Realising Human Rights in South African Copyright Legislation

Report on Fundamental Rights, and Global Copyright Legislative Best Practise for Access to Knowledge in South Africa

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Executive Summary

The Bill of Rights sets out fundamental human rights which in turn give rise to access to knowledge requirements. Recent research on the 1978 Copyright Act finds it to be deficient in enabling access to knowledge, and that the Act itself restricts access to knowledge. Some of the restrictions on access to knowledge infringe fundamental rights, and render the 1978 Copyright Act putatively unconstitutional.

Fundamental rights affect every part of South African law, including copyright law. They cannot be dismissed as irrelevant or subordinate to other interests. The Constitution is the supreme law and any legislation inconsistent with it is invalid (s2). Every branch of government has a positive duty to advance the rights in the Bill of Rights (s7). Fundamental rights may only be limited as far as permitted in the Bill of Rights. A critical factor in assessing whether a limitation on a fundamental right in legislation is constitutional is whether there is a "less restrictive means" of attaining the purpose of the legislation. Discrimination against persons with disabilities is prohibited (s9). The provisions of the Copyright Act preventing print impaired persons from using technology to read like everyone else discriminate against the print disabled. Everyone has the right to education (s29) and to receive and impart information (s16), taken together these require access to learning materials which the Copyright Act currently prohibits. The ban on parallel import is not required to achieve the purpose of Copyright law nor by the Berne Convention or the WTO-TRIPS agreement, and is an unconstitutional infringement of the rights to education (s29) and to receive and impart information (s16).

These restrictions on fundamental rights could be cured by adopting legislative best practise from other countries which enables access to knowledge. Legislative best practise from other jurisdictions does not resolve every access to knowledge issue. It does however provide the best immediate solution for the unconstitutionality of the Copyright Act. Legislative best practise from other jurisdictions is an indication of "less restrictive means" of achieving the purpose of copyright legislation. Legislative best practise from other jurisdictions may be assumed to be compliant with South Africa's obligations under the Berne Convention and the WTO-TRIPS agreements, and it provides existing legislative language which may thus be implemented quickly to enable access to knowledge for a generation of South Africans, while longer policy processes to completely re-write South African copyright law are under way.

The New Zealand Copyright Act provides an example of how to permit parallel import of legitimate copyright goods from elsewhere. The fair use provision which protects freedom of expression in the United States can protect freedom of expression in South Africa. The Canadian Copyright Act offers an exception in favour of sensory-disabled persons.

Introduction

That there is a problem of access to knowledge in South Africa is not a novel observation. Neither is the potential breadth of the phrase "access to knowledge. Some five years ago researchers investigating access to knowledge in Southern Africa observed.

> "As a concept, knowledge covers vast ground and has multiple meanings. In the present day, it is frequently encountered through the term 'knowledge economy,' which is usually used to refer to the importance of knowledge as a contemporary

> commodity – an undeniable fact, even if it puts a big idea in a utilitarian cage. Consequently, it becomes important to acknowledge both the normative and pragmatic foundations of this concept. As Peter Drahos succinctly puts it: 'Knowledge underpins everything, including economies'...To circumscribe 'knowledge' would be a foolhardy exercise... 'Access' is a similarly fraught term. One could begin by considering that knowledge is accrued in different ways, by both the structured system of education and cultural encounters at large. One might consider that access to these resources can be by different means: the printed and spoken word, television, the Internet, and many other media. One might also consider that systems of learning must be compliant with learners' needs, in the case of either disabled learners or distance learners, to name but two possible groupings."[1]

The report begins by considering access to knowledge in South Africa as a human rights issue, and then assesses the extent to which the 1978 Copyright Act fails to meet the human rights standards of the Bill of Rights. The first chapter begins by surveying a number of the most prominent access to knowledge requirements of the fundamental rights in the South African Bill of Rights. This is followed in Chapter 2 by a summary of the current access to knowledge research on the South African Copyright Act of 1978. This chapter draws heavily on two recent reports which find the South African Copyright Act severely deficient in respect of access to knowledge, reprising their conclusions to inform the inquiry into the constitutional implications of these deficiencies in Chapter 3. This chapter briefly outlines several prominent A2K issues, and their human rights dimensions in South Africa, and finds that the South African Copyright Act is open to a number of constitutional challenges. It is neither possible nor desirable to exhaustively examine every access to knowledge issues arising in connection with the 1978 Act and its potential constitutional ramifications. Instead the report focuses on several salient deficiencies of the Copyright Act.

The report then considers selected examples of legislative best practise which enables access to knowledge in other countries focussing on those access issues in respect of which the 1978 Copyright Act is most vulnerable yo constitutional challenges. Chapter 4 discusses how such these examples may be useful in legal reform in South Africa, particularly for the immediate amendment of the Copyright Act to enable access to knowledge while longer processes seek optimal solutions for the problems addressed.

The conclusion discusses opportunities for legislative innovation in South African copyright law, listing a number of issues for which no suitable legislative best practise were found in other jurisdictions. These issue are important, and may even be addressed by adopting legislative best practise from other jurisdictions. However unlike three issues dealt with the inquiry into appropriate legislative best practise does not yield an immediate answer. The report recommendations the urgent amendment of the 1978 Copyright Act in three key

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[1] A. Rens, A. Prabhala and D. Kawooya *Intellectual Property, Education and Access to Knowledge in Southern Africa* (2006) TRALAC, UNCTAD and ICTSD. Available at http://www.iprsonline.org/unctadictsd/docs/06%2005%2031%20tralac%20amended-pdf.pdf, subsequently published in *Intellectual Property and Sustainable Development: Development in a Changing World,* Ricardo Meléndez-Ortiz and Pedro Roffe (eds), Elgar Publishing (2010)

respects.

Why consider legislative best practise which enables access to knowledge from other jurisdictions? Developing countries have spent considerable energy at the World Intellectual Property Organization (WIPO) making the case that when it comes to intellectual property law one size does not fit all. While the legal history, and socio-economic milieu in each country is unique the examination of legislative best practise which enables access to knowledge is useful for a number of reasons examined in the second part of the report. Adopting legislation from other countries that enables access to knowledge has important advantages under the current globalised intellectual property regime, in which the WTO-TRIPS agreement has severely constrained the policy space for developing countries to craft appropriate intellectual property systems. If the legislation in another country has not evoked a challenge under the Trade Related aspects of Intellectual Property Agreement, that is a rough but ready test to determine that it passes muster under the TRIPS agreement. Adopting such legislative language thus provides a relatively quick and efficient means for a legislature, such as the South African Parliament to enable access to knowledge and to repair some of the obvious deficiencies of a Copyright Act.

