ASSAf
ACADEMY OF SCIENCE OF SOUTH AFRICA

Applying scientific thinking in the service of society

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Collation of written submissions forwarded to the Academy of Science of South Africa (ASSAf) following a Workshop of 29 June 2021 on the Copyright Amendment Bill (CAB) [B128-2017]

Contents

Acronyms

ANFASA	Academic and Non-Fiction Authors Association of SA
L&Es	Limitations and exceptions
TRIPS	The Agreement on Trade-Related Aspects of Intellectual Property Rights
VCLT	Vienna Convention on the Law of Treaties
WIPO	World Intellectual Property Organisation
WPPT	WIPO Performances and Phonograms Treaty
WTC	WIPO Copyright Treaty
WTO	World Trade Organisation
UN	United Nations

1. Background

In this submission, the Academy of Science of South Africa has forwarded the comments sent through by participants in a workshop on the subject of the Copyright Amendment Bill. The Workshop was held on the 29 June 2021. In this document, ASSAf does not offer its own opinion as a body.

The genesis of the Copyright Amendment Bill was in 2009, when the Department of Trade and Industry (DTI) initiated various studies and impact assessments. In July 2015, the DTI published a Draft Copyright Amendment Bill for public comment. The final 2017 version of the Bill was approved by Parliament in 2019 and it was sent to President Cyril Ramaphosa for action in terms of Section 79(1) of the Constitution. Section 79(1) states that "The President must either assent to and sign a Bill passed in terms of this Chapter or, if the President has reservations about the constitutionality of the Bill, refer it back to the National Assembly for reconsideration". The President referred the Bill back to Parliament for review on 16 June 2020, on constitutionality issues. In response to the President's reservations, Parliament's Portfolio Committee on Trade and Industry has invited stakeholders and other interested parties to submit written submissions on certain sections of the Bill by no later than 9 July 2021.

The current copyright law is outdated and does not address the digital environment. The Academy hosted a virtual workshop on 29 June 2021 which was attended by over 180 participants. The aim of the workshop was to take into account the status of the copyright legislation and the anticipated effects of the amendment Bill on different issues.

Parliament has called for submissions on clause 13 (sections 12A, 12B, 12C and 12D), clause 19 (section 19B) and clause 20 (section 19C) in response to the President's constitutional reservations regarding the Copyright Amendment Bill ('CAB').

2. Introduction

This submission has been organised by the Academy of Science of South Africa (ASSAf) in order to convey contributions from experts and academics from various South African institutions.

ASSAf was formed in response to the need for an academy of science congruent with the dawn of democracy in South Africa - activist in its mission of using science for the benefit of society. The mandate of the Academy encompasses all fields of scientific enquiry, and it includes the full diversity of South Africa's distinguished scientists. ASSAf derives its mandate and functions from the Academy of Science of South Africa Act, 67 of 2001, as amended. ASSAf is a representative body of the scientific and scholarly research community of South Africa.

A large volume of valuable comment was received by the Academy in response to its call. Internationally and locally, there has been strong support for the Bill, as well as strong opposition to the Bill.

ASSAf called for comment, and the comments received have been collated here. The Academy thanks the commentators for generously taking the time and effort to contribute. In section 3, a summary table is shown. In section 4, detailed comment is relayed. Final remarks will be found in section 5.

In some cases, comment was submitted which was not directly relevant to the President's Referral. This has been removed and is indicated by ellipses […].

In some cases, comment was submitted which was not directly relevant to the clauses named above. This has been removed and is indicated by ellipses […].

The formatting of commentators' submissions for the purposes of this report has not included changes such as replacing "Covid" by "COVID-19".

ASSAf, as an organisation, is not in a position to express a view on the submissions received and summarised in the table of section 3. This document is a collation of the comments themselves, is not a legal opinion, and does not represent a view or opinion adopted by ASSAf.

A separate report on the Workshop of 29 June 2021, will be issued.

The Academy would welcome the opportunity to further engage with the Parliamentary Committee about any of the matters detailed below, as required.

3. Summary of Comments and Recommendations submitted by Workshop participants

The response of the commentators is summarised in the table below. Each Clause in the President's Referral has been addressed in the table. Where Amendments have been proposed in this assembly of comments, these have been added.

Since opinion in the submitted comments is, in many cases, divided, the contents of the table are limited to direct quotations from comments received. A blank cell does not mean that no comments addressed a Clause or section. The table provides a necessarily brief overview of comments related to specific Clauses. The body of the report contains the comments in this submission.

Please note that ASSAf itself has not submitted an opinion as an organisation.

Clauses 13 and 20 (sections 12A – 12D section 19C) **Three-step test and Berne convention; Fair Use; Fair Dealing in the Copyright Act of 1978**	**In favour of the CAB [B128-2017]** The majority local and international view of the three-step test, supported by the World Intellectual Property Organisation (WIPO), an agency of the United Nations, is that it is concerned with the 'legitimate interests' of the copyright owner, not those of third parties. Fair use in Section 12A entails a process of reasoning to which South African courts have become accustomed over many years…). The only thing that would be novel is that the fair use provision in Section

	12A includes the words "such as," when enumerating the purposes for which a work may be used, in letter (a)(i)-(vii). … This allows the law sufficient room to develop naturally without the constant need for the legislator to intervene. The fact that the courts' reasoning remains bound to certain prescribed considerations is very clear from the factors mentioned in Section 12A(b)(i)-(iv). Access to information, especially for education, research, creativity, and innovation, is stymied under the current law, particularly in the digital environment. This has been very evident in the COVID-19 lockdown periods and continues to present problems. Fair dealing is limited and does not address the digital space, evolving technologies, or the 4IR. Libraries and archives cannot carry out their statutory mandates. This seriously affects their services and creates barriers for users and producers of information and research. The Bill … better supports open access, open educational resources, open licensing, open science, open data, etc. [The Bill] … addresses orphan works. It enables and empowers libraries and archives to carry out their full statutory mandates. **[NB: the above are direct quotations from comments received]**
	Against the CAB [B128-2017] Copyright of authors/writers and scriptwriter must have ownership on their creative work. An exception to the copyright in a work that does not pass the three-step test will amount to an arbitrary deprivation in respect of that item of property, as provided for in section 25 of the Constitution. In terms of the section no law may so provide. 'Fair use' entails the empowerment of the court hearing a copyright infringement matter to decide whether, on the facts of the particular case, it is fair to condone the defendant's infringing conduct. Certain criteria that the judge must consider are specified… The parties to a dispute, and the public at large, will only know the answer to this question in each specific case once the case has been taken through to its final conclusion and all appeals have been exhausted, a process that could take several years from the commencement of the dispute.

	It is widely accepted that the 'fair use' doctrine does not meet the three-step test. If too liberal an approach is adopted towards the granting of exceptions, the incentive provided to authors to produce original works is taken away and the public interest suffers in the long run due to a decline in the production of works, which impacts on the development of the arts and sciences. To the extent that section 12A's subject matter is not covered by the proposed new sections 12B to 12D […] these sections should be amended to incorporate some of the examples contained in section 12A. This situation highlights the fact that sections 12B to 12D, which are essentially in the nature of 'fair dealing' sections, are overlaid by the 'fair use' provisions of section 12A. Bearing the cost of the constitutional litigation, to both the State (the taxpayer) and private parties, which will surely follow in the event that the Bill in substantially its present form and state becomes law. **[NB: the above are direct quotations from comments received]**
Clause 13 (sections 12A) **General exceptions from copyright protection**	**In favour of the CAB [B128-2017]** The state's response to covid-19 has required a move to online tuition, this has required flexibility in digitisation of learning and teaching materials …. The CAB […] includes explicit provisions enabling time and device shifting in s 12A(a). The current Copyright Act does not enable the use of evolving … methodologies for research thus significantly limiting the right to scientific research and in turn slowing down innovation. The only uses that can be included within the illustrative list are *analogous* uses rather than random uses that are entirely unrelated. s 12A(b) contains a list of relevant factors to be taken into account. [A]uthors' moral rights of attribution are protected in s 12A(c). Altogether, many arguments count in favour of fair use: • Fair use is flexible and technology-neutral (allowing copyright to naturally adapt to changing digital environments). • Fair use promotes public interest and transformative uses (e.g., a search engine's rendering of thumbnail-sized photographs has been considered transformative use in the U.S.). • Fair use assists innovation (e.g., text and data mining: Current fair dealing in South Africa would likely not allow for text and data

	mining. This usually requires the reproduction of large data sets. Text and data mining is of crucial significance for scientific progress.). • Fair use better aligns with reasonable consumer expectations (e.g., covering the right to repair software embedded devices). • Fair use helps protect rights holders' markets (~ second leg of three-step test). • Fair use is sufficiently certain and predictable (not more or less certain than fair dealing). • Fair use is compatible with moral rights and international law. (Section 12A) The 2011 WIPO Study on "The Economic Contribution of Copyright-Based Industries in South Africa" also supported fair use. (Section 12A) The current fair dealing provisions do not have criteria and give no clarity to users. Fair use also will enable text and data mining, an inherent part of online research. TDM will be particularly useful for research on vaccines and treatments for COVID-19 and its variants, as well as other research. It will also apply to orphan works where material is needed urgently and cannot wait for the rather cumbersome process provided in Section 22A of the Bill. **[NB: the above are direct quotations from comments received]**
	Against the CAB [B128-2017] Academic and Non-Fiction Authors Association of SA (ANFASA) copyright committee: for our members and for authors in general the CAB is potentially damaging as control over the use of their own works will be taken away from them and in many instances, they will forfeit payment. **[NB: the above are direct quotations from comments received]**
Clause 13 (sections 12B) **Specific exceptions from copyright protection applicable to all works**	**Specific Amendments Offered** (Appended) ● Require that quotations under Section 12B(1)(a) be "consistent with fair practice", as in the current Act; ● Remove the exception in Section 12B(1)(e)(i) for uses of works not subject to reservations of rights; ● Revise the translation right in Section 12B(1)(f) to include the full range of purposes for which a lawful translation may be made. (VII) SECTION 12B(1)(A) We offer the following amendment as an option to return the "consistent with fair practice" requirement to the quotation right. (1) Copyright in a work shall not be infringed by any of the following acts: (a) Any quotation: Provided that— (i) the quotation is compatible with fair practice;

	(ii) the extent thereof shall not exceed the extent reasonably justified by thepurpose; and (iii) to the extent that it is practicable, the source and the name of the author, ifit appears on or in the work, shall be mentioned in the quotation. (VIII) SECTION 12B(1)(E), NEWS OF THE DAY We offer the following amendment to remove the exception for uses of news unless the reproduction right is expressly reserved: 12B. (1) Copyright in a work shall not be infringed by any of the following acts: (e) subject to the obligation to indicate the source and the name of the author in so far asit is practicable— (i) the reporting of current events, or the reproduction and the broadcasting or communication to the public of excerpts of a work seen or heard in the course of those events, to the extent justified by the purpose; or (ii) the reproduction in a newspaper or periodical, or the broadcasting or communication to the public, of a lecture, address, or sermon or other work of a similar nature delivered in public, to the extent justified by the purpose of providing current information. (IX) TRANSLATION We propose the following language be used to replace the current Section 12B(1)(f) to better reflect the full range of purposes for which a lawful translation may be made. (f) the translation of such work into any language: Provided that such translation is done for a non-commercial purpose, is consistent with fair practice, and does not exceed the extent justified by the purpose. **[NB: the above are direct quotations from comments received]**
	In favour of the CAB [B128-2017] The CAB […] includes explicit provisions enabling time and device shifting in s 12A(a), s 12B(1)(i) and 12B (2). (Section 12B) Suggestions that the clause allowing quotation will encourage plagiarism are incorrect. Acknowledgement is required whether it is copyrighted, out of copyright, never copyrighted,

	open access or freely available. Plagiarism is generally dealt with through university and other institutional policies and disciplinary procedures. **[NB: the above are direct quotations from comments received]**
	Against the CAB [B128-2017] The new section 12B and 12D introduce new 'fair dealing' type exceptions and vary some of the existing exceptions. Each of these exceptions must be tested against the three-step test and where they do not satisfy that test, they must be removed or varied. By way of example section 12(1)(i) allows the making of **a** personal copy by an individual of entire works for non-commercial use without any qualification that the activity must be fair. Allowing unauthorised copying to this extent would destroy the market for most books. The exception does not meet tests 2 and 3 of the three-step test and the provision is vulnerable to a constitutional challenge. **[NB: the above are direct quotations from comments received]**
Clause 13 (sections 12C) **Temporary reproduction and adaptation**	**In favour of the CAB [B128-2017]** In s 12C, the CAB recognises that in order to use the internet to send emails, for instance, incidental copies of work are a necessary part of the technological process. (Section 12C) Transient or incidental copies or adaptations of a work, including reformatting, where such copies or adaptations are an integral and essential part of a technical process cannot be excluded from digital processes. This section should be supported. **[NB: the above are direct quotations from comments received]**
Clause 13 (sections 12D) **Reproduction for educational and academic activities**	**In favour of the CAB [B128-2017]** The CAB … [enables] academics to retain the right to deposit their work in institutional repositories. [the] CAB contains provisions that do not subordinate the right to education and research to the inability to find the copyright holder. [Full] works can be included in course packs only where a reasonable licence is unavailable… Regarding Section 12D (4), allowing the copying of whole textbooks by educational institutions where a book is not reasonably priced on the South African market, it should be held that also this complies with the three-step test of international law. The *Limpopo Textbook* case decided by the Supreme Court of Appeal confirms and concretises this for textbooks. These must be available to each learner in each subject at the beginning of the

	academic year. Excluding even a few students from access to textbooks amounts to discrimination (Section 9 of the Constitution). (Section 12D) […] cost of course-packs in South African public universities is astronomical. In 2018, … estimated expenditure in 2018 relating to e-resources, book budgets and copyright fees [was surveyed]. […] 15 of the country's 26 higher education libraries would pay just over R1 billion (USD$69 million) in 2018 towards electronic and printed resources. This amount increases by 5% per year on average with the exchange rate of these international resources adding to the expense. (Section 12D) 2010 calendar year, the total amount DALRO [Dramatic, Artistic and Literary Rights Organisation] collected from licensing was R28 582 389 and the total amount distributed R21 601 415 (of which R 9 477 661 was distributed to local rights holders). This proves that the bulk of revenues collected by DALRO from educational institutions are paid to international publishers, not South Africans or journal authors. **Copying of whole works (12D (4 & 5)**: The circumstances in which educational institutions are permitted to make copies of whole or major parts of copyright works are limited to specific legitimate purposes, and not for commercial purposes. **Inclusion in assignments, ETDs, etc. (S12D 6**): […] This applies in the print environment – it will now extend to the digital space which is logical and legitimate. **Open Access Repositories (S12D 7a-c):** This clause … should be supported as it applies to public money. **Unenforceable agreements (S12D 7e):** This sub-clause should be welcomed as authors often get an unfair deal by signing restrictive contracts with publishers. **[NB: the above are direct quotations from comments received]**
	In favour of the CAB [B128-2017] Similarly, section 12D (1) permits a person to make multiple copies of works for educational and academic purposes, provided the copying does not exceed the extent justified by the purposes. This could allow a lecturer to make copies of all the salient parts of a textbook for each member of his class of one hundred students, thus making it unnecessary for them to each purchase the textbook. [**NB: the above are direct quotations from comments received]**
Clause 19 (section 19B) **General exceptions regarding protection of**	**In favour of the CAB [B128-2017]** (SECTION 19 B) **…** addresses copyright software and its use and reproduction to enable interoperability, observation, study and

computer programs	testing for re-engineering and related legitimate purposes. […] This Section should be supported. **[NB: the above are direct quotations from comments received]**
Clause 20 (section 19C) **General exceptions regarding protection of copyright work for libraries, archives, museums and galleries**	**In favour of the CAB [B128-2017]** The CAB … enable[s] libraries, museums, archives, and galleries to frame clear policies on the preservation and storage of invaluable cultural artefacts from across the country. These provisions contain a limitation … that the purpose for which digitisation and other measures of preservation is carried out must be non-commercial. (Section 19C) The provisions for preservation and digital curation are extremely urgent, especially in the COVID-19 pandemic, when libraries, archives, and related information services are closed, and access is only possible via electronic services and resources. Replacement of lost or damaged works, interlibrary digital services, institutional repositories, digitisation, format-shifting and conversion from obsolete technologies to new technologies and other exceptions in this section are essential for accessibility and preservation of collections and cultural heritage. **[NB: the above are direct quotations from comments received]**
General Comments	
	A review of the South African IP landscape is ongoing. The first phase is complete. It will still be some time before a review of the copyright law is dealt with. … . It will be logical to finalise the IP policy, a holistic approach prior to finalising a new Copyright Act (which is sorely needed) https://www.gov.za/sites/default/files/gcis_document/201808/41870gen518_1.pdf **[NB: the above are direct quotations from comments received]**

4. Collated submissions on clause 13 (sections 12a, 12b, 12c and 12d), clause 19 (section 19b) and clause 20 (section 19c)

In this section, section 4., comments received are presented. These are not the opinions of ASSAf as an organization, but of commentators and participants in the Workshop of 29 June 2021.

