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Submission on the Copyright Amendment Bill [B13B – 2017] & Request to present at the public hearing

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Legal Opinion – Copyright Amendment Bill (CAB) – [redacted][*]

The President queries the compatibility of Section 12A, 12B, 12C, 12D and 19B and 19C of the Copyright Amendment Bill (CAB) with the three-step test as laid down in the international copyright treaties to which South Africa is a party, and further with Section 25 of the Constitution, which provides protection against arbitrary deprivation of property.

I write this legal opinion as an expert on both international and national copyright law and human rights law. Regarding the latter, I focus on the right to education, the right to enjoy the benefits of scientific progress and its applications, and linguistic human rights.

Inter alia, I am the author of the global standard work on the right to education in international law:

> Klaus D. Beiter, *The Protection of the Right to Education by International Law: Including a Systematic Analysis of Article 13 of the International Covenant on Economic, Social and Cultural Rights* (Martinus Nijhoff, 2006).

I am also the author of the seminal article on the international three-step test of copyright law in its relation to education uses:

> 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), 1-79.

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Content

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1. Properly construing the three-step test of international copyright law

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),[1] 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 health, even though this deprives trade mark holders of their IP rights. In arriving at its decision, the panel refers to Article 7 of the TRIPS Agreement.[2] 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.[3]

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.[4] It may be noted that

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1 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.

2 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.

3 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 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).

4 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

all these access aspects are also protected in the Bill of Rights of the South African Constitution.[5] 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.[6]

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.

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.[7] 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.[8]

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*

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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.

5 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.

6 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.

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

8 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).

(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*.[9]

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 fundamental freedoms*, interests in competition and other *public interests, notably in scientific progress and cultural, social or economic development*.[10]

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.

2. Compliance of Section 12A (fair use) with the international three-step test and Section 25 of the Constitution

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.[11]

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."[12]

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

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9 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).

10 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).

11 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.

12 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.

> [T]he U.S. fair use limitation is compatible with the "three-step test."[13]

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 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.[14]

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.[15]

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.[16] 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.

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[13] 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).

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

[15] 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.

[16] 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)

Altogether, many arguments count in favour of fair use:[17]

- 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.[18]

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 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.

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

[18] 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).

3. Compliance of Section 12D (education) with the international three-step test and Section 25 of the Constitution

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.[19] 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.[20] Subsequent studies have confirmed this.[21] 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."[22] 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.[23] The Committee underlines that "free" encompasses textbooks as an indirect cost.[24] 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."[25] Regarding another state party, the Committee categorially stated that it "is concerned about indirect costs in primary education, such as for textbooks."[26] All these considerations must play a role when applying the three-step test.

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19 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).

20 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.

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

22 *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.

23 General Comment No. 13, *supra* note 19, para. 6(b).

24 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.

25 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.

26 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.

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.[27]

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.[28] As a mechanism agreed to by 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.

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[27] 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.

[28] 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 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.

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.[29] 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.[30]

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."[31]

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 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).[32] The *Limpopo Textbook* case decided by the Supreme Court of Appeal confirms and concretises this for textbooks. These must be available to

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[29] 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.

[30] 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.

[31] 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.

[32] 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.

each learner in each subject at the beginning of the academic year.[33] Excluding even a few students from access to textbooks amounts to discrimination (Section 9 of the Constitution).[34] 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.

[33] 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.

[34] *Ibid.* para. 49.