

https://dspace.org/

Copyright Legal and Practical Reform for the South African Film Industry

Flynn, Sean

2015-12-15

http://hdl.handle.net/10539/19313

Flynn, S. (2015). Copyright legal and practical reform for the South African film industry. The African Journal of Information and Communication (AJIC), 16, 38-47. https://doi.org/10.23962/10539/19313

Downloaded from a DSpace repository. https://dspace.org/

COPYRIGHT LEGAL AND PRACTICAL REFORM FOR THE SOUTH AFRICAN FILM INDUSTRY

Sean Flynn
Associate Director, Program on Information Justice and Intellectual Property (PIJIP), American University Washington College of Law, Washington, D.C.

ABSTRACT
Copyright's interest in promoting creative production is often described as requiring a "balance" between exclusion and access rights. Owners of copyright receive exclusive rights to control copies of their works, which enables authors to earn returns on their creations through sales or licensing transactions. But as important to promoting creation are the user rights in copyright law which permit building on the work of predecessors. The necessity for balance in order to promote creation is clearly evident in the documentary film industry, where producers rely on copyright ownership to facilitate the dissemination of their works through broadcasters and other distributors, and on user rights to incorporate excerpts of other copyrighted material in their work.

This article draws on a collaborative South African research project that has been working since 2008 to document influences of copyright law on the production of documentary films. The results of that research, summarised in the first part of the article, show that South African filmmakers are hampered by a legal environment that denies them copyright ownership in the majority of their projects while also denying them adequate rights to use, in their own works, elements of the works of others. The second part of the article describes capacity-building approaches and legal reforms that could be advantageous to the local film industry.

This article is licensed under a CC BY 4.0 licence, http://creativecommons.org/licenses/by/4.0
Recommended citation: Flynn, S. (2015). Copyright legal and practical reform for the South African film industry. *The African Journal of Information and Communication (AJIC), 16,* 38-47.

KEYWORDS
copyright, limitations and exceptions, filmmaking, fair dealing, fair use, South Africa, user rights

INTRODUCTION

The making of documentary films provides an illustration of how copyright laws can both promote and pose barriers to free expression and development of creative industries. Copyright laws help promote documentary filmmaking by providing exclusive rights of reproduction that permit filmmakers to sell and distribute their work. But documentary films also frequently require the use of historical and other illustrative content in their productions, which can implicate the exclusive rights of others.

To prevent copyright from enabling a private regime of censorship that could inhibit the production of new works, copyright laws contain what the US Supreme Court has referred to as "built-in [free expression] accommodations" in the form of limitations and exceptions to exclusive rights. (*Eldred v. Ashcroft*, 2003, pp. 219-220). Copyright limitations and exceptions, which allow quotation and other uses of copyrighted material without permission of the copyright owner in certain circumstances, may be broadly referred to as "user rights." Optimising creative production requires a careful balance between protections enabling authors to generate income from their work and user rights that permit the free quotation, use and transformation of cultural products into new creations (Okediji, 2006).

A team of legal researchers from American University (AU) and the University of Cape Town (UCT), in collaboration with organisations representing South African filmmakers, has been working since 2008 to study how copyright law, and perceptions of the law, influence the production of documentary films in South Africa (Flynn & Jaszi, 2009). The legal researchers have used participatory action research methodologies (Chevalier & Buckles, 2013; Reason & Bradbury, 2008), generating relationships with filmmakers and their organisations and working with them to evaluate the legal enabling environment in which they work and to generate policy and training responses to the knowledge generated.

The first stage of the research consisted of a survey of filmmakers to assess their practices and perceptions. In this stage, legal researchers worked with local filmmakers to draft interview questions that would be asked by fellow filmmakers of other members of their community. That research, summarised in the first part of this article, found that filmmakers are hampered by a legal environment that denies them copyright ownership in the majority of their projects, and by a copyright clearance culture that is produced by a combination of the legal regime, the clearance demands of broadcasters and other distribution channels, and inadequate filmmaker knowledge of their user rights under the law.

The second stage of the project has consisted of a series of workshops with filmmakers aimed at co-generating solutions for the copyright problems identified in the survey. The key outputs from this second stage are recommendations regarding improved filmmaker usage of user rights and recommendations to the South African government in the context of its copyright law reform process, specifically the draft Copyright Amendment Bill of 2015. These recommendations are outlined in the second part of this article, followed by a conclusion section.

SOUTH AFRICAN FILMMAKER PERCEPTIONS AND PRACTICES

In the first phase of the research, researchers from the AU Washington College of Law's Program on Information Justice and Intellectual Property (PIJIP) and the UCT Faculty of Law's Intellectual Property Unit (IP Unit) collaborated with South African documentary filmmakers in both the design and implementation of a survey. The survey sought evidence of filmmakers' perceptions and practices with regard to the use of copyrighted material in their films. Semi-structured interviews were conducted with more than 40 experienced filmmakers, supplemented by a two-day focus group meeting with dozens of additional filmmakers. The core findings of the research were that filmmakers face copyright barriers in two dimensions. First, they rarely control copyright in their own films. Second, they face enormous costs, in both money and time, to meet perceived licensing requirements for the quotation of other works in their films (Flynn & Jaszi, 2009).

LACK OF COPYRIGHT PROTECTION

South African filmmakers do not enjoy copyright protection in many of their works. Although the South African Copyright Act 98 of 1978 generally makes cinematographic films eligible for copyright in section 2(1)(d), the Act's section 21(1)(c) creates a statutory default vesting copyright in a film in the party commissioning the work rather than in the film's author.

