew of opinions and rulings altering and amending the legal status of hyperlinking.

In our submission on the 2015 draft, we suggested that the definition of the term “communication to the public” be clarified so that it cannot be construed as regulating technologies that are a necessary tool to access digital content. Our requests stemmed from a practical, experience-based approach to how digital technologies of necessity work, and how consumers use them. If we want to have digital platforms, and those platforms are in turn based on being available via the Internet, then we must take into account how those platforms work, and permit them to function as they are intended to function.

¹⁷ 2017 Westlaw 2505007 at pages 4, 7.

¹⁸ This does not mean that all mashups are fair use, no more than any other fair use purpose. In the Dr. Seuss case, the court did not reach the ultimate merits question.

Principal among these tools are providing hyperlinks to works. Tim Berners-Lee, one of the inventors of the World Wide Web, spoke directly to the importance of allowing hyperlinks in a 1997 article, dispelling what he called myths that had been created about them:

"Myth one

Myth: "A normal link is an incitement to copy the linked document in a way which infringes copyright".

This is a serious misunderstanding. The ability to refer to a document (or a person or any thing else) is in general a fundamental right of free speech to the same extent that speech is free. Making the reference with a hypertext link is more efficient but changes nothing else.

When the "speech" itself is illegal, whether or not it contains hypertext links, then its illegality should not be affected by the fact that it is in electronic form.

Users and information providers and lawyers have to share this convention. If they do not, people will be frightened to make links for fear of legal implications. I received a mail message asking for "permission" to link to our site. I refused as I insisted that permission was not needed.

Myth Two

Myth: Making a link to a document makes your document more valuable and therefore is a right you should pay.

This is another dangerous one. It is of course true that your document is made more valuable by links to high quality relevant other documents. A review in a consumer magazine has added value because of the quality of the products to which it refers the reader. I may be more valuable to you as a person if I refer you to other people by name, phone number or URL. This doesn't mean I owe those people something."¹⁹

In line with Mr. Berners-Lee's comments, the Canadian Supreme Court has held "[h]yperlinks ... are an indispensable part of [the Internet's] operation."²⁰ In terms of how one views hyperlinking as communicating to the public, Justice Abella wrote:

"Communicating something is very different from merely communicating that something exists or where it exists. The former involves dissemination of the content, and suggests control over both the content and whether the content will reach an audience at all, while the latter does not.... Hyperlinks ... share the same relationship with the content to which they refer as do references. Both communicate that something exists, but do not, by themselves, communicate its content. And they both require some act on the part of a third party before he or she gains access to the content. The fact that access to that content is far easier with hyperlinks than with footnotes does not change the reality that a hyperlink, by itself, is content-neutral — it expresses no opinion, nor does it have any control over, the content to which it refers."²¹

Linking is not transmitting a work: it is providing information about where to find a work, and thus should not be considered a communication of the work to the public. As explained by the Ninth Circuit Court of Appeals in the case of *Perfect 10, Inc. v. Google Inc.*

¹⁹ Tim Berners-Lee, "Links and Law: Axioms of Web Architecture," April 1997, available at:

<https://www.w3.org/DesignIssues/LinkMyths.html>

²⁰ [2] See *Crookes v Newton*, [2011] SCC 47, [2011] SCR 269 per Abella J, at [34].

²¹ *Crookes v Newton*, [2011] SCC 47, [2011] SCR 269, at [26], [30]. The case involved defamation, not copyright, but the principle expressed applied to copyright as well.

*“Instead of communicating a copy of the image, Google provides HTML instructions that direct a user’s browser to a website publisher’s computer that stores the full-size photographic image. Providing these HTML instructions is not equivalent to showing a copy. First, the HTML instructions are lines of text, not a photographic image. Second, HTML instructions do not themselves cause infringing images to appear on the user’s computer screen. The HTML merely gives the address of the image to the user’s browser.”*²²

The court of appeals decision affirmed in relevant part²³ a district court opinion that articulated and adopted the server test. As that court explained:

“[T]he most appropriate test is also the most straightforward: the website on which content is stored and by which it is served directly to a user, not the website that in-line links to it, is the website that “displays” the content. Thus, the Court adopts the server test, for several reasons.