Legislative best practise which enables serves two further important functions in the human rights analysis of the 1978 Copyright Act, by demonstrating the putative unconstitutionality of a restriction in the Act by showing less restrictive means of achieving the same purpose and serving as the basis for a remedy in a constitutional challenge. The reasons for considering legislative best practise which enables access to knowledge are therefore specific to the South African constitutional context in which the pre-constitutional 1978 Copyright Act is fails to provide the access to knowledge required by the Bill of Rights. Some of the provisions are found in the laws of developed countries, but it is noteworthy that those countries have not sought to export their access to knowledge provisions to developing countries, instead insisting on ever greater monopoly rights. Reference to specific access to knowledge provisions of a particular country does not constitute a general argument for South Africa to imitate the copyright legislation of those countries.

Historically provisions to enable access to knowledge have often been neglected in developing countries. The first intellectual property laws applicable to most developing countries were imposed by colonial administrations, concerned primarily with securing the rights of rights holders based in the colonising country. Post independence most developing countries have had few resources to devote to crafting appropriate developing property rules. In many cases developing countries have relied for expertise on international agencies which have exhibited a tendency to be captured by powerful rights holder interests from the developed world. There have been dramatic changes since the beginning of the 1990's, developing countries hadn't fully understood how the WTO-TRIPS agreement constrained their policy space when they were confronted with additional treaties such as the WIPO Copyright Treaty, bilateral trade agreements, which invariably contain an intellectual property clause, and ongoing campaigns financed by rights-holders located in developed countries for ever expanding rights and ever more draconian enforcement.

1. Human Rights and Access to Knowledge in South Africa

Access to knowledge can be analysed through a number of different lenses. An economic

analysis shows that without access to critical knowledge, especially learning materials, people have fewer opportunities to participate in the economy, are less skilled and therefore less productive, and have poorer health and other welfare outcomes. The macro-economic consequences of limited access to knowledge are a less competitive economy as a result of lower production, weaker technology, less high tech innovation, and consequent less competitive positioning in the global value chain. In a political theory analysis knowledge empowers both individuals and classes, lack of knowledge dis-empowers individuals and classes. Access to knowledge is directly implicated in the power structures of the body politic. Access to knowledge is also often cast as a developmental issue. The recently completed African Copyright and Access to Knowledge project; an eight country multi-disciplinary comparative study of the access to knowledge and copyright legislation in Africa articulates this framing:

> "It appears that 20th-century intellectual property policymaking, including copyright policymaking, was dominated by the belief that, because some protection is good, more protection is better. This belief manifested itself in a century's worth
>
> of international treaties, national laws and local practices that continuously raised levels of copyright protection. Harmonisation was the ostensible justification, but it only occurred in one direction: upwards. The result has been criticised as a one size (extra-large) fits all mode of protection. The beginning of the 21st century foreshadows a new phase in global intellectual property governance, characterised neither by universal expansion nor reduction ofstandards, but rather by contextual 'calibration'. And systemic calibration is taking place, based on a cognisance of the positive and negative implications of intellectual property for broad areas of public policy.In essence, a newly emerging intellectual property paradigm is based on a richer understanding of the concept of development. While development was once defined
>
> as mainly an issue of economic growth, there is now a more nuanced view, a view that emphasises the connections between development and human freedom."[2]

The insights gained from these analyses are critical to increasing access to knowledge. The 'new' developmental perspective acknowledges the importance of human freedom. There is however a different analysis of access to knowledge issues, the analysis of access to knowledge as a human right. Understanding access to knowledge as a human rights issue is crucial in the current South African context. Why is this so?

Firstly because human rights, more specifically the fundamental rights set out in the Bill of Rights in the South African Constitution impose duty on every part of the State, the executive and the legislature, as well as the judiciary, a positive duty to promote the rights, rather than a simple negative duty to refrain from infringing the rights.

Section 7 (2) of the Chapter 2 of the Constitution (the Bill of Rights) provides:

> "The state must respect, protect, promote and fulfil the rights in the Bill of Rights."

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[2] Access to Knowledge in Africa, the role of Copyright, (Armstrong et al) 2010, UCT Press -IDRC (ACA2K Book), 4

As a result members of the executive and legislature have a duty to configure legislation so that it will further the rights protected in the Bill of Rights. This duty creates a radically different constitutional dispensation to those systems where the Bill of Rights is only a check on government. In the South African system members of the executive and legislature must themselves seek out measure which will promote the rights in the Bill of Rights. They have a positive duty to promote and fulfil the rights. The rights therefore form part of the mandate of every government department, rather than being only a limitation on what those departments can do. One consequence of South Africa's constitutional system for South African lawmakers working with copyright reform is that the role of lawmakers in copyright reform is not to play referee between competing interest groups, but instead to reform copyright law in order to respect, protect, promote and fulfil the rights in the Bill of Rights, even if that does not serve the interests of a particular interest group.

Another consequence is that the Bill of Rights is fully justiciable. All legislation, including copyright legislation is subject to constitutional challenge in the courts, so that those provisions in copyright legislation which unjustifiably infringe a fundamental human right can be struck down by the Constitutional Court.

A second reason why human rights analyses is important in considering access to knowledge is that human rights analysis escapes the tendency of the economic ane even developmental approach to obscure the important issues in the lives of ordinary South Africans. An prospective increase in GDP as a consequence of increased corporate profits at the expense of the welfare of ordinary South Africans may be regarded as acceptable in economic analysis, but human rights analysis reveals it as illusory, since the growing the economy is only a means to the end of increasing the welfare of ordinary South Africans. Human rights analysis uncovers these contradictions in the economic and developmental analysis of access to knowledge and copyright. Knowledge is not merely a commodity, where the failure of the market to provide access can be excused by reference to other economic factors. Knowledge is not merely a means to a more productive workforce but an end in itself. Knowledge is necessary for the full development of human beings. More recent developmental analyses acknowledge that development cannot be reduced to per capita income. However even developmental analysis might tend to regard failures to provide access to knowledge of particular individuals or groups of people as acceptable in a developmental trade off. Human rights however requires far close attention to the impact of copyright law on those whom it dis-empowers. It is equality as much as freedom that requires access to knowledge.