CONSTITUTIONAL BASIS FOR EXCEPTIONS AND LIMITATIONS

Comment 1

Briefly, Parliament has a duty to respect, protect, promote and fulfil all rights in the Bill of Rights. Where it a law enacted by Parliament limits the realisation of a right in the Bill of Rights, the state is under a burden to justify such a limitation for it to be constitutionally valid. South Africa' constitutional values and the Bill of Rights are thus key to the law-making process as it is a constitutional democracy with the Bill of Rights as a cornerstone. More specifically, where apartheid-era laws remain on the statute books and cannot be read in conformity with the Bill of Rights, Parliament is under an obligation to bring them in line with the Bill of Rights through effecting necessary amendments, as the case may be.

At present, the current Copyright Act 1978 and its attendant regulations constitute an apartheid-era law that unfairly discriminates against people living with disabilities and people living in poverty thereby limiting the right to equality; and unjustifiably limits the realisation of the rights to basic and further education, the right to the freedom to receive and impart information and conduct scientific research, and the right to participate in cultural and linguistic life.10 In doing so, it arguably establishes an unconstitutional status quo. Parliament, discharging its constitutional duty, after numerous consultations drafted the CAB to rectify this situation and bring the Copyright Act 1978 in line with the Bill of Rights.

This is the current context. Additionally, the Copyright Act 1978 is technologically obsolete, ill-suited to respond to the covid-19 pandemic, and does not protect valuable cultural heritage. The CAB rectifies these problems to the benefit of academics, researchers, authors, and students among other rights-bearers. It recognises the unity of interests of the above groups and disaggregates economic interests of publishers and other intermediaries from the above groups' interests.

A. IN FAVOUR OF THE CAB

Comment 2

i. Unconstitutionality of the current copyright Act Of 1978

It is our opinion that the current apartheid-era Copyright Act of 1978 violates the Bill of Rights in several respects. Specifically, the 1978 Act:

- unfairly discriminates against persons living with visual and print disabilities as it does not permit the creation of accessible formats of works under copyright without permission from the rights holder, in violation of the right to equality, Sec. 9;
- does not permit uses of works to the degree required for freedom of expression, in violation of the right to receive and impart information, Sec.16;
- inhibits access to educational materials in the modern world, including through the digital environment, in violation of the equal right to basic and further education for all, including in languages of the students' choice, Sec. 29;
- does not allow for materials to be translated into underserved languages, in

violation of rights to use languages of one's choice and participate in cultural life, Sec. 30 and 31;

- does not protect the rights of authors, performers, and other creators to fair remuneration and fair contract terms, as needed to promote the right to dignity and the principle of decent work, Sec. 10.

The CAB promotes the Constitution and the Bill of Rights by amending the deficient Copyright Act with provisions modelled on examples that exist in other open and democratic societies. Until the CAB is adopted, the Copyright Act 1978 will continue to violate the Bill of Rights, and therefore responding to the President's reservations and finalising the Copyright Amendment Bill is urgent. The urgency of amending the Copyright Act is all the more urgent with the advent of the COVID-19 pandemic, which has cut off access to physical schools, libraries and other institutions. These public services, in many cases, are not enabled to share materials for remote access and learning needed to promote the enjoyment of the rights in the Bill of Rights.

ii. Royalty rights in existing contracts

We conclude that the royalty rights provisions of the Bill should be amended to require only "fair" remuneration for current dispositions of copyrights.

The President states his reservation that the royalty requirements in the Bill may constitute "retrospective and arbitrary" regulation of property protected by the Constitution.

The alleged retrospectivity of the royalty provisions is not, in itself, a ground to find the provisions unconstitutional. Many laws, including all minimum wage laws, are "retrospective" in the limited sense of applying to future work under existing contractual or other arrangements. This is the same effect of the CAB's royalty provisions. The CAB applies its royalty requirements "where copyright in that work was assigned before the commencement date" of the Act, but only if the work "is still exploited for profit", and only for uses "after the commencement date" of the Act.[1] The CAB does not require that royalties be paid for past uses of works.

We accept that the royalty provisions must avoid arbitrariness to comply with the Constitution, despite the unclarity in South African constitutional law as to whether rights conveyed in copyright agreements are constitutionally protected property.[2] The provisions do not lack an adequate purpose. There was ample evidence before Parliament of unfairness in current and past contracts between South African creators

[1] Copyright Amendment Bill, Sec. 6A(7).

[2] The question of whether copyright is covered by the right not to be arbitrarily deprived of property under section 25 has not been definitively settled in South African law. *See Laugh It Off Promotions CC v South African Breweries* [2005] ZACC 7) (deciding that free expression rights apply to use of parody in trademarks without deciding whether trademarks are property protected by section25); *Ascendis Animal Health (Pty) Limited v Merck Sharpe Dohme Corporation* [2019] ZACC 41 (characterising patents as a statutory system creating an 'artificial monopoly' rather than property for the purposes of section 25); *Certification of the Constitution of the Republic of South Africa* [1996] ZACC 26 at 75 (holding that there was no defect in the final Constitution on the basis that it did not contain an explicit right to intellectual property in the Bill of Rights). We do not need to opine here, however, on whether the regulation of contract implicates the right not to be deprived arbitrarily of *property* because all legislation must avoid arbitrariness. *See Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1

and distributors of their work.[3] Other copyright laws have responded to similar problems by requiring adequate remuneration of authors and performers, including recently in the European Union.[4]

Any perceived constitutional problem may arise from the failure of sections 7A and 8A to explicitly limit the required royalty in existing agreements to "fair" remuneration.[5] Without clarifying regulations or interpretation, the law as written could be seen to require the renegotiation of otherwise fair copyright licenses and transfer agreements.[6] This could arguably be considered an arbitrary regulation, as there would be no legitimate reason to alter existing arrangements that are already fair. We therefore advise that the Bill revise sections 7A and 8A to clarify those existing arrangements are required to be modified only when their terms are not fair.

iii. Exceptions to rights

We conclude that the limitations and exceptions to rights – considered individually and together – are reasonable, justifiable and indeed necessary, and reflect those contained in many open and democratic societies around the world. Nothing in international or comparative copyright law suggests that the number or collective effect of the exceptions is impermissible, excessive or extraordinary.[7] We do, however, propose

[3] *See* Copyright Review Commission Report 2011 (surveying the plight of South African creators and recommending that unfair contracts be regulated, that excessive costs and unfair practices of collective management organizations be controlled, that copyrights revert to the creator after 25 years, and that the Copyright Tribunal be streamlined).

[4] Similar provisions were recently included in the European Union's 2019 Digital Single Market Directive. Specifically:

- Article 18 of the DSM Directive gives authors and performers a right to "appropriate and proportionate remuneration."
- Article 19 requires reporting of uses to enable remuneration determination - requiring that "authors and performers receive on a regular basis, at least once a year, and taking into account the specificities of each sector, up to date, relevant and comprehensive information on the exploitation of their works and performances from the parties to whom they have licensed or transferred their rights, or their successors in title, in particular as regards modes of exploitation, all revenues generated and remuneration due."
- Article 20 applies to existing contracts through what some refer to as a "bestseller" clause. The Articles provides a "contract adjustment mechanism" in which authors and performers are "entitled to claim additional, appropriate and fair remuneration from the party with whom they entered into a contract for the exploitation of their rights … when the remuneration originally agreed turns out to be disproportionately low compared to all the subsequent relevant revenues derived from the exploitation of the works or performances."

[5] Proposed section 6A would require that authors of literary and artistic works be entitled to "a fair share" of royalties for uses of their work. Sec 7A and 8A change the standard, proposing that authors of "visual artistic works" and performers in audiovisual works "share in the royalty received for" uses of their protected rights. The provisions apply to prospective uses of works created before the Act goes into effect.

[6] It could require the revision, for example, of an arrangement that provided a fully adequate payment to an author or performer through a lump sum payment, rather than through "a royalty".

[7] There are many countries that have more exceptions than South Africa would under the Bill. See, e.g. Australia Copyright Act of 1968 Sections 103, 135A-ZT (providing four separate fair dealing exceptions and 38 provisions for other exceptions). See generally Standing Committee on Copyright and Related Rights, Thirty-Fifth Session, Geneva, November 13 to 17, 2017, Updated Study And Additional Analysis Of Study On Copyright Limitations And Exceptions For Educational Activities prepared by Professor Daniel Seng (surveying the common practice of countries around the world to enact multiple exceptions and limitations).

technical amendments that would dispel any doubts about theconstitutionality of some of the provisions questioned by the President.

Comment 3

Some problems posed by current copyright legislation

These are some of the problems the current law poses for researchers, educators, authors, creators, library and other information services, people with disabilities, and others:

- No provisions for accessible formats for people with disabilities. On 7 April 2021, Blind SA served papers in the High Court, Johannesburg, on Parliament, the President and relevant Government department officials, regarding the unconstitutionality of the current copyright law. This matter is currently in process.
- Access to information, especially for education, research, creativity, and innovation, is stymied under the current law, particularly in the digital environment. This has been very evident in the COVID-19 lockdown periods and continues to present problems.
- Fair dealing is limited and does not address the digital space, evolving technologies, or the 4IR.
- It does not allow text and data mining for research, particularly in the pandemic.
- It does not address orphan works, open science, open access, online teaching and learning, and resource-sharing, open educational resources, institutional repositories, etc. No criteria to determine what is fair, so users tend to err on the side of caution or infringe to access material.
- Libraries and archives cannot carry out their statutory mandates. This seriously affects their services and creates barriers for users and producers of information and research. The extent to which, if at all, digitisation is permitted without permission in the current law, is not clear. Digitisation and preservation of fragile and special collections and legal deposit collections are crucial for preservation of our cultural heritage and documentary memory. The lack of adequate exceptions in this regard was very evident in the recent fire at UCT, which destroyed the African Studies collection and other historical and cultural treasures.
- Authors and creators do not get a fair share of royalties and experience unfair contractual conditions, etc, as highlighted in the Copyright Commission Review Report of 2011.
- The current law does not prevent limitations and exceptions from being overridden. This occurs often in publishing agreements, e-licences, etc. where libraries, authors and creators, end up with biased or unfair contracts.
- Translation of works for educational purposes, format-shifting, and conversion from old to new technologies are not permitted without prior permission and payment of fees.
- A policy decision has been made to delay ratification of the 2013 Marrakesh Treaty for the Visually Impaired until the copyright law has been amended.

How does the Copyright Bill as passed by Parliament address this problem?

- Although not perfect, and of course, never satisfactory to all stakeholders, the Bill addresses most of the problems caused by or omitted in the current law.

- The Bill introduces fair use provisions, and exceptions for research, education, libraries, archives, museums and galleries, and for people with disabilities. It also provides for authors, creators, innovators and others who need to use, re-use, re-mix, transform, adapt, quote, etc. to create new or derivative works or new inventions. Fair use is enjoyed by the US and 9 other countries to date, and others are considering it in their copyright reforms. It has not damaged publishing or creative industries in the countries that have adopted fair use. In fact, with fair use provisions, the US has the largest and wealthiest publishing, entertainment and IT industries in the world.
- The Bill aligns our copyright law with progressive copyright laws around the world and the 21st century. Some of its clauses are found in other countries' copyright laws, including US, EU Directive, Singapore, and WIPO Treaties and Treaty proposals.
- It better supports open access, open educational resources, open licensing, open science, open data, etc.
- It addresses orphan works, albeit a cumbersome process. Fair use can also be applied for use of orphan works, e.g., for teaching and learning, creation of open content, text and data mining, and freedom of panorama.
- It enables and empowers libraries and archives to carry out their full statutory mandates, and empowers them, especially legal deposit libraries, to collect, digitise and preserve documentary records and cultural heritage for the future.
- It addresses preservation, format-shifting and conversion to new technologies, translations, use of full works under specific conditions for educational purposes, use for non-commercial commemorative events and exhibitions, and digital interlibrary loans.
- It will give authors and creators more access to others' material for the purpose of creating new works. It gives them more control over their works and fairer contracts and royalties. It will give royalty rights to performers rights and a resale right to authors, which they currently do not have.
- It allows course-packs of extracts of books and journals for educational purposes. This is likely to be addressed more clearly in Regulations. Currently SA institutions pay millions of Rands each year to DALRO for copyright clearances, of which about 70% flows out of the country annually to rightsholders in developed countries. Monies collected for use of journal articles goes to publishers, not authors, mainly in developed countries. Duplication of costs occurs when material from already paid-for e-databases and other e-resources is included in course-packs. Savings on fees for course-packs will be substantial, and will enable funds to be redirected e.g., to university presses and new resources, and in the process, will boost the local publishing industry and benefit local authors.
- It enables people with disabilities to access material via accessible formats. When the Bill is enacted, it will enable SA to ratify the Marrakesh Treaty, per its chosen approach, which will allow cross-border exchange of accessible formats. These provisions will also enable publishers to publish accessible formats and create new markets in this regard.
- It will regulate collection management organisations to ensure accountability and transparency.
- It provides for penalties and imprisonment for infringements and strengthens the Copyright Tribunal to address offences and avoid expensive litigation in the courts.

The Bill was tagged as a Section 75 Bill, as were all subsequent amendments to it. The tagging was confirmed as correct by the Joint Tagging Mechanism (JMT) and the Office of the Constitutional and Legal Services (OCLS). You can listen here to discussions in this regard at the PC on Trade and Industry's briefing on 5 May 2021. Also, see confirmation of this in Opinion by SC Susannah Cowen and associates.

CLAUSE 13: SECTIONS 12A-C (RECTIFYING DISCRIMINATION ON GROUNDS OF DISABILITY AND POVERTY)

Comment 4

The current Copyright Act is technologically obsolete and unfairly discriminates against people living with disabilities and people living in poverty as it does not make provision for accessible format shifting, time shifting and device shifting. This creates an onerous burden upon people living with disabilities to contact the holder of copyright for their consent if for instance, they require closed captioning of a film or a reprint in a large format, in order to access a particular work. Moreover, since the state's response to covid-19 has required a move to online tuition, this has required flexibility in digitisation of learning and teaching materials and even greater adaptability in terms of device shifting of such materials. This is particularly due to unequal access to the internet across the country, mapping on to people living in poverty, in most cases necessitating the use of internet on mobile devices. The current Copyright Act does not enable this and places explicit limits by prescribing a single copy for 'classroom' use (which, during the pandemic, has had its walls dissolved leading to a greater use of educational materials in personal and private spaces).

The CAB rectifies this discriminatory situation by including an explicit provision for accessible format shifting in s 19D. It also includes explicit provisions enabling time and device shifting in s 12A(a), s 12B(1)(i) and 12B (2). In s 12C, the CAB recognises that in order to use the internet to send emails, for instance, incidental copies of work are a necessary part of the technological process. The same provision recognises incidental copies made as a necessary part of device shifting. This effects overdue updates to copyright in South Africa.

The President's concern regarding these provisions is the potential arbitrary deprivation of property of the copyright holder. The question of whether copyright is considered constitutionally protected property is still an open one – the Constitutional Court has not yet decided the question. In any event, even if it is argued by opponents that there has been a deprivation, the rectification of unfair discrimination and technological updating of South African copyright law would easily pass the test of 'sufficient reason' demonstrating that such a deprivation if any is *not* arbitrary. The right is therefore not engaged, and the concern is laid to rest.

CLAUSE 13: SECTION 12A (FAIR USE NECESSARY FOR NEW AND EVOLVING SCIENTIFIC RESEARCH METHODS)

Comment 5

The current Copyright Act does not enable the use of evolving text, content, and data mining methodologies for research thus significantly limiting the right to scientific research and in turn slowing down innovation. The current Act limits research exceptions to literary and musical works – and entirely excludes sound recordings, software, and cinematograph films. This is an arbitrary distinction and confines innovation in these areas to human ability than making use of advancements in technology to synthesise knowledge from existing knowledge. Its lack of 'fair use' also prevents the incidental copying required to run these processes.

The CAB rectifies this situation through s 12A(a) which does away with the arbitrary distinction across works. The hybrid model of fair dealing *and* fair use in this provision entails an inclusive list which provides illustrations of the particular uses the Parliament has legislatively determined as be 'fair'. Research, scholarship, and teaching a few listed purposes. The 'such as' inclusiveness of the list entails that the CAB is future proofed and scientific innovation and technological development will not have to wait for repeated legislative amendments whenever newer technologies evolve to aid innovation.

The President's concern regarding these provisions is the potential arbitrary deprivation of property of the copyright holder. However, as discussed above, notwithstanding the question of whether copyright falls within constitutionally protected property, there are several factors that contribute to fulfilling the 'sufficient reason test'. First, this hybrid model does not entail a free-for-all – the only uses that can be included within the illustrative list are *analogous* uses rather than random uses that are entirely unrelated. Second, s 12A(b) contains a list of relevant factors to be taken into account when assessing the fairness of an unlisted use. These factors include whether the potential market for the work is substituted by the use, whether it is for commercial purposes, among others. Third, authors' moral rights of attribution are protected in s 12A(c). Finally, these provisions enable the realisation of the equal right to impart and receive information and scientific research in the Bill of Rights. There is no threat of arbitrariness here, and the right against arbitrary deprivation of property is not engaged.

