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Third Joint Academic Opinion on the South African Copyright Amendment Bill [B13D-2017]

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THIRD JOINT ACADEMIC OPINION ON THE SOUTH AFRICAN COPYRIGHT AMENDMENT BILL [B13D-2017]

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ABSTRACT

South Africa is in the process of reforming its copyright law, attempting to update and align it with constitutional rights and existing and prospective international treaty obligations. A coalition of copyright, human rights, and constitutional law experts have been engaging in the ongoing national and provincial public participation processes. This working paper chronicles the law reform process until April 2023, covering related constitutional court litigation, and then goes on to set out the submissions made on behalf of the group of experts. The process offers insights into the different but crucial roles played by the legislature and the judiciary in aligning copyright with the constitution. It also provides valuable comparative lessons for other jurisdictions seeking to reform their copyright laws.

ABSTRACT	1
I. A BRIEF HISTORY OF THE CAB: LAW REFORM AND LITIGATION	2
II. THIRD JOINT ACADEMIC OPINION RE: COPYRIGHT AMENDMENT BILL	10
[B-13D OF 2017].....	10
A. <i>Introduction</i>	<i>10</i>
B. <i>Request to Participate in Oral Hearing.....</i>	<i>12</i>
C. <i>PROVISIONS RELATED TO PEOPLE WITH DISABILITIES</i>	
<i>Clause 22, CAB and Clause 31 CAB.....</i>	<i>12</i>
D. <i>PROVISIONS RELATED TO FAIR USE CLAUSE 13, CAB.....</i>	<i>15</i>
E. <i>PROVISIONS RELATED TO TECHNOLOGICAL PROTECTION</i>	
<i>MEASURES Clause 29 and 31, CAB.....</i>	<i>16</i>
III. CONCLUSION: WHAT NEXT?	18

I. A BRIEF HISTORY OF THE CAB: LAW REFORM AND LITIGATION¹

Over the past decade, South Africa has been involved in attempts to update its obsolete copyright laws and bring them out of the apartheid-era and in line with the Constitution of the Republic of South Africa, 1996. This has taken the shape of legislative amendments to the Copyright Act of 1978 and its attendant regulations. A coalition of copyright, human rights and constitutional law experts, referred to as the CAB (Copyright Amendment Bill) Academic Team, have been engaging with national and provincial parliaments' public participation processes. Written collaboratively by the members of the CAB Academic Team, the Third Joint Academic Opinion (February 2023), that forms the body of this working paper, analyses the most recent version of the Copyright Amendment Bill [B13D-2017] making its way through the National Council of Provinces in Parliament. This opinion follows the group's submissions on a previous version of the Bill [B13B-2017] that were submitted to the National Assembly in previous rounds of

¹ This is lightly adapted and updated from Sanya Samtani, 'A Short Legislative History' in KD Beiter et al 'Copyright Reform in South Africa: Two Joint Academic Opinions on the Copyright Amendment Bill [B13B-2017]' PER/PELJ 2022 (25) <<http://dx.doi.org/10.17159/1727-3781/2022/v25i0a13880>>. The Third Joint Academic Opinion is written jointly by the listed authors and updated and put in context by Sanya Samtani, DPhil (Oxon) BCL (Oxon) BA LLB (Hons) (NALSAR) Senior Researcher, Mandela Institute, University of the Witwatersrand Email: sanya.samtani@wits.ac.za ORCID: <https://orcid.org/0000-0003-0448-8798>.

public consultation, namely the First Joint Academic Opinion (May 2021) and the Second Joint Academic Opinion on the Proposed Changes November and December 2021 (January 2022).² This contribution locates the CAB in its legal historical context and sets out where we are now, as of March 2023.

The process of legislative reform began in 2009,³ with the Department of Trade, Industry and Competition (currently the DTIC, formerly the DTI) commissioning a series of studies.⁴ The DTI, in 2010, subsequently established the Copyright Review Commission (the CRC), headed by Justice Farlam, to assess various concerns surrounding collecting societies' unfair distribution of royalties to musicians and composers.⁵ Amongst other things, the CRC recommended that the DTI begin the process of amending the Copyright Act of 1978 'to improve access to education, regulate collecting societies effectively, and facilitate fair and speedy payment of royalties to rightful owners'.⁶ Accordingly, in July 2015, draft amendments to the Copyright Act were published for public comment along with the National Intellectual Property Policy. An early version of the CAB was introduced to the National Assembly.⁷

The Bill was tagged by Parliament's Joint Tagging Mechanism as an ordinary bill that did not affect the provinces (under s75 of the Constitution).⁸ The

² These opinions are available at KD Beiter et al 'Copyright Reform in South Africa: Two Joint Academic Opinions on the Copyright Amendment Bill [B13B-2017]' PER/PELJ 2022 (25) <<http://dx.doi.org/10.17159/1727-3781/2022/v25i0a13880>>.

³ It must be noted that in 1998, the Music Industry Task Team was established to review the destitute condition of artists. This led to limited amendments to the Copyright Act 98 of 1978 in 2002, regarding needle time. Here, we focus on the origins of the CAB that is currently under consideration by parliament.

⁴ Denise Nicholson, 'The Copyright Amendment Bill: Its genesis and passage through Parliament', LIASA-in-touch: Vol 20, Issue 2 (June 2019). <<https://infojustice.org/archives/41167>>.

⁵ DTI, Copyright Review Commission Report (2011) para 1.1.1. <https://www.gov.za/sites/default/files/gcis_document/201409/crc-report.pdf>.

⁶ 'Budget Vote Address delivered by Dr Rob Davies, Minister of Trade and Industry', (DTI, 22 July 2014) <<http://www.thedti.gov.za/the-dti-budget-vote-address-delivered-by-dr-rob-davies-minister-of-trade-and-industry-22-july-2014/>>.