The way in which human rights analysis illuminates deficiencies in access to knowledge which escape economic, and most developmental analyses. This chapter examines a number of the rights set out in the Bill of Rights, and their applicability to access to knowledge. Each right is set out together with its immediate implications for access to knowledge in South Africa. The result is to see what on a plain reading what the Bill of Rights regard as primary. There are of course competing considerations; policy goals, global economic forces, the interests of various industries. Proponent of industry lobby groups these will tend to dismiss the requirements of the Bill of Rights as unrealistic or irrelevant. That is not a lawful possibility in South Africa. Section 2 states:

> “This Constitution is the supreme law of the Republic; law or conduct inconsistent

with it is invalid, and the obligations imposed by it must be fulfilled."

In the Constitution the Bill of Rights enjoys the highest status. Section 7, of Chapter 2 of the Constitution, the Bill of Rights, states:

> "1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
>
> 2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights."

The claims of the Bill of Rights cannot be simply dismissed as one more claim by an interest group. Instead it is the Bill of Rights itself which sets out how competing rights, interests and policies are to be dealt with. Clashes between fundamental rights and other considerations are considered in sections 36, 38 and 39. This chapter will conclude with a look of the implications of the limitations provisions of section 36 for the remainder of the report.

Non discrimination, the visually disabled and the reading impaired

Section 9 of the Bill of Rights sets out the right to equality:

> "9. Equality
>
> 1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
> 2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
> 3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
> 4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
> 5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

Section 9(3) requires that the State may not discriminate against anyone on the grounds if disability, and section 9 (5) stipulates that discrimination on the grounds of disability is regarded as unfair unless proven otherwise.

Various types of disability affect the ability of people in South Africa to read, view and hear

media. Reading is one of the primary means of access to knowledge. There is a significant minority for whom reading the texts so easily open to others is not possible. This includes the blind, visually impaired and other print disabled persons. Consequences of reduced ability to read the are barriers which hinder disabled people from contributing their skills and energy to the economy, engaging in political life, learning and expressing themselves to the full. Reading impairment results in a de facto inequality between those who are impaired and those who are not. Enabling the reading impaired to read requires a range of solution employing different technologies so that the reading impaired can read. Since reading impaired persons suffer a disability the constitution requires that they should not be discriminated against by anyone, least of all the state.

> "Equality for the disabled involves removing barriers to opportunities, eradicating discrimination and providing positive measures to accommodate and include them."[3]

Access to learning materials and the right to education

The Bill of Rights includes the right to education.

> "29. Education
>
> 1) Everyone has the right :
>
> a) to a basic education, including adult basic education; and
>
> b) to further education, which the state, through reasonable measures, must make progressively available and accessible."

The right to education is an empowering right[4]. The right has two "dimensions" a prohibition on prevention of access to existing educational resources[5] and duty on the state to provide education in certain circumstances. The former dimension when coupled with the guarantee of equality "narrows dramatically the space for the denial of access to 'private' educational goods."[6] The right to education extends to the means of education, and one of the primary means of education is learning materials.

> "The link between education and the availability of adequate learning materials such as textbooks is undeniable: It is difficult to imagine effective learning independent of learning materials, both inside and outside of classrooms. Learning materials take many forms."[7]

A meaningful right to education thus includes the right to learning materials. This places an

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3 'Equality' Catherine Albertyn and Beth Goldblatt, *Constitutional Law of South Africa,* Woolman et al, 2009, 2nd ed, 35-70 (Equality, Constitutional Law of South Africa)

4 Education, Stu Woolman and Michael Bishop in *Constitutional Law of South Africa,* Woolman et al, 2009, 2nd ed, 57-7,8, (Education, Constitutional Law)

5 Education, Constitutional Law 57-8,9

6 Education, Constitutional Law 57-9

7 *Access to Knowledge in Africa, the Role of Copyright*, Armstrong et al, 2010, UCT Press-IDRC 2

obligation on the state to provide adequate learning materials in certain circumstances. However it also means that legislation should not prevent access to learning materials. This is especially so when the right to education is read together with the right to receive and impart information.

Right to receive and impart information

The right to receive and impart information forms part of freedom of expression in the South African Constitution.

> "16. Freedom of expression
>
> 1) Everyone has the right to freedom of expression, which includes
>
> a) freedom of the press and other media;
>
> b) freedom to receive or impart information or ideas;
>
> c) freedom of artistic creativity; and
>
> d) academic freedom and freedom of scientific research.
>
> 2) The right in subsection (1) does not extend to
>
> a) propaganda for war;
>
> b) incitement of imminent violence; or
>
> c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."

The right to receive and impart information and ideas stems from the importance of information and ideas to an open society. This right, and freedom of expression of which it forms a part is both a means and an end. Free flow of information and ideas is crucial to a democracy[8]. Voters need to be informed about the issues which affect their votes. Freedom of expression is necessary to enable people to mobilise politically. It is no accident that a great deal of the repression of the pre-Constitutional regime was aimed at preventing freedom of expression. But that is not the only role of freedom of expression, freedom of expression also enables people to have the largest possible range of information and opinion to evaluate in the search for truth[9]. Open societies are premised on the idea that if people can communicate then at some point the truth about a particular issue will emerge. That is also why freedom to receive and impart information is so important to science. Any society which wishes to make knowledge a priority for the economic advantages which it offers must seek to increase the freedom to receive and impart ideas. One way in which the pursuit of truth can operate is through a "market place of ideas". Freedom to exchange ideas is essential to operation of the "marketplace". There are two important issues to bear in mind which are particularly pertinent to access to knowledge. Freedom to pursue the truth is not the same thing as the marketplace of ideas[10]. Rather the marketplace of ideas is an important means to pursue truth but neither the exclusive nor a guaranteed means of obtaining truth.

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8 Freedom of Expression, Dario Milo, Glenn Penfold & Anthony Stein, *The Constitutional Law of South Africa*, Stu Woolman et al, 2009, (Expression, Constitutional Law of South Africa) 42-21 to 42-25

9 Expression, Constitutional Law of South Africa 42-16 to 42-21

10 Expression, Constitutional Law of South Africa 42-20

> "[T]he probability of truth emerging from open discussion may be hampered if the marketplace is skewed"[11].

This second point is particularly important in considering access to knowledge. To the extent that the marketplace of ideas fails to provide South Africans with access to knowledge the right to free expression requires law makers and courts to look beyond the marketplace, especially where the marketplace is itself constructed by regulation.