First, this test is based on what happens at the technological-level as users browse the web, and thus reflects the reality of how content actually travels over the internet before it is shown on users’ computers. Persons who view the full-size “image in its original context” (i.e., the lower frame) after clicking on one of the thumbnails that Google Image Search aggregated, are not viewing images that Google has stored or served. Rather, their computers have engaged in a direct connection with third-party websites, which are themselves responsible for transferring content.

Second, adoption of the server test neither invites copyright infringing activity by a search engine such as Google nor flatly precludes liability for such activity. This test will merely preclude search engines from being held directly liable for in-line linking and/or framing infringing content stored on third-party websites. Copyright owners may still seek, as P10 does, to impose contributory or vicarious liability on websites for the inclusion of such content. Such secondary liability will require analysis of the different set of factors discussed in Section III.B.3 of this Order.

Third, website operators can readily understand the server test and courts can apply it relatively easily. To be sure, the incorporation test, which would have courts look at the URL displayed in the browser’s address bar, also can be applied relatively easily. But that test fails to acknowledge the interconnected nature of the web, both in its physical and logical connections and in its ability to aggregate and present content from multiple sources simultaneously.

Fourth, here the initial direct infringers are the websites that stole P10’s full-size images and posted them on the internet for all the world to see. P10 would not have filed suit but for their actions.

Finally, the server test maintains, however uneasily, the delicate balance for which copyright law strives—i.e., between encouraging the creation of creative works and encouraging the dissemination of information. Merely to index the web so that users can more readily find the

²² 487 F.3d 701, 717 (9th Cir. 2007).

²³ The court of appeals also found that Google was likely to succeed at trial on its fair use defense (and therefore wasn’t a direct infringer). It reversed on various secondary liability issues, remanding for fact finding under a possible DMCA defense.

information they seek should not constitute direct infringement, but to host and serve infringing content may directly violate the rights of copyright holders.”²⁴

The European Copyright Society, an independent group whose members are renowned scholars and academics from various countries of Europe, agreed in a brief to the CJEU in the Svensson case that linking should not implicate the communication to the public right:

“Hyperlinking in general should be regarded as an activity that is not covered by the right to communicate the work to the public embodied in Article 3 of Directive 2001/29. We offer three reasons for this conclusion:

[1] Hyperlinks are not communications because establishing a hyperlink does not amount to “transmission” of a work, and such transmission is a prerequisite for “communication”;

[2] Even if transmission is not necessary for there to be a “communication”, the rights of the copyright owner apply only to communication to the public “of the work”, and whatever a hyperlink provides, it is not ‘of a work’.”

[3] Even if a hyperlink is regarded as a communication of a work, it is not to a “new public.”²⁵

Our submission today, like millions of other written documents, contains links in its footnotes. One would hope that these links are not considered a communication to the public, and for which payment and permission must first be made. This is equally true even if one considers that hyperlinks are providing “access” to a work. As the European Copyright Society observed, “adding a hyperlink will not normally provide the possibility of access to users that they would not have in the absence of the hyperlink.”²⁶

The opinion of the Advocate General in the CJEU’s GS Media case also provides valuable insight:

“Although it is true that hyperlinks posted on a website make it much easier to find other websites and protected works available on those websites and therefore afford users of the first site quicker, direct access to those works, I consider that hyperlinks which lead, even directly, to protected works do not ‘make available’ those works to a public where the works are already freely accessible on another website, but merely facilitate the finding of those works. As the Portuguese Republic states in its observations, the act which constitutes the actual ‘making available’ was the action by the person who effected the initial communication.

Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society must be interpreted as meaning that the posting on a website of a hyperlink to another website on which works protected by copyright are freely accessible to the public without the authorisation of the copyright holder does not constitute an act of communication to the public, as referred to in that provision.

Article 3(1) of Directive 2001/29 must be interpreted as meaning that it is not important whether the person who posts on a website a hyperlink to another website on which works protected by

²⁴ 416 F.Supp.2d 828, 843-844 (C.D. Cal. 2006).

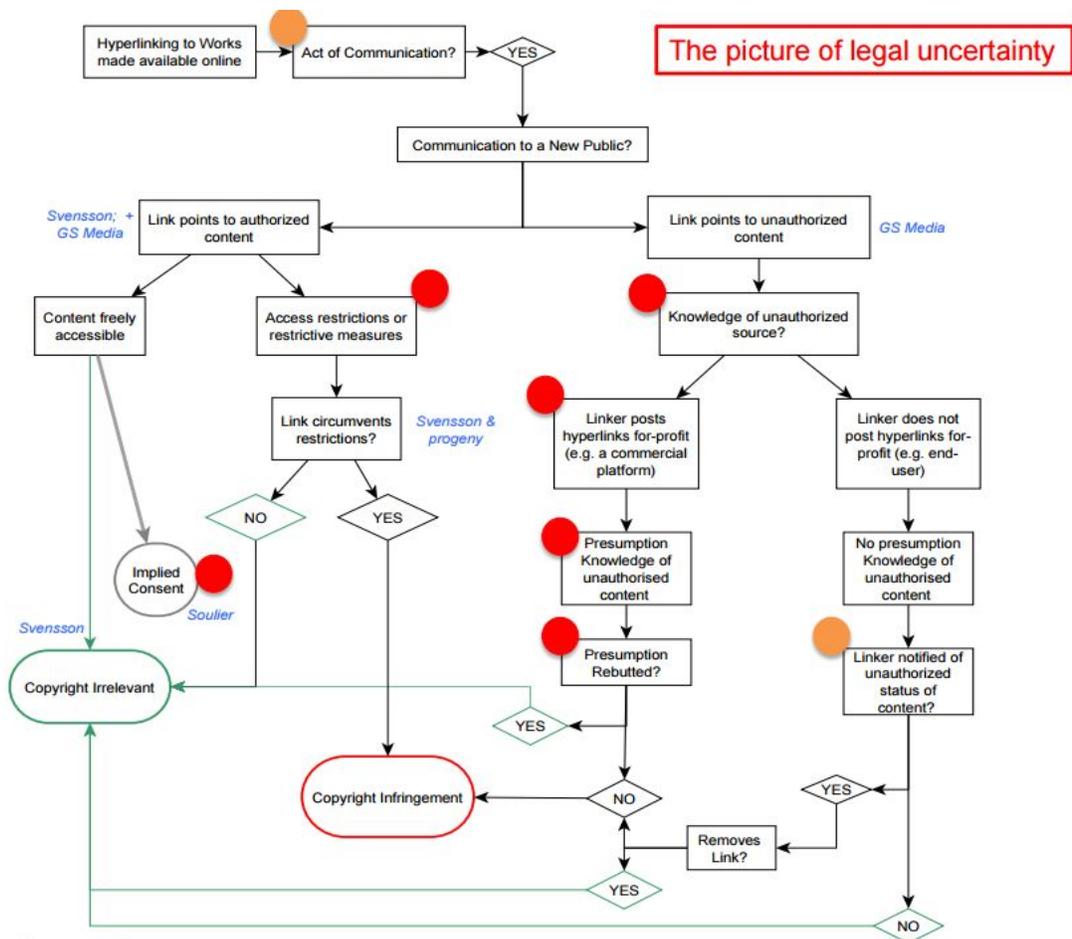
²⁵ Opinion of Advocate General Wathelet, delivered on 7 April 2016, Case C-160/15 GS Media BV v. Sanoma Media Netherlands BV, Playboy Enterprises International Inc., Britt Geertruida Dekker. Available at: <https://europeancopyrightsociety.org/opinion-on-the-reference-to-the-cjeu-in-case-c-46612-svensson/>

²⁶ Brief in the CJEU Svensson case, Available at: <https://europeancopyrightsociety.org/opinion-on-the-reference-to-the-cjeu-in-case-c-46612-svensson/>

copyright are freely accessible to the public is or ought to be aware that the copyright holder has not authorised the placement of the works in question on that other website or that, in addition, those works had not previously been made available to the public with the copyright holder's consent.

Article 3(1) of Directive 2001/29 must be interpreted as meaning that a hyperlink to another website on which works protected by copyright are freely accessible to the public, which facilitates or simplifies users' access to the works in question, does not constitute a 'communication to the public' within the meaning of that provision."²⁷

It is true that the CJEU has taken a different path, but it is a path no one should follow. Even before the GS Media case, national courts struggled with interpreting the Delphic-like pronouncements of the CJEU.²⁸ Under the "a picture is worth a thousands words" axiom, here is a chart demonstrating the morass created by the CJEU:²⁹



J.P. Quintais, Untangling..., Munich 23.03.2017

²⁷ Available at: <http://curia.europa.eu/juris/document/document.jsf?docid=175626&doclang=EN>

²⁸ See e.g., Jan Bernd Nordemann, "Communication to the public in copyright law – the German struggle with the CJEU concept," April 28, 2016, available at this link: <http://kluwercopyrightblog.com/2016/04/28/communication-to-the-public-in-copyright-law-the-german-struggle-with-the-cjeu-concept/>

²⁹ Available at: <http://www.zr11.jura.uni-muenchen.de/aktuelles/online-platforms/quintais.pdf>

Complexity at this level, and for a foundational tool of the Internet, has nothing to commend for South Africa. A simple exception, or a construction of the communication to the public right that is based on the simple to understand server test, will serve all much better.

5. Technological Protection Measures

We note the new language in proposed Section 1(h)(b) excluding from the definition of “technological protection measure”:

“a process, treatment, mechanism, technology, device, system or component, to the extent that it controls any access to a work for non-infringing purposes.”

We believe that the intent of this provision is to ensure that something which otherwise acts as a TPM will not be considered a TPM if it restricts someone from engaging in acts that are otherwise permitted in the Act. This seems to be parallel to Section 28P(1)(a), which states that it is not a violation of the Act and Section 86 of the Electronic Communications and Transaction Act of 2002 to engage in acts covered by an exception spelled out elsewhere in the statute.

If we are correct in this reading, it would be helpful for explanatory notes to detail this. This ties into another issue though: the scope of the exceptions spelled out elsewhere in the statute and in draft section 28P. After all, the exceptions in Section 28P are in part based on exceptions in other sections and if the exceptions in those other sections are inadequate, Section 28P cannot fulfill its purpose. Would, for example, a use considered fair use or fair dealing, or a use of computer interfaces excluded from protection, absolve one from liability for circumventing a TPM? We hope so, and it would be helpful that this be clarified.

We previously expressed concern that the 2015 draft would discourage legitimate computer security research efforts by prohibiting the publication of information enabling or assisting others to circumvent TPMs. New section 28P(b) permits the sale and adaptation of things “designed primarily to overcome security measures for the protection of data in order to enable the performance of any act permitted” otherwise in the Act. This is a step in the right direction, but it also raises the same issue just noted: where in the rest of the Act is there an the exception for engaging in unauthorized acts for computer security research purposes? New Section 19B permits using a computer programme to observe, study, or test the functioning of that programme in order to learn the underlying ideas and principles. While helpful, it does not permit using a computer programme for computer security purposes. For this reason, we believe Section 28P should be amended to have a separate exception for computer security purposes.

6. Droit moral

Proposed Section 20(a)(2) gives authors not only droit moral, but also gives them the sole right to complain of “any infringement, rather than the owner of the copyright in question.” “Infringement” here means infringement of the droit moral granted in that section. Does this mean that defendants will face two suits, and perhaps two sets of damages? For example, if there is a suit over an altered work brought by a music publisher to whom the right to prepare derivative works has been granted, does this mean there can also be a separate suit by the composer for a droit moral violation, even though there is only one allegedly infringing work? As a matter of basic fairness, if liability is found in either of these suits, only one award of damages should be allowed. We request that the draft be clarified to so limit any damages.

Google again thanks the Department for its commendable effort to revise South Africa's copyright law and for the opportunity to share our comments on the draft proposal. Do not hesitate to contact us if we can be of any additional assistance.



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