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Cape Town, 19 October 2018

# OPINION

Dear Ms Sheldon:

Thank you for giving me the opportunity to provide my input to a set of questions raised by the Portfolio Committee on Trade and Industry concerning ss12A to 19D of the Copyright Amendment Bill.

I wish to emphasise my respect for the Portfolio Committee's continued efforts - in spite of continued public attacks by one or two stakeholders mainly through popular media - to take measure (like the request for this opinion) to thoroughly examining the remaining issues with a view of creating the best possible copyright law for the country.

Please do not hesitate to contact me should you have any questions.

Kind regards,

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## A. Do the proposed exceptions and limitations comply with the Berne three-step test? If not, is it necessary to comply?

In order to incentivise and reward creativity, national copyright laws seeks to adequately protect creators and owners of copyrighted works - and they do this through granting copyright owners numerous exclusive rights concerning the use and distribution of their works. However, these exclusive rights are not absolute and copyright laws around the world contain so-called copyright exceptions and limitations that curtail the rights of copyright owners with a view of fairly balancing the rights of copyright owners with the interests of other stakeholders to access and use copyrighted works.

It is the difficult task of national lawmakers to find the "right" balance between protection (through exclusive rights) and access (through exceptions and limitations), with due consideration of domestic needs and circumstances to ultimately maximise creativity for the benefit of society at large.

International treaties and agreements such as the Berne Convention for the Protection of Literary and Artistic Works of 1886 (the Berne Convention), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of 1995, the WIPO Copyright Treaty (WCT) of 1996 and the Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities (the Marrakesh Treaty) seek to harmonise domestic copyright laws. In essence, they prescribe minimum standards for copyright protection and, since the Marrakesh Treaty, minimum standards for copyright limitations and exceptions (in some areas). **As a member of the WTO, South Africa is bound by TRIPS, and as a contracting party to the Berne Convention, South Africa is also bound by the provisions of the Berne Convention.**[1] At this point, however, South Africa has not acceded to or ratified either the WCT or the Marrakesh Treaty.

Crucially, for the purposes of this opinion, both the Berne Convention and TRIPS contain a mechanism commonly referred to as the three-step test. The test narrows down national lawmakers' abilities to freely legislate in the area of copyright exceptions and limitations. Put differently, the three-step test sets limits to copyright

[1] For further details see http://www.wipo.int/treaties/en/remarks.jsp?cnty_id=1026C

exceptions and limitations, thereby creating an international standard against which national copyright exceptions and limitations are to be judged.

For the sake of completeness, it must be mentioned here briefly that the language of the test actually differs from one international instrument to another. In the Berne Convention, for instance, Article 9(2) provides:

> *It shall be a matter for 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 a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.*

Article 13 TRIPS, on the other hand, states:

> *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.*

Hence, the Berne three-step-test only applies to exceptions to the reproduction right (while TRIPS applies to copyright exceptions and limitations more broadly), and while Art 9(2) of the Berne Convention seeks to protect the interests of *authors*, Art 13 TRIPS protects *rights holders*.

**Broadly, though, the three-step test puts forward three cumulative conditions for national copyright exceptions and limitations and prescribes that such exceptions and limitations must:**

1. **be confined to certain special cases;**
2. **not conflict with the normal exploitation of the copyright work; and**
3. **not unreasonably prejudice the legitimate interests of the rights holder / author.**

The remainder of this section will address the question whether the proposed open-ended, flexible fair use exception as well as the other exceptions and limitations contained in ss12A-19D of the Copyright Amendment Bill comply with the three-step test. Emphasis is on the compatibility of the proposed fair use provision with the three-step test.

This question of whether fair use provisions comply with the three-step test is not new to lawmakers and legal experts, and has been discussed many times over. What

is noticeable, however, is that the number of commentators criticising fair use for being in conflict with the three-step test is on the decline as the views of previously critical authors such as Ruth Okediji, Sam Ricketson and Mihaly Fiscor have evolved[2] (even though their older writings are still frequently cited in support of criticism against fair use provisions). This may have to do with more flexible interpretations of the three-step test in recent times as, for instance, proposed in the Max Planck Institute's Declaration on a Balanced Interpretation of the 'Three-Step Test (see below).