Comment 6

[…] [T]he global academic standard is very much in favour of Fair Use […]. This is a highly politicized issue, as is exemplified by threats we have received from UK and US based multinationals.

Comment 7

Appendix 2 answers many of the questions that have been posed about fair use, and also responds to the misinformation about fair use that has been circulated in the media for some time. There are also many useful guidelines and best practices on fair use to guide stakeholders on the use of copyright works – see: https://libguides.wits.ac.za/Copyright_and_Related_Issues/BestPractice\

What is pertinent is that in his 2014 budget speech, Minister Davies, Trade and Industry, announced plans to amend the Copyright law and proposed to address key findings in Copyright Review Commission & key challenges raised by artists. He also proposed measures to regulate fair use and fair contract terms.

In the Handbook of South African Copyright Law, in paragraph 9.2.3, on page 1-96, posits that "the America and Australian approaches to fair use are commonsensical and reasonable and should be followed by the South African courts".

The 2011 WIPO Study on "The Economic Contribution of Copyright-Based Industries in South Africa" also supported fair use. See reports in support of fair use from Australia and New Zealand as well. It is also compliant with international treaties and the 3-step test. This Australian report is pertinent - see: https://www.alrc.gov.au/publication/copyright-and-the-digital-economy-alrc-report-122/4-the-case-for-fair-use/fair-use-complies-with-the-three-step-test/

Fair use is not a carte blanche for infringement and piracy and is limited by 4 criteria that give clarity to users of copyright material. The current fair dealing provisions do not have criteria and give no clarity to users. Fair use also will enable text and data mining, an inherent part of online research. TDM will be particularly useful for research on vaccines and treatments for COVID-19 and its variants, as well as other research. It will also apply to orphan works where material is needed urgently and cannot wait for the rather cumbersome process provided in Section 22A of the Bill.

Comment 8

The scholarly literature confirms the compatibility of the fair use doctrine with international copyright law. Senftleben states in his standard work on the three-step test:

> [T]he same questions will arise in the course of the interpretation of the three-step test which are also begged by the fair use doctrine. The latter, however, has a much longer tradition than the three-step test and operates against the backdrop of a wealth of experience for which established case law gives evidence.[8]

Hence, by way of example, both entail an enquiry into whether the normal (economic) exploitation of a work will be affected (second leg of three-step test), or whether there is a substitution effect on potential markets (fair use; see, e.g., Section 12A(b)(iv) of the CAB). The loss of income will often be a major concern to right-holders, of course. Geiger, Gervais and Senftleben hold:

> [T]he open-ended wording of the three-step test supports flexible approaches seeking to strike an appropriate balance in copyright law, such as allowing for "fair uses."[9]

Samuelson and Hashimoto opine with regard to the U.S. fair use clause:

> [T]he U.S. fair use limitation is compatible with the "three-step test."[10]

However, also the findings of international experts or commissions are to the same effect. The "Max Planck" formulations have already been referred to above as supporting

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8 Martin Senftleben, *Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law* (Kluwer Law International, 2004), 113.

9 Christophe Geiger, Daniel Gervais and Martin Senftleben, "The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law," 29 *American University International Law Review* (2014), 581, 612.

10 Pamela Samuelson and Kathryn Hashimoto, "Is the U.S. Fair Use Doctrine Compatible with Berne and TRIPS Obligations?" in Tatiana Synodinou (ed.), *Universalism or Pluralism in International Copyright Law* (Wolters Kluwer, 2019).

open-ended L&Es that may be interpreted widely. In 2013, the Australian Law Reform Commission arrived at the following conclusion:

> [F]air use is consistent with the three-step test. This conclusion is based on an analysis of the history of the test, an analysis of the words of the test itself, and on the absence of any challenge to the US and other countries that have introduced fair use or extended fair dealing exceptions.[11]

Closer to home, Prof. Anastassios Pouris and Ms. Roula Inglesi-Lotz propose in a 2011 WIPO report, commissioned by the Department of Trade and Industry:

> [W]e suggest that DTI should review the Copyright Act in order to introduce limitations in accordance with the Berne Convention three steps test (article 9(2)) and with the fair use provision and to clarify clauses as necessary.[12]

In support of their recommendation, the authors refer inter alia to the absence of L&Es in respect of technological protection measures and electronic rights management information, but also the uncertainty surrounding the teaching exception, which has led to use agreements between collecting societies and educational establishments being concluded that are to the financial detriment of the latter.

There is also no basis on which to hold that fair use conflicts with Section 25 of the Constitution. Fair use in Section 12A entails a process of reasoning to which South African courts have become accustomed over many years, namely, when adjudicating on the fair dealing provisions of the current Copyright Act (which are retained in the CAB). These provisions are as open or closed as the proposed fair use clause. The only thing that would be novel is that the fair use provision in Section 12A includes the words "such as," when enumerating the purposes for which a work may be used, in letter (a)(i)-(vii). This means that potential uses that are (or cannot be) known today, may yet be accepted in the future to permit the use of works. This allows the law sufficient room to develop naturally without the constant need for the legislator to intervene. The fact that the courts' reasoning remains bound to certain prescribed considerations is very clear from the factors mentioned in Section 12A(b)(i)-(iv): the nature of the work, the amount of a work used, the purpose of the use, the market affected, etc. These considerations largely coincide with those that current South African case law on fair dealing recognises, as set out, for example, by Judge Harms in the *Moneyweb* Case of 2016.[13] Factors mentioned there include the nature of the mediums in which the works are published, the amount that has been taken, the extent of acknowledgement given to the original work, and so on. Section 12A(c) moreover protects moral rights, by requiring the source and the name of the author to be mentioned. Problems of attribution are not more or less difficult when compared with fair dealing.

Altogether, many arguments count in favour of fair use:[14]

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11 *Copyright and the Digital Economy* (Australian Law Reform Commission Report 122, 2013), para. 4.139.

12 Prof. Anastassios Pouris and Ms. Roula Inglesi-Lotz, *The Economic Contribution of Copyright-Based Industries in South Africa* (Report commissioned by the DTI from WIPO, 2011), 53.

13 Moneyweb (Pty) Limited v. Media 24 Limited and Another (31575/2013) [2016] ZAGPJHC 81; [2016] 3 All SA 193 (GJ); 2016 (4) SA 591 (GJ), para. 113 (5 May 2016)

14 This enumeration is based on, and further develops, *Copyright and the Digital Economy* (Australian Law Reform Commission Report 122, 2013), 87-122.

- Fair use is flexible and technology-neutral (allowing copyright to naturally adapt to changing digital environments).
- Fair use promotes public interest and transformative uses (e.g., a search engine's rendering of thumbnail-sized photographs has been considered transformative use in the U.S.).
- Fair use assists innovation (e.g., text and data mining: Current fair dealing in South Africa would likely not allow for text and data mining. This usually requires the reproduction of large data sets. Text and data mining is of crucial significance for scientific progress.).
- Fair use better aligns with reasonable consumer expectations (e.g., covering the right to repair software embedded devices).
- Fair use helps protect rights holders' markets (~ second leg of three-step test).
- Fair use is sufficiently certain and predictable (not more or less certain than fair dealing).
- Fair use is compatible with moral rights and international law.

Article 15(1)(b) of the International Covenant on Economic, Social and Cultural Rights protects the right "to enjoy the benefits of scientific progress and its applications." The U.N. Committee on Economic, Social and Cultural Rights, the expert body supervising implementation of the Covenant, has held in its recent General Comment No. 25 on the right to science:

> States should make every effort, in their national regulations … on intellectual property, to guarantee the social dimensions of intellectual property, in accordance with the international human rights obligations they have undertaken … *A balance* must be reached between *intellectual property* and *the open access and sharing of scientific knowledge and its applications*, … The Committee reiterates that ultimately, intellectual property is a social product and has a social function.[15]

It is submitted that the proposed fair use clause of Section 12A would allow for the necessary flexibility to adequately cater for many of the current and future needs of science (of relevance to Assaf, of course) in a way that satisfies the above criteria set by the Committee. In principle entailing the same reasoning as under fair dealing, fair use is, however, also an opportunity to leave behind the approach propagating that L&Es must always be construed narrowly (see thus the comments on the way that the current fair dealing "teaching exception" in Section 12(4) has been misconstrued in the past to hinder any meaningful fair dealing with works by educational institutions). In accordance with Section 39(1)(c) of the Constitution (international law to guide the interpretation of the Bill of Rights), the Committee's considerations would have to play a role in construing Section 16(1)(d) of the Constitution – which postulates the right to freedom of scientific research – *widely*, and the property clause of Section 25 of the Constitution *narrowly*, and as revealing a disposition in favour of fair use in support of the sciences.

Comments 9

We conclude that there was adequate public participation in drafting the fair use clause in Sec. 12A, and that the fair use right is fully in compliance with the Constitution.

[15] U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 25, Science and Economic, Social and Cultural Rights (Article 15(1)(b), (2), (3) and (4) of the ICESCR), U.N. Doc. E/C.12/GC/25 (30 April 2020), paras. 61, 62 (own emphasis).

The fair use clause was adequately considered in public submissions and testimony. Parliament and the Department of Trade and Industry considered in many public processes that South African copyright law currently has a general exception permitting for a "fair dealing" with a work. Semantically, the terms "use" and "dealing" are equivalent.[16] A key difference from present law is the inclusion of the words "such as" before the list of permitted purposes - making clear that the list is open to other purposes of use, as long as the use itself is fair to the copyright owner. Similar openness to purposes is present in about a dozen other countries.[17] The policy reason to include an opening term like "such as" to a list of permitted purposes is to ensure that fair uses of the future – that cannot be known today – are permitted without further legislative amendment.[18] This policy issue was thoroughlycanvassed in the parliamentary record. Indeed, the term "such as" was present in the2015 Bill, removed in a later draft, and then reinserted based on consideration of comments from the public. This legislative history shows that the issue was adequately considered and commented on by the public.

Another difference from present law is that the inclusion of express factors to be considered in determining whether a use is fair. These factors, although new to the statute, substantially reflect South African case law and commentary.[19]

CLAUSE 13: SECTION 12B

Comment 10

All these exceptions are very relevant to scholarly communication, publishing, research and teaching and learning, and innovation and creativity, whether academic or otherwise. Suggestions that the clause allowing quotation will encourage plagiarism are incorrect. Acknowledgement is required whether it is copyrighted, out of copyright, never copyrighted, open access or freely available. Plagiarism is generally dealt with through university and other institutional policies and disciplinary procedures.

Comment 11

12B(1)(a), Quotation

We conclude that Parliament could make explicit the "fair practice" standard within the

[16] O H Dean, Handbook of South African Copyright Law (1987) 1-52 ("While it is true that the American Act refers to 'fair use' whereas the South African Act uses the term 'fair dealing' it is submitted that for the present purposes the two terms are synonymous").

[17] *See* Elkin-Koren, Niva and Netanel, Neil Weinstock, *Transplanting Fair Use Across the Globe: A Case Study Testing the Credibility of U.S. Opposition,* Joint PIJIP/TLS Research Paper Series #50, 3-6 (2020) (finding that "the fair use model has been adopted, with some variation, in a dozen countries").

[18] *See Supreme Court of Appeal in Golden China v Nintendo* Golden China TV Game Centre and Others v Nintendo Co Ltd (55/94) [1996] ZASCA 103; 1997 (1) SA 405 (SCA); [1996] 4 All SA 667 (A)(25 September 1996) at 13-14 (discussing the "intention" in the Copyright Act "to cover future technical innovations by using general words"; "This general scheme of the Act suggests to me that the definitions in the Act should be interpreted 'flexibly, so that it would cover new technologies as they appeared, rather than to interpret those provisions narrowly and so force [the Legislature] periodically to update the act'").

[19] *See Moneyweb (Pty) Limited v Media 24 Limited and Another* (31575/2013) [2016] ZAGPJHC 81; [2016] 3 All SA 193 (GJ); 2016 (4) SA 591 (GJ) para 113 (5 May 2016) (considering factors to determine whether a particular dealing is "fair" as including: the nature of the medium in which the work has been published; whether the original work has been published; the time lapse between the publication of the two works; the amount (quality and quantity) of the work that has been taken; the

quotation right in Section 12(B)(1)(a) to parallel the requirement in the current Act and in the Berne Convention for the Protection of Literary and Artistic Works.

The President lists the quotation right in Section 12(B)(1)(a) of the CAB among those he alleges may violate the Constitution, but he does not explain hisreservations. The Berne Convention, which South Africa is a member of, requires that it "shall be permissible to make quotations from a work …, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose."[20] In the Parliamentary review process, it was suggested that the quotation right include the Berne Convention's standard that every quotation be "compatible with fair practice."[21]

The Berne Convention does not require that the "compatible with fair practice" condition be stated directly in the exception,[22]and many copyright laws provide quotation rights that do not explicitly require compliance with "fair practice."[23] Many of these laws, however, contain other qualitative terms that require analysis of the fairness of the purpose for which the quotation is used. It is possible that courts would read such a qualitative assessment of purpose into the statute and render it incompliance with international law. The existing quotation right in South Africa explicitly requires that

[20] Berne Convention for the Protection of Literary and Artistic Works, Art. 10.

[21] See Copyright Act of South Africa, Sec. 12 (3) states (emphasis added):

"The copyright in a literary or musical work which is lawfully available to the public shall notbe 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 thatthe quotation shall be compatible with fair practice*, that the extent thereof shall not exceed the extent justified extent of acknowledgement given to the original work); O H Dean, Handbook of South African Copyright Law (1987) 1-52 (opining that four factors in U.S. fair use right, which also appear in in theAustralian fair dealing rights, "are commonsensical and reasonable and should be followed by the South African courts"). by the purpose and that the source shall be mentioned, as well as the name of the author if it appears on the work."

[22] *See* Jonathan Band, *Analysis of Woods and Myburgh Comments on CAB*, Joint PIJIP/TLS ResearchPaper Series #55, 4 (2020) ("Contrary to Woods' suggestion, the Berne Convention does not require explicit inclusion of the concept "compatible with fair practice" in national legislation. Rather, the phrase serves as a standard by which to evaluate whether the exceptions for quotations and illustrations in teaching are being applied fairly, or are being applied so broadly that they swallow the author's exclusive rights.").

[23] See e.g. Copyright in Literary and Artistic Works (Sweden), Art. 22 (as amended up to Act (2018:1099) (permitting quotation "in accordance with proper usage and to the extent necessary for the purpose"); Intellectual Property Code (France), Art. L211 (amended by Act No. 2016-925 of July 7, 2016) (permitting "analyses and short quotes justified by the critical, polemical, educational, scientific or informative nature of the work in which they are incorporated"); Dominican Republic: Law No. 65-00 on Copyright, Art. 31 (August 21, 2000)(permitting quotation "provided that they are not of such length and continuity that they might reasonably be considered a simulated, substantial reproduction of the content observed"). Jordan: Law No. 22 of 1992, on Copyright and its Amendments, Art. 17 (2005)("for the purpose of clarification, explanation, discussing, criticizing, educating or testing in as much as justifiable by this objective, provided that the name of the product and its author are mentioned); Netherlands: Act of September 23, 1912, containing New Regulation for Copyright, § 15a (Copyright Act 1912, as amended up to September 1, 2017)("the quotation is in accordance with what is generally regarded of his work that causes injury to the author thereof"); Iran: Act for Protection of Authors, Composers and Artists Rights, Art. 7 (Copyright Law) (January 12, 1970), Translation and Reproduction of Books, Periodical and Phonograms Act (December 26, 1973)("provided that the sources of quotations are mentioned and the customary limitations are observed"). Jordan: Law No. 22 of 1992, on Copyright and its Amendments, Art. 17 (2005)("for the purpose of clarification, explanation, discussing, criticizing, educating or testing in as much as justifiable by this objective, provided that the name of the product and its author are mentioned); Netherlands: Act of September 23, 1912, containing New Regulation for Copyright, § 15a (Copyright Act 1912, as amended up to September 1, 2017)("the quotation is in accordance with what is generally regarded as reasonably acceptable and the number and size of the quoted parts are justified by the purpose to be achieved").

quotation be compatible with fair practice. To resolve any ambiguity and to follow current law, we advise that the "fair practice" criteria be included in the quotation right.

12B(1)(c) Broadcasting

We conclude that no amendment is needed for Section 12B(1)(c), authorizing certain uses of works by broadcasters.

The President lists the exceptions for broadcasters in Sec. 12B(1)(c) among those he alleges may violate the Constitution and international law, but he does not explain his reservations. The purpose of the provision is to authorise expressly incidental reproductions made by broadcasters to facilitate their services. The Section expressly prohibits any reproduction from being "used for broadcasting or for any other purpose without the consent of the owner of the relevant part of the copyright in the work." The currently in force Copyright Act already provides this right; the amendments made by the CAB are merely semantic.[24] We see no reason toamend this provision.

12B(1)(e)(i), News of the day

We propose removing Sec. 12(B)(1)(e)(i) from the Bill.