Freedom of expression has yet another reason; learning and creating new knowledge , artistic expressions and innovation are important parts of human fulfilment[12]. A society which wishes to enable the creativity of its members must place as few constraints on that creativity as possible.

Most of the debates around freedom of expression centre around the content of expression with questions whether the government should be allowed to censor a particular kind of speech such as pornography, or should freedom of expression excuse affronts to the dignity of others? There are however constraints on freedom of expression, particularly on the right to receive and impart information which are not immediately about the content of particular speech and it is these which are of concern when it comes to access to knowledge.

> "Meaningful protection of the right to freedom of expression, particularly in a context of material inequality, requires that there must be access to the necessary resources for effective expression.[13]"

Its not possible to list all the implications of freedom of expression for access to knowledge here but a few important issues are obviously relevant to access to knowledge. Freedom of artistic creativity (s16(c)) requires freedom for parody, satire and other creative expressions including those in which the creative expression of others is re-used. Academic freedom and freedom of scientific research (s16(d)) requires that researchers should have access to research materials. Freedom to receive and impart ideas and information (s16(b)) requires that any legislation which limits that freedom will have to be justified in accordance with the procedure in the Bill of Rights.

> "Any restriction upon or interference with the means of expression constitutes an infringement of the right to freedom of expression that must be justified under the limitations clause. This principle has been recognised in a number of jurisdictions and is a necessary incident of the right to freedom of expression under our Constitution.[14]"

Freedom of expression in also affects the regulation of the new information and

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[11] Expression, Constitutional Law of South Africa 42-19
[12] Expression, Constitutional Law of South Africa 42-25 to 42-27
[13] Expression, Constitutional Law of South Africa 42-62
[14] Expression, Constitutional Law of South Africa 42-62

communications technologies 21st century.

> "[C]hanges in technology and the media through which information and ideas are communicated have had a fundamental impact on the protection of expression. Today meaningful expression often requires access to extensive financial and advanced technological resources.[15]"

Limiting Access to Knowledge in the Bill of Rights

Section 39 of the Bill of Rights governs how the rights in the Bill are to be interpreted.

> "39. Interpretation of Bill of Rights
>
> 1) When interpreting the Bill of Rights, a court, tribunal or forum :
>
> a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
>
> b) must consider international law; and
>
> c) may consider foreign law.
>
> 2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
>
> 3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."

What does this mean for access to knowledge? It means that other rights created by legislation such as the rights created by copyright legislation may exist, but only to the extent that they are consistent with the rights in the Bill of Rights. Section 36 sets out how and how much, the fundamental human rights in the Bill of Rights, may be limited.

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

[15] Expression, Constitutional Law of South Africa 42-62 50 42-63

The human rights requirements for access to knowledge set out in this chapter may be limited, but only by a law of general application, and only where the limitation is appropriately made for a sufficiently important purpose, and the limitation does not cut too far into the right. The rights granted by intellectual property legislation may be allowed to exist, but only to the extent that they are consistent with the Bill of Rights. A limitation of a basic human right in favour of another right must be acceptable in terms of section 36.

As a consequence copyright legislation must be evaluated to consider whether it meets the access to knowledge requirements of the Bill of Rights. Wherever copyright legislation does not meet these requirements it must be seen whether the limitation which it imposes on the fundamental rights in the Bill of Rights is a justifiable limitation. Balancing the different factors in section 36 may seem like a complex task. In the case of copyright legislation it is made easier by paying attention to "d) the relation between the limitation and its purpose (s36(1)(d) and "less restrictive means to achieve the purpose" (s36(1)(e)). Because almost all the other countries in the world have copyright legislation, and are obliged, as signatories of the Berne Convention, to ensure minimum standards in their legislation, there is a wide number of comparisons in which to discover copyright legislation which advances the purposes of copyright while not limiting human rights as much as current South African copyright legislation.

2. The South African Copyright Act 1978 and Access to Knowledge

This chapter draws on recent research on the extent to which the Copyright Act 1978 promotes or hinders access to knowledge. To so it summarises some of the sources but reproduces portions verbatim[16].

The purpose of Copyright Law

Before considering the specifics of the 1978 Copyright Act it is important to consider its purpose. The purpose of the Act will be particularly important in the next chapter, when the Acts is assessed for compliance with the Bill of Rights. Dr Owen Dean, author of the Handbook of South African Copyright Law states:

> "Copyright law.....seeks to create a system whereby the creator of an original work is afforded a qualified monopoly in the use or exploitation of his work..."[17]

Dean insists that it is the creator who is to be afforded the monopoly by the law, and not others such as publishers, although others may become the successors in title of creators. Dean admits that while copyright rewards creators the reward is granted by law to encourage the creation of new works.

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[16] Ironically, as the research indicates, the exceptions in the Copyright Act are inadequate and are at best unclear about whether the reproduction of so much pertinent material would be permitted. However the sources reproduced extensively have been licensed under open licenses which enable their extensive reproduction in this report. Far from solving the problem of inadequate exceptions the use of open licences serves to demonstrate the failure of the Copyright Act to enable access to knowledge.

[17] O H Dean *HandBook of South African Copyright Law*, 1987, 1-1,

> "The rationale behind this philosophy is the establishment of a profit incentive for the creators of intellectual property."[18]

The purpose of copyright law is to give an incentive to people to create new works which others can use. Copyright does not exist for its own sake but rather as a government grant to motivate creativity. The grant consists not of money but a limited monopoly intended to serve the public interest. Understanding that copyright is intended to serve the public interest by granting incentives to increase available knowledge has important consequences. Copyright is intended to increase access to knowledge. It aims to do so by limiting access to knowledge through the grant of a qualified monopoly in the hope that ultimately the access to knowledge will be increased. The African Copyright and Access to Knowledge project, regarded access to learning materials as the essence of access to knowledge. The project described the relationship of copyright to access to learning materials as a paradox.

> "The predominant legislative mechanism used to facilitate the creation and dissemination of learning materials is copyright. Paradoxically, copyright law is usually also one of the primary constraints to access to learning materials. Thus, copyright has the capacity to both promote and hinder access to learning materials, as [access to knowledge] in general."[19]

What does this mean for copyright law? Copyright law can be justified only if it increases access to knowledge. If it fails to increase access to knowledge then it fails in achieving its purpose, and accordingly the monopoly which it grants cannot be justified. Therefore copyright law must not simply be configured so as to avoid unduly limiting access to knowledge while it achieves another purpose, its purpose is to increase access to knowledge, if it fails to increase access to knowledge it fails altogether.