⁷ Department of Trade and Industry Invitation for the Public to Comment on the Copyright Amendment Bill 2015, Government Gazette 39028, 27 July 2015. See also, 'Trade and Industry hosts consultative conference on Copyright Amendment Bill, 27 Aug' (The DTI, 20 August 2015) <<https://www.gov.za/speeches/dti-hosts-conference-copyright-law-changes-2015-08-20-20-aug-2015-0000>>. For the text of the amendments, see, 'Copyright Amendment Bill 2015' <https://libguides.wits.ac.za/ld.php?content_id=15668791>. Notably, this is the first version of the CAB wherein amendments regarding the creation of accessible format copies of works for people with disabilities appears.

⁸ The South African Parliament consists of two houses of parliament: the National Assembly and the National Council of Provinces. A bill tagged under s 75 does not mean that the National Council of Provinces is uninvolved – rather it entails that once the National Assembly passes the Bill, the delegates of the National Council of Provinces vote individually to either pass the Bill, or propose amendments to it. The Bill then returns to the National Assembly which can decide whether to accept the amendments and ultimately pass or reject the Bill after which it goes to the President for assent. The role of the National

CAB went through a process of public participation in the form of further comments, consultations, and multiple stake-holder workshops.⁹ In May 2017, the CAB was reintroduced in the National Assembly as a substantially revised Bill. Further public comments were sought, leading to the Bill being revised once again in 2017 after three days of public hearings and stakeholder engagement; and multiple times in 2018, until it was passed by the National Assembly in December 2018.¹⁰ Once passed by the National Assembly, the CAB was presented before the National Council of Provinces per ordinary constitutional procedure ('NCOP'). On 28 March 2019, the NCOP passed the CAB and the Bill was sent to the President for assent in order for it to become law.¹¹

At this stage, the President was bound to either sign the CAB to make it law, or refer it back to the National Assembly in the event that he had reservations about its constitutionality.¹² Approximately 15 months after the CAB was passed by both houses of Parliament, in May 2020, Blind SA, a national organisation that advocates for the rights of people with visual and print disabilities, filed a lawsuit against the President for an 'unreasonable delay'¹³ in making a decision on the CAB.¹⁴ According to Blind SA the delay led to an enduring violation of their rights of access to information in accessible formats.¹⁵ This violation was exacerbated during the covid-19 pandemic, which began to affect South Africa in March 2020.

In the lead up to the lawsuit, news reports indicated that the President faced pressure by the industry lobby and consequently international trade partners – in particular, the European Commission and the USA – not to sign the CAB into law.¹⁶ In October 2019, the Office of the US Trade Representative called

Council of Provinces is limited, but not insubstantial.

⁹ See generally, 'Copyright and Related Issues: Copyright Amendment Bill 2015' (Wits LibGuide) <https://libguides.wits.ac.za/Copyright_and_Related_Issues/SA_Copyright_Amendment_Bill_2015>.

¹⁰ See for a timeline of the CAB, 'Bill history: Copyright Amendment Bill (B13-2017)' (Parliamentary Monitoring Group) <<https://pmg.org.za/bill/705/>>.

¹¹ Constitution, s 79. Coupled with the Copyright Amendment Bill is the Performers Protection Amendment Bill ('PPAB'), that seeks to amend the Performers Protection Act in order to update the law to respond to technological changes amongst other issues. We do not discuss the PPAB in our submissions. Our focus is on the CAB.

¹² Pursuant to section 79(1) of the Constitution.

¹³ This argument was made pursuant to section 237 of the Constitution that requires constitutional obligations to be performed without delay.

¹⁴ See Blind SA's letter of demand at Blind SA, 'Letter to the President re: the Copyright Amendment Bill' (7 February 2020) <https://libguides.wits.ac.za/ld.php?content_id=52484314>.

¹⁵ Blind SA 'Blind SA serves papers on the President and others at the Constitutional Court in respect of the Copyright Amendment Bill' (8 June 2020) <<https://blindsa.org.za/2020/06/08/blind-sa-serves-papers-on-the-president-and-others-at-the-constitutional-court-in-respect-of-the-copyright-amendment-bill/>>.

¹⁶ Laura Kayali, 'How the U.S. and European Union pressured South Africa to delay copyright reform' (Politico, 28 June 2020) <<https://www.politico.com/news/2020/06/28/copyright-reform-south-africa-344101>>.

for a review of South Africa's status within the Generalised System of Preferences programme (US preferential tariff system for developing countries) on the basis that the CAB did not enable 'effective' and 'adequate' protection of copyright holders.¹⁷ The European Commission, on the other hand, was more covert with 'missives from the EU's delegation to South Africa asking the government to delay the reform'.¹⁸

The lawsuit became moot when the President made a decision on the CAB in June 2020, to refer the CAB back to Parliament citing reservations as to its constitutionality.¹⁹ Although Parliament is constitutionally bound to consider these concerns, it retains the discretion to make its own determination as to the CAB's constitutionality. In constitutional law, a referral does not require a fresh review of the entire Bill – only those aspects that the President listed in his letter.

There were six reservations outlined in the President's referral letter: that the Bill was incorrectly tagged under section 75; that the royalty provisions may constitute "retrospective and arbitrary" regulation of constitutional property (assuming without demonstrating the applicability of section 25) and relatedly that the Minister's power to promulgate regulations was impermissible; that there was inadequate public participation on "fair use"; that copyright exceptions in respect of libraries and education may run the risk of arbitrary deprivation of constitutional property; and that in general these provisions are potentially incompatible with South Africa's international copyright obligations.²⁰

¹⁷ 'USTR Announces GSP Enforcement Actions and Successes for Seven Countries' (USTR, 25 October 2019) <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/october/ustr-announces-gsp-enforcement>. After the hearing in 2020, South Africa's status remained unchanged and it was not placed on the Special 301 Watch List. The Special 301 Report is an annual review of the intellectual property laws of States that have trade relations with the United States of America. The Watch List and Priority Watch List comprise of those States that, in the view of the Office of the US Trade Representative, have inadequate or ineffective IP laws that may unfairly disadvantage US copyright holders among other concerns. The consequences of this include the initiation of dispute settlement proceedings at the World Trade Organisation, the retraction of unilaterally granted trade benefits, and the imposition of unilateral sanctions among others.

¹⁸ Laura Kayali, 'How the U.S. and European Union pressured South Africa to delay copyright reform' (Politico, 28 June 2020) <<https://www.politico.com/news/2020/06/28/copyright-reform-south-africa-344101>>. See also, list of documents acquired by former Minister for European Parliament, Julia Reda, in response to Freedom of Information requests <https://www.asktheeu.org/en/request/7916/response/26626/attach/12/Gestdem%202020%202472%20REDA%20List%20of%20documents.pdf?cookie_passthrough=1>. See also, list of copyright holders in Europe asking for further intervention <https://www.asktheeu.org/en/request/7916/response/26627/attach/10/Doc%2033%20Ares%202020%202496211%20Meeting%20Report%20Minutes%20TRADE%201444%20Redacted.pdf?cookie_passthrough=1>.

¹⁹ Pursuant to section 79 of the Constitution.

²⁰ See, Office of the President of South Africa, Referral of the Copyright Amendment Bill [B13B-2017] and the Performers Protection Amendment Bill [B24-2016]

The National Assembly Portfolio Committee on Trade and Industry began considering the six concerns raised by the President in August 2020. After debating these issues for approximately a year, in June 2021, the Portfolio Committee agreed with the President's reservations on tagging, and recommended that the Joint Tagging Mechanism re-tag the CAB as a section 76 Bill.²¹ The Joint Tagging Mechanism did so,²² out of caution.²³

In May 2021, in order to consider amendments to respond to the President's reservations on educational and library exceptions, fair use, and international law, the National Assembly published a call for written and oral submissions by the public. Parliament received over 90 written submissions and public hearings took place online in August 2021.²⁴

Our First Joint Academic Opinion (May 2021) submitted to the National Assembly, as part of the public consultation process on the President's reservations, concluded that the CAB was constitutionally defensible as it was, and that some provisions of the CAB that were referred to Parliament by the President were constitutionally required on the basis that they fulfilled the rights to equality and non-discrimination, equality, dignity, freedom of expression and information, and access to and participation in cultural life. In respect of the final reservation on international law, our First Joint Academic Opinion points out that the Constitution is supreme in South Africa, and not international law – especially not those treaties that South Africa is not yet party to. The First Joint Academic Opinion offered analysis and proposed minor textual amendments to further clarify the above issues. These minor

<https://static.pmg.org.za/200818ramaphosa_on_copyright_amendment_bill.pdf>.

²¹ This action meant that once the National Assembly's Parliamentary Portfolio Committee on Trade and Industry finalised its recommendations on the other five reservations, and adopted its report on the Bill, the CAB would be required to go through the NCOP's participatory processes that require public hearings be held and opportunities for oral and written submissions be provided in all nine provinces as well as at the national level. In our First Joint Opinion at p 3, we explain that re-tagging the Bill is arguably unnecessary. The Constitution describes a process requiring a greater provincial role in legislation (ie., tagging as a section 76 Bill) only if it 'falls within a functional area listed in Schedule 4.' See, *Democratic Alliance v President of South Africa and Others* 2014 (4) SA 402 (WCC) para 94-95. The regulation of copyright, and all intellectual property law, does not fall within a functional area listed in Schedule 4. See also, the advice of the Parliamentary Legal Advisor on 5 May 2021 <https://libguides.wits.ac.za/ld.php?content_id=61553221>.

²² See 'Announcements, Tablings and Committee Reports', Item 3, 18 June 2021 (<https://www.parliament.gov.za/storage/app/media/Docs/atc/55566f1a-ee5d-4f2f-9759-315caf4f1270.pdf>).

²³ S Nakhjavani, Legal Opinion on the Copyright Amendment Bill for ReCreate (5 May 2022) <https://www.parliament.gov.za/storage/app/media/Links/2022/5-may/RECREATE_Opinion_In_re_Copyright_Amendment_Bill1.pdf> [13] citing S Cowen, J Berger, M Nxumalo, Legal Opinion on the Copyright Amendment Bill (13 October 2019) <<https://www.re-createza.org/legal-opinion-on-the-bill>>.

²⁴ Portfolio Committee on Trade and Industry, 11 August 2021 <<https://www.youtube.com/watch?v=76wB4BIP2Ss>>; Portfolio Committee on Trade and Industry, 12 August 2021 <<https://www.youtube.com/watch?v=pXcdwUwyrM&t=29766s>>.

amendments were for the purposes of clarity, and not in response to any perceived constitutional defects.

The Portfolio Committee considered the submissions made by stakeholders in November 2021. The Committee then published a call for comments on further amendments to the CAB on 03 December 2021.²⁵ The CAB Academic Team made submissions on these further amendments in the form of a Second Joint Opinion to meet the deadline of 28 January 2022.²⁶

While the parliamentary process at the National Assembly was ongoing, Blind SA's central concern remained: that people with disabilities continued to be excluded from cultural life due to the absence of an accessible format shifting provision in the Copyright Act.²⁷ The CAB's section 19D contains a provision to this effect as well as legal framework to facilitate cross-border exchange of accessible works. But the coming into force of this provision is bound up with the passing of the CAB. On this basis, and the fact that further delay was likely in passing the CAB given that approximately one year after referral, the Bill remained in Parliament, was retagged and required to undergo additional legislative processes at the NCOP, Blind SA initiated fresh litigation.²⁸

BlindSA, represented by SECTION27, filed a suit against the Minister of Trade, Industry and Competition (the Minister who introduced the CAB in Parliament), the Minister of International Relations and Cooperation, the representatives of both houses of Parliament (Speaker of the National Assembly and Chairperson of the National Council of Provinces), and the President of the Republic of South Africa in early 2021.²⁹ Four deponents with visual and print disabilities, including the head of BlindSA; a former Constitutional Court judge; a novelist and PhD researcher; and a school teacher, explained how the Copyright Act limits their rights by failing to

²⁵ Portfolio Committee, 'Copyright Amendment Bill: Additional Amendments' (PMG, 28 January 2022) <<https://pmg.org.za/call-for-comment/1114/>> accessed 01 March 2022.

²⁶ The Portfolio Committee took a decision to publish only part of the amendments that were being effected, despite the fact that the unpublished amendments materially affected the published amendments. After stakeholders conveyed this to the Committee, the Committee published a second document, which contained both sets of amendments.

²⁷ See, Blind SA's campaign 'Braille is no crime, unlock the chains and ratify the Marrakesh Treaty' <<https://blindsa.org.za/2020/09/13/brailleis-no-crime-unlock-the-chains-and-ratify-marrakesh-treaty/>>. See also, Youtube, 'Braille is No Crime' <<https://www.youtube.com/watch?v=g2p3KRgYHMU>>.

²⁸ BlindSA, 'Court case to end the Book Famine' (8 September 2021) <<https://blindsa.org.za/2021/09/08/court-case-to-endthebookfamine/>>. See also, Linda Daniels, 'Challenge to the constitutionality of 'outdated' Copyright Act heads to court' (7 April 2021, Daily Maverick) <<https://www.dailymaverick.co.za/article/2021-04-07-civil-society-challenge-constitutionality-of-outdated-copyright-act-in-court/>>

²⁹ *Blind SA v Minister of Trade, Industry and Competition* [2021] ZAGPPHC 871 ('Blind SA HC'). The Court heard arguments from the amici curiae (the International Commission of Jurists, Media Monitoring Africa and ReCreate) on the rights of all people to freely impart and receive information and the interpretation of South Africa's existing obligations under international human rights law and copyright law.

provide for accessible format shifting. The matter was listed on the unopposed roll as the respondents expressed an intention to abide by the Court's judgment.³⁰

The High Court held that the Copyright Act is unconstitutional to the extent that it unfairly discriminates against people living with visual and print disabilities as it effectively prevents them from accessing materials under copyright. According to standard constitutional procedure, an order of constitutional invalidity by a High Court must be confirmed by the Constitutional Court for it to be operational.³¹ Bearing this in mind, the High Court also held that in the interim, to avoid further deprivation of access, proposed s 19D of the CAB [B13B-2017 at the time] would be read into the current Copyright Act immediately making accessible format shifting legal in South Africa.

On 12 May 2022, the Constitutional Court of South Africa heard the case. The parties remained the same, and the matter once again remained unopposed, with all the respondents depositing an intention to abide by the Court's decision.³² The Minister of Trade, Industry and Competition filed written submissions and made oral arguments to assist the Court but did not oppose. The unanimous judgment was handed down on 21 September 2022, penned by Acting Justice Unterhalter.³³ The Court held that the Copyright Act was unconstitutional to the extent that it unfairly discriminated against people with visual disabilities and violated several constitutional rights by requiring authorisation by the copyright holder for a person with visual and print disabilities to convert published works into accessible formats to read them.³⁴ With regard to remedy, although one of the proposals before the Court was an interim reading-in of proposed s 19D of the CAB, the Court crafted its own remedy s 13A drawing on the language of the Marrakesh VIP Treaty.³⁵ The Court, recognising the ongoing law reform process in the form

³⁰ Blind SA HC [26].

³¹ Constitution, s 172(2)(d) read with Superior Courts Act, s 15(1)(b) and rule 16(4), Rules of the Constitutional Court.

³² The International Commission of Jurists and Media Monitoring Africa intervened once again as amici curiae. In addition, Professor Owen Dean, a prominent retired copyright law academic, also intervened as an amicus despite not having done so at the High Court level.

³³ *Blind SA v Minister of Trade, Industry and Competition and Others* [2022] ZACC 33 ('Blind SA CC').

³⁴ Blind SA CC order para 1. The constitutional rights that the judgment held were violated included: right to equality and non discrimination, the right to dignity, the freedom of expression, particularly, the right to receive and impart information, the right to education, and the right to participate in cultural and linguistic life. See, Blind SA CC [64]-[68], [71]-[73].

³⁵ A full analysis of the judgment is available at Sanya Samtani, 'Case note: Copyright Exception to Convert Works into Formats Accessible to People with Visual and Print Disabilities', 72(3) GRUR International (2023) 300-316. See also, for a full analysis of the remedial proposals before the Court, Caroline B Ncube and Sanya Samtani, 'Copyright, Disability rights, and the Constitution: *Blind SA v Minister for Trade, Industry and*

of the CAB, suspended its declaration of invalidity and gave Parliament a period of 2 years from the date of the judgment to pass the CAB – in particular, the provisions relating to people with disabilities.³⁶ In the interim, in order to offer immediate relief to people with visual and print disabilities and to rectify the unconstitutionality that it identified, the Court read-in its own remedy section 13A which legalises accessible format shifting and renders it a non-infringing use.

In the meanwhile, the legislative process continued on, with the National Assembly amending the CAB to address the President’s reservations and to give effect to the submissions it received through the public participation process, finally adopting its report that contained CAB [B13D-2017] on 1 September 2022.³⁷ This is the version of the Bill that the Third Joint Academic Opinion comments on.

At the time of writing, the NCOP Select Committee on Trade & Industry, Economic Development, Small Business, Tourism, Employment & Labour has published a call for oral and written submissions on the CAB [B13D-2017] and has conducted public hearings on 21 February 2023, 7 March 2023 and 14 March 2023.³⁸ According to standard parliamentary procedure, all nine provinces in the country must issue calls for public consultation on the Bill. At the time of writing, the provinces of Mpumalanga, Gauteng, Northern Cape, Eastern Cape, Western Cape, and KwaZulu-Natal have published calls for oral and written comments.³⁹ The Third Joint Academic Opinion has been submitted to all of the above. At this stage, the entirety of the Bill is open to comment on (unlike the preceding process at the National Assembly after the President referred the CAB back with reservations). Parliament is also concerned with ensuring that its proposed section 19D is aligned with the Constitutional Court’s judgment in the *Blind SA* case.⁴⁰

Competition’ CCR XIII (forthcoming, December 2023).

³⁶ *Blind SA* CC order.

³⁷ National Assembly, Unrevised Hansard, 1 September 2022 <<https://pmg.org.za/hansard/35448/>>.

³⁸ PMG, ‘Copyright Amendment Bill: public hearings’ 21 February 2023 <<https://pmg.org.za/committee-meeting/36362/>>; 7 March 2023 <<https://pmg.org.za/committee-meeting/36488/>>; 14 March 2023 <<https://pmg.org.za/committee-meeting/36546/>>.

³⁹ PMG, ‘Provincial Legislatures: Copyright Amendment Bill & Performers Protection Amendment Bill’ <<https://pmg.org.za/call-for-comment/1245/>>.

⁴⁰ See, Sabinet, Bill Tracker ‘Copyright Amendment Bill’ <<https://discover.sabinet.co.za/document/2890116>> stating that ‘The Select Committee is scheduled to meet as follows: 14 March 2023 – Hearings; 28 March 2013 - Briefing by Advocate Van der Merwe, the Senior Legal Adviser from the Legislative draft unit in Parliament on analysis in respect of the Constitutional Court judgement on the Bill.’

II. THIRD JOINT ACADEMIC OPINION RE: COPYRIGHT AMENDMENT BILL [B-13D OF 2017]

A. *Introduction*

We welcome the call for comments published by National and Provincial Parliaments in February 2023 and offer the enclosed Joint Academic Opinion on the Copyright Amendment Bill [B13D-2017]. This Opinion builds on our previous two Opinions which were submitted to the National Assembly Portfolio Committee on Trade, Industry and Competition. Those Opinions have been published and can be accessed at: Beiter, K. D., Fiil-Flynn, S. M., Forere, M., Klaaren, J., Ncube, C., Nwauche, E., Rens, A., Samtani, S., & Schonwetter, T. (2022). Copyright Reform in South Africa: Two Joint Academic Opinions on the Copyright Amendment Bill [B13B 2017] Potchefstroom Electronic Law Journal, 25, pp 1 – 45 <<https://doi.org/10.17159/1727-3781/2022/v25i0a13880>>.

Our sustained engagement with the law-making process in the National Assembly led to many of our recommended changes being effected in the current Bill. In this Opinion, we focus only on those few sections of the Bill that we believe require additional changes to meet the concerns we raise below. We submit that the sections that we do not comment on in this Opinion are defensible policy choices of the legislature and conform to established international and comparative copyright law and practice, and should be retained in their current form.

For example, we submit that the provisions regulating collecting societies bring South Africa in line with international practice and should be retained as is.⁴¹ At present, there is *no* comprehensive legislation governing the activities of the collecting societies on behalf of their members.⁴² Through ss 22B-22F, the Bill gives effect to judicial⁴³ and executive⁴⁴ recommendations to ensure that authors, composers, performers, and copyright owners remain

⁴¹ For instance, Kenya Copyright Act, 12 of 2001 (as amended), Chapter VII and the Copyright (Collective Management) Regulations, 2020 Legal Notice No. 178, Kenya Gazette Supplement No. 161, 11 September 2020; Nigeria Copyright (Collective Management Organisations) Regulations, 2007 promulgated pursuant to Copyright Act, Chapter C28, Laws of the Federation of Nigeria 2004; Canada Copyright Act (R.S.C., 1985, c. C-42). As of December 2022, Singapore launched public consultation on subsidiary legislation on Regulation of Collective Management Organisations available at: <<https://www.mlaw.gov.sg/news/public-consultations/public-consultation-on-draft-regulations-for-cmos/>>.

⁴² The current regulations only cover the music industry. See, Regulations on the Establishment of Collecting Societies in the Music Industry, GN 517 in GG 28894 of 1 June 2006.

⁴³ *Shapiro v South African Recording Rights Association Limited*, unreported case no 14698/04 (6 November 2009).

⁴⁴ Department of Trade and Industry, Copyright Review Commission Report, 2011, pp3-6 available at: <https://www.gov.za/sites/default/files/gcis_document/201409/crc-report.pdf>

in charge of, and actively control, the collective management of their copyright and related rights, and consequently actually receive fair remuneration for their creative work.⁴⁵

As we described in our previous Opinions, and as recently held by the Constitutional Court in reference to people with disabilities,⁴⁶ the prevailing apartheid-era Copyright Act 98 of 1978 (“the Copyright Act” or “the Act”) violates the Bill of Rights in several respects. We submit that the Copyright 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 and non-discrimination, under section 9 of the Constitution;⁴⁷
- does not permit uses of works to the degree required for freedom of expression, in violation of the right to receive and impart information, under section 16 of the Constitution;
- 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, under section 29 of the Constitution;
- does not allow for materials to be translated into underserved languages, in violation of the rights to use languages of one's choice and to participate in cultural life, under sections 30 and 31 of the Constitution; and
- does not adequately protect the rights of authors, performers⁴⁸, and other creators to fair remuneration and fair contract terms, as needed to promote the right to dignity and the principle of decent work, under section 10 of the Constitution.

The Copyright Amendment Bill promotes the Constitution and the Bill of Rights by amending the deficient Copyright Act with provisions modelled on

⁴⁵ DO Oriakhogba, *Copyright, Collective Management Organisations, and Competition in Africa: Regulatory Perspectives from Nigeria, South Africa and Kenya* (Cape Town: JUTA, 2021).

⁴⁶ *Blind SA v Minister of Trade, Industry and Competition and Others* [2022] ZACC 33 (“*Blind SA CC*”).

⁴⁷ The Constitutional Court suspended the declaration of constitutional invalidity and read in a court-crafted remedy (s 13A) to rectify this unconstitutionality in the interim period. The Court provided Parliament with a period of two years, beginning 21 September 2022, to legislate in this manner. Once Parliament has done so, Parliament’s remedy will permanently substitute for the Court’s interim remedy. See *Blind SA CC* order.

⁴⁸ The Performer’s Protection Act 11 of 1967 is the primary regulatory framework for performers’ rights. Parliament has recognised that this Act also requires amendments as it does not adequately protect the rights of performers to fair remuneration and fair contractual terms. Parliament is currently engaged in a process of amendment by the Performer’s Protection Amendment Bill [B24D-2016]. Our submissions are confined to the Copyright Amendment Bill.

examples that exist in other open and democratic societies.⁴⁹ In particular, the Bill amends the Copyright Act to provide for uses to promote access by people with disabilities, to permit “fair use” to enhance freedom of expression and other purposes, to permit educational uses, including by increasing the ability to fairly use materials that are excessively priced in one of the most unequal countries in the world, to permit translation of materials into South African languages, and to require fair royalties to authors and creators so that they may have a decent standard of living.

In our submission, we are mindful of the constitutional imperative that all organs of State must respect, protect, promote and fulfil the rights in the Bill of Rights.⁵⁰ This extends to Parliament’s law-making function across all subject matter, including copyright. At the same time, we understand that the Bill of Rights is not absolute and that Parliament may limit rights through a law of general application under certain conditions. Where Parliament exercises its discretion to legislate to limit rights, it must ensure that these limitations are reasonable and justifiable in an open and democratic society and can thus pass constitutional muster.⁵¹ We submit that this approach - one that considers the impact of statutory copyright on the Bill of Rights - has been correctly taken by the National Assembly and that, considered as a whole, an appropriate balance has been struck between users and creators in the Act as the Bill proposes to amend it. We adopt the same approach in our submissions that follow.

B. Request to Participate in Oral Hearing

We would like to indicate our interest in presenting oral submissions before the Committee on the issues we set out below and on any other issues that the Committee deems useful.

C. Provisions Related to People with Disabilities, Clause 22, CAB and Clause 31 CAB

1. Section 19D(1)

We propose that, in order to avoid any interpretation that could lead to its unconstitutionality, s 19D be amended to comply with the Constitutional Court’s judgement in *Blind SA v Minister of Trade, Industry and Competition*.⁵² The first sentence of s 19D(1) was interpreted by the Court to require regulations for its operationalisation.⁵³ This was one of the reasons that the Court did not read-in s 19D(1) as an interim remedy and instead crafted its own interim remedy, s 13A,⁵⁴ that applied with immediate effect.

⁴⁹ See, for instance, CAB, ss 12A-D, 19C, 19D.

⁵⁰ Constitution of South Africa, 1996, ss 7(2), 8(1).

⁵¹ Constitution, s 36(1).

⁵² *Blind SA v Minister of Trade, Industry and Competition and Others* [2022] ZACC 33 (“Blind SA CC”).

⁵³ *Blind SA CC* [102], [108], [109].

⁵⁴ *Blind SA CC* [112], order para 6.

The Court held that “immediate redress”⁵⁵ was required to rectify the unconstitutionality of the Copyright Act. The Court recognised that further delays would exacerbate the unfair discrimination experienced by people with visual and print disabilities,⁵⁶ and that the appropriate remedy was one that “avoids the need for government authorisation”.⁵⁷

Recommendation

Delete the phrase “as may be prescribed and” from s 19D(1).

Amended clause

The amended clause would read as follows: s 19D(1) “Any person who serves persons with disabilities, including an authorised entity [...]”.

2. *Section 19D(2)(a)*

Section 19D(2)(a) restricts the scope of its application to those activities that are a result of the operation of s 19D(1). This means that persons with disabilities are permitted to only use accessible format copies made under s 19D(1). Since s 19D(1) relates to persons serving persons with disabilities and authorised entities only, this excludes the possibility of a blind person already having lawful access to a work (say, through an e-library) and converting it to an accessible format on their own; or already having lawful access to a work that is in an accessible format and needing to lawfully share such copies, say for educational purposes. This creates limitations on the actual practice of making and sharing accessible format works within the disability community and runs the risk of perpetuating further unfair discrimination. The lawfulness of sharing and using accessible format copies is already covered by the definition of copyright infringement under s 23(2) of the Act as well as the internal limitations of s 19D(2) as relating solely to facilitating access for persons with disabilities.

Recommendation

Delete the phrase “as a result of an activity under subsection (1)”.

Amended clause

The amended clause would read as follows: s 19D(2)(a) “A person to whom the work is communicated by wire or wireless means may, without the authorisation of the owner of the copyright work [...]”.

3. *Section 19D as a whole*

We propose, to avoid further litigation on the grounds of unfair disability discrimination, that the scope of s 19D remains extended to persons with disabilities across the spectrum. The Constitutional Court, in *Blind SA*, understood its mandate as limited to visual disabilities on the basis that the

⁵⁵ *Blind SA CC* [102].

⁵⁶ *Blind SA CC* [66], [102].

⁵⁷ *Blind SA CC* [109].

affidavits and evidence before it related to the discrimination experienced by people with visual and print disabilities.⁵⁸ By law, courts are limited in their interpretation to the case and issues presented by parties to the suit before them. Hence the Court crafted s 13A which only addressed people with visual and print disabilities. However, the purport of the CAB is to address *all* forms of disabilities, therefore s 19D is drafted more broadly. Parliament's role is broader than the Court's in this regard, and must consider the analogous impact of copyright on all people with disabilities across the spectrum.⁵⁹ We submit that this is required by the United Nations Convention on the Rights of Persons with Disabilities ("UNCRPD") to which South Africa is a party and bears obligations.⁶⁰

Recommendation

To pass s 19D, with the suggested changes listed above, and to retain its scope as catering for all forms of disabilities.

Amended clause

None needed.

4. Section 28P(2)

We propose that s 28P(2) be deleted as it replicates the requirement of authorisation by the copyright owner that renders accessible format shifting near impossible. This requirement was considered by the Constitutional Court as the key obstacle to accessible format shifting and the basis for the unfair discrimination ruling.⁶¹ Moreover, the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled ("Marrakesh VIP Treaty") requires that where contracting parties decide to provide protection against circumvention of technological protection measures ("TPMs") in their laws, this protection must not prevent accessible format shifting in any way, whether in the law or in its effect.⁶² Given that Parliament's stated objective has been to legislate to enable ratification of the Marrakesh VIP Treaty, we submit that Parliament must take note of this mandatory obligation to "safeguard the rights of print disabled persons against the uses of TPMs that interfere with Marrakesh VIP Treaty rights".⁶³ Such an exception to facilitate circumvention of TPMs for

⁵⁸ *Blind SA CC* [104].

⁵⁹ World Intellectual Property Organisation report, prepared by B E Reid and C B Ncube, 'Revised scoping study on access to copyright protected works by persons with disabilities' SCCR/38/3 (2019) available at: <https://www.wipo.int/edocs/mdocs/copyright/en/sccr_38/sccr_38_3.pdf>.

⁶⁰ UNCRPD, art 30(3) that states that 'States Parties shall take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.'

⁶¹ *Blind SA CC* [67].

⁶² Marrakesh VIP Treaty, art 7.

⁶³ LR Helfer, MK Land, RL Okediji, JH Reichman, World Blind Union Guide to the Marrakesh VIP Treaty (Oxford University Press, 2017) 150. See also, at 153, the statement

people with disabilities is common practice, reflected in the EU Infosoc Directive⁶⁴ as well as the regulations implementing the US Digital Millennium Copyright Act (“DMCA”) by the US Library of Congress.⁶⁵ Should Parliament retain this provision, it would roll back the effect of the Constitutional Court judgement, leading to further discriminatory outcomes for people with disabilities.

Recommendation

Delete s 28P(2).⁶⁶

Amended clause

None needed as this is a recommended deletion.

D. Provisions Related to Fair Use Clause 13, CAB

5. Section 12A(a)(i)

Section 12A(a) adds an open, general exception that can authorise use of a work if that use is “fair” according to a four part balancing test similar to that specified in many fair use and fair dealing countries.⁶⁷ The exception is “open” to potentially any purpose by inclusion of the words “such as” before the list of exemplary purposes. The openness of the exception permits courts to balance the rights of authors with those of users as required by fundamental human rights and as permitted by the so-called “three step test” in international law.⁶⁸ This openness makes the exception “future-proof” in that it can apply to fair uses that are not immediately conceivable by the legislature. Open general exceptions exist in many laws around the world, including open fair dealing countries like Malaysia, countries following the “fair use” formulation,⁶⁹ and countries that use the three step test as an

that, “An express legislative or administrative exemption best achieves the object and purpose of the Marrakesh VIP Treaty in general, and of Articles 4 and 7 [of the Marrakesh VIP Treaty] in particular.”

⁶⁴ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, paras 51–52.

⁶⁵ Exemptions to Prohibition against Circumvention, 37 C.F.R. § 201.40(b)(2) (2015).

⁶⁶ Our recommendation will result in s 28P(1) reading similar to the New Zealand Copyright Act 1994, s 226E(1) that states “Nothing in this Act prevents any person from using a TPM circumvention device to exercise a permitted act.”

⁶⁷ For examples, see J Band and J Gerafi, *Fair Use/Fair Dealing Handbook* (May 7, 2013) available at SSRN: <<https://ssrn.com/abstract=2333863>>.

⁶⁸ See C Geiger, DJ Gervais and M Senfleben, “The Three-Step-Test Revisited: How to Use the Test’s Flexibility in National Copyright Law” (November 18, 2013) *American University International Law Review*, Vol. 29, No. 3 (2014), pp. 581-626, available at SSRN: <<https://ssrn.com/abstract=2356619>>.

⁶⁹ N Elkin-Koren and NW Netanel, “Transplanting Fair Use Across the Globe: A Case Study Testing the Credibility of U.S. Opposition” (2020) *Joint PIJIP/TLS Research Paper Series 50* available at:

<<https://digitalcommons.wcl.american.edu/research/50>>.

enabling general exception, such as Thailand.

The key value of the openness of the exception is its ability to adapt to new uses over time. Such flexibility limits the need for frequent legislative intervention in the future. The value of the example purposes is to increase clarity and predictability. To this end, we recommend that the example purposes include “information analysis” as do recent copyright amendments in many countries.⁷⁰ The issue here is that new research methodologies allow computers to help researchers read and analyse information, including in copyrighted works such as books, articles and web pages.⁷¹ These “text and data mining” methods are “used in many machine learning, digital humanities, and social science applications, addressing some of the world’s greatest scientific and societal challenges, from predicting and tracking COVID-19 to battling hate speech and disinformation.”⁷² The current proposed fair use exception should be sufficient to authorise text and data mining methodologies. However, to give researchers a clearer signal, an explicit reference to information analysis (or computational analysis) research methods could be added to the list of presumptively authorised purposes.

Recommendation

Retain the section in its current form, and after “research”, add the phrase “, including informational analysis”.

Amended clause

The amended clause would read as follows: ‘(i) Research, including informational analysis, private study or personal use, including the use of a lawful copy of the work at a different time or with a different device [...].’

E. Provisions Related to Technological Protection Measures, Clause 29 and 31, CAB

6. Sections 27(5B) and 28O

We propose that ss 27(5B) and 28O be replaced by civil liability provisions. Section 27(5B) criminalises the use, provision, and possession of technologies on the basis that these technologies could be used to circumvent technical protection measures and then infringe copyright. The WIPO Copyright Treaty (“WCT”) states that countries “shall provide adequate legal

⁷⁰ See, for a scoping study and a list of countries that have included such an exception in their laws, World Intellectual Property Organisation report prepared by Guilda Rostama, ‘Scoping Study on the Impact of the Digital Environment on Copyright Legislation adopted between 2006 And 2016’ SCCR/35/4 (2017) available at: <https://www.wipo.int/edocs/mdocs/copyright/en/sccr_35/sccr_35_4.pdf>.

⁷¹ See Sean Fiil Flynn et al, *Legal reform to enhance global text and data mining research: Outdated copyright laws around the world hinder research*, SCIENCE Vol 378, Issue 6623 pp. 951-953 (Dec 2022) available at <<https://www.science.org/doi/10.1126/science.add6124>>.

⁷² Id.

protection and effective legal remedies against the circumvention of effective technological measures that are used by authors [...] and that restrict acts, in respect of their works, which are not authorised by the authors concerned or permitted by law.”⁷³ The WCT does not require *criminal* penalties and permits circumvention for uses authorised by exceptions and limitations.

Leading jurisdictions prefer *civil* remedies for circumvention⁷⁴ and civil remedies are also a common consequence for copyright infringement under our current Copyright Act.⁷⁵ When circumvention includes technological acts that are criminal in nature, such acts are already extensively dealt with in dedicated cybercrime legislation.⁷⁶ If Parliament elects to criminalise circumvention of TPMs as part of copyright law, the Bill should clearly indicate that the requisite criminal intent is required.⁷⁷

Recommendation

Replace criminalisation of circumvention with civil penalties including damages and interdicts for circumvention of technical protection measures.⁷⁸ This requires that ss 27(5B) and 28O be deleted from the Bill and replaced by a provision deeming circumvention and trafficking in anti-circumvention devices to be an infringement of copyright.

Amended clause

Delete ss 27(5B) and 28O and insert in its place:

“Section 23A

Subject to s 28P any person who, at a time when copyright subsists in a work that is protected by a technological protection measure applied by the author or owner of the copyright—

(a) intentionally circumvents that effective technological protection measure in order to infringe copyright when that person is not authorized to do so; or

(b) makes, imports, sells, distributes, lets for hire, offers or exposes for sale or hire or advertises for sale or hire, a technological protection measure circumvention device or service and

knows that the device or service will, or is likely to be used to, infringe copyright in a work protected by an effective technological protection measure; or

⁷³ WIPO Copyright Treaty, art 11. The requirements of the WIPO Performers and Phonograms Treaty in respect of technological protection measures is the equivalent to that in the WIPO Copyright Treaty.

⁷⁴ See Canada Copyright Act (R.S.C., 1985, c. C-42), s 41 (treating circumvention as an infringement of copyright subject to an interdict or damages).

⁷⁵ See Copyright Act, s 24.

⁷⁶ Cybercrimes Act 19 of 2020, Chapter 2.

⁷⁷ To accomplish this we recommend: insert “intentionally” before “circumvents” in S27(5B)(c); Insert “intentionally” before “circumvent” in S28O(4); Delete “has reason to believe” in S28O(1) and (2)(b); Insert “to their knowledge” before “such” in S28O(2)(a).

⁷⁸ We leave open the question of whether criminal liability is an effective/appropriate deterrent to copyright infringement in the rest of the CAB and the Act.

(c) provides a service to another person to enable or assist such other person to circumvent an effective technological protection measure when they know that the service will, or is likely to be used, by that other person to infringe copyright in the work;⁷⁹ is deemed to have infringed copyright in the work which infringement is actionable under s 24.”

7. *Section 28P(1)*

The wording of s 28P(1) is too narrow to achieve its objective. We propose a minor amendment to rectify this. Technological protection measures can prevent people including people with disabilities, learners and artists from engaging in lawful uses of works permitted by the Act. Section 27(5B) seeks to impose criminal liability for engaging in uses that Parliament expressly authorises subject to certain exceptions. Section 28P(1) is intended to permit these lawful uses, however its language refers only to exceptions. But not every lawful use is in the form of an exception. Sections 12C and 12D are not labelled as exceptions and may be better termed limitations. The memorandum to the Bill, preamble to the Bill and s 19D(2) refer to both limitations and exceptions. Lawful uses include those permitted by regulation and statutory licences such as those in Schedule 2. To avoid a lack of clarity whether a lawful use is technically an exception or not, all lawful uses should be included.

Recommendation

Extend the ambit of the clause to every lawful use but retain the reference to exceptions to ensure clarity.

Amended clause

Insert the words “by law”, resulting in the amended clause reading as follows: “(a) An act permitted by law, including in terms of any exception provided for in, or prescribed under, this Act; or [...]”.

III. CONCLUSION: WHAT NEXT?

After the process of provincial public participation is complete, the relevant Committees submit their recommendations to the provincial legislatures, which will then take a position on the Bill in the form of their negotiating mandates and subsequently their voting mandates.⁸⁰ The nine provincial delegations will vote accordingly at the NCOP.⁸¹ The NCOP will deliberate and decide whether to reject the CAB, pass an amended version of the CAB,

⁷⁹ The prohibition on publishing information that might enable circumvention in ss 27(5B)(c) and 28O(3) infringes the right to receive and impart information in s 16(1)(c) of the Bill of Rights and is unlikely to survive a constitutional challenge. An equivalent provision is omitted from the recommendation.

⁸⁰ Mandating Procedures of Provinces Act, 2008 enacted pursuant to s 65(2), Constitution.

⁸¹ Constitution, s 65(1).

or pass the CAB as is. Each provincial delegation casts one vote and a majority of five out of nine provinces must vote in favour for the CAB to pass. If the CAB is passed by the NCOP without amendments, it goes directly to the President for his assent.⁸² If an amended CAB is passed by the NCOP, the CAB goes back to the National Assembly for it to consider. If the National Assembly then passes the version of the CAB as amended by the NCOP, the CAB goes to the President for his assent.⁸³

However, if the NCOP rejects the CAB, or if the National Assembly rejects the CAB as amended by the NCOP, the Bill is referred to a Mediation Committee and the procedure set out in the Constitution is followed.⁸⁴

⁸² Constitution, s 76(1)(b).

⁸³ Constitution, s 76(1)(c).

⁸⁴ Constitution, s 76(1)(d)-(k).