Section 21(1)(c) states:

> (c) Where 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 in money or money's worth, and the work is made in pursuance of that commission, such person shall, subject to the provisions of paragraph (b), be the owner of any copyright subsisting therein by virtue of section 3 or 4.

Since the great majority of documentary films in South Africa are produced under commission – most commonly by state-owned South African Broadcasting Corporation (SABC) – the producers of films rarely own the copyright in them, by virtue of section 21(1)(c) (Flynn & Jaszi, 2009, pp. 6, 18). The result is that many films face a copyright barrier to their further dissemination and marketing. The producers of commissioned films lack rights to, for instance, release their works to the public through open licences, to post their works on YouTube or other platforms for public consumption, or to sell their works (or derivatives of them) in other markets, local or foreign, without permission from the commissioning party. This restriction deprives South African filmmakers of important channels for revenue generation and public exposure, and for that reason has long been a key target for law reform by filmmakers, as is discussed further below.

LACK OF EXPLOITATION OF USER RIGHTS

On the flip side of copyright, South African filmmakers also lack an adequate infrastructure of user rights necessary for use of segments of other copyrighted works in the production of their works. Filmmakers described the industry as dominated by a "clearance culture", i.e., "a common law on the ground that everyone thinks is the law" requiring that every use of copyrighted material in a film be licensed (Flynn & Jaszi, 2009, p. 17). Nearly 70% of the filmmakers interviewed reported that they did not know of any instances when they could use copyrighted content in their work without a licence (Flynn & Jaszi, 2009, p. 17).

Filmmakers reported that obtaining copyright clearances for using historical footage, music, and other illustrative uses of other works in their films typically required enormous amounts of time and money. Filmmakers reported that determining who owns the copyright in a work – especially in older material – was often exceedingly complex. Even when copyright holders were known, it was "difficult to receive replies from licensing inquiries, particularly from major Hollywood studios" (Flynn & Jaszi, 2009, p. 19). Where it was possible to find and communicate with copyright holders, the fees demanded for short excerpts were often enough to sink a budget:

> Seventy-nine percent of the interviewees stated that they have problems finding affordable archive material for their films. For historical documentaries, the cost of acquiring archival material can be overwhelming. One described working on a film with a budget of R600,000 and facing a licensing fee of nearly R200,000 for 20 seconds of a 1950s song and R48,000 a second for needed historical footage. One common theme was that the SABC commissions do not provide an adequate budget to afford licensing rates from SABC's own library (Flynn & Jaszi, 2009, p. 22).[1]

This lack of exploitation of user rights restricts the production and distribution of films in South Africa. Eighty-six percent of filmmakers surveyed stated that they had avoided using important illustrative material in a film in order to avoid the licensing process (Flynn & Jaszi, 2009, p. 39). Such avoidance often degrades the value of the end product.

> Filmmakers reported replacing "dance music with mood music" and international with local news footage and cutting scenes entirely to avoid licensing requirements. One filmmaker recounted licensing a clip that contained material from a variety of sources and "to play safe, [we] decided not to use any of the material." Another reported that after paying the research and related archive costs to find historical footage, she "often just dropped" the footage from the film "just because I can't afford [clearance licenses] to broadcast or go to

1 R stands for South African rand (ZAR), which had an average value of ZAR8.2 to USD1 in 2008.

> festivals with that archive in the film." Others take pains to avoid using any copyrighted material "in order not to go through that whole [clearance process]." In sum: "If copyright wasn't an issue, we would have used far more and different stuff." (Flynn & Jaszi, 2009, pp. 23-24)

It was also found that filmmakers frequently included unlicensed material in their films, under the assumption that such inclusion was illegal (Flynn & Jaszi, 2009, pp. 2, 23-25). This perceived illegality (which was not always correct) inhibited filmmakers from access to distribution channels. Many such channels – including broadcast television, film festivals, and other outlets – require affirmations of the sort found in the SABC standard contract, which requires that distributed films "will not include any material in the PRODUCTION without obtaining the required permission, consent, and authorisation of the owners and/or copyright holders of that material" (Flynn & Jaszi, 2009, p. 19). Sixty-nine percent of the filmmakers interviewed stated they had avoided at least one major distribution channel for a film because of concerns that they could not establish clearance for some unlicensed material used (Flynn & Jaszi, 2009, pp. 22-23, 43).

The surveyed filmmakers reported that, with respect to rights clearance issues, accessing more lucrative international markets could be even more difficult. Filmmakers reported that international distributors "want to make sure everything regarding copyrights has been cleared", and "are much more vigorous" in requiring evidence of rights clearance for every piece of copyrighted material used in a film (Flynn & Jaszi, 2009, p. 18). As a result, many filmmakers – especially smaller ones – avoid international distribution opportunities altogether.

REFORMING THE RELATIONSHIP BETWEEN COPYRIGHT LAW AND FILMMAKING

The 2008 survey interviews and focus group with filmmakers showed that, at least in the perception of filmmakers themselves, they would be able to access more markets, generate more revenue for their businesses, and make better films with an improved relationship with the copyright system. During and after the survey research, AU and UCT researchers worked with filmmakers to analyse the South African Copyright Act and to ascertain whether the problems identified could be resolved through better training and understanding (e.g., through "best practices" guides for filmmakers) or whether the problems necessitated legal change. It was found that both training and statutory reform are needed to bring the industry into line with the rights enjoyed by filmmakers in many other markets.

USING EXISTING FLEXIBILITIES IN SOUTH AFRICAN LAW

With respect to user rights to quote materials in their films, South Africa's Copyright Act is not as restrictive as documentary filmmakers often assume. In some respects, the South African Act is very open and flexible in its user rights, indicating that some of the problems filmmakers face could be solved through better education of filmmakers.

RIGHT OF QUOTATION

Perhaps the most useful and flexible user right in the South African Copyright Act is its right of quotation. Section 12(3) states:

> The copyright […] shall not be infringed by any quotation therefrom, including any quotation from articles in newspapers or periodicals that are in the form of summaries of any such work: Provided that the quotation shall be compatible with fair practice, that the extent thereof shall not exceed the extent justified by the purpose and that the source shall be mentioned, as well as the name of the author if it appears on the work.

Many of the most common uses of copyrighted content in a documentary film – such as the inclusion of historical footage to illustrate a point or as the subject of commentary – may fall within this broadly worded exception. Importantly, there is no restriction to the purposes for which a quotation is used other than the specification that it be "compatible with fair practice". Some quotation exceptions from other countries are more restrictive. For example, it is common for quotation rights to be applicable only for criticism or review of the work quoted – which could rule out illustrative purposes – or for purposes of review of a work other than the one quoted.

The quotation right appears to be poorly understood among South African filmmakers. Training filmmakers on best practices with respect to quotation – including determination of what kinds of quotation in film should be considered "consistent with fair practice" – could go a long way to liberating filmmakers from some of the most onerous clearance requirements they face.

FAIR DEALING

Another potentially flexible user right can be found in the South African Act's "fair dealing" clause. Section 12(1) of the Act states:

> 12.- (1) Copyright shall not be infringed by any fair dealing with a literary or musical work-
> (a) for the purposes of research or private study by, or the personal or private use of, the person using the work;
> (b) for the purposes of criticism or review of that work or of another work; or
> (c) for the purpose of reporting current events-
> (i) in a newspaper, magazine or similar periodical; or
> (ii) by means of broadcasting or in a cinematograph film:
> Provided that, in the case of paragraphs (b) and (c)(i), the source shall be mentioned, as well as the name of the author if it appears on the work.

Unlike the quotation right, the fair dealing standard applies only to a limited range of specified purposes. And the purposes are further restricted for the use of sound recordings and excerpts of films. The fair dealing clause originally applied only to the use of a "literary or musical work". The provision was later extended to films and sound recordings by the addition of sections 16 and 17. But these extensions only applied to the purposes listed in 12(1)(b) and (1)(c), i.e., for the purpose of "criticism or review" or "reporting current events".[2]

The most useful of the permitted fair dealing purposes for filmmakers is likely the exception for "criticism or review of that work or another work". Since "[m]ost filmmakers choose a particular piece of footage or music to quote in order to not only tell a story about the facts being portrayed in the work, but also to make a comment about the material or its relation to other works", the utility of the fair dealing right is potentially quite broad (Flynn & Jaszi, 2009, p. 12). Fair dealing rights are even less understood among South African filmmakers than quotation rights. No filmmaker surveyed had heard of a "fair dealing" right in the act and none referenced it when asked about user rights in the Copyright Act.

The potential utility, and widespread ignorance among filmmakers, of the quotation and fair dealing rights in South African law indicate the potential utility of training efforts among filmmakers. Towards this end, the AU and UCT researchers have been working with filmmakers, through training workshops, to improve legal literacy among filmmakers. In addition, filmmaking organisations have agreed to develop a best practices statement "to promote greater understanding and use of existing users' rights, thus helping to lessen the burdens imposed on documentary film production by the clearance culture" (Flynn & Jaszi, 2009, p. 28).

SEEKING LEGAL REFORM

Despite the utility of some provisions of South Africa's Copyright Act for user rights, not all of filmmakers' problems could be solved through training activities. As noted above, there are very real barriers to filmmakers obtaining copyright in their works. In addition, South Africa's law in many respects fails to provide typical user rights that exist in other countries and that would be greatly beneficial to South African filmmakers.

In July 2015, the South African government released a draft Copyright Amendment Bill ("draft Bill") for comment (DTI, 2015). The publication of this draft Bill provided a key opportunity for the researchers from AU and UCT and the filmmakers to generate concrete options for legal reform to benefit the local industry. Some proposals for reform had been included in the report on the initial survey (Flynn & Jaszi, 2009, pp. 12-16), but the announced reform of the Copyright Act in 2015 provided impetus to the researchers and filmmakers to work with other stakeholders – including librarians, bloggers, Wikimedia site managers, and educators – to build a fuller catalogue of proposals that would aid local creators and users. To this end, the researchers convened a multi-stakeholder workshop in Pretoria in August 2015, and used the inputs from that workshop to draft a document entitled Joint Academic Comments on the South African Copyright Amendment Bill (Flynn et al., 2015), which was submitted to the Department of Trade and Industry (DTI) on 16 September 2015. The sections that follow contain recommendations that grew out of that process that are most pertinent to filmmakers' concerns.

RIGHTS IN RESPECT OF COMMISSIONED WORKS

As described above, the most frequent complaint about copyright law made by filmmakers in South Africa is with respect to the statutory defaults that vest copyrights for films, photographs and certain artistic works in the commissioners of the works rather than with their authors. The draft Bill of 2015 does not propose any change to section 21(1)(c) – the section vesting copyrights in films and some other works in the commissioners of those works. Section 21(1)(c) applies whether the commissioning party is public or private. Where the commissioning party is an organ of the state, additional restrictions on copyright ownership in the final product are proposed by amendments to the Act's section 5. Section 5(2) as amended would read (with the proposed language redactions in bold and the new language underlined):

> 5 Copyright in relation to the state and certain international organizations
> […]
> (2) Copyright **[shall be conferred by this section]** on every work which is eligible for copyright and which is made by or funded by or under the direction or control of the state or such international organizations **[as may be prescribed.]** shall be owned by the state or such international organization.

Expansion of state-owned copyright to every work "funded by" the state could effect a massive expansion in state ownership of authors' works in South Africa. The existing subsection, which applies only to works made "under the direction or control of the state" is far less restrictive, in that it would appear to allow authors to retain copyright in a work produced with government funding, as long as the government did not control the creative decisions in the end product. The proposed amendment would make the reach of state-owned copyright far broader. Unless restrictively interpreted, the draft Bill's language would appear to grant the state ownership in all works that receive government funding, even if the government did not direct or control the creative decisions for the work. Such a revision would be out of step with the norm in copyright laws around the world. The Joint Academic Comments on the draft Bill explain:

2 The extension of the provision to broadcasts in section 18, however, applies to the entire fair dealing clause, including for the purposes of "research or private study" in 12(1)(a).

> We are not aware of any modern copyright law that deals in this way with funded works as a category. Indeed, the typical default is that copyright, which is an author's right, vests in the individual who received the funding (or other commission), while a funding contract or another mechanism assures the funder whatever use rights it may require in the resulting work. (Flynn et al., 2015)

The copyright revision process provides an opportunity to bring section 5(2) in line with international norms, to the benefit of filmmakers and other authors. The Joint Academic Comments propose the following substitute subsection (2):

> 5.
> […]
> (2) Unless altered by terms [of] contract, copyright for state funded works shall vest in the author of the funded work and the state or international organization funder shall enjoy a royalty-free paid-in-full non-exclusive licence to the full practice and use of the full rights in the work for any purpose. In absence of contractual provisions to the contrary, data and works funded by the state or international organization shall be released or licenced under a public licence to maximise public access to such works.

The proposed subsection (2) would make author ownership, rather than state ownership, the default. As is the case with copyright normally, the default would be subject to contractual arrangements between the parties. An organ of government could choose to alter the background rule by declaring in its funding proposals, and implementing by contract, ownership rights for the state where needed in the individual case. One benefit of reversing the default could be to save the government money in its funding. Where the government does not need full ownership of the rights in a funded work, then it should not pay for such rights. Authors may be willing to work at lower costs to the government if they are permitted to retain rights to exploit the end product in other ways, including through derivative works.

With regard to section 21(1)(c), which vests copyright in films in the commissioning entity whether that entity is an organ of state or not, the Joint Academic Comments propose a similar revision. The Comments note filmmakers' experiences of having their commissioned films "locked away in the archives of commissioning entities", thus curtailing "enjoyment by the public, as well as benefits to the authors" (Flynn et al., 2015). To bring section 21(1)(c) in line with international best practice, the comments propose the following amendment:

> Ownership of copyright
> (1)
> […]
> (c) Where 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 in money or money's worth, and the work is made in pursuance of that commission, the ownership of any copyright subsisting in the work as between the commissioning person and the author or authors who execute the commission shall be governed by contract; provided that in the absence of an effective, signed agreement, ownership shall vest in the author or authors and the commissioning party shall enjoy an irrevocable non-exclusive licence to use all copyright rights as may subsist in the work.

As in the proposed revision to section 5(2), the Joint Academic Comments here propose a default of author ownership subject to alteration by contract. The proposal also seeks to reflect particular interests of a commissioning party. Unlike a mere funder – who may have little interest in using the end product of the grant – a commissioning party is assumed to have an interest in using the final work. In the case of films, it is often a broadcaster who seeks to have the work produced for airing in its programming. Recognising this interest, the proposed revision for section 21(1)(c) includes a default full licence to the commissioning party to use the work for any purpose.

The value of making the default a licence, rather than ownership of copyright, is to permit the filmmaker to use the product for other purposes, such as expanding it into a feature film or making it available through other distribution channels. These rights can, of course, be modified by the commissioning contract. A commissioning party is free to negotiate for greater restrictions on the author's ability to use the work for other purposes.

FAIR USE AND FAIR DEALING

The draft Bill proposes to add a "fair use" provision as a new section 12A in the Act. In relevant part, the draft Bill's section 12A states:

> (2) Notwithstanding any provision of this Act, fair use of work for purposes such as criticism, comment, news reporting, judicial proceedings, professional advice, teaching which may include, making multiple copies for classroom use, scholarship or research is not an infringement of copyright
> […]
> (5) In determining whether the use of copyright work in any particular case is fair use, the following factors shall be considered:
> (a) the purpose and character of the use including, whether such use is of a commercial nature or is for non-profit educational 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;
> (d) whether the use of the copyrighted work is fair and proportionate, by considering further that-

(i) the use of copyrighted work is of few lines of a song, literature or few parts of a film or art work for cartoon, parody or pastiche;
(ii) the use of the whole copyrighted work for cartoon, parody or pastiche for commercial use shall require the issuance of licence; and
(iii) the use of copyrighted work is compatible with fair practice in that the source and the name of the author are mentioned in the publication, broadcast, recording or the platform where the copyrighted work is displayed.

(e) the effect of the fair use upon the potential market for of the value of the copyrighted work.

The term "fair use" derives from the US Copyright Act. In the U.S., the provision has long been interpreted to allow the "fair use" of copyright material for any purpose subject to a four-part balancing test. The U.S. balancing test, similar to the draft Bill's proposed section 12A, includes consideration of "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes", "the nature of the copyrighted work", "the amount and substantiality of the portion used in relation to the copyrighted work as a whole", and "the effect of the use upon the potential market for or value of the copyrighted work" (17 U.S.C. § 107).

The primary difference between US fair use rights and the fair dealing rights in most Commonwealth countries is the openness of the fair use purpose test. While fair dealing rights, like those in the South African Act's current section 12(1), are commonly restricted to a set list of purposes, the US fair use right is more flexible in that it is open ended. It applies to uses "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" (17 U.S.C. § 107, emphasis added).

In modern fair use cases, US courts have emphasised the first balancing factor especially – i.e., finding fair uses where the new work "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message" (*Campbell v. Acuff-Rose Music*, 1994, p. 579). The standard in Campbell has become known as a "transformativeness" test. A use of a work is transformative, and therefore more likely to be held legal under the balancing test, if it serves a different purpose and audience from the original (Leval, 1990).The openness of the purposes in US fair use has allowed courts to apply the right to many purposes not mentioned in the US Act. Uses of works for purposes including parody, text and data mining, inline linking, reverse engineering of interoperable software, and other purposes have been held to be fair uses because they meet the demands of the balancing factors, especially its "transformativeness" test in the first factor (Samuelson, 2009).

Countries that have recently added a flexible exception similar to the US fair use doctrine to their copyright laws include Singapore, Korea, the Philippines, Israel, Taiwan and Malaysia. An open-ended exception based on the Berne Convention Article 9 "three step test" is being proposed for China (PIJIP, 2012a). Inclusion of a fair use right in the South African Copyright Act would have many advantages over the current section 12 fair dealing provision. Applying a flexible exception to all uses and purposes, via a fair use provision, would ensure that the South African Copyright Act is adaptable to future technologies and practices. Just as the last generation's copyright laws failed to anticipate new uses like Internet search or "mashups" of content, we cannot today imagine the future technological or cultural revolutions affecting creative production. Questions of copyright laws' applicability to new uses, or to new technologies for using and transforming works by others, should be determined by whether the new uses or technologies compete with the copyright owner's interests, not by whether the uses or technologies existed or were predicted at the time the legislation was drafted.

Explicitly stating factors to be balanced in an individual case, as the proposed new section 12A does, would usefully serve to ground the exception in an internal balance between the interests of copyright-owners and users (including downstream creators). The balancing factors provided for in the proposed section 12A, which are modelled on the US fair use right – e.g., the purpose and character of the use, the nature of the copyrighted work, the amount used, and the market effect of the use – would ground the provision in a corpus of comparative jurisprudence that is evolving and that can be consulted with application to individual cases. And the use of balancing factors that exist in US and other legal systems would also help ensure compliance with international legal restraints on limitations and exceptions in copyright law (see Geiger et al., 2014).

PARODY

The draft Bill's fair use provision (the proposed new sect. 12A) adds parody to the enumerated exceptions in the Act (in sect. 12A, subsection (4)), but at the same time includes some notable restrictions on the utility of the exception. As seen above, the proposed section 12A, subsection (5)(d)(i) would restrict the parody right by requiring licensing for any use of copyrighted works in a parody if the use is of more than a "few lines of a song, literature or few parts of a film or art work". Additionally, the proposed section 12A(4) would appear to restrict parody rights to "non-commercial use":

(4) Fair use of copyright work shall allow for some limited and reasonable use of copyright work for purposes of cartoon, parody or pastiche work in songs, films, photographs, video clips, literature, electronic research reports or visual art for non-commercial use, without having to request a permission specified in the Schedule hereto. The use includes-

(a) quoting the works of the copyright owner in a manner that is reasonable and fair;
(b) making copies of eBooks or compact discs purchased by the user; or
(c) transferring of purchased compact discs onto the user's MP3 format player.

Most fair dealing laws, and the US fair use doctrine as it has been interpreted in the courts, allow use of copyrighted material for the purpose of parody. Australia's Copyright Act of 1968, for example, provides, in section 41A, that a "fair dealing […] does not constitute an infringement of the copyright in the work if it is for the purpose of parody or satire". The current South African law does not contain a parody exception, although such use could be interpreted as being allowed under the fair dealing exception's allowance for "criticism". Additionally, the South African Constitutional Court's 2005 ruling in the *Laugh It Off* case, permitting a parody of a trademark, indicates that there may be a constitutional basis for recognising a parody exception in copyright cases (*Laugh It Off Promotions CC v South African Breweries International*, 2005).