Historically South Africa's copyright law stems from colonial legislation such as the 1911 Imperial Copyright Act. More recently South Africa's copyright legislation including the 1978 Act was intended to comply with South Africa's obligations under the Berne Convention. This secondary purpose, compliance with international treaty obligations demonstrates once again the importance of legislative best practise from other jurisdictions which increase access to knowledge. Provisions in the laws of other Berne Convention countries which enable access to knowledge are of particular importance for South Africa, because whether or not access to knowledge is a human rights issue in those jurisdictions the provisions from those countries which enable access are presumptively compliant with the Berne Convention. Therefore whether or not such provisions are required by the constitutions of those countries they are important in assessing South African Copyright law, since they indicate " less restrictive means to achieve the purpose" of copyright law. Indeed they indicate less restrictive means of complying with both the primary purpose of copyright law, as an incentive scheme for the creation of new works and the secondary purpose of complying with the Berne Convention.

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[18] Dean 1-2

[19] African Copyright and Access to Knowledge Project, Methodology Guide, 2008, p8

To what extent does the 1978 Copyright Act enable access to knowledge rather than simply compliance with the Berne Convention? The Shuttleworth Foundation conducted a review of the 1978 Copyright Act[20] which engaged civil society, and sought the views of constituencies historically excluded from influence on copyright legislation such as independent musicians and film makers, local computer programmers and civil society generally. The Open Review Report offers an important observation:

> "The policy processes which led to these [successive South African] Acts have never taken into account that South Africa is a developing country, instead they've been marked by aspirations to copy European law, specifically United Kingdom law as an example of what was claimed to be advanced law."[21]

The African Copyright and Access to Knowledge Project

The South Africa Country Team of the African Copyright and Access to Knowledge Report set out to examine the interaction of copyright and access to learning materials in South Africa. Access to learning materials is understood as a useful proxy for gauging access to knowledge more generally. The South African country team issued a report in 2009.

> "The research tested the following two hypotheses:
>
> • The South African copyright environment does not maximise effective access to learning materials; and
>
> • The South African copyright environment can be changed to maximise effective access to learning materials.
>
> In testing these hypotheses, this research examined the South African copyright environment and its potential impact on access to learning materials." [22]

In testing the hypotheses the country found.

> "Currently, the South African Copyright Act does not permit the scanning, translation, adaptation or conversion of works for the sensory-disabled without permission from the copyright-holder. However, the Constitution of South Africa expressly provides for the right to education, which arguably places a duty on the

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[20] The review process is referred to as the Open Review of the South African Copyright Act (Open Review), while the final report from the process is referred to as the Report of the Open Review of the South African Copyright Act. The author was lead investigator of the review process and chief editor of the report.

[21] The Report of the Open Review of the South African Copyright Act (Open Review Report), by A J Rens et al, Shuttleworth Foundation 2008, p8

[22] *The African Copyright and Access to Knowledge Project, South Africa Country Report* (ACA2K SA Report), 2009 Schonwetter, Ncube and Chetty, p4. The report is licensed under a Creative Commons Attribution South Africa 2.5 Share Alike license, and available at http://www.aca2k.org/attachments/154_ACA2K%20South%20Africa%20CR.pdf). Full attribution required by the project for licensed use requires acknowledgement of the following: International Development Research Centre (IDRC), and the publishers (Shuttleworth Foundation, Cape Town; and the LINK Centre, Graduate School of Public and Development Management (P&DM), University of the Witwatersrand, Johannesburg), http://www.aca2k.org, http://www.idrc.ca, http://www.shuttleworthfoundation.org, http://link.wits.ac.za)

state to facilitate access to learning materials required to exercise the right to education."[23]

"...there is no doubt that the legislative landscape may be improved, or amended for clarity, in order to facilitate access to learning materials in South Africa. This applies in particular to legal flexibilities that advance access to learning materials, such as fair dealing and the Copyright Regulations based on Section 13 of the Copyright Act. Recently-revised copyright laws in other countries, e.g, Australia, could provide a basis for a revision process in South Africa that enhances and clarifies access possibilities in terms of learning materials. For instance, currently the South African Copyright Act does not permit the scanning, translation, adaptation or conversion of works for the sensory-disabled in the absence of permission from the copyright-holder. The Act also fails to adequately address fair dealing in the context of digitised works."[24]

"The current set of copyright exceptions and limitations, particularly in relation to educational uses of copyright-protected materials, are vague, fragmentary and in many instances outdated. The use of modern technologies for educational purposes, for example in distance education, remains largely unconsidered."[25]

The concluding portion of the country report discusses the findings of the research team.

"This study found that the existing legislation is inadequate in a number of ways. The key pieces of legislation in the area of copyright law, the Copyright Act 98 of 1978 and its Regulations, are in need of review and amendment – particularly when compared to their international counterparts. Most notably, the current Copyright Act does not make use of many of the flexibilities contained in TRIPs, and other international copyright treaties and agreements, particularly in relation to copyright exceptions and limitations. Also, the Copyright Act does also not properly address the digital environment and its challenges. In addition, the ability to promote access to learning materials by, for instance, creating adaptations of copyright-protected works for the sensory-disabled, is hindered by the threat of copyright infringement. Many existing copyright exceptions and limitations in the South African Act and Regulations – especially the provisions on fair dealing – are generally considered to be too vague by both rights-holders and users. The failure to provide clarity for fair dealing in digitised works, for instance, hinders the distribution of knowledge through the efficient distribution mechanisms of ICTs. In addition, despite progress in electronic communications access in South Africa, the Electronic Communications and Transactions Act, through its protection of TPMs, may override some important access-enabling fair dealing provisions of the Copyright Act, and thereby attach criminal liability to materials usage that is legitimated by the Copyright Act."[26]

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[23] ACA2K SA Report, 28
[24] ACA2K SA Report, 28
[25] ACA2K, SA Report, 29
[26] ACA2K Report, 50