The President lists Section 12(B)(1)(e)(i) among those for which he expresses reservations. The Section permits the reproduction and communication to the publicof articles and broadcasts "on current economic, political or religious topics" if exclusive rights in the work "is not expressly reserved." The provision exists in muchthe same form in the current Act,[25] and is common in other copyright laws.[26]

One commentator posited that permitting uses of works where copyright is "not expressly reserved" violates the Article 5(2) of the Berne Convention. That Article requires that the "enjoyment and the exercise" of copyright "shall not be subject to any formality." The notice requirement that copyright has been reserved, required for a work to not be subject to the exception in Sec. 12(B)(1)(e)(i), could be intercepted as the kind of "formality" prohibited by Article 5(2) of the Berne Convention. The Berne Convention may not apply here, however, because it expressly provides that its protections "shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information."[27] The question is thus raised as to whether Sec. 12(B)(1)(e)(i) only provides a use right for"news of the day or … items of press information."

We conclude that this section of the law may be safely deleted to resolve any ambiguity as to its permissibility under international law. Any fair use of works for informatory purposes would be adequately dealt with under the general flexible exception in Section

[24] See Copyright Act of South Africa, Sec. 12(5)(b).

[25] See Copyright Act of South Africa, Sec. 12(7) ("The copyright in an article published in a newspaper or periodical, or in a broadcast, on any current economic, political or religious topic shall not be infringed by reproducing it in the press or broadcasting it, if such reproduction or broadcast has not been expressly reserved and the source is clearly mentioned.").

[26] See, e.g., African Intellectual Property Organization (OAPI), Agreement Revising the Bangui Agreement of March 2, 1977, Article 16 ("it shall be permitted, without the consent of the author and without payment of remuneration, but subject to the requirement of stating the source and the name

[27] Berne Convention for the Protection of Literary and Artistic Works, Art. 2(8).

12A. As long as that Section is maintained, Sec. 12(B)(1)(e)(i) may be deleted without harming the objectives of the Bill.

12B(1)(f), Translations

We propose amending the translation exception in 12B(1)(f) to promote the Bill of Rights and reflect the full range of purposes for which a lawful translation may be made.

The President lists the exception for translations "for teaching" (as it is presently worded) in Sec. 12B(1)(f) among those he alleges may violate the Constitution and international law, but he does not explain his reservations. The right to translate works may be necessary to promote various Constitutional rights, such as the right of South Africans "to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable,"[28] the right of everyone "to use the language and to participate in the cultural life of their choice,"[29] and the right of linguistic communities not to be denied the right, "to enjoy their culture" and "use their language."[30] The current Act provides a right of translation that is not limited to "teaching."[31] The limitation of the translation right to "teaching" is too narrow to realise the full scope of these rights protected by the Bill of Rights. We therefore recommend the expansion of the translation right to include any translation "for a non-commercial purpose," which is "consistent with fair practice," and which "does not exceed the extent justified by the purpose."

CLAUSE 13: SECTION 12C

Comment 12

Transient or incidental copies or adaptations of a work, including reformatting, where such copies or adaptations are an integral and essential part of a technical process cannot be excluded from digital processes.

Comments 13

We find no reason to amend the exception for **transient copies** in Section 12C.

The President lists the exception for uses of transient copies in technological processes authorized by Section 12C of the CAB among those he alleges may violate the Constitution and international law, but he does not explain his reservations. Exceptions for transient copies are necessary to facilitate many modern digital activities such as streaming video, reading a website, and sending and receiving email. The provision is substantially similar to the exception for transient copies in current EU law,[32] as well in the

[28] Berne Convention for the Protection of Literary and Artistic Works, Art. 2(8).

[29] Constitution of South Africa, sec. 29(2).

[30] Constitution of South Africa, sec. 30.

[31] See Copyright Act of South Africa, sec. 12(11) ("(11) The provisions of subsections (1) to (4) inclusive and (6), (7) and (10) shall be construed as embracing the right to use the work in question

[32] See EU Directive 2001/29/EC, Art. 5 (requiring exception for "[t]emporary acts of reproduction

… which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable: (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance").

laws of many countries around the world.[33] It is widely accepted that exceptions for transient copies for technological processes are reasonable and comply with international law.[34]

CLAUSE 13: SECTION 12D (RECOGNISING ACADEMICS AND THEIR STUDENTS; RECOGNISING AUTHORS AS USERS

Comment 14

The current Copyright Act does not respond to the deeply entrenched inequalities in South African society emerging from apartheid. These inequalities, as recognised by the Constitutional Court in several judgments, leads to vastly differing access to education and educational materials, further determining outcomes and future opportunities for majority of the Black population in the country. Moreover, it does not recognise that majority of academic research and writing is publicly funded by universities and other research institutions that often gets paywalled resulting in these institutions needing to buy back research conducted by their own staff.

The CAB rectifies this by enabling academics to retain the right to deposit their work in institutional repositories. The same provision enables authors to retain their right to re-use their own published work for educational and academic activities, for instance in academic assignments e.g., theses by publication. Further, the CAB recognises the realities of research funding by vesting authors with the right to make publications resulting from publicly funded research (at least 50% funding from public funds) available open access in order to ensure that this research is accessible to all. [Fair Use]

Further, the CAB contains provisions that do not subordinate the right to education and research to the inability to find the copyright holder. It does so in two ways – first, it provides for very specific circumstances where full works can be included in course packs only where a reasonable licence is unavailable. This recognises that the impetus is first on the educational institution to seek out a licence, but should the terms of the licence be unreasonable, the work can be included rather than excluded (as the default is in the current context). In South African law, reasonableness has real content29 – and would include a contextual assessment of the terms of the licence and the particular resource constraints of the institution, for instance.

Second, it enables the obtainment of a full copy of a whole textbook in three limited circumstances – first, where the textbook is entirely out of print, and the copy is the only way to access it; second, where the holder of the copyright cannot be found; and third,

[33] See, e.g., Botswana Copyright Act, Art. 19(a) (providing exception for "temporary reproduction of a work … made in the process of a transmission of the work or an act of making a stored work perceptible").

[34] See Sam Ricketson, *WIPO Study On Limitations And Exceptions Of Copyright And Related Rights in the Digital Environment*, Standing Committee on Copyright and Related Rights (2003) p.79 (explaining that "no provision concerning temporary reproductions found its way into the text of the WCT", and "[a]ccordingly, it remains a matter for national legislators to determine whether, and to what extent, they will provide for exceptions for this kind of reproduction in their laws").

where that particular edition is unavailable for sale in South Africa at the normal market price.

The concerns raised in the public discourse centre around the economic interests of the publishing lobby being compromised by this provision, through a substitution effect. As the text of the provision indicates, this is not a free-for-all. There are only three narrowly tailored circumstances where it is possible to copy a full textbook as set out above. Several countries have similar provisions, some worded even more broadly.

Comment 15

Section 12D

This section was informed by many progressive copyright laws around the world, and the Draft WIPO Treaty on Exceptions and Limitations for the Persons with Disabilities, Educational and Research Institutions, Libraries and Archives (Africa Group – SA plays a leading role in the Africa Group) https://www.wipo.int/edocs/mdocs/copyright/en/sccr_22/sccr_22_12.pdf.

Use of copyright works is subject to the provisions that the copying does not exceed the extent justified by the purpose.

Course packs for educational purposes (S. 12D(1): The exception for printed and electronic course-packs, study packs, resource list will be extremely helpful for teaching and learning, particularly in the pandemic, but also for less privileged educational institutions, including schools, where printed material is required because internet capacity is limited, slow, or non-existent, or data costs are too high. Also, course-packs are necessary where textbooks are unaffordable and access to other reading material is restrictive or inaccessible. They would also be useful for academics to collate and share with less privileged academics in the rural areas, who often depend on older journal articles because they do not have internet connectivity or funds to subscribe to expensive journals.

In the more advanced educational institutions, this exception will eventually become non-existent as there has been very noticeable increases in their use of digital resources, ebooks, open access, open institutional repositories, and open educational resources. As a result, the use of printed course-packs and the number of photocopies in such institutions have reduced considerably. Some Schools are prescribing one textbook instead of using course-packs, and then provide links to digital resources. It must be noted that many publishers allow printed and electronic course-packs in their e-licences. This practice of inclusion of such rights in e-licences will no doubt increase as new e-licences are negotiated between SANLIC and publishers in the future. Photocopied course-packs will eventually disappear. Transactional licences will be used for special requests.

In addition, the cost of course-packs in South African public universities is astronomical. In 2018, 15 CHELSA members responded to my request for estimated expenditure in 2018 relating to e-resources, book budgets and copyright fees. Due to non-disclosure agreements only 15 of the 26 public universities were able to respond.

It emerged that 15 of the country's 26 higher education libraries would pay just over R1 billion (USD$69 million) in 2018 towards electronic and printed resources. This amount

increases by 5% per year on average with the exchange rate of these international resources adding to the expense. In addition, 14 of the 15 mentioned institutions would pay about R31 million (USD$1.8 million) to the Dramatic, Artistic and Literary Rights Organisation (DALRO) for copyright licences on prescribed works and study materials that year alone.

Since an estimated 80% of the collections in academic libraries are purchased from international publishers, the majority of money flows out of the country to publishers in developed countries. The Farlam Copyright Review Report 2011 (point 9.2.5) confirmed that in the 2010 calendar year, the total amount DALRO collected from licensing was R28 582 389 and the total amount distributed R21 601 415 (of which R 9 477 661 was distributed to local rights holders). This proves that the bulk of revenues collected by DALRO from educational institutions are paid to international publishers, not South Africans or journal authors. Moreover, a great deal of research produced locally is published internationally and forms part of the cohort of knowledge that is given to international publishers for free. These publishers legally become the copyright holders through publishing agreements and sell back information to libraries and institutions in South Africa.
There is also a great deal of duplication and double dipping so higher institutions of learning are paying more than they should for copyright fees. Some examples:

- the DALRO blanket licence fees are calculated on the number of FTEs at an institution. This assumes that every student will exceed the fair use exceptions in the current law and should pay copyright fees. Most postgraduate students copy under fair dealing and do not receive course-packs, yet they are included and levied a fee for copyright through the Blanket Licence. With the cost of printing and paper, and closure of libraries in the pandemic, students no longer have the privilege of copying excess amounts.
- Fewer copies are being made (as mentioned above) yet the cost of the DALRO licences increases every year, so institutions are in fact paying more each year for fewer reproductions.
- Institutions pay exorbitant subscription fees annually for e-databases and other electronic resources, as well as high prices for printed material. If lecturers want to make an article from a subscribed (paid-for) electronic resources and make it available on a password-protected e-learning platform, they have to pay copyright fees to DALRO before they can scan the full text article, images, etc. onto the e-learning platform. This is duplication or double dipping as the publishers gets paid over and over for the same material every year.
- Also, some institutions that have rejected the Blanket Licence and have returned to transactional licensing have saved millions in copyright fees (e.g. DUT and UFS).

Some of the University Presses have opposed this exception, supposedly because they will lose thousands of Rands from works used in course-packs.

The huge amounts that the universities will save on copyright fees for course-packs can be redistributed for the purchase or new printed and electronic resources (specially to support local publishers), infrastructure to improve library services, etc. and a portion could

surely be allocated to assist their University Presses. Issues raised by University Presses can also be addressed in the Draft Regulations that will follow when the Bill is passed.

The fact that knowledge resources expenditure for research and teaching purposes in the South African higher education sector runs into the billions should be an issue of major concern, and an urgent research project for ASSAf. It is a known fact that textbooks and other reading material is often much higher than in other countries, even developed countries. There is little collated information available, particularly because institutions are bound by non-disclosure agreements with publishers. This is a practice that needs to change in the future. Member institutions of SANLIC should be able to share and compare agreements that are negotiated by SANLIC on their behalf but they are not permitted to do so. This makes it difficult for the tertiary institutions to do research on these issues.

Precedents: This provision is not unique to South African copyright law. This case in India is important and applicable to this section of the Bill – see: Course Packs For Education Ruled Legal in India - https://www.eifl.net/Blogs/Course-Packs-Education-Ruled-Legal-India

It is also consistent with recent fair use decisions in the United States. In a lawsuit brought by publishers against Georgia State University, the U.S. Court of Appeals for the Eleventh Circuit rejected the publishers' effort to find GSU's electronic reserve system was infringing as a matter of law. Importantly, the court distinguished earlier cases publishers had brought against commercial photocopy shops that assembled course-packs from this case, where the university maintained the copies on its servers for non-commercial educational purposes. Additionally, the fair use analysis of the U.S. Court of Appeals for the Second Circuit in Authors Guild v. HathiTrust was influenced by the security measures employed by HathiTrust, a consortium of research libraries that stored the full text of millions of digitized books. The South African provision requires similar security measures.

Copying of whole works (12D(4 & 5): The circumstances in which educational institutions are permitted to make copies of whole or major parts of copyright works are limited to specific legitimate purposes, and not for commercial purposes, i.e. where the textbook is out of print; where the owner of the right cannot be found; or where authorised copies of the same edition of the textbook are not for sale in the Republic or cannot be obtained at a price reasonably related to that normally charged in the Republic for comparable works.

Inclusion in assignments, ETDs, etc.(S12D 6): Any person receiving instruction may incorporate portions of works in printed or electronic form in an assignment, portfolio, thesis or a dissertation for submission, personal use, library deposit or posting on an institutional repository. This applies in the print environment – it will now extend to the digital space which is logical and legitimate.

Open Access Repositories (S12D 7a-c): This clause was adapted from the German Copyright law and should be supported as it applies to public money. The author of a scientific or other contribution, which is the result of a research activity that received at least 50 per cent of its funding from the state and which has appeared in a collection, has

the right, despite granting the publisher or editor an exclusive right of use, to make the final manuscript version available to the public under an open licence or by means of an open access institutional repository. If one looks at the Sherpa Romeo website, there are thousands of publishers that allow this already, and nearly 1000 publishers who allow the final PDF published version to be deposited, so this is not an unusual provision.

Third parties assisting authors (S12D 7d): It is international practice that librarians assist scholarly authors to deposit their publications on open access institutional repositories, or train scholarly authors to do it themselves.

Unenforceable agreements (S12D 7e): This sub-clause should be welcomed as authors often get an unfair deal by signing restrictive contracts with publishers (including open access publishers and self-publishers). What this sub-clause does is ensures that publisher and digital service provider contracts do not override lawful copyright exceptions. It has been a practice for years where contract law has overridden lawful copyright exceptions, removing the benefits of the exceptions.

This clause remedies this unfair practice and empowers authors in the process. This clause is not intended to undermine contract law, but it does put authors and publishers on a more equitable level. It was adopted from the EIFL Model Copyright Law and should be supported.

Acknowledgement (8): Acknowledgement is required where the source is available, and this applies to copyrighted, open access, out of copyright, not copyrighted and free works regardless. This does not encourage or lend itself to plagiarism.

Comment 16

We conclude that Section 12D is constitutional in its present form.

The President lists the exception for educational uses in 12D among those he alleges may violate the Constitution and international law, but he does not explain his reservations. Some commenters question section 12D(3), which allows educational institutions to copy an entire book into a course pack if "a licence to do so is not available from the copyright owner, collecting society or an indigenous community on reasonable terms and conditions." Section 12D(4) permits reproduction of "a whole textbook" solely for "educational or academic activities" if the "textbook is out of print," "the owner of the right cannot be found," or authorised copies . . . cannot be obtained at a price reasonably related to that normally charged in the Republic."

In our considered view, section 12D is defensible as a legitimate policy choice made by the South African legislature that reconciles its international obligations in respect of copyright and human rights and gives effect to the Bill of Rights in line with its constitutional obligations. The core provision of Sections 12D(3) and (4) is to require that copyright holders of educational materials serve the South African market on reasonable terms and conditions. This power to control abuses of monopoly power is enshrined in international law, including in the Berne Convention and WTO TRIPS Agreement, which

protect the right of countries to control abuses of intellectual property rights.[35] There are parallel concepts in South African patent and competition law, both of which define a failure to serve the market on reasonable terms as an abuse.[36] The provision reflects long standing practice in South Africa, where universities and other educators during Apartheid commonly reproduced for educational purposes articles and whole books that were not available in South Africa because of censorship or economic boycotts.[37] The provisions reflect the laws of many other countries that permit greater free uses of works that are not commercially available at reasonable prices.[38] The expansion of

[35] See Stockholm Revision Conference Report I ("263. The Committee accepted, without opposition, the proposal of its Chairman that mention should be made in this Report of the fact that questions of public policy should always be a matter for domestic legislation and that countries of theUnion would therefore be able to take all necessary measures to restrict possible abuses of monopoly."); WIPO Guide to the Berne Convention for the Protection of Literary and Artistics Works (Paris Act, 1971) ("17.4. However, quite apart from these powers of censorship, it was unanimously agreed in Stockholm that questions of public policy should always be a matter for national legislation and that countries of the Union would therefore be able to take all necessary measures to restrict possible abuse of monopolies."); Sam Ricketson, *Study on Limitations And Exceptions of Copyright and Related Rights in the Digital Environment* (2003) ("Berne Union members are free to take all necessary measures to restrict possible abuses of monopoly, and this will not be in conflict with the Convention so long as this is the purpose of the measures, even if, in some instances, this means that the rights of authors are restricted. All private rights have to be exercised in accordance with the prescriptions of public law, and authors' rights are no exception to this general principle."); World Trade Organization Agreement on Trade Related Aspects of Intellectual Property Rights, Art. 8(2) (clarifying that WTO Members may adopt measures "to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade").