The following table shows that the wording of the proposed South African fair use provision sufficiently aligns with the wording of its U.S. equivalent so that arguments made by commentators with regards to the U.S. provision apply *mutatis mutandis* to the South African fair use provision. In particular, the factors for assessing fairness are strikingly similar. If anything, the South African provision is more detailed and there should thus be less tension between s12A and the three-step test (especially the test's first step).

| South Africa | U.S. |
|---|---|
| **12A. General exceptions from copyright protection**<br><br>(1) *(a)* In addition to uses specifically authorised, 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:<br><br>(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;<br>(ii) criticism or review of that work or of another work;<br>(iii) reporting current events;<br>(iv) scholarship, teaching and education;<br>(v) comment, illustration, parody, satire, caricature or pastiche;<br>(vi) preservation of and access to the collections of libraries, archives and museums;<br>(vii) expanding access for underserved populations; and<br>(viii) ensuring proper performance of public administration. | **17 U.S. Code § 107**<br><br>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 criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.<br><br>In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—<br>(1) the purpose and character of the use, including whether such use is of a |

[2] See P Samuelson and K Hashimoto, Is the U.S. fair use doctrine compatible with Berne and TRIPS obligations? Footnote 9 in T Synodinou (ed) *Universalism or Pluralism in International Copyright Law (2018, forthcoming)*

| | |
|---|---|
| *(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—<br>(i) the nature of the work in question;<br>(ii) the amount and substantiality of the part of the work affected by the act in relation to the whole of the work;<br>(iii) the purpose and character of the use, including whether—<br>*(aa)* such use serves a purpose different from that of the work affected; and<br>*(bb)* it is of a commercial nature or for non-profit research, library or educational purposes; and<br>(iv) the substitution effect of the act upon the potential market for the work in question.<br><br>*(c)* For the purposes of paragraphs *(a)* and *(b)* and to the extent reasonably practicable and appropriate, the source and the name of the author shall be mentioned. | commercial nature or is for nonprofit educational purposes;<br>(2) the nature of the copyrighted work;<br>(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and<br>(4) the effect of the use upon the potential market for or value of the copyrighted work.<br>The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors. |

In recent years, the conflict between fair use and the three-step test was addressed by lawmakers and many legal commentators. It goes beyond the scope of this opinion to summarise and analyse all these contributions – but those interested may find the following two more recent contributions particularly helpful in that they examine numerous contributions by others to reach their conclusions:

P Samuelson *Is the U.S. Fair Use Doctrine Compatible with Berne and TRIPS Obligations?* (2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3228052

C Geiger; D Gervais and M Senftleben *The Three-Step-Test Revisited: How to Use the Test's Flexibility in National Copyright Law* (2014), *available at https://bit.ly/2pYExLa*

In 2014, the Australian Law Reform Commission (ALRC) published a report[3] based on a 18-month inquiry during which the ALRC carried out more than 100 consultations

[3]https://www.alrc.gov.au/sites/default/files/pdfs/publications/final_report_alrc_122_2nd_december_2013_.pdf

and received close to 900 submissions. In that report, the ALRC concluded with regards to the compatibility of fair use and the three step test[4]:

> *The ALRC considers that fair use is consistent with the three-step test. [...]*

The ALRC further stated:

> *To deny Australia the significant economic and social benefits of a fair use exception, the arguments that fair use is inconsistent with international law should be strong and persuasive, particularly considering other countries are enjoying the benefits of the exception. The ALRC does not find these arguments persuasive, and considers fair use to be consistent with international law.*

The ALRC emphasised that the "question of whether fair use is compatible with the three-step test is really a question of whether it meets the first step"[5] and it based its conclusion on, among other things:

- the fact that the US and other countries that have introduced fair use exceptions, such as such as the Philippines, Israel and the Republic of Korea, consider their exceptions to be compliant, and have not been challenged in international forums[6];
- the argument that a fair use exception would be a 'special case' because fairness itself is a special case; and
- a statement by the US Trade Representative, Ambassador Ronald Kirk, in September 2012, confirming that "[t]he United States takes the position that nothing in existing US copyright law, as interpreted by the federal courts of

[4] Ibid at 4.139 and 4.164

[5] According to the ALRC report, "Fair use could only conflict with a normal exploitation of the work and could only unreasonably prejudice the legitimate interests of the right holder if it were applied incautiously by the judiciary. The same is true of the existing exceptions. [And] The third limb of the three-step test provides only that limitations or exceptions must not 'unreasonably' prejudice the 'legitimate' interests of the rights holder. The test does not say an exception must never prejudice any interest of an author."

[6] Interestingly, the ALR further stated in this context that "[t]he fact that the US has already been subject to challenge in the WTO with respect to one provision of its copyright statute suggests that the US is not so 'unique' as to be immune from challenge in the WTO if its fair use provision was thought to be inconsistent with the three-step test."

> appeals, would be inconsistent with its proposed three-step test [for the Trans Pacific Partnership Agreement]."

The latter view of the US Trade Representative is echoed by the Copyright Alliance, a US-based group representing the interests of rightsholders. In a blogpost on their website dated 28 September 2017, they state that "[t]he three-step test is the international consensus for ensuring balanced copyright law. It is appropriately tailored, provides legal certainty, ***and is consistent with U.S. law***"[7] [emphasis added].

In addition, the ALRC also referred to a declaration published by the Max Planck Institute for Innovation and Competition in Germany which addressed a potential conflict between fair use provisions and the three-step test. This *Declaration on a Balanced Interpretation of the 'Three-Step Test' in Copyright Law*[8], endorsed by dozens of copyright scholars from around the world, advocated a more permissible interpretation of the three-step test and concluded that *"[t]he Three-Step Test's restriction of limitations and exceptions to exclusive rights to certain special cases does not prevent legislatures from introducing open ended limitations and exceptions, so long as the scope of such limitations and exceptions is reasonably foreseeable".*

In her aforementioned 2018 book chapter, Prof Samuelson of the University of Berkley, California, and her co-author carried out a very detailed analysis under consideration of all U.S. fair use case law and most literature available on the topic. Her conclusions are instructive for the current debate in South Africa. On this basis, the authors concluded:

> *"that the U.S. fair use doctrine does satisfy Berne and TRIPS three-step tests for permissible L&Es, the doubts of some commentators notwithstanding. Indeed, there has been growing recognition that open-ended L&Es such as fair use allows copyright law to be adapted to a wide range of new uses of protected works made possible by the extraordinary technological advancements in the digital age."*

In reaching this conclusion, the authors state:

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[7] https://copyrightalliance.org/ca_post/three-step-test-nafta-negotiations/

[8] **Available at:** https://www.ip.mpg.de/fileadmin/ipmpg/content/forschung_aktuell/01_balanced/declaration_three_step_test_final_english1.pdf

*"First, the U.S. fair use doctrine was accepted as consistent with the three-step test when the U.S. joined the Berne Convention in 1989. Its statutory embodiment recites several specific criteria that provide guidance to its interpretation, and the fair use caselaw has evolved to refine the types of special cases to which it applies, in accord with the first step of the test. Because fair use cases carefully assess harms that challenged uses to markets for protected works and other legitimate interests, the fair use doctrine satisfies the second and third steps of the test. Second, the U.S. fair use doctrine has remained consistent with the three-step test since the U.S. joined the World Trade Organization (WTO) in 1994. Several developments since then reinforce our conclusion that the U.S. fair use doctrine satisfies the TRIPS three-step test notwithstanding certain recent criticisms."*

As far as the existence of U.S. case law is mentioned in support of the fair use doctrine's compliance with the three-step test (and in light of the fact that similar case law does obviously not yet exist in South Africa), it is important to stress that while foreign court decisions are of course not binding in South Africa, numerous courts in South Africa have indeed considered, and incorporated in their judgements, foreign authorities. U.S. fair use case law may therefore be used, with caution, to determine the scope of fair use in South Africa. Some legal commentators in South Africa have indeed long argued for interpreting South Africa's current fair dealing provision along the lines of the criteria provided by the U.S. fair use provision – a suggestion which would also require relying on U.S. case law.

It should also be noted that there are obvious parallels between the three-step test criteria and the fair use factors in both the U.S. and the South African versions of fair use. In particular, the test's prohibition of a conflict with a normal exploitation parallels, in South Africa, with the requirement in s12A(1)(b)(iv). Such parallels do further mitigate against a conflict between the three-step test and fair use.

**Based on the examination in this section it is respectfully submitted here that newer in-depth research on the topic strongly suggests that open-ended, flexible fair use provisions like the one contained in the South African Copyright Amendment Bill are indeed permissible under and consistent with the three-step test – and in fact needed for copyright law to adapt to digital technology.**

As for the other exceptions contained in ss12B-19D the Bill, I cannot see any obvious conflicts with the three-step test either: Several of these provisions stem from the current Copyright Act and it is assumed that their compliance with the three-step test is not all of a sudden challenged now. As far as newly introduced exceptions and limitations are concerned, some of these are based on similar provisions in foreign laws. This may not substantiate compliance with the three-step test *per se* but may at least suggest compliance if these provisions have not been challenged in the other country. Overall, the newly introduced exceptions are flexible but appear, on balance, to be specific enough to meet the requirement of the first step ("certain special cases") as discussed in the context of s12A above. Crucially, most of these exceptions and limitations contain time honoured limits such as "fair practice", "extent justified by the purpose" which limit their scope effectively. And as far as the test's third step is concerned, it should also be remembered that this step does not state that an exception must never prejudice any interest of an author; instead it only provides that limitations or exceptions must not 'unreasonably' prejudice the 'legitimate' interests of the rights holder, thereby giving the lawmaker more leeway in this area than acknowledged by some commentators. If doubts remain, however, one interesting consideration could be to expressly integrate the wording / requirements of the second and third steps of the three-step test into the Act so that it is clear that the proposed exceptions and limitations are subject to these conditions as well. To avoid adding too much complexity to the Act at this point, my suggestion would, however, be to perhaps only do this if and when the exceptions are later challenged – in whatever forum – for non-compliance with the three-step test.

B. Would any of the proposed exceptions and limitations constitute deprivation of property? If so, would section 36 of the Constitution be covered?

This is a question for constitutional law experts. To me, it seems that the relationship between s25 and s36 of the Constitution in the context of intellectual property / copyright needs to be clarified. Prof Owen Dean's blog post provides some useful context in this regard.[9]

Section 25 provides as follows:

***25. Property***
***(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.***

***(2) Property may be expropriated only in terms of law of general application***
***(a) for a public purpose or in the public interest; and***
***(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.***

*[...]*

It thus clearly distinguishes between "deprivation" of property and "expropriation."

In addition, section 36 of the Constitution stipulates:

***36. Limitation of rights***
***(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—***
***(a) the nature of the right;***
***(b) the importance of the purpose of the limitation;***
***(c) the nature and extent of the limitation;***
***(d) the relation between the limitation and its purpose; and***
***(e) less restrictive means to achieve the purpose.***
***(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.***

[9] http://blogs.sun.ac.za/iplaw/2015/07/14/intellectual-property-and-the-constitution/

It is obvious that the proposed amendments do not constitute expropriations. Whether or not some of the proposed exceptions amount to deprivation of property must be determined by constitutional law experts.[10] However, deprivations are not banned; instead s25(1) requires that "[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property." The proposed provisions would be law of general application, and such deprivations would also not be arbitrary. Hence, any deprivations caused by the new provisions would likely be justified.

Equally, to the extent that s36 of the Constitution applies, the new provisions would qualify as "law of general application", and they appear "*reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.*" Yet, once again, a detailed analysis – including a consideration of the relevant factors in s36 (1)(a)-(e) – is better left to constitutional law experts.

[10] For a general analysis of takings law applied to copyright in the U.S., see https://harvardlawreview.org/2015/01/copyright-reform-and-the-takings-clause/

## C. A word on AGOA compliance

Recently, some stakeholders – including the IIPA - have put forward concerns that the provisions contained in the Copyright Amendment Bill, if enacted, would jeopardise South Africa's compliance with AGOA eligibility criteria. While such concerns need to be taken seriously, the lack of substantiation for such claim makes it difficult to engage with it. I should also state upfront that I am not an expert on AGOA – a U.S. piece of legislation. With respect, however, the manner in which the claim was presented, and the timing of it, suggest that this argument is a smokescreen.