> "In summary, the primary South African copyright legislation must be amended to keep pace with technological advancements and other policy and legislation related to access to knowledge. It would appear, from the interviews conducted with government officials, that more prominence is likely to be given to access to learning material in any future copyright policy or legislation amendment process....It is suggested by the South African research team that the lack of debate on copyright and access to knowledge may be blamed on the currently unclear and incomplete legislative framework. A law cannot be subjected to substantial criticism if it is unclear as to what it allows and prohibits. Furthermore, such ambiguity often discourages people from reverting to the courts, since the outcome of costly court proceedings is uncertain.
>
> In summary, therefore, both of the research hypotheses tested are accurate in describing the current situation in South Africa: the copyright environment in South Africa does not maximise effective access to learning materials and the environment can be changed in order to maximise effective access to learning materials."[27]

These conclusions are amplified by those set out in the final analysis of the African Copyright and Access to Knowledge project[28] by the lead researchers for the entire comparative project. In the Chapter dealing with South Africa a number of problems with the current copyright environment are identified. The 1978 Act does not deal with so called anti-circumvention measures, but other legislation; the Electronic Communications and Transactions Act whether intentionally or not, prohibits technological circumvention[29]. This provision is ambiguous[30] and so has the effect of limiting access to knowledge, even if it was not intended to do so. The Copyright Act does not clearly exempt exceptions and limitations from the prohibition. The lead researchers for the comparative study came to several conclusions on

> "This study found that the existing legislation is inadequate in a number of ways. The key pieces of legislation/regulation in the area of copyright law, the Copyright Act 98 of 1978 and its Regulations, do not make use of many of the flexibilities contained in TRIPs and other international copyright treaties and agreements, particularly in relation to copyright exceptions and limitations. The Copyright Act does not properly address the digital environment and its challenges.
>
> The ability to promote access to learning materials by, for instance, creating adaptations of copyright-protected works for the sensory-disabled, is hindered by the threat of copyright infringement. Many existing copyright exceptions and

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27 ACA2K Report, 51

28 The final analysis of the ACA2K Project took the form of a book co-written by the core team: *Access to Knowledge in Africa, the Role of Copyright*, 2010, Armstrong et al, UCT Press (ACA2K book). The book is licensed under a Creative Commons Attribution Non-commercial Share-Alike South Africa 2.5 License.

29 ACA2K Book, 245

30 T. Pistorius *Developing countries and copyright in the information age—the functional equivalent implementation of the WCT* (2006) 2 Potchefstroom Electronic Law Journal. Available at http://www.puk.ac.za/opencms/export/PUK/html/fakulteite/regte/per/ issues/2006_2__Pistorius_art.pdf

limitations in the South African Act andRegulations—especially the provisions on fair dealing—are generally considered to be too vague by both rights-holders and users. The failure to provide clarity for fair dealing in digitised works, for instance, hinders the distribution of knowledge through the efficient distribution mechanisms of ICTs. In addition, despite progress in electronic communications access in South Africa, the ECT Act, through its protection of TPMs, may attach criminal liability to materials usage that is legitimated by the Copyright Act."[31]

The researchers highlighted the necessity of ensuring that the Copyright Act complies with the Constitution.

"The provisions of the Constitution, particularly the right to education and the right to equality, are important and may be relied upon when proposing the need for legislative changes that cater for improved access to knowledge. The extent to

which the Copyright Act is inconsistent with the provisions of the Constitution must be resolved."[32]

"Thus, both of the ACA2K research project hypotheses tested are accurate in describing the current situation in South Africa: the copyright environment in South Africa does not maximise effective access to learning materials; and the environment can be changed in order to maximise effective access to learning materials...The Copyright Act is silent in respect of orphan works. Our recommendation is for an amendment to the South African Copyright Act that permits use of orphan works on reasonable terms when copyright-owners cannot be identified or located to negotiate voluntary licences...

Currently, the South African Copyright Act does not permit the scanning,translation, adaptation or conversion of works for the sensory-disabled without permission from the copyright-holder. However, the Constitution of South Africa expressly provides for the right to education, which arguably places a duty on the state to facilitate access to learning materials required to exercise the right to education. The South African Copyright Act should be amended to remove barriers to access to learning materials faced by people with disabilities by, for instance,allowing the permission-free conversion of learning material into Braille or into audio formats."[33]

"The current set of copyright exceptions and limitations, particularly in relation to educational uses of copyright-protected materials, are vague, fragmentary and in many instances outdated. The use of modern technologies for educational purposes, for example in distance education, remains largely unconsidered. Exceptions and limitations contained in the South African Copyright Act must be reformed to, among other things, address technological advancements that could facilitate access to knowledge. Detailed and clear provisions for uses by libraries, archives, educators and learners should be introduced. One particular issue that requires further clarification is if and to what extent the creation of course-packs for learners is and ought to be allowed, under South African law. While for reasons of

[31] ACA2K Book 268
[32] ACA2K Book 269
[33] ACA2K Book 270

> legal certainty it seems best to adopt a detailed list of specific copyright exceptions and limitations (for which the recently amended copyright laws of other countries such as Australia could serve as an example), it should also be considered by the South African lawmaker to introduce an additional and subordinate catch-all clause modelled after the 'fair use' doctrine in the United States. Such a provision would (in the future) prevent numerous unanticipated uses being deemed illegal simply because the law cannot keep up with the pace of technological change. Of course, national copyright exceptions and limitations must fulfil the requirements for copyright exceptions and limitations as set out by the relevant international copyright treaties and agreements..."[34]

The African Copyright and Access to Knowledge Project examined not only copyright legislation but also sub-ordinate legislation, and copyright practises and attitudes to copyright to investigate the copyright environment. By contrast the Open Review of the South African Copyright Act (Open Review) reviewed the text 1978 Copyright closely, employing an access to knowledge audit of the Act, together with a scrutiny of certain specific provisions of the Act.

The Open Review of the South African Copyright Act

The findings of the open review process were published in a report (Open Review Report)

The open review examined the current exceptions and limitations in the 1978 Copyright Act, including the provision referred to as "fair dealing".