[36] See South African Patents Act, Sec. 56(2)(c) ("The rights in a patent shall be deemed to be abused if—(c) the demand for the patented article in the Republic is not being met to an adequate extent and on reasonable terms"); Competition Act of South Africa, Section 8(a) (prohibiting dominant firm from charging "an excessive price to the detriment of consumers", defining "excessive price" as"a price for a good or service which- (aa) bears no reasonable relation to the economic value of that good or service; and (bb) is higher than the value referred to in subparagraph (aa)"); WTO TRIPS Agreement, Art. 8(2) ("Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology."); Art. 40(2) ("Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market.");

[37] See Eve Gray and Laura Czerniewicz, *Access to Learning Resources in Post-apartheid South Africa*, in Shadow Libraries, 112 (2018) (reviewing publishing practices before and after Apartheid).

[38] See Canada Copyright Act, Section 29.4 (providing that "[i]t is not an infringement of copyright for an educational institution … to reproduce a work, or do any other necessary act, in order to display it" if the work is not "commercially available" - defined as "available on the Canadian market within a reasonable time and for a reasonable price"); Indian Copyright Act, s 52(1)(o) (providing that "the making of not more than three copies of a book … for the use of the library if such book is not available for sale in India"); 17 U.S. Code § 108 (providing right of libraries to make replacement copies of an "entire work, or to a substantial part" if the work "cannot be obtained at a fair price"); Afghanistan, Law Supporting the Rights of Authors, Composers, Artists and Researchers (Copyright Law) (2008), Article 44 (permitting Minister to grant "a nonexclusive license to reproduce and publish" any work if "Copies of the work were not distributed in the state … for a price similar to the prices of similar works"); Albania, Law No. 35/2016 of March 31, 2016, on Copyright and Related Rights, Article 72 (providing right to make personal copy of a whole book if "its sold copies are exhausted for at least two years"); Australia Copyright Act, Section 40(2)(c) (including as a factor for determining a fair dealing for research or study "the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price"); Section. 49 (providing right of libraries and archives to make replacement copies of a whole work if "the work cannot be obtained within a reasonable time at an ordinary commercial price"); Cabo Verde, Copyright Act, Article 72 (permitting reproduction "of a single copy of works which are not yet available in trade or are impossible to obtain, for purely scientific or humanitarian interest purposes"); China, Regulation on the Protection of the Right to Network Dissemination of Information, Art. 7 (2006) (permitting libraries to make a digital replacement copy of a work "which is unavailable or only available at a price obviously higher than the marked one on the market"); Sudan, Copyright and Neighbouring Rights (Protection) and Literal and Artistic Works Act 2013, Art 31 (authorizing libraries and archives to make replacement copies of works if "the edition of the copy in their possession might be out of stock or is impossible toget in a reasonable price").

education rights in the Copyright Act was recommended by professional reviews of the law commissioned by the Department of Trade and Industry.[39]

Sections 12D(3) and (4) are quite narrow in their application. Each is subject to Section 12D(1), which clarifies that the only purpose for which a whole book can be copied is for non-commercial "educational and academic activities." Similarly, Section 12D(3) provides that educational institutions must by default *first* try to secure a licence from the copyright owner to incorporate whole works into course packs or any other form. *If and only if* such a licence is unobtainable on *reasonable terms* can they incorporate whole works.

Comment 17

Section 12D of the CAB is a fair dealing provision catering for the educational context. Section 1 allows "a person" to make copies for educational purposes. Section 2 clarifies that this covers "educational institutions" making copies for instructional purposes (e.g., inclusion in study packs). Section 3 goes on to state that ordinarily whole or substantially whole books may not be copied by educational institutions unless copyright holders grants their permission. Section 4 allows the copying of whole books in limited cases, notably where the book is not reasonably priced.

Section 12D must satisfy the requirements of the international three-step test, This refers to the three-step test as defined above, construed in the light of Article 7 of TRIPS and that provision's call for balance between creation/innovation and access, and permitting such uses as constitute entitlements under international human rights law. Hence, Article 13 of the International Covenant on Economic, Social and Cultural, protecting the right to education in international law, becomes relevant. This obliges states parties to ensure that education at the various levels is both available and accessible. As the U.N. Committee on Economic, Social and Cultural Rights has clarified, "availability" covers textbooks and libraries.[40] Already in 1981, a study had found that – compared to other potential correlates of school achievement, such as teacher-training, class size, or teacher salaries – the availability of books is particularly consistently associated with higher levels of achievement.[41] Subsequent studies have confirmed this.[42] Moreover, "for textbooks to be effective they must be not only available but also … in a language that is widely understood by students and teachers."[43] Article 13(2) requires primary education to be free, secondary and higher education to be made progressively free. This relates to the *economic* accessibility of education, which states parties must guarantee.[44] The

[39] See Genesis Analytics, *Assessment of the Regulatory Proposals on the Intellectual Property Policy Framework for South Africa*, p. 77-78 (31 July 2014) (advocating for expansion of educational exceptions in the law, including through a general fair use provision, allowances for the utilisation of whole works for teaching, extending exceptions to all types of education, and removing restrictions on the number of copies for educational purposes that can be made of a work).

[40] U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 13, The Right to Education (Art. 13 of the ICESCR), U.N. Doc. E/C.12/1999/10 (8 December 1999), para. 6(a).

[41] Stephen P. Heyneman, Joseph P. Farrell and Manuel A. Sepulveda-Stuardo, "Textbooks and Achievement in Developing Countries: What We Know," 13 *Journal of Curriculum Studies* (1981), 227, 227.

[42] Tony Read, *Where Have All the Textbooks Gone?: Toward Sustainable Provision of Teaching and Learning Materials in Sub-Saharan Africa* (World Bank, 2015), 33.

[43] *Ibid.* This is of relevance in finding that Section 12B(1)(f) of the CAB, permitting translations inter alia for educational purposes, is consistent with the three-step test. See also IV.E. of the Opinion referred to under point 4 with regard to the translation L&E.

[44] General Comment No. 13, *supra* note 19, para. 6(b).

Committee underlines that "free" encompasses textbooks as an indirect cost.[45] For textbooks, copyright usually leads to higher prices, of course. The Committee has thus called upon a state party to "gradually reduce the costs of secondary education, e.g. through subsidies for textbooks."[46] Regarding another state party, the Committee categorially stated that it "is concerned about indirect costs in primary education, such as for textbooks."[47] All these considerations must play a role when applying the three-step test.

Regarding Section 12D(1) and (2), it should be noted that use is clearly restricted to educational and academic purposes, may not occur "for commercial purposes" (Section 12D(5)), and "[must] not exceed the extent justified by the purpose," provisos clearly bringing these provisions within the ambit permitted by the three-step test. In fact, Section 12D(1) and (2) do nothing more than provide clarity with what is the teaching exception in Section 12(4) of the current Copyright Act. This has in the past been interpreted wrongly as allowing educational institutions virtually no leeway in using portions of works for teaching:

> I've spent the past several years trying to negotiate with publishers for uses. We also have access to fair dealing … Publishers say they have taken a reasonable position. They have no problem with individual students and teachers making copies. But when an institution makes copies, even of a single page, they must pay royalties. For instance, [an] English literature professor making copies of a single poem from an anthology of 600 of them. There is no fair dealing from the standpoint of administrative teaching.[48]

Educational institutions now pay fees under use agreements with collecting societies for use that should be considered free under Section 12(4) of the current Copyright Act. As already remarked above, the WIPO study by Pouris and Inglesi-Lotz specifically refers to the uncertainty surrounding the current teaching exception, detrimental to educational institutions, as justifying clear "user rights-affirmative" L&Es.

Regarding Section 12D(4), allowing the copying of whole textbooks by educational institutions where a book is not reasonably priced on the South African market, it should be held that also this complies with the three-step test of international law. Ultimately, Section 12D(4) is almost an exact rendering of the content of the Appendix to the Berne Convention, agreed to by Berne members in 1971, to facilitate access for developing states to reproductions and translations of *whole textbooks* by means of compulsory licences. Also, this allows whole textbooks to be reproduced where textbooks are not reasonably priced (or copies thereof to be made available in a certain language in which these are not available). While the Appendix may provide for a very formalised compulsory licensing scheme, the view of many well-known copyright scholars is that the Berne Appendix does not prevent TRIPS members from adopting similar schemes beyond the Appendix under Article 13 of TRIPS.[49] As a mechanism agreed to by the international

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[45] U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 11, Plans of Action for Primary Education (Art. 14 of the ICESCR), U.N. Doc. E/C.12/1999/4 (10 May 1999), para. 7. This must be read with General Comment No. 13, *supra* note 19, paras. 6(b), 10, 14, 20.

[46] Concluding Observations on the Initial Report of The former Yugoslav Republic of Macedonia, U.N. Doc. E/C.12/MKD/CO/1 (15 January 2008), para. 47.

[47] Concluding Observations on the Initial to Third Reports of the United Republic of Tanzania, U.N. Doc. E/C.12/TZA/CO/1-3 (13 December 2012), para. 26.

[48] Julien Hofman, Commonwealth of Learning, Department of Commercial Law, University of Cape Town, Blogging WIPO: Information Meeting on Educational Content and Copyright in the Digital Age, 21 November 2005, https://www.eff.org/deeplinks/2005/11/blogging-wipo-information-meeting-educational-content-and-copyright-digital-age.

[49] See, e.g., Susan Isiko Štrba, *International Copyright Law and Access to Education in Developing Countries: Exploring Multilateral and Quasi-Legal Solutions* (Martinus Nijhoff, 2012), 157-164; Ruth L. Okediji, *The International*

community must obviously be considered to satisfy the criteria of the three-step test, it would be non-sensical to hold that South Africa's adoption of a similar arrangement does not. Moreover, copyright holders must first be approached under both the Berne Appendix and under the CAB and refuse a licence on reasonable terms before the mechanism may be relied on. If the holder of copyright in a textbook agrees to fair compensation (measured against an internationally comparable proportion of per capita GNP expended by a student for textbooks), there is nothing they must fear.

Section 12D, it is alleged, should also not amount to arbitrary deprivation of property under Section 25 of the Constitution. The Constitution, it needs reminding, does not expressly protect intellectual property. The Constitutional Court's Certification Judgement of 1996 clearly stated that intellectual property does not constitute a universally recognised human right and, therefore, needed not to be included as a fundamental right in the Constitution.[50] So far, the Court has also refrained from clearly holding that intellectual property is covered by Section 25. While, in principle, clear cases of the taking of *vested* intellectual property rights from specific persons holding registered or similarly accruing title to specific intellectual property rights might potentially be a subject matter for Section 25 in some cases, any formulation of general intellectual property law by the legislator should only in the rarest of cases be held capable of constituting arbitrary deprivation of property. Laurence Helfer, one of the world's leading intellectual property scholars, strongly warns against courts relying on property clauses to outline the ambit of intellectual property law (and potentially limit fundamental rights such as that to education):

> The intellectual property balancing paradigm presents the least persuasive case for [court intervention]. Under this approach, the Court determines the legality of diminutions of intellectual property by applying [the property clause]. … Adoption of the balancing paradigm would create several interrelated problems, including greater complexity and uncertainty [because the socio-economic and developmental implications of intellectual property rights remain globally empirically unclear and under-researched]. The paradigm would also transform the [court] into an arbiter of intellectual property law and policy … a role that the Court is jurisprudentially and institutionally ill-suited to play.[51]

Or, as has been stated elsewhere, assessing alleged "diminutions" of intellectual property against a property clause "may entail opening Pandora's box and constitutionally entrenching 'a skewed system' of overprotection and lack of balance of IP rights to the detriment of other important human rights goals."[52]

But, apart from these fundamental concerns relating to the application of Section 25 in this type of context, the Constitution also protects other human rights, whose clear limiting effect on Section 25 needs to be borne in mind. Section 29 thus protects the right to education. Under Section 39(1)(c), all rights of the Bill of Rights must be interpreted in the light of international law. Hence, the normative content of Article 13 of the International

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Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries (UNCTAD-ICTSD, Issue Paper No. 15, March 2006), 18, https://unctad.org/en/Docs/iteipc200610 _en.pdf.

50 Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996), para. 75.

51 Laurence Helfer, "The New Innovation Frontier? Intellectual Property and the European Court of Human Rights," in Paul L. Torremans (dd.), *Intellectual Property and Human Rights: Enhanced Edition of Copyright and Human Rights*, 29, 87.

52 Klaus D. Beiter, "Establishing Conformity between TRIPS and Human Rights: Hierarchy in International Law, Human Rights Obligations of the WTO and Extraterritorial State Obligations under the International Covenant on Economic, Social and Cultural Rights," in Hanns Ullrich et al. (eds.), *TRIPS plus 20: From Trade Rules to Market Principles* (Springer, 2016), 445, 462.

Covenant on Economic, Social and Cultural Rights, as described above, must be taken into account when determining the content of Section 29. Accordingly, basic education under Section 29 (and it is clear now that this means primary and secondary education) covers learning materials that must be available and accessible to all. In fact, the Constitutional Court has held in the *Juma Musjid* case that basic education is immediately realisable (thus not subject to progressiveness).[53] The *Limpopo Textbook* case decided by the Supreme Court of Appeal confirms and concretises this for textbooks. These must be available to each learner in each subject at the beginning of the academic year.[54] Excluding even a few students from access to textbooks amounts to discrimination (Section 9 of the Constitution).[55] By implication, where textbook costs (potentially from copyright) lead to the exclusion of students from access, this violates rights to education and non-discrimination. Also, further (including higher) education must be available and accessible. Here, learning materials must at least be affordable. It is hardly conceivable that remuneration concerns under Section 25, notably those of impersonal publishing houses, can outweigh rights of access to education even under Section 36, the general limitation clause of the Constitution.

CLAUSE 19: SECTION 19B

Comment 18

This section addresses copyright software and its use and reproduction to enable [56]interoperability, observation, study and testing for re-engineering and related legitimate purposes. It would also allow a library considering the purchase of an e-database to browse and examine its functionality, accessibility, etc.

Comment 19

We find no reason to amend the new exception in Section 19B for **reverse engineering**. The President listed this exception in his criticisms, but no other commentator to our knowledge criticised this exception as being out of compliance with the Constitution or international law. Reverse engineering exceptions are widespread throughout the world.[57] Sec. 19B(2) closely follows the text of Article 6 of the European Union Software Directive (2009/24/EC) with minor textual changes. Sec. 19B(1) is almost exactly the same as Article 5(3) of the European Union Software Directive. Both exceptions are narrowly tailored to allow very specific actions necessary for the advancement of technology. Such exceptions are critical for enabling competition in the supply of parts of inputs to standard technology that needs to interoperate with other components.

CLAUSE 20: SECTION 19C (EXCEPTIONS FOR LIBRARIES, MUSEUMS, ARCHIVES, AND GALLERIES TO PROTECT INVALUABLE CULTURAL HERITAGE)

[53] Governing Body of the Juma Musjid Primary School & Others v. Essay N.O. and Others (CCT 29/10) [2011] ZACC 13; 2011 (8) BCLR 761 (CC) (11 April 2011), para. 37.

[54] Minister of Basic Education v. Basic Education for All (20793/2014) [2015] ZASCA 198; [2016] 1 All SA 369 (SCA); 2016 (4) SA 63 (SCA) (2 December 2015), para. 52.

[55] *Ibid.* para. 49.

Comment 20

The current Copyright Act does not have explicit provisions to permit the mass digitisation of collections of libraries, museums, archives, and galleries for preservation and storage purposes. Although the full extent of the damage is yet to be assessed, the devastating fire at the University of Cape Town's African studies collection wiped out several rare manuscripts of which there are no digital copies. Priceless cultural heritage was entirely lost reducing the scope for the realisation of the right to participate in cultural and linguistic life in the Bill of Rights. The slow pace of digitisation in libraries, museums, archives, and galleries across the country is in large part due to unclear copyright exceptions. The nature of copyright as a statutory monopoly requires explicit exceptions as the Act creates a generalised restraint on the free flow of information. The current Copyright Act also makes it entirely unclear if mass digitised collections in other countries or personal collections can be used to rebuild the lost UCT archive. The consequences of this lack of clarity and absence of provisions are the threat of criminal penalties for infringement of copyright. This leads to a chilling effect upon library policy to err on the side of caution.

The CAB rectifies this dire situation by introducing comprehensive explicit exceptions in order to enable libraries, museums, archives, and galleries to frame clear policies on the preservation and storage of invaluable cultural artefacts from across the country. Additionally, these provisions enable temporary access to other libraries' databases in emergencies (like covid-19); enable accessible format shifting to ensure that everyone across the spectrum of disabilities has access to cultural life; enable meaningful inter-library loans; and importantly, the realisation of the rights to education, participation in cultural life, scientific and academic research, free flow of information through libraries, archives, museums, and galleries.

The President's concern regarding these provisions is unclear, given that 102 countries in the world have exceptions for libraries, museums, archives, and galleries with the objectives of storage and preservation. In any event, these provisions contain a limitation at the outset – that the purpose for which digitisation and other measures of preservation is carried out must be non-commercial. This fits neatly with the public purpose of these institutions. Moreover, should the concern relate to arbitrary deprivation, the 'sufficient reason' test is easily passed, particularly bearing in mind the important purpose of these institutions in facilitating everyone's participation in cultural and linguistic life protected by the Bill of Rights.

Comment 21

It provides long overdue limitations and exceptions for museums and galleries that are important custodians of our historical memory and cultural heritage. It also expands on the current limited exceptions for libraries and archives and enables their statutory mandated functions to be performed in the digital space.

The provisions for preservation and digital curation are extremely urgent, especially in the COVID-19 pandemic, when libraries, archives, and related information services are closed, and access is only possible via electronic services and resources. Replacement of lost or damaged works, interlibrary digital services, institutional repositories, digitisation, format-shifting and conversion from obsolete technologies to new technologies and other

exceptions in this section are essential for accessibility and preservation of collections and cultural heritage.

The devastating fire and loss of irreplaceable collections at the Jagger Reading Room at the University of Cape Town in April 2021 is a stark reminder of the lack of provisions for libraries and other custodians of our historical memory and cultural heritage. The Bill provides internationally accepted, useful and appropriate exceptions for these entities and enables legal deposit libraries that collect, catalogue and preserve our government publications and other official documents to engage in digitisation and digital curation too. They also enable libraries and other information services to provide access to and assist people with disabilities.

These exceptions are also essential for various international and regional scholarly programmes, including open access, open science, open data, SCIELO SA, information services and research outputs. Without these exceptions, prior copyright clearance is required for any transfer or conversion of material from the analogue format to digital format. This often involves copyright fees as well. This is not only time-consuming, expensive and counter-productive, but a serious barrier to access to knowledge and resource-sharing, authorship, innovation and scientific collaboration.

Libraries, archives and other information services entities are currently deprived of benefits that their counterparts in developed countries and some developing countries have had for years.

These exceptions were adopted from:

- progressive copyright laws around the world
- the internationally recognised EIFL Model Copyright law – see: https://www.eifl.net/system/files/resources/201607/eifl_draft_law_2016_online.pdf;
- WIPO Studies on limitations and exceptions for libraries and archives – see: https://www.wipo.int/copyright/en/limitations/libraries_and_archives.html;
- Treaty Proposals of IFLA and its Alliance Partners (supported by the Africa Group at WIPO) – see: https://www.ifla.org/files/assets/hq/topics/exceptions-limitations/tlib_v4_4.pdf.
- Draft WIPO Treaty on Exceptions and Limitations for the Persons with Disabilities, Educational and Research Institutions, Libraries and Archives (Africa Group – SA plays a leading role in the Africa Group) https://www.wipo.int/edocs/mdocs/copyright/en/sccr_22/sccr_22_12.pdf

These provisions have been formally supported by the international, regional and domestic library and archive communities, but also by many others. Key supporters to note are: the International Federation of Library Associations and Institutions (IFLA), the International Council of Archives, the Australian Digital Alliance, the Library Copyright Alliance (USA), the African Library and Information Association (AfLIA), the Southern African Regional Universities Association (SARUA), the National Council for Library and Information Services (NCLIS), the Legal Deposit Committee (LDC), Universities South (USAf), the Library and Information Association of South Africa (LIASA), the Committee of Higher Education Libraries of South Africa (CHELSA), as well as many other organisations, entities serving people with disabilities, NGOs, and information and intellectual property specialists

around the world. The Department of Higher Education and Training (DHET), the Department of Basic Education (DBE) and Department of Arts and Culture (DAC) also supported the whole Copyright Amendment Bill during its process in Parliament.

Comment 22
We find no reason to amend the library rights in Section 19C.

These provisions appear substantially similar to a frequently-referenced international model law to meet the interests of libraries.[35] Some commenters question the provisions in 19C(4) and (9) that permit the making available of works in their collection through a "secure computer network," without the requirement contained in some laws that such network be accessed only from the premises of thelibrary. These criticisms were made before the COVID-19 pandemic cut off physical access to libraries around the world. The CAB now appears prescient. Many librariesand educational institutions in the United States, Canada and Europe provide remoteaccess to at least some works via secure computer networks. This right is necessary to promote the rights of all South Africans to information and to education during periods when physical facilities are closed or inaccessible. We find no reason to amend this Section.

Comment 23
We offer the following proposed amendments to the Bill to better tailor its provisions to its purposes. As we describe above, we do not find that any of these amendments is constitutionally required.

VI. SECTION 6A, 7A, 8A
Option 1
Add the word "fair" before "share of royalty" throughout Sections 7A and 8A.

Option 2
To add further definition of the application of the concept of the fair royalty requirement, including to prospective uses under existing agreements, Parliament could add a definition of a "fair royalty." For example:

Definitions
'Royalty' means a periodic payment based on a percentage or other share of the revenue or sales made from commercial exploitation of a work or performance.

'Fair royalty' means appropriate and proportionate remuneration based on the totality of the circumstances, including:

the actual or potential economic value of the licensed or transferred rights, taking into account the author's or performer's contribution to the overall work or performance;

market practices, the actual exploitation of the work, and amount normally paid in the particular industry in South Africa and globally;

amounts or ranges determined fair through collective bargaining or a determination by the Minister, if any.

It could also consider replacing the standard for application to works or performances assigned before the commencement date of the Copyright

Amendment Act (i.e. sections 6A(7), 7A(7), 8A(5)) with language based on the so-called "bestseller" clause in current EU law, described above in footnote 5. For example:

(xx) An author or performer is entitled to claim additional, appropriate and fair remuneration from the party with whom they entered into a contract for the exploitation of their rights or to whom the author or performer licensed or assigned his copyright, or from the successors in title of such party, when the remuneration originally agreed turns out to be disproportionately low compared to all the subsequent relevant revenues derived from the exploitation of the work or performance. Where parties cannot agree on fair remuneration in such a case, any party may refer the matter to the Tribunal for an order determining the fair remuneration.

VII. SECTION 12B(1)(A)
We offer the following amendment as an option to return the "consistent with fair practice" requirement to the quotation right.

(1) Copyright in a work shall not be infringed by any of the following acts:

(a) Any quotation: Provided that—
(i) **the quotation is compatible with fair practice**
(ii) the extent thereof shall not exceed the extent reasonably justified by the purpose; and
(iii) 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 mentioned in the quotation

VIII. SECTION 12B(1)(E), NEWS OF THE DAY
We offer the following amendment to remove the exception for uses of news unless the reproduction right is expressly reserved:

12B. (1) Copyright in a work shall not be infringed by any of the following acts: . . .
(e) subject to the obligation to indicate the source and the name of the author in so far as it is practicable—
(i) the reproduction by the press, or in a broadcast, transmission or other communication to the public of an article published in a newspaper or periodical on current economic, political or religious topics, and of broadcast works of the same character in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved;
(ii) the reporting of current events, or the reproduction and the broadcasting or communication to the public of excerpts of a work seen or heard in the course of those events, to the extent justified by the purpose; or
(~~iii~~) (ii)the reproduction in a newspaper or periodical, or the broadcasting or communication to the public, of a lecture, address, or sermon or other work of a similar nature delivered in public, to the extent justified by the purpose of providing current information;

IX. TRANSLATION
We propose the following language be used to replace the current Section 12B(1)(f) to better reflect the full range of purposes for which a lawful translation may be made.

(f) the translation of such work into any language: Provided that such translation is done for a non-commercial purpose, is consistent with fair practice, and does not exceed the extent justified by the purpose.

X. SECTION 19D, DISABILITY
We offer the following amendments to better tailor the CAB to the terms of the Marrakesh Treaty designed to enable cross-border exchanges of works.

Definitions
"authorised entity" means an entity that is authorised or recognised by the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis. It also includes a government institution or non-profit organization that provides the same services to beneficiary persons as one of its primary activities or institutional obligations.

Amend Section 19D(3) to read:
(3) A person with a disability or a person that serves persons with disabilities, **including an authorised entity,** may, without the authorisation of the copyright owner export to or import from another country any legal copy of an accessible format copy of a work referred to in subsection (1), as long as such activity is undertaken on a non-profit basis by that person**, provided that prior to the distribution or making available the person did not know or have reasonable grounds to know that the accessible format copy would be used for other than for persons with disability.**

B: AGAINST THE BILL

Comment 24
The Property Clause
In terms of section 25(1) no law may permit arbitrary deprivation of property. The thrust of the section is to protect existing property rights or interests (including copyright) against certain forms of interference. According to the authorities deprivation as contemplated entails any interference with the use, enjoyment or exploitation of property. Further, where property has various components, protection applies to even individual components, and not only to the whole. Thus, depriving a copyright owner of a component right of copyright, for instance the right to control the whole, or a part of the, right of reproduction of a work, amounts to a deprivation of property for purposes of the section. Such a deprivation diminishes the bundle of rights which make up copyright.
The authorities say that a deprivation of property is arbitrary when brought about by a law in circumstances where there is not sufficient reason or justification for it. The circumstances to be taken into account must necessarily include whether the law in question, or a relevant provision of it, offends against South Africa's obligations under an international treaty. There can be no 'sufficient reason' to act in contravention of an international obligation in a country governed by the rule of law, as South Africa is.

Treaty Obligations
South Africa's international obligations in respect of copyright are imposed by the Berne Convention and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). These treaties require copyright protection to be granted to original works in a specified manner. The Copyright Act is in compliance with these obligations. The treaties allow exceptions, catering for the public interest, to be made to the scope of protection

conferred by copyright only in clearly circumscribed circumstances, namely when the so-called 'three step test' can be satisfied. The three-step requires the following:

(1) The exceptions may only be granted in **certain special** cases.
(2) An exception must not conflict with the normal exploitation of the work.
(3) An exception must not unreasonably prejudice the legitimate interests of the rightsholder.

These tests must be applied consecutively, in the specified order. In other words, if the first test is not met that is the end of the matter, and so forth.

Three-Step Test and Arbitrary Deprivation

The upshot of the afore going is that an exception to the copyright in a work that does not pass the three-step test will amount to an arbitrary deprivation in respect of that item of property, as provided for in section 25 of the Constitution. In terms of the section no law may so provide.

The equation is straight forward: an exception that does not comply with the three-step test is unconstitutional.

Comment 25

The CAB is a poor piece of draft legislation. It is infested with anomalies, inconsistencies and incorrect or imprecise terminology and concepts. Above all it is unconstitutional in many respects as highlighted above. It must be reviewed in its entirety and redrafted by a committee of true copyright experts.

As prefaced above comes to the fore in the following respects:

(a) The CAB is detrimental and impoverishing to authors and copyright owners and comes at a severe cost to them, which they are expected to pay.
(b) The CAB does damage to constitutional property rights and puts the boot into the Bill of Rights.
(c) Informed commentators are amply justified in severely criticizing the CAB and putting the boot into it.
(d) The CAB and the drafters warrant being given the boot and being replaced. We are entitled to expect and to receive delivery of a first-class Bill and should not have to accept the defective Bill which the legislator appears to find sufficient.
(e) Bearing the cost of the constitutional litigation, to both the State (the taxpayer) and private parties, which will surely follow in the event that the Bill in substantially its present form and state becomes law.

CLAUSE 13: SECTION 12A (FAIR USE NECESSARY FOR NEW AND EVOLVING SCIENTIFIC RESEARCH METHODS)

Comment 26

[…][On the topic of 'fair use'] - A controversial interpretation of the three-step test of the Berne Convention and TRIPS Agreement[… has been presented]. [This fails] to mention that what is presented is a minority opinion, and that the majority local and international view of the three-step test, supported by the World Intellectual Property Organisation

(WIPO), an agency of the United Nations, is that it is concerned with the 'legitimate interests' of the copyright owner, not those of third parties. On closer examination, none of the brief quotes […] presented in support of [t]his position actually made clear why the provisions in section 13 of the CAB, amending **section 12** of the Act were not in contravention of the three-step test which South Africa is bound to respect in terms of its international obligations.

[…]If ASSAf were to include […][this] view of the three-step test in its submission it would be putting forward a contested opinion and, moreover, not one necessarily supported by educationists in South Africa.

[…] I head up the ANFASA copyright committee; for our members and for authors in general the CAB is potentially damaging as control over the use of their own works will be taken away from them and in many instances, they will forfeit payment (which is certainly unconstitutional).

Comments 27
The Copyright Act currently provides for various exceptions to copyright in sections 12 to 19B. For the major part, these exceptions are taken straight out of the Berne Convention, and they meet the three-step test.

The principle applied by the Act is known internationally as 'fair dealing' with a work. Each exception is detailed in the legislation and there is a so-called *numerus clausus*, or closed list, of such exceptions. The list is now outdated and requires to be extended or amplified by further clearly defined exceptions that meet the three-step test, in order to meet contemporary reasonable requirements.

The fair dealing principle in respect of exceptions to copyright is applied in the vast majority of countries in the world. The copyright law of the USA, on the other hand, applies a different principle to exceptions, known as 'fair use'. This principle is only applied in a handful of countries which are disposed to follow the American lead. 'Fair use' entails the empowerment of the court hearing a copyright infringement matter to decide whether, on the facts of the particular case, it is fair to condone the defendant's infringing conduct. Certain criteria that the judge must consider are specified, but in the final analysis the judge is given a wide, almost unfettered, discretion to excuse just about any conduct in respect of a work from being copyright infringement on the basis that it is 'fair use' of the work. The uncertainty as to what unauthorised uses of a work are allowed, or not allowed, brought about by this system is manifest. The parties to a dispute, and the public at large, will only know the answer to this question in each specific case once the case has been taken through to its final conclusion and all appeals have been exhausted, a process that could take several years from the commencement of the dispute.

It is widely accepted that the 'fair use' doctrine does not meet the three-step test. This seems self-evident since it defies logic that a judge's general power to make an ad hoc discretionary ruling on the particular facts of a case can qualify as a **certain special** case for purposes of copyright legislation and as required by the treaties.

It must be pointed out that every exception made to copyright comes at the expense of the author or copyright owner of the work. His/her right to derive remuneration in respect to the particular right in the bundle is extinguished. This deprivation should not lightly be

granted, nor should its ambit be wider than is necessary in the circumstances. The deprivation should only be imposed where it is clearly in the public interest that this should happen. Before granting an exception, the legislator must weigh up the rights of the author/copyright owner against the public interest. This entails applying particularly tests 2 and 3 of the three-step test. If too liberal an approach is adopted towards the granting of exceptions, the incentive provided to authors to produce original works is taken away and the public interest suffers in the long run due to a decline in the production of works, which impacts on the development of the arts and sciences.

In the CAB the legislator seeks to bestow generous bounty on the public at the expense of the author and in apparent disregard of his/her treaty guaranteed rights. The result is that the balance between authors' rights and the public, who become freeloaders, is thrown drastically out of kilter. In the process the legislator is riding roughshod over the three-step test and breaching our country's international obligations.

Comment 28

The CAB proposes the adoption of Fair Use. However, the legislative risk to rights holders is increased by the Fair Use open-ended exceptions (Karjiker 2021: 247). Although derived from Fair Use legislation in the United States, Fair Use in the CAB is not accompanied by the same legislative recourse for compensation in the event of infringements. The only recourse would be the courts of law, a costly process that would be prohibitive for most local publishers, let alone the small scholarly publishers.

The CAB's Fair Use differs from the current copyright law's Fair Dealing, which is based on fact, degree and impression (Karjiker 2021: 242):

> Fair use, or any form of open-ended exception, may cause South Africa to breach its treaty obligations under the Berne Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights, in particular, the so-called 'three-step-test'. (Karjiker 2021:250-1)

The proposed CAB is in violation of the three-step test set (applied consecutively) as set out in the Berne Convention, which stipulates that exclusive rights of a copyright holder may be limited, but any exception needs to meet these three requirements: it needs to be confined to certain cases, it should not conflict with the normal exploitation of the work and it should not unreasonably prejudice the legitimate interests of the copyright holder (Karjiker 249, 250). Under the CAB's proposed Fair Use aspect, it already fails on the first step.

Currently, licensing of content for use in course packs and other educational resources is managed by the Dramatic, Artistic and Literary Rights Organisation, DALRO. Copyright librarians at South African institutions report the extent of copyrighted content used for educational purposes to DALRO under a license agreement. In this way, publishers are able to recoup some of the costs for themselves and pay royalties to their authors. In a small market where sales of scholarly books are limited, this arrangement provides an important contribution to income from publication.

The experience of Canada with fair use and overly broad educational exceptions is instructive. Many universities have interpreted the Canadian legislation to mean that lecturers may freely copy content (as long as it does not exceed 10% of a work, a limitation

not included in the CAB), without paying compensation to rightsholders. (LePan 2016) As a result, publishers have suffered damages. In the words of one publisher:

> The danger is not that we will disappear as a publisher, but that our publishing program will become far smaller, far less interesting, and far less culturally significant. If we do receive reasonable compensation (whether in the form of a per copy fee or an overarching per student fee for all coursepack and related uses), we can continue to justify publishing culturally valuable but commercially iffy collections such as Native Poetry in Canada … But if we receive no compensation whatsoever, we simply can't continue to publish books of that sort; we cannot work for free. (Le Pan 2016)

It is reasonable to assume that publishing programmes in South Africa will be similarly affected. Commercially non-viable publications that would suffer – unless significant financial support is provided by institutions – include the works of first-time authors and early career academics, important but highly specialist research with a South African focus, and publications in indigenous languages.

CLAUSE 13: SECTION A-D

Comment 29
Section 13 of the CAB deals with the question of exceptions. It introduces various new sections containing novel exceptions.

The proposed new section 12A causes the undisguised invasion of the alien American fair use doctrine into our law. It allows judge-made fair use measures to become law and, as stated above, it offends against the Berne Convention and TRIPS. It thus furthers arbitrary deprivation of property and is contrary to Section 25 of the Constitution. It should be deleted in its entirety.

To the extent that section 12A's subject matter is not covered by the proposed new sections 12B to 12D (there is presently a measure of duplication of section 12A in them), these sections should be amended to incorporate some of the examples contained in section 12A. This situation highlights the fact that sections 12B to 12D, which are essentially in the nature of 'fair dealing' sections, are overlaid by the 'fair use' provisions of section 12A. Virtually every country in the world opts for one or the other of these systems. The CAB employs both, which is anomalous and excessive.

The new section 12B and 12D introduce new 'fair dealing' type exceptions and vary some of the existing exceptions. Each of these exceptions must be tested against the three-step test and where they do not satisfy that test, they must be removed or varied. By way of example section 12(1)(i) allows the making of **a** personal copy by an individual of entire works for non-commercial use without any qualification that the activity must be fair. Allowing unauthorised copying to this extent would destroy the market for most books. The exception does not meet tests 2 and 3 of the three-step test and the provision is unconstitutional.

Similarly, section 12D (1) permits a person to make multiple copies of works for educational and academic purposes, provided the copying does not exceed the extent justified by

the purposes. This could allow a lecturer to make copies of all the salient parts of a textbook for each member of his class of one hundred students, thus making it unnecessary for them to each purchase the textbook. This could be justified on the basis that each student requires a copy of such material in order to follow the course. The sales of textbooks could virtually dry up in these circumstances and the businesses of academic publishers and the livelihood of academic writers would be mortally affected by such activities.

Conscientious application of the three-step test to these new exceptions will result in a large number of them not passing muster. The legislator appears to have given scant attention to the three-step test, assuming that it is aware of its existence and applicability.

Comment 30

A review of the South African IP landscape is ongoing. See the link below. The first phase is complete. It will still be some time before a review of the copyright law is dealt with. CAB is putting the cart before the horse. It will be logical to finalise the IP policy, a holistic approach prior to finalising a new Copyright Act (which is sorely needed) All the Statutes mentioned in Phase 1 are interrelated. Once the policy is finalised, the drafting of new laws, with the assistance of experts with a broad experience and knowledge, should follow. In fact, a shortlist of members of such an expert committee (SACIP) was prepared and, as I understand it, is waiting for signing off by the responsible minister.
https://www.gov.za/sites/default/files/gcis_document/201808/41870gen518_1.pdf

The legislative amendment of the Copyright Act needs to start again from scratch and be looked at by a committee of experts with experience in practising IP law. Prof Dean speculated that the current drafters of the CAB had very little exposure to the practice of copyright law. He favoured the appointment of a new drafting committee and suggested that Judge Goldstone would make an excellent chairperson of such a committee.

C: PROPERLY CONSTRUING THE THREE-STEP TEST OF INTERNATIONAL COPYRIGHT LAW

Comment 31

The fair use provision in Section 12A of the CAB must be considered compatible with the three-step test as laid down in Article 9(2) of the Berne Convention, Article 13 of TRIPS, Article 10 of the WIPO Copyright Treaty (WTC), or Article 16(2) of the WIPO Performances and Phonograms Treaty (WPPT). The three-step test requires that limitations and exceptions (L&Es) 1.) apply in certain special cases only, that 2.) use must not conflict with the normal exploitation of a work (this notably seeking to ensure that authors must not suffer unreasonable economic damage) and 3.) that use must not unreasonably prejudice the legitimate interests of the author (this calling for a balance with the interests of the wider society, protecting access to works). While the World Trade Organisation's (WTO) dispute settlement body initially emphasised the first step (that L&Es may only cater for very clearly defined cases),[58] it has moved away from this position in the last years. Instead, it now favours a wider approach that looks at the test holistically, emphasising also the interests of society. In a much-celebrated recent decision, it thus allowed Australia to introduce plain-packaging of tobacco products in the endeavour of protecting public

[58] WTO, United States – Section 110(5) of the US Copyright Act, para. 6.62, Report of the Panel, WT/DS160/R (15 June 2000), para. 6.109.

health, even though this deprives trademark holders of their IP rights. In arriving at its decision, the panel refers to Article 7 of the TRIPS Agreement.[59] This is the clause setting out the objectives of TRIPS – and, as it were, of the international regime of IP rights protection as a whole. Article 7 emphasises that IP rights (thus also copyright) must contribute to *both* the promotion of innovation *and* the transfer and dissemination of (access to) knowledge.[60]

Hence, the emphasis cannot be on the first step as such, but all three steps must be read together. This notably also follows from the fact that transfer, dissemination, and access are aspects protected by international human rights law. Under Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT) of 1969, when interpreting a treaty (thus also Berne, TRIPS, WCT, WTTP, etc.), there *must* be taken into account, together with the context of the treaty terms, *any relevant rules of international law that are applicable in the relations between the parties*. This also reflects customary international law. This is the so-called principle of "systemic integration" in international law. It therefore requires that the three-step test of Berne, TRIPS, WCT, WTTP, etc., be read in conformity with human rights considerations relating to *access to* education, language, science, culture, health, socio-economic development, etc., as protected in the U.N.'s various human rights treaties, such as the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights, both of 1966, as also ratified by South Africa.[61] It may be noted that all these access aspects are also protected in the Bill of Rights of the South African Constitution.[62] In other words:

> [T]he three-step test must *perfectly mirror* the demands of human rights. Or, stated differently: the three-step test must permit any such use as constitutes an entitlement under human rights. Naturally, a solution that is legitimate in a developing country need not be so in an industrialized country.[63]

These considerations must inform the holistic reading of the test and cannot be rendered inapplicable by finding that an L&E does not pass the initial stage of the test. Such a limited reading conflicts with the VCLT and thus also Berne, TRIPS, WCT, WTTP, etc. In fact, it directly conflicts with Article 7 of TRIPS itself as it does not seek to establish a balance between innovation/creation and access.

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[59] WTO, Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, Report of the Panel, WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R (28 June 2018), para. 7.2402.

[60] As Christophe Geiger underlines, there is "[a] need to rethink copyright in order to adapt its rules to its initially dual character: 1) of a right to secure and organise cultural participation and access to creative works *(access aspect)*; and 2) of a guarantee that the creator participates fairly in the fruit of the commercial exploitation of his works *(protection aspect)*": Christophe Geiger, "Copyright as an Access Right: Securing Cultural Participation Participation through the Protection of Creators' Interests," in Rebecca Giblin and Kimberlee Weatherall (eds.), *What If We Could Reimagine Copyright?* (ANU Press, 2017) 73, 75 (emphasis added).

[61] The International Covenant on Economic, Social and Cultural Rights protects the rights to education, culture, and science in Articles 13, 15(1)(a) and (b), respectively. It also protects various aspects of the right to development. The International Covenant on Civil and Political Rights protects the right to freedom of expression and culture and language rights in Articles 19 and 27, respectively.

[62] South African Constitution, Section 16 (freedom of expression, freedom of science), Section 29 (education, language in education), Sections 30 and 31 (language and culture), and so on.

[63] Klaus D. Beiter, "Not the African Copyright Pirate is Perverse, But the Situation in which (S)He Lives: Textbooks for Education, Extraterritorial Human Rights Obligations, and Constitutionalization 'From Below' in IP Law," 26 *Buffalo Human Rights Law Review* (2020), 1, 54-55.

In achieving such balance, Article 7 provides WTO states with the necessary "policy space" to tailor intellectual property protection in a way that responds to domestic development concerns, taking account of local access to knowledge needs.[64] Accordingly, the famous 2002 Report of the U.K. Commission on Intellectual Property Rights finds that developing countries enjoy "policy space" in respect of national IP law under the three-step test in TRIPS:

> In order to improve access to copyrighted works and achieve their goals for education and knowledge transfer, … *[d]eveloping countries should be allowed to maintain or adopt broad exemptions for educational, research and library uses in their national copyright laws*. … In some cases, *access to scientific journals and books* at subsidized prices for a limited period would help greatly. In others, local publishers with limited markets need easy and inexpensive access to foreign books in order to *translate them into the local language*. In a different context, permission to *reprint books from the industrialised countries* in the original language is needed to serve [the local] population … unable to pay the high cost of imported books.[65]

This approach – and also the compatibility of the fair use doctrine with international copyright law – is confirmed by the leading international copyright scholars. In a *Declaration on a Balanced Interpretation of the Three-Step Test in Copyright Law*, formulated under the auspices of the renowned Max Planck Institute for Innovation and Competition in Munich, Germany, and signed by 30 of the world's best-known copyright scholars in 2008, it is thus emphasised that

1. The Three-Step Test constitutes an indivisible entirety.
   The three steps are to be considered together and as a whole in a comprehensive overall assessment.
2. The Three-Step Test *does not require limitations and exceptions to be interpreted narrowly*. They are to be interpreted according to their objectives and purposes.
3. The Three-Step Test's restriction of limitations and exceptions to exclusive rights to certain special cases *does not prevent*
   (a) legislatures from introducing *open ended limitations and exceptions [such as fair use]*, so long as the scope of such limitations and exceptions is reasonably foreseeable;

6. The Three-Step Test should be interpreted in a manner that respects the legitimate interests of third parties, including
   – *interests deriving from human rights and fundamental freedoms*.[66]

This position is reaffirmed in a proposed draft International Instrument on Permitted Uses in Copyright Law of this year, again signed by 15 of the world's leading copyright scholars. Article II(2) thereof states:

> [The three steps] shall be considered *as a whole* in a comprehensive overall assessment and must be interpreted in a manner that respects the legitimate interests of third parties, including *interests deriving from human rights and*

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[64] Henning Grosse Ruse-Khan, *The Protection of Intellectual Property in International Law* (Oxford University Press, 2016), para. 13.44.

[65] Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy* (Sept. 2002 Report of the U.K. CIPR, 3rd ed. 2003), 104 (own emphases) (internal quotation marks omitted).

[66] Christophe Geiger et al., "Declaration on a Balanced Interpretation of the Three-Step Test in Copyright Law," 39 *International Review of Intellectual Property and Competition Law* (2008), 707 (own emphases).

fundamental freedoms, interests in competition and other *public interests, notably in scientific progress and cultural, social or economic development*.[67]

It is the rendering of the three-step test as set out above that must be applied in assessing whether Section 12A, 12B, 12C, 12D and 19B and 19C of the CAB are permissible under international copyright law.

The analysis below will briefly address (only) Section 12A (fair use) and Section 12D (education) separately. For more detail on both and on all the other queried provisions, I refer to the Copyright Opinion mentioned under point 4.

D: INTERNATIONAL LAW

Comment 32

The President's letter states that the President refers the Copyright Amendment Bill back to Parliament "so that it may consider the Bills against South Africa's International Law obligations". However, section 79(1) of the Constitution permits referral back to Parliament only for constitutional issues. It is possible that in a limited number of highly specific cases a failure to comply with International Law has implications for the constitutionality of a legislative provision. However, the President's letter does not explain why any of the reservations on the CAB's compliance with international law raises a constitutional issue and cites several treaties to which South Africa is not a party.[68] We nevertheless examine each of the President's reservations and suggest possible amendments to respond to any legitimate concerns we identify.

E: SECTION 19D MARRAKESH TREATY

Comment 33

We propose that Parliament may add a reference to "authorised entities" in Section 19D to clarify the application of the cross-border provisions of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled. We emphasise, however, that we do not conclude that this clarification is required by the Constitution or to implement the Marrakesh Treaty.

The President's letter asserts that the Bill may not be in compliance with the Marrakesh Treaty, without giving any detail.[69] It has been claimed by some commenters that the CAB does not adequately authorise cross border trade in accessible format copies of works, as intended by the Marrakesh Treaty. We disagree.

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[67] Reto M. Hilty et al., "International Instrument on Permitted Uses in Copyright Law," 52 *International Review of Intellectual Property and Competition Law* (2008), 62 (own emphases).

[68] For further discussion of these points, *see* Samtani, Sanya, *The Domestic Effect of South Africa's Treaty Obligations: The Right to Education and the Copyright Amendment Bill* (2020). PIJIP/TLS Research Paper Series no. 61, at 31-39.

[69] South Africa is not currently a member of the Marrakesh Treaty. However, we recognise that one of Parliament's stated purposes for enacting the CAB is to put in place appropriate domestic legislation in order for South Africa to accede to the Marrakesh Treaty. In its current form, we believethat 19D is constitutionally required as the current Copyright Act does not contain any provisions at all to facilitate access to materials under copyright for persons with disabilities.

It is claimed that the Bill does not establish a mechanism for the cross-border trade in accessible format copies of works by so-called "authorised entities" -- a termused in Article 5 of the Marrakesh Treaty. Article 5.1 of the Marrakesh Treaty requires that member countries "shall provide" that accessible format copies of works "may be distributed or made available by an authorised entity to a beneficiaryperson or an authorised entity in another Contracting Party" (emphasis added). Article 5.2 provides that parties "may" meet this obligation through a specific provision of law for authorised entities. But Article 5.3 makes clear that countries donot need such a provision: "A Contracting Party may fulfill Article 5(1) by providing other limitations or exceptions in its national copyright law".

Section 19D(3) of the CAB promotes cross-border trade of accessible formatted works, including through authorised entities:

> (3) A person with a disability or a person that serves persons with disabilities may, without the authorisation of the copyright owner export to or import from another country any legal copy of an accessible format copyof a work referred to in subsection (1), as long as such activity is undertaken on a non-profit basis by that person.

Section 19D(3) is adequate to implement the cross border provision of the Marrakesh Treaty. By authorising cross border trade by "a person that serves persons with disabilities," the section clearly authorises cross border trade by legal persons, including authorised entities.[70] If Parliament desires to make this fact moreclear, it could add a definition of "authorised entity" and add the phrase "including an authorised entity" in Section 19D(3) after the words "a person that serves persons with disabilities." We emphasise, however, that these provisions are not required to implement the Marrakesh treaty.

Comment 34

*T*here is consensus that the CAB needs to be in compliance with the Marrakesh Treaty to Facilitate Access to Published Works for Person Who Are Blind, Visually Impaired or Otherwise Print Disabled. Many publishers have signed the Accessible Books Consortium charter in order to provide access for the disabled through formats that are accessible to the visually impaired. We, as publishers, have become increasingly aware and support compliance in terms of required formats that provide access, subject to recognizing authors' rights.

F: TECHNOLOGICAL PROTECTION MEASURES, WIPO COPYRIGHT TREATY

Comment 35

We find that no amendments to the Bill are needed for South Africa to accede to the WIPO Copyright Treaty (WCT), including in its definition of a technological protection measure. But, as with the Marrakesh Treaty, South Africa is not a party tothe Treaty, so compliance with it cannot raise a constitutional concern. Rather, an intent of the Bill is to allow South Africa to accede to the WCT.

[70] The term "person" in South African Law includes a legal person - i.e. an organization.

The President states that the WCT requires "legal remedies against the circumvention of technological measures used by authors to protect their works," implying that the Bill does not provide such protection. The Bill provides protections against circumventing technological protection measures, defined in Section 1(i)(a) as "any process, treatment, mechanism, technology, device, system or component that in the normal course of its operation prevents or restricts infringement of copyright in a work." This definition is consistent with the WIPO Copyright Treaty Art. 11, which requires "adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used … in connection with the exercise of their rights." There is no requirement in the WIPO Copyright Treaty to protect measures that control access to work for a non-infringing purpose. Accordingly, we find no amendment is needed in response to the President's objections.

G: TRADE AGREEMENTS

Comment 36

Many local publishers collaborate with international partners; it will be an insurmountable obstacle if South African copyright laws are in violation of international standards and treaties. South Africa is a signatory to the TRIPS Agreement (Trade-related Aspects of Intellectual Property Right). This Agreement, `Recognizing that intellectual property rights are private rights' (WTO sa: 320), binds trade partners to compliance with the Berne Convention for the protection of literary and artistic works (1971). It refers to 'a balance of rights and obligations' pertaining to intellectual property rights (WTO: 323).

Part II (WTO sa: 324-325) deals with 'Standards Concerning The Availability, Scope And Use Of Intellectual Property Rights', stipulating that even exceptions may `not unreasonably prejudice the legitimate interests of the right holder.' (WTO sa:325). The driving force for the recognition of intellectual property rights is `to encourage and reward creative work' (WTO sa: TRIPS: 1). The test for the CAB will be whether it meets these requirements. The dispute amongst legal experts is a matter of concern and should be resolved before the Bill is enacted.

H: OPEN ACCESS

Comment 37

Scholarly publishers in South Africa who are publishing in Open Access make use of the Creative Commons' set of user licenses (used by 48 countries around the world). The licenses provide authors and publishers a standardised way to grant public permission to use their work under copyright law. Two of the six licenses do not allow derivatives of work, making it possible for the author to obtain some income to cover the production cost of the Open Access work. Under the new CAB, there will not be compensation to copyright owners for derivative rights such as translation rights. This will mean a loss of income to the authors and/or publishers, while they would also not have any control over derivative versions in terms of quality assurance (refer to CAB 12 D,7f).

I: TEXTBOOOKS

Comment 38

Claims that textbooks in South Africa are more expensive than elsewhere in the world are not empirically supported. According to the Publishers' Association of South Africa (PASA 2014), South African textbooks are far less expensive than imported textbooks, apart from the benefit of the content being customized to reflect our local context. Should the CAB come into effect, fewer local authors and publishers will be incentivized to develop context-specific textbooks for South African users, and more imported textbooks will impose content developed for the Global North on local learners. This will undermine efforts to promote the decolonization of textbooks and other teaching resources. Should South African copyright law not adequately protect its authors' content, local authors will be driven to rather publish with global publishers. This will undermine growth in the local publishing industry and lead to a flow of local content being published outside of South Africa.

An economic impact assessment is needed on the effect of the CAB on the book publishing, distribution and sales industry. The PriceWaterhouseCooper (PWC) Report commissioned by PASA is the only *available* report to date seeking to quantify the potential effect of the CAB on the sustainability of local publishers. A key finding suggests a 33% decrease in sales…. In many cases the response to these negative impacts would be significant restructuring, retrenchments and – in some cases – business closure. On a weighted basis, a 30% decline in employment is expected in the event that the Bill is promulgated. It is also likely that the volume of imported publications will increase and exports will decrease. South Africa would become more dependent on imported knowledge production. (PASA 2017)

J: COMMENT FROM SCRIPTWRITER, AUTHOR, POET, ACTIVIST, SONGWRITER, MUSICIAN, AND ASPIRING FILMMAKER.

The section 79(1) of the constitution doesn't represent the creative people who work so hard, but they get nothing and I'm appealing to President to change it to accommodate creative people.

Copyright of authors/writers and scriptwriter must have ownership on their creative work.

Producers/ those who owns companies that host events such as music festivals must not be credited.

Section 6A,7A,8A,39(CG). (c,)22 (3)7B and 22A of the Bill provide incorrect information on authors/writers/scriptwriter and creative people.

Other angle that must be changed on the old Bill is the right of authors/writers/scriptwriter and creative people to own their respective work, trademarks, and copyrights.

The new Bill must favour creative people/authors/writers and scriptwriter, the right to ownership.

There are many loopholes in the old Bill that the National Assemblies must consider before the President sign the new Bill. We must review the amended Bill and the public must be

informed about it. Authors, writers, scriptwriter, and creative people must be recognised by the new Bill.

Other angle is Publishing companies that rob author, writers, and scriptwriter on their own creative work. All the sections of the old Bill on copyright must be changed, either performing arts and culture.

The Amended Bill must work in favour of creative people and not producers/records labels, and publishing companies who work on their behalf.

K: PUBLISHERS

Comment 39

The rights of creators of content need adequate protection. Artists' and authors' rights to compensation for their work are negated by the CAB's fair use and open list of exceptions (CAB 12A-12D, 19B and 19C). In addition, the 'CAB does damage to constitutional property rights. Fair use as proposed is unconstitutional in that it does not recognize or protect the property right aspect'. (Owen 2021a) The copyright exceptions should be revised and brought in line with the Berne Convention, TRIPS, Marrakesh and other international treaties on copyright, to which South Africa has or will ratify.

Publishers provide access to content. In the case of scholarly publishers, we make important research conducted in South Africa available to local (researchers, students, policy makers and the general public) as well as international audiences; our publications contribute to a re-balancing of the geopolitics of knowledge and promote the research conducted in the Global South. In light of the post-Covid19 austerity and policy initiatives, it is especially important that the financial basis for scholarly publishers to continue publishing excellent content is not taken away by shifting the emphasis only onto the demand for free content; in the long run, the local academy will become increasingly dependent on content sourced at greater cost from international publishers. Unless revised, the CAB with its Fair Use and open list of exceptions will place the local scholarly publishing industry in jeopardy and disable it from protecting the rights of its academic authors.

J: IMPLICATIONS FOR UNIVERSITY PLANNING AND RESEARCH RESOURCE MANAGEMENT

Comment 40

Intellectual Property Rights (IPRs), as modus for wealth creation, are being transferred onto previously unvalorised sectors beyond 'the market': cultural forms, fabric designs, folklore, knowledge of natural resources, dance steps, and so on. As such, IPR is central for development and innovation in 4IR information-led economies.

Weak copyright protection, however, disincentivises the creation of new and original content. The specific issue under consideration here revolves around the Copyright

Amendment Bill's (B-13B of 2017**)** (CAB) 'fair use' clause, widely debated in this journal[71] and elsewhere. The 'fair use' exceptions (Section 39B) is far more extensive than that of the USA, when coupled with an indiscriminate contract override clause, but with none of the protections like statutory damages that would discourage 'fair use' beyond the limits of fairness.

While theoretical arguments for fair use could be made, the practical implementation of the direct implications for authors to contest/challenge authorship and the protracted period of non-resolution, make it neither practically viable nor in line with an author's constitutional right to 'speedy justice'.

My concern here relates less to the constitutionality of the Bill, which has dominated discussion thus far. Rather, my concern relates to the a) potential impact of the Bill on the national research, creative and publishing economy, and b), the allocation and management of research and publication resources and rewards within universities themselves. The intricate complexities of the value chain remain largely a hidden transcript in our academic day-to-day work of teaching, research and administration. That's why getting to grips with the implications of the Bill is proving so difficult.

My conclusion is that a significant portion Department of Higher Education and Training (DHET) publishing incentive that currently finances research activities would be rerouted to meet publication charges were the Bill to be passed in its current form.

Are our institutions ready for the impending sea-change?

The CAB broadens the current Act's numerous exceptions such that unauthorised, unpaid and even unacknowledged use of an author's work is permitted if it is 'for education' – an undefined purpose wide open to mis/interpretation.

Promoters of the Bill, subject to certain corrections, do not also propose the retention of moral rights in the fair use clause.[72] The academic need for citation practice is, however, a key component of variability in the scholarly project.

The pro-Bill argument is that publishers are deliberately impoverishing students. In effect, the solution is to thus enlist educational authors and their publishers to cover state funding shortfalls, by tolerating unrestricted copying of printed materials. Research management, impact and performance measuring systems would become confused. Currently, a system of permanent identifiers helps to manage publication, but the proposed Bill will undermine such mechanisms. The ascription of a work to an author becomes all the more important with OA imperatives. Ascription is necessary for the academy to be able to identify research produced by its staff and students, and to motivate for funding opportunities. Ascription is also the technology on which all PID (permanent Identifier) systems are constructed - ORCiD, ISNIs and DOIs are the key identifiers used in this regard. The Bill as it stands is therefore at odds with current trends in higher education, and

[71] Tomaselli KG. South Africa's Copyright Amendment Bill: Implications for universities. S Afr J Sci. 2019;115(5/6), Art. #6283, 3 pages. https://doi.org/10.17159/ sajs.2019/6283

[72] Forere, M. et al, 10 May 2021, Joint Academic Opinion Re: Copyright Amendment Bill (B-13B of 2017).

research globally. Author attribution is central to output and may actually work against these initiatives/policies.

[…]The very wide-ranging definition of 'fair use' on materials to be used for 'educational purposes' is of grave concern to the Publishing Association of South Africa. The negative financial implications, as assessed by the PwC analysis[73], is that the Bill's extended version of fair use and its education exceptions are over-balanced towards users and prejudicial to creators.

AN illustration of the creation, re-creation, and appropriation reported in *Daily Maverick*, *Graeme Williams vs Hank Willis Thomas: Acceptable artistic appropriation — or just plain old theft?*

> https://www.dailymaverick.co.za/article/2018-09-17-graeme-williams-vs-hank-willis-thomas-acceptable-artistic-appropriation-or-just-plain-old-theft/

The graphic appropriation by Thomas without citation, might qualify as an example of 'fair use' in the USA, but it alienated Williams from the fruits of his labour, and his moral rights, as he was not consulted by appropriating artist. The educational exceptions in Section 12D might enable replications of such a case. The question is: to what extent can authors and publishers retain control over the ways in which their creations are used?

In publishing, local university Presses that lack sufficient institutional support will be directly affected. Some might close, merge and/or downsize. International publishers partnering with local presses might cease.

Full-time educational authors (especially of school and university textbooks) could be deprived of royalties, as might African-language authors when their books are adopted as class readers – a key market for indigenous language publications. Local textbooks will stall … with no sustainable back-up plan. Remember, local university Presses are inadequately resourced, unlike the international 'straw men' Big Five publishers […]

But this OA argument confuses access with content.

OA - a desirable format - will see a shift from 'reader-pays' (via libraries and campus bookshops) to 'author-pays', which can be prohibitively expensive, especially for emerging humanities and social sciences scholars publishing their first monographs. There is no consensus yet on how to sustainably fund OA monograph publishing. Economies of scale stretched across tens of thousands of subscribing libraries and millions of readers will be replaced with author-pays for readers-to-read. Under this scenario, funding is flipped as APCs will substitute for the cost currently borne by publishers.

Big tech companies are eyeing the digital future. The broader the 'fair use' regimes worldwide, the easier it will be for them to appropriate intellectual property.

The actually stated intention of big tech is to engage in information prospecting and appropriation. Their argument is that information is then be made 'free' to browsers and users (e.g., students, lecturers and researchers). […] *Whichever financial model is at play, commodification remains an outcome*. Thus, protecting rights is not just the preserve of

[73] Price Waterhouse Coopers, July 2017. The expected impact of the 'fair use' provisions and exceptions for education in the Copyright Amendment Bill on the South African publishing industry. https://www.publishsa.co.za/file/1501662149slp-pwcreportonthecopyrightbill2017.pdf

multinationals — all organisations and individuals, irrespective of their economic status, should be protected. The misplaced assumption that copyright is 'bad' because it protects the North-Atlantic assumes that the Global South has nothing worth protecting. Such a position will simply enable post-colonial mining of Southern ideas, designs, music and science.

For university administrators, the CAB is understood as 'a matter for the library' or is thought mainly to affect textbook production. However, the loss of homegrown textbooks will have implications for the decolonisation of curricula, one of the key performance indicators now listed in performance assessment categories, a response to the #feesmustfall movement. The downside will be that we will again become reliant on expensive international imports written for the general reader anywhere. The CAB will also incentivise South African academic and non-fiction authors to publish overseas, where their rights would not be subjected to the same restrictions and limitations.

The enactment of the CAB would mean that every one of South Africa's universities and tertiary colleges would only be required to purchase just one copy each of a book, from where photocopies can be made for students and extracts included in course packs and materials. This would most likely be done at the cost of the students, with no reward to the authors of the works, while the printing machine, paper and ink suppliers would reap the profits. Needless to say, this may have a catastrophic impact for educational, non-fiction and academic authors and their publishers. While this interpretation is contested by those supporting the Bill, this is not shared by the legal advisors consulted by PASA and the Coalition for Effective Copyright. This is another ambiguity that needs clarification and correction in the revision.

Research funding regimes will be directly impacted; hefty article processing charges and upfront book publishing subventions will be instituted as publishers will no longer absorb the risks and costs of publishing, leaving less funding for actual research expenses. Less work might be published locally, less often.

Contradictions for Universities

If authors' rights are to be restricted, then how does one square IPR with copyright policy? The University recognizes the institution as a repository of knowledge, generated through research and disseminated through applied research and consulting, teaching, community service and archiving. This knowledge is reflected in IP created in forms such as copyrights, patents, trademarks, designs, trade secrets and know-how. IP must be identified and properly managed for the mutual benefit of the university's community, the creator thereof, and society in general. Furthermore, appropriate. commercialisation of IP is the university's objective. In identifying and managing such IP, the University will uphold the rights of its IP creators. These will be recognised to further ensure that such IP is supportive of the primary function of the university - scholarship and good research.

If the CAB is to be supported by universities, then the contradiction is clear: Universities should place their patents, software and inventions into the public domain also, and allow tech companies to harvest them for their own profits. The one set of exceptions cannot operate to the exclusion of the other.

This Bill, meant to bring South Africa into the 21'st century, does not even have an exception for text and data mining. This is rather odd for a Bill that has extensive and specific exceptions that compliment and even duplicate the fair use exception. The major

STEM publishers already allow free text and data mining of content to which universities subscribe in any event[74].

Authors write in order to be read so they tend to support the free flow of information - but not the flow of free information. Reproduction under license is the solution to ensure that South African created information as an export commodity will earn its rightful share in the international commons. That's the basis of the 4IR.

Comment 41

1. There appears to be consensus that the current apartheid-era Copyright Act 1978 does not adequately realise the rights of people living with disabilities. All contributors to this comment agree that exceptions to copyright are required to remedy this constitutional issue. In substance, it appears that no contributor took issue with s 19D of the CAB. It is therefore submitted that the CAB's provisions relating to accessible format shifting, time shifting, and device shifting are thus urgently required.
2. All contributors appear to agree that the current Copyright Act 1978 is obsolete. Further, amendments are required to bring South Africa's laws in line with modern technology such as the internet. As we have set out in the rest of the report, some contributors pointed to specific provisions that indeed enable the modernisation of copyright in South Africa. These provisions include s 12A of the CAB. Noting that there was robust debate and therefore no consensus across the contributors on the inclusion of 'fair use' in the CAB, it is submitted that that Parliament must ensure that the provisions of the CAB relating to modernisation be retained. The importance of new technologies being used for research and innovation is noted.
3. On the related point of fair use and the CAB's compatibility with the three-step test in international law, contributions received can largely be divided into two positions – first, that exceptions must be of a 'certain special case' and that the exceptions under ss 12A-D do not fall within this category and therefore do not fulfil the three-step test; and second, the opposite view, that the three-step test according to the rules of public international law, cannot be interpreted in isolation and must be interpreted in line with the other international and constitutional obligations that bind South Africa, therefore that the CAB's provisions are a proper harmonisation of all of South Africa's obligations. While this is a question of legal interpretation, the view can be taken that *all* of South Africa's binding obligations must be fulfilled by Parliament. This includes human rights obligations which contain the right to the benefits of science and its applications as well as the objects of the TRIPS Agreement which bind states parties to implement and enforce intellectual property rights (including the three-step test) to the advantage of both producers and users in a way that promotes social and economic welfare. Therefore, whatever form the CAB takes in the future, this principle must not be neglected.
4. On the point of arbitrary deprivation of property, while some contributors submitted that the exceptions and limitations in ss 12A-D constitute a deprivation of property in this instance, others explained that only arbitrary deprivations are constitutionally

[74] The major international STM publishers already allow free text and data mining of content to which the university subscribes, is the 2017 STATEMENT OF COMMITMENT BY STM PUBLISHERS TO A ROADMAP TO ENABLE TEXT AND DATA MINING (TDM) FOR NON COMMERCIAL SCIENTIFIC RESEARCHING THE EUROPEAN UNION: https://www.stm-assoc.org/2017_05_10_Text_and_Data_Mining_Declaration.pdf.

invalid. If a deprivation of property can be shown, the latter contributors offer a rights-based basis for a potential deprivation therefore concluding that it would fail the arbitrariness test. The upshot of this is that the right against arbitrary deprivation (s 25 of the Constitution) is not engaged because the constitution only protects holders of property from being *arbitrarily* deprived of their property – it does not protect non-arbitrary deprivations. It is submitted that Parliament must ensure that what it considers to be the correct position on arbitrary deprivations of property informs the position it adopts in relation to the exceptions in ss 12A-D, 19B and 19C.

5. Some contributors discussed the importance of comprehensive exceptions and limitations for libraries, archives, museums and galleries that are absent from the Copyright Act 1978. In doing so, they pointed to the woeful lack of a legal framework to enable mass digitisation and preservation of cultural heritage. Other contributors did not comment on this, neither did they dissent from it.
6. ASSAf has recently supported South Africa's TRIPS waiver that aims to put in place an emergency response to the COVID-19 pandemic by securing a commitment that all intellectual property treaties be interpreted in a manner that does not impede the realisation of the rights to health, to seek, receive and impart information, to education, and to freely participate in cultural life and share in scientific advancement and its benefits, while protecting the moral and material interests of authors. After understanding the current landscape created by the apartheid-era Copyright Act 1978 set out by the contributors, it is submitted that Parliament must act urgently to amend the current Copyright Act 1978 or else it will create an incongruent situation where South Africa's own copyright laws cannot do domestically, what it is asking for on the international plane.

5. Final remarks

The intention of the Academy is to ensure that the voices of the scholarly community are heard within this debate by collecting, collating and submitting this commentary.

A large volume of material was received in response to the call for comment. It should not be construed that the length of any part of the material included in this document indicates a judgement on the part of ASSAf on the balance of opinion in a contested scope: content has been included to allow commentators to explain their views and present illustrations. In view of the contrasting opinions expressed, this collection presents concerns from the commentators themselves, rather than a critical interpretation by, or opinion of, ASSAf.

The Academy has sought to inform academics and institutions, to hear the issues, and to forward community comment. Sound copyright protection and Intellectual Property Rights are vitally important for South Africa, for research, for sciences in the broad sense, and for innovation.