In part A of this opinion, the view was expressed and substantiated that the proposed copyright exceptions – and especially the proposed fair use provision – comply with the international three-step test standard for domestic copyright exceptions and limitations. The proposed ss12A and 12B combine more specific exceptions and limitations with a more general clause (hybrid approach) – an approach not unlike what can be found in U.S. copyright law. On the face of it, it would therefore appear paradoxical if South Africa was, under AGOA, penalised by the U.S. for essentially adopting the approach that the U.S. has taken towards copyright exceptions and limitations.

Given the width of AGOA eligibility criteria, there is a real risk in my opinion, that broadly submitted threats of losing benefits under AGOA could henceforth be used to undermine or attack legislative efforts in a number of areas – be it copyright law or an amendment to section 25 of our Constitution. One should not give in to such pressures.

In response to the IIPA's claim concerning AGOA, two U.S. professors recently submitted to the U.S. Trade Representative the following response that I align myself with:

> *We write in reference to the August 1, 2018, filing of the IIPA, in respect of South Africa's proposed copyright amendments. IIPA claims that adoption of the South Africa copyright amendment bill "would place South Africa out of compliance with the AGOA eligibility criteria regarding intellectual property." We find this claim wholly unsupported.*

*AGOA is a general system of preferences (GSP) program. GSP programs are regulated under the World Trade Organization's GSP "Enabling Clause." The WTO permits GSP programs as exceptions to the most favored nation obligation only in so far as GSP criteria are "generalized, non-reciprocal and non discriminatory," and that they "be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries." See DS246: European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries (explaining that needs of developing countries must be assessed according to an "objective," "[b]road-based recognition of a particular need," such as those "set out in the WTO Agreement or in multilateral instruments adopted by international organizations").*

*The IIPA's submission vaguely criticizes South Africa's proposed copyright amendments as containing "extremely broad and new exceptions and limitations," and an "ill-considered importation of the U.S. 'fair use' rubric" which it concludes without explanation would violate the so-called three-step test in TRIPS Article 13 and Berne Article 9. We take exception to this cursory analysis.*

*South Africa's proposed copyright amendment bill contains an innovative, forward-thinking and South Africa-specific set of modernized limitations and exceptions that will contribute to its support of both innovation and access that will serve its public.*

*The bill's proposed new article 12 (considering A and B together) is a hybrid general exception that combines a set of modern specific exceptions for various purposes (Section 12B) and an open general "fair use" exception that can be used to assess any use for a purpose not specifically covered elsewhere. In this sense, it is akin to US law, which also contains a host of specific exceptions and a general fair use general exception.*

*The IIPA criticizes the specific exceptions in 12B as being "broad." The breadth of South Africa's new specific exceptions is a virtue, not a flaw. Its current law applies exceptions narrowly to specific types of works, users and uses, to the effect that many modern lawful uses of works permitted under US fair use law are excluded from their scope. For example, the incidental use right in current South Africa law applies to artistic, but not audiovisual, works – with the result that documentary film makers lack a right to capture a radio or television broadcast in the background of a shot. The new law broadens most of its current exceptions to apply to all works (e.g., extending to audiovisual, etc.), uses (including, e.g., display, performance, etc.), and users (e.g., to both individuals and institutions). This breadth will make South Africa's law function more similarly to US and other laws around the world that are more accommodating of modern technology.*

*The breadth of South Africa's exceptions is a feature that contributes to its development, financial and trade needs. Recent empirical research has shown, for example, that providing exceptions that are open to purposes, uses, works and users is correlated with both information technology industry growth and to increased*

*production of works of knowledge creation. See Sean Flynn and Mike Palmedo, The User Rights Database: Measuring the Impact of Copyright Balance. PIJIP Working Paper 2017-03; Deloitte, Copyright in the digital age: An economic assessment of fair use in New Zealand.*

*The fair use provision in Article 12A is similarly forward thinking. The main features of the clause draws from the US fair use right, and thus must be unassailable as a matter of US trade policy. The provision contains several innovations in its phrasing that will make the provision more clear in its application and consistent with modern trends in the interpretation of fair use and fair dealing rights.*