> "The Copyright Act does not give a specific definition of what fair dealing means and does not specify how much of a work may be reproduced without asking permission of the copyright holder. It just states that the amount copied needs to be '…compatible with fair practice [and] shall not exceed the extent justified by the purpose…' This means that any user of a copyright work, who wants to claim usage under fair dealing, would have to prove that the amount of the work that they copied was sufficient for their purpose, and not excessive." [35]

> "In addition to fair dealing the Copyright Act contains a number of more specific exceptions for the different kinds of works. These limitation and exceptions are complex and detailed. Each work has a different list of which exceptions apply to it."[36]

The Open Review Report goes on to set out the complexities of these exceptions, section 12 lists twelve exceptions in addition to the three part fair dealing exception. Sections 14 to 19B sets out whether each of the exceptions applies to a different type of copyright work,

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[34] ACA2K Book 271
[35] Open Review Report 12
[36] Open Review Report 13

as well as exceptions unique to each[37]. How can non lawyers make sense of such complex legislation? The complexity of this scheme of exceptions is sufficient to render it unusable. The Open Review Report continues:

> "but South Africa's system of copyright exceptions and limitations is in many respects outdated. Current copyright exceptions and limitations do not sufficiently take into account new technologies."[38]

The Open Review found that failure of the Act to provide appropriate exceptions to the monopoly which it imposes has a negative effect on teaching and learning.

> "New teaching methods are often hampered. It is often necessary to digitise material which involves making a copy. Copying for the purposes of distance education or e-learning is not clearly regulated. The lack of appropriate copyright exceptions and limitations generally reduces the access that learners and teachers have to a great deal of information.
>
> Lack of appropriate exceptions impacts most on those who do not have the resources to track down and contact the rights holders, or cannot afford to pay royalty or licence fees. It's important to stress once again that when teachers, learners and librarians want to use works without the consent of the copyright owner, such use is not necessarily illegal. Rather, the teacher, learner or librarian must first investigate whether the intended use is permitted by an exception or limitation before using the work in an educational context. As a result of the ambiguous wording of some of the educational copyright exceptions and limitations, the permission of the rights owner is often unnecessarily obtained to be on the safe side. This is a protracted, lengthy and sometimes expensive process, not only because the rights owners sometimes demand costly royalties, but also because the rights owners are sometimes difficult and even impossible to find.
>
> A teacher or learner facing these difficulties could give up!
>
> The Copyright Act often makes it impossible for certain works to be made accessible for many South Africans. For example, it is illegal to create a version of a work in Braille, make a work more visual or adapt it as text to speech without first obtaining permission of the rights holders. This means that visually and hearing impaired South Africans have no access to a great deal of copyright work.
>
> Under the present regime of copyright exceptions and limitations, a work may usually also not be translated into another language without the permission of the rights owner, which limits the access of many South Africans to that information.
>
> In addition, it is not clear to what extent a computer programme may currently not

[37] Open Review Report 12-14
[38] Open Review Report 14

be re-engineered or adapted without the permission of the rights owner.

An out-of-print book, which is not widely available but which is not yet in the public domain, cannot be duplicated and the copy kept in a library.

These examples highlight some of the many inadequacies of the current copyright exceptions and limitations in South Africa. Numerous countries around the world have faced similar problems in recent years, and many have seized this opportunity to overhaul and reform their systems of copyright exceptions and limitations. South Africa now has the chance to benefit from experiences and related research efforts in these countries.

Current exceptions do not cover a wide variety of situations in which exceptions are necessary for access to knowledge and resources for South African citizens."[39]

The Open Review also considered the issue of parallel import.

"Parallel importation can be described as the importation of a product, which is subject to intellectual property rights, disposed of with the implied or express authorisation of the intellectual property right holder in the country of export, where the importation is without the authorisation of the particular intellectual property right holder in the country to which the product is imported."[40]

Copyright law gives the creator of a copyright work a qualified monopoly over that work, including the exclusive right to make or authorise the making of copies. Once copies are made with the authority of the creator, or her successor in title, then the specific embodiment of that legitimate copy may be freely traded by the purchaser of the embodiment. This is often referred to as the doctrine of first sale, or more technically exhaustion of rights. The monopoly granted to a creator does not extend to all subsequent sales or transfers of the embodiment of the work. Parallel import involves the importation of works legitimately created, with the consent of the copyright holder in one country into another country without having to obtain the permission of a second holder of copyright in the same material in the country of import. Parallel importation of copyright goods therefore does not affect the exclusive rights of copyright holders, listed in the Berne Convention. There is no international requirement that a country should prohibit parallel importation. On the contrary the freedom is expressly preserved.

"The TRIPS Agreement prevents the parallel importation of counterfeit or unauthorised infringing goods. The TRIPS Agreement explicitly refrains from regulating the exhaustion of copyright. As currently drafted, the South African Copyright Act deals with the matter of unauthorised importation as a form of secondary or indirect infringement and not as a matter of exhaustion. The Copyright

[39] Open Review Report 16
[40] Open Review Report 63

Act also provides for criminal sanctions for unauthorised imports." [41]

In the quote above the term unauthorised refers to whether there is authorisation from a copyright holder or someone with a licence to make copies of a particular work in South Africa. The Review examined section 23 of the Copyright Act which prohibits the importation of legitimate copyright goods from other jurisdictions into South Africa, without the say so of local rights holders, (often the licensees of foreign rights holders which have authorised production in the country of export).

> "The lowering of price levels in the South African market which would result from permitting parallel import would increase competition and result in consumer benefit...[T]he increase in competition that parallel importation may cause in a developing country such as South Africa is an important factor in aiding further economic development. These problems are no different to any other problems which must be addressed by free markets and do not serve as a justification for the imposition of monopoly power, requiring instead suitable consumer regulation....Parallel importation is already a powerful tool in providing access to medication in the struggle against HIV/AIDS. It may prove to be an equally important in access to knowledge especially learning materials."[42]

South Africa does not prohibit parallel import of goods in either the Patent or Trademark Acts, or at common law, nor is there any research suggesting that the lack of parallel import provisions in any way undercuts these statutory schemes.

The Open Review Report finds the 1978 Copyright Act deficient in wide variety of ways. The most succinct summary of these can be found in the recommendations of the Open Review Report on Copyright reform which are reproduced in full.

> "1. Not extend the exclusive rights granted under copyright in term and scope beyond what is required by the international treaties in terms of which South Africa is bound, specifically:
>
> Reduce the term of photographs from 50 to 25 years;
>
> Reduce the term of works first made public after the author's death to life of the author plus fifty years.
>
> Do not extend copyright terms beyond those required by treaties binding South Africa.