The draft Bill's proposed limitation of use of works for parody to small excerpts in non-commercial works would have freedom of expression implications. The purpose of parody is to reproduce and transform a work sufficiently that the original work is being critiqued and commented upon. In some cases, this can require the reproduction of the entire work. Take, for example, the case when a cartoon is being parodied. It would be difficult to do so without reproducing the cartoon in whole or substantial part. Nor are parodies limited to non-commercial uses. Commercially distributed satiric cartoons, essays, films and other such works are no less contributors to free discourse and debate merely because they, or the publications they are produced in, seek to make a profit.

Both of these issues were addressed by the US Supreme Court in the *Campbell v. Acuff-Rose Music* case (*Campbell v. Acuff-Rose Music*, 1994). In that case, the Court overturned a lower court ruling that held that the hip-hop group 2 Live Crew violated copyright in Roy Orbison's song "Oh, Pretty Woman" by reproducing the "heart" of the song in a commercially distributed parody musical work. The Supreme Court found that a work's commercial nature is properly considered as only one element of the first factor enquiry into its purpose and character. In a passage that could equally be applicable to the South African draft Bill's fair use clause and the existing South African fair dealing exception, the US Supreme Court opined:

> If, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph […], including news reporting, comment, criticism, teaching, scholarship, and research, since these activities are generally conducted for profit. (internal quotation marks removed)

The Court further reasoned that the "amount and substantiality" prong of the fair use analysis must be interpreted flexibly in relation to the purpose of the use. The Court found that

> [e]ven if 2 Live Crew's copying of the original's first line of lyrics and characteristic opening bass riff may be said to go to the original's "heart," that heart is what most readily conjures up the song for parody, and it is the heart at which parody takes aim.

Accordingly, the Joint Academic Comments urge the South African government to reconsider the draft Bill's restrictive approach to parody, noting that while commerciality may be a factor in a fair dealing or fair use analysis, it should not be determinative: "Newspapers, search engines, blogs, etc. may be for-profit commercial activities, but nonetheless [should be] eligible for fair use treatment" (Flynn et al., 2015). Also, it may be necessary for parody films and other works to reproduce more than a few lines of a song or "parts" of a film or artwork for legitimate satiric, expressive purposes, and "[t]he key is to ensure that exceptions are not 'wide open' but rather appropriately bounded" (Flynn et al., 2015) – a bounding that would still be provided by the other factors in the proposed fair use standard in the draft Bill's section 12A(5) even if the provisions on parody were made less restrictive.

INCIDENTAL CAPTURE

Many copyright laws provide exceptions that permit copyrighted material to be used when it is incidentally captured in the background of a film sequence. These provisions are sometimes referred to as "freedom of panorama" rights. It is common, for example, to capture copyrighted music or television playing in the background while shooting documentaries. Indeed, such an exception is one of the most commonly identified by South African filmmakers as an exception that they "know" exists and that they believe is a core attribute of a fair system (Flynn & Jaszi, 2009, pp. 17, 25).

However, the reality is that the current incidental use exception in the Act does not extend to the most frequently captured copyrighted content in films. In terms of section 15(1):

> 15(1) The copyright in an artistic work shall not be infringed by its inclusion in a cinematograph film or a television broadcast or transmission in a diffusion service, if such inclusion is merely by way of background, or incidental, to the principal matters represented in the film, broadcast or transmission.

This user right is limited to the capture of "an artistic work", and section 1 of the Act defines "artistic work" narrowly, as including "(a) paintings, sculptures, drawings, engravings and photographs; (b) works of architecture, being either buildings or models of buildings; or (c) works of craftsmanship […]". This definition in section 1 excludes music, film or broadcast footage, as well as literary texts. Thus, the incidental use right as currently provided by the Act would, for instance, permit the filming of a building or sculpture in the background of a scene, but not the capture of music playing on a radio or a programme playing on a television set.

The Joint Academic Comments propose applying the incidental capture exception to all kinds of works. A revised provision could provide, for example, that copyright in a work shall not be infringed "by its inclusion in another work if such inclusion is merely by way of background, or incidental, to the principal matters represented in the new work" (Flynn et al., 2015). Such a clause would eliminate the necessity of a court determining whether the used work is one specifically mentioned in the Act and allow legal judgements to turn instead upon the core factor of whether the use of the work is "by way of background, or incidental" to the new work's purposes.

ORPHAN WORKS

Filmmakers often seek access to historical materials where the authors of the works are difficult to determine or contact. (Flynn & Jaszi, 2009). Works that are subject to copyright but whose rights owners cannot be identified or who no longer exist are known as "orphan works". Without rights to use such works without a licence, the works may cease to be available to the public.

South Africa's Copyright Act does not have a specific provision authorising uses of orphan works. Adding an exception permitting the use of orphan works has been a common refrain of copyright reform advocates, including by the Open Review of South Africa's copyright law facilitated by the Shuttleworth Foundation (2010).

The draft Bill proposes an orphan works exception through a new section 22A. According to the proposed section 22A(6), those wishing to use an orphan work would first have to conduct the following:

- "a search of the records of the database of the register of copyright in the [Companies and Intellectual Property] Commission";
- "a search of reasonably available sources of copyright authorship and ownership information and where appropriate, licensor information";
- "a search using appropriate technology tools, printed publications and where reasonable, internal or external expert assistance are enlisted";
- "a search using any other database including databases that are available to the public through the internet or any other means"; and
- unspecified "actions that are reasonable and appropriate in terms of the facts relevant to the search including, actions based on facts known at the start of the search and facts uncovered during the search including, actions as directed by the Commission and review any records not available to the public through the Internet that are known to be useful in identifying and locating the copyright owner".

After completion of these steps, use of the work would require an application to the Companies and Intellectual Property Commission (sect. 22A(1), (3)), preceded by the applicant publishing the "intention to make such application in the national gazette and two (2) daily newspapers" (sect. 22A(2)). The Commission would be empowered to grant licences to use orphan works "subject to the payment of a royalty and subject to such other terms and conditions as the Commission may determine" (sect. 22A(4)).

The complexity of these proposed mechanisms for identifying and licensing orphan works would likely thwart reliance on them. The survey research found that filmmakers already spent extensive amounts of their time attempting to find, contact, and negotiate licences with owners of content needed for their films. (Flynn & Jaszi, 2009). The draft Bill's proposed orphan works licensing process would almost certainly add further complexity to an already draining process. The Joint Academic Comments thus advise a far simpler orphan works provision. Jamaica's Copyright Act of 1993, for example, provides in Article 71 that copyright

> is not infringed by an act done at a time when, or under arrangements made at a time when — it was not possible by reasonable inquiry to ascertain the identity of the author; and it was reasonable to assume — that copyright had expired; or that the author had died fifty years or more before the beginning of the year in which the act was done or the arrangements were made.

A provision of this sort would provide for the free use of orphan works without creating new and complicated administrative procedures. However, if a flexible fair-use-style right is included in the final Act, the administrative process proposed in section 22A for orphan works, even if adopted, might be unnecessary for many uses. Where the use is otherwise fair, it would not be relevant whether or not an owner could be found. (When a right-holder cannot be identified, the risk of displacing sales from that right-holder is diminished, tipping the overall balance of interests in the user's direction in a fair use determination.).

UNENFORCEABLE CONTRACTUAL RESTRICTIONS

The draft Bill includes a provision on unenforceable contracts, a proposed new section 39A(1), that would be beneficial to filmmakers. The proposed 39A(1) states:

> To the extent that a term of a contract purports to prevent or restrict the doing of any act which by virtue of this Act would not infringe copyright or which purports to renounce a right or protection afforded by this Act, such term will be unenforceable.

In the survey, a large number of South African filmmakers reported restricting the geographic distribution of their works because the films were subject to copyright clearance licences that restricted the markets that could be served. In many instances, these licences were the product of filmmakers licensing content that they could have in fact relied on user rights to justify. The new section 39A(1) would make clear that in such cases the user rights in the Act prevail.

TECHNOLOGICAL PROTECTION MEASURES

Filmmakers commonly include excerpts in their films from other media sources, including from CDs and DVDs that are often subject to technical copy protection. User rights in copyright law can be rendered ineffective if these copy controls could not be bypassed for lawful purposes. South Africa's Electronic Communications and Transactions (ECT) Act contains prohibitions on circumventing TPMs. The draft Copyright Amendment Bill, meanwhile, would clarify, in its proposed new section 28A, that the user rights in the Copyright Act prevail over the ECT Act's anti-circumvention prohibitions. Section 28A would permit circumventing TPMs for "a permitted act or an act that falls within the general public interest exceptions in sections, 12, 13, 14, 15, 16, 17, 18, 19, 19A, 19B, 19C, 19D of this Act". This exception would be useful to filmmakers in exercising their existing rights. Permitting such circumvention, as section 28A would do, for "a permitted act or an act that falls within the general public interest exceptions", would provide an important guarantee that user rights can be exercised in practice even in the presence of TPMs.

CONCLUSION

Filmmaking is one of many copyright-intensive industries in South Africa that can be dramatically affected by how the balance is struck in copyright law between owner and user rights. Currently, both sides of the equation disadvantage the local industry. On the protection side, filmmakers are regularly denied ownership of copyright in their works because the statutory default assigns all rights to commissioning parties (and most filmmaking is performed under commission). Receiving no copyrights in their works inhibits filmmakers from distributing and profiting from their work, to their detriment and to the detriment of the public they seek to serve.

Filmmakers are also disadvantaged by a rights clearance culture that exists as a product of both the law and filmmakers' perceptions of the law. Despite the existence of some notable exceptions in the current law that can provide for filmmaker use of excerpts in their films – most notably the quotation and fair dealing exceptions – most filmmakers believe that copyright requires them to acquire a licence for use of each excerpt of another work in their films. The result is that filmmakers spend large amounts of time and money attempting to license every such use, and often avoid quotations and other excerpts from other works in order to avoid licensing requirements.

As has been argued in this article, enacting a fair use clause and expanding existing exceptions for quotation, incidental use, and other uses would go a great distance towards enabling filmmakers to feel liberated to create works that include appropriate references to the works of others. But law reform, while necessary, is not the sole step that needs to be taken to free filmmakers from copyright barriers to the production of their films. A key finding from the survey research outlined above was that filmmakers do not adequately understand their current rights (Flynn & Jaszi, 2009, p. 17). Efforts to develop best practice statements among filmmakers in the US have helped to inform filmmakers in that country about their rights (see Association of Independent Video and Filmmakers et al., 2005), and have led to structural changes in the industry that have supported the exercise of user rights by filmmakers (Aufderheide & Jaszi, 2011, pp. 100-107). Similar efforts in South Africa are being considered by filmmaking organisations and such efforts may be key to ensuring that existing user rights, and any expansions of user rights that result from the current law reform, are put into practice by creators.

REFERENCES

Association of Independent Video and Filmmakers, Independent Feature Project, International Documentary Association, National Alliance for Media Arts and Culture, Women in Film and Video, Washington, D.C. Chapter. (2005). *Documentary filmmakers' statement of best practices in fair use.* Issued 18 November, in consultation with Center for Social Media (CSM) and Program on Information Justice and Intellectual Property (PIJIP), American University, Washington, DC. Retrieved from http://www.centerforsocialmedia.org/files/pdf/fair_use_final.pdf

Aufderheide, P., & Jaszi, P. (2004). *Untold stories: Creative consequences of the rights clearance culture for documentary filmmakers.* Washington, DC: American University. Retrieved from http://www.cmsimpact.org/sites/default/files/UNTOLDSTORIES_Report.pdf

Aufderheide, P., & Jaszi, P. (2011). *Reclaiming fair use: How to put balance back in copyright*. Chicago: University of Chicago Press.

Berne Convention for the Protection of Literary and Artistic Works (1886).

Birnhack, M. (2003). Acknowledging the conflict between copyright law and freedom of expression under the Human Rights Act. *Entertainment Law Review, 2003*, 24-34.

Campbell v. Acuff-Rose Music, 510 U.S.US 569 (1994).

Chevalier, J. M., & Buckles, D.J. (2013). *Participatory action research: Theory and methods for engaged inquiry.* London: Routledge.

Commonwealth of Australia (1968). Copyright Act 63 of 1968.

Department of Trade and Industry (DTI). (2013). *Draft national policy on intellectual property*, 4 September. Pretoria: Government of South Africa. Retrieved from http://ip-unit.org/wp-content/uploads/2013/09/DRAFT-IP-POLICY.pdf

Department of Trade and Industry. (2015). [draft] Copyright Amendment Bill 2015. *Government Gazette No. 39028,* 27 July. Retrieved from http://www.thedti.gov.za/gazzettes/Copyright_Amendment_Bill.pdf

Eldred v. Ashcroft, 537 U.S. 186 (2003).

Flynn, S., & Jaszi, P. (2009). *Untold stories in South Africa: Creative consequences of the rights-clearing culture for documentary filmmakers*. PIJIP Research Paper No. 20. Retrieved from http://digitalcommons.wcl.american.edu/research/20/

Flynn, S. (2015). Joint Academic Comments on the South African Copyright Amendment Bill, 2015, (with Jonathan Band, Brandon Butler, Peter Jaszi, Caroline Ncube, Denise Nicholson, Andrew Rens, Tobias Schonwetter, Rebecca Tushnet, Coenraad Visser), 16 September. Retrieved from http://infojustice.org/archives/35003

Geiger, C., Gervais, D. J., & Senftleben, M. (2014). The three-step-test revisited: How to use the test's flexibility in national copyright law. *American University International Law Review, 29*(3).

Jamaica. (1993). The Copyright Act 5 of 1993.

Jaszi, P. (2005). Public interest exceptions in copyright: A comparative and international perspective. Retrieved from http://correctingcourse.columbia.edu/paper_jaszi.pdf

Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another (CCT42/04) [2005] ZACC 7; 2006 (1) SA 144 (CC); 2005 (8) BCLR 743 (CC) (27 May 2005).

Leval, P. N. (1990). Toward a fair use standard. *Harvard Law Review, 103*, 1105.

Mkhabela Huntley Adekeye, & Spoor and Fisher. (2008). *Unlocking the creative and economic potential of the South African television sector – recommendations for legal, regulatory and commissioning practice changes: Report to the South African Broadcasting Corporation, Independent Producers Organisation and the South African Screen Federation.* Johannesburg: Mkhabela Huntley Adekeye Inc. and Spoor and Fisher Attorneys.

Okediji, R. L. (2006). *The international copyright system: Limitations, exceptions and public interest considerations for developing countries.* Issue Paper No. 15, International Centre for Trade and Sustainable Development (ICTSD) and UN Conference on Trade and Development (UNCTAD). Retrieved from http://unctad.org/en/docs/iteipc200610_en.pdf

Program on Information Justice and Intellectual Property (PIJIP). (2012a). Appendix II: Examples of flexible limitations and exceptions from existing and proposed laws. American University Washington College of Law. Retrieved from http://infojustice.org/wp-content/uploads/2012/12/Appendix-II.pdf

PIJIP. (2012b). Masterlist: Excerpts of representative copyright limitations and exceptions, 26 November. American University Washington College of Law. Retrieved from http://infojustice.org/wp-content/uploads/2013/08/Masterlist-11262012.pdf

Reason, P., & Bradbury, H. (Eds.). (2008). *The Sage handbook of action research: Participative inquiry and practice*. Thousand Oaks, CA: Sage.

Republic of South Africa. (1978). Copyright Act 98 of 1978, as amended up to Copyright Amendment Act 9 of 2002. Retrieved from http://www.wipo.int/wipolex/en/text.jsp?file_id=130429

Republic of South Africa. (2002). Electronic Communications and Transactions Act 25 of 2002.

Samuelson, P. (2009). Unbundling fair uses. *Fordham Law Review, 77*, 2537-2621.

Shuttleworth Foundation (2010). *Report on the South African open copyright review*. Retrieved from http://ip-unit.org/wp-content/uploads/2010/07/opencopyrightreport1.pdf

United States Congress. (1976). Copyright Act, as amended. 17 U.S.C. §§ 101-810.