*First, we commend the drafters on the opening phrase — "In addition to uses specifically authorized." This provision makes clear that the fair use clause intends to cover issues unaddressed in its specific exceptions, as is the case with US fair use. This is particularly important to obtain the benefit of fair use as enabling adaptation to technology and culture change. It also signals to the interpreter that there exist a full set of specific exceptions (in 12B et seq.), which we commend for adding to the predictability of the law.*

*We commend as well the unique and clear phrasing of the opening clause — "for purposes such as the following." The inclusion of the illustrative purposes in an itemized list, preceded by the opening clause, makes it very clear that the listed purposes are illustrative, not exhaustive.*

*We commend the drafters on the list of illustrative purposes that are included. The list of illustrative purposes is innovative in including both traditional fair dealing purposes (e.g., criticism or review of that work or of another work), as well as more modern purposes that have been recognized by statutes and in case law in other countries (e.g., "comment, illustration, parody, satire, caricature, cartoon, tribute, homage or pastiche").*

*The inclusion of the interests of "libraries, archives and museums" ensures that such institutions will be able to utilize fair use in addition to the specific rights they are provided later in the Act.*

*The provision will add to the predictability of its interpretation by reflecting the traditional approach that in interpreting whether a use is fair "all relevant factors shall be taken into account, including but not limited to" the listed four factors. This is also consistent with US law.*

*The proposal includes a well-considered four-factor test that reflects the global trend, but clarifies its application.*

*The four fair use factors in the Bill add to the predictability of the law. South Africa's current fair dealing provision contains no standards for how to consider when a dealing*

*is fair. The Bill proposes to ground the law in a growing international trend toward defining fairness, in both fair use and fair dealing statutes, through a variation of the US four factor test for defining fair use. See Jonathan Band, The Fair Use/ Fair Dealing Handbook, http://infojustice.org/wp-content/uploads/2013/04/Band-and-Gerafi-04032013.pdf (reporting that over a dozen fair use and fair dealing jurisdictions have adopted a similar four factor test).*

*The four factors in the South African bill contain helpful clarifications that reflect global trends in interpretation.*

*In evaluating the purpose and character of the use, the provision helpfully instructs consideration of the core of the transformative use test – whether "such use serves a purpose different from that of the work affected." The "transformative use" test has added greatly to the predictability of fair use in the US. Judge Leval's opinion in Authors Guild v. Google, 804 F.3d 202 (2d Cir. 2015)("Google Books") makes the convergence of reasoning within US courts especially clear — he cites authorities from various circuits in reaching his conclusion. The Supreme Court denied certiorari review of the decision, leaving it to stand as the latest and most authoritative interpretation of the transformative use doctrine to date.*
*The fourth factor in the South African bill is clarified to focus on "the substitution effect of the act upon the potential market for the work in question." The focus on "substitution effect" is important because copyright law is designed to protect consumer markets for protected works rather than licensing revenue in general. The concept is reflected in US interpretations of fair use. For example, the Second Circuit explained in Google Books, 804 F.3d at 214:*
*The more the appropriator is using the copied material for new, transformative purposes, the more it serves copyright's goal of enriching public knowledge and the less likely it is that the appropriation will serve as a substitute for the original or its plausible derivatives.*

*Substitutionality is a common-sense concept, based on notions of intended audience. It does not open the floodgates for non-licensed use of derivative works. Art consumers substitute reproductions for originals — that's why there's a reproduction market, and why no one argues that merchandise based on reproductions of copyrighted art works is fair use. An example of a non-substitutional use would be the reproduction of some bars of music in a scholarly article, or a brief sample from one musical work incorporated into another.*

*IIPA makes vague but unsubstantiated claims that these provisions would violate TRIPS Article 13 and Berne Article 9. We find no basis for these claims. Many other nations have copyright laws with similar exceptions as proposed for South Africa, including the United States.[1] The three-step test in the Berne Convention and in TRIPS is adequately flexible to accommodate the full range of such exceptions. See Christoph Geiger, et al., The Three-Step Test Revisited: How to Use theTest's Flexibility in National Copyright*

*Law, http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1041&context=research*

*At bottom, the limitations and exceptions in South Africa's proposed legislation are well crafted and completely within their rights under international law. They should not be considered as any basis for sanctioning the country under AGOA.*