[41] Open Review Report 64
[42] Open Review Report 66

2. Expand Copyright exceptions and limitations, state exceptions and limitations clearly.

Expand and adapt the current set of exceptions and limitations to better enable access to knowledge, specifically:

Introduce exceptions for transformative or derivative works (including caricature, parody or pastiche);

Exceptions and limitations for educational use should cover distance learning and e-learning;

Introduce a (subordinate) broad “catch-all’ exception and limitation clause for educational institutions (including archives and libraries);

Exceptions and limitations for the benefit of teachers and/ or for teaching purposes need to be extended and simplified. This particularly pertains to the exceptions and limitations contained in the Copyright Regulations enacted under sec 13 of the South African Copyright Act.

Introduce exceptions and limitations for the benefit of people with a disability;

Exceptions and limitations should address new technologies.

Copyright exceptions and limitations should automatically qualify as defences in the context of anti-circumvention provisions

Specifically allow:

temporary acts of reproduction which are transient or incidental and an integral and essential part of a technological process;

time-shifting, format-shifting and space-shifting in certain circumstances (e.g. private use as well as library and archive use).

Clarify the scope of fair dealing in South Africa

3. Protect the public domain; specifically:

Define the public domain as a realm in which the public has positive rights to

re-use creativity;

Introduce a provision which allows copying and adaptation of copyright works in the process of enabling use of the public domain; for example, the copying involved in re-engineering software to use public domain elements;

Explicitly provide that all official, administrative and legal works, of whatever form, are automatically in the public domain.

4. Address the orphan works problem; specifically:

Include a simple provision which will enable the re-use of orphan works, after reasonable notice, for a percentage of royalties determined by Copyright Tribunal or similar body;

Create a voluntary on-line free copyright register which preserves the creativity of South Africans by allowing creators to prove their title to their works.

5. Explicitly permit circumvention of technologies which jeopardise the balance of copyright by preventing users from exercising their rights under exceptions and limitations.

6. Permit parallel import. Allow legitimate copyright works acquired in other countries to be imported into South Africa without requiring additional permission from the copyright holder in South Africa.

7. Balance the reduction in the public domain resulting from proposed grant of rights over indigenous knowledge by granting appropriate exceptions such as those referred to in 2 above.

8. Provided that all government funded works which do not immediately fall into the public domain are freely available on equal terms to all South Africans.

9. Define licence so as to explicitly support free copyright licences.

10. Commence government inquiry into a provision that authors can reclaim title to works which subsequent rights holders fail to use over long periods of time such as five years.

11. Commence government inquiry into feasibility of making use of the Berne Appendix, special provisions for Developing Countries."[43]

Recent research thus shows that the 1978 Copyright Act fails to adequately promote access to knowledge. The Act therefore fails its achieve its own underlying purpose. The public interest in copyright, and thus the rationale for copyright in the first place is not to give authors and others exclusive rights, is not even to encourage the creation of new new works, but properly understood it is to give an incentive to authors to create new works in order to increase the knowledge available to the public. There is no empirical evidence that the granting of the copyright monopoly does in fact give an incentive for the creation of new works. Even if there were such evidence, if the creation of new works does not result in increased access to knowledge by the public the monopoly does not serve the public interest and therefore cannot be justified. Research shows that both in its effect and its provisions of the 1978 Copyright Act fails to achieve its own objective.

The recent research drawn on in this chapter shows that this failure is not necessary, in particular that there are a wide range of measures available to South Africa under both the Berne Convention and the WTO-TRIPS agreement which would increase access to knowledge in South Africa. Furthermore the research observes that this failure is contrary to the rights set out in the Bill of Rights. Chapter 3 examines this issue in greater detail than the recent research has been able to do.

3. Constitutional Assessment of the South African Copyright Act

This chapter assess how the Copyright Act of 1978 either addresses the access to knowledge issues identified in Chapter 1 issue or fails to do so, and how the Copyright Act either conforms to or diverges from the human rights provisions in the Constitution. In order to do so expeditiously it considers issues already identified in the previous chapter: restrictions on access to knowledge for the disabled, restrictions on translation, restrictions on learning materials, and restrictions on receiving and imparting information more generally. Not every one of the issues raised in the previous chapters can be addressed in detail or at all. This does not mean that they are not important. Instead the chapter focuses on those issues where legislative best practise from other jurisdictions helps illuminate the problem most clearly.

How must the 1978 Copyright Act be assessed for compliance with the requirements of the Constitution? There are some provisions such as section 23(2) which considered on their own directly infringe constitutional rights. Section 23 (2) will be considered later in the chapter. However the scheme of the Act is itself threatened with unconstitutionality.

The Act creates the monopoly in each work by granting what are termed "exclusive rights" to the natural persons who made works, and in some cases other legal persons. For example section 6 grants rights in respect of literary and

" 6. Nature of copyright in literary or musical works

[43] Open Review Report 5-6

Copyright in a literary or musical work vests the exclusive right to do or to authorize the doing of

any of the following acts in the Republic:

(a) Reproducing the work in any manner or form;

(b) publishing the work if it was hitherto unpublished;

(c) performing the work in public;

(d) broadcasting the work;

(e) causing the work to be transmitted in a diffusion service, unless such service transmits a

lawful broadcast, including the work, and is operated by the original broadcaster

(f) making an adaptation of the work;

(g) doing, in relation to an adaptation of the work, any of the acts specified in relation to the

work in paragraphs (a) to (e) inclusive."

Each type of work has a different list of exclusive actions which only the rights holder can perform or authorise.

Key exclusive rights in the South African Copyright Act (From ACA2K Book, Table 8.2)

Section	Work	Exclusive Rights
6	Literary or Musical Works	(a) Reproduce; (b) Publish; (c) Perform; (d) Broadcast; (e) Transmit in a diffusion service unless such service transmits a lawful broadcast, including the work, and is operated by the original broadcaster; (f) Make an adaptation of the work; and (g) Do, in relation to an adaptation of the work, any of the acts specified in relation to the work in (a) to (e) above.
7	Artistic Works	(a) Reproduce; (b) Publish; (c) Include the work in a cinematograph film or a television broadcast; (d) Cause a television or other programme, which includes the work, to be transmitted in a diffusion service, unless such service transmits a lawful television broadcast, including the work, and is operated by the original broadcaster;

		(e) Make an adaptation of the work; and (f) Do, in relation to an adaptation of the work, any of the acts specified in relation to the work in (a) to (d) above.
8	Cinematograph Films	(a) Reproduce including making a still photograph; (b) Cause the film, in so far as it consists of images, to be seen in public, or, in so far as it consists of sounds, to be heard in public; (c) Broadcast; (d) Cause the film to be transmitted in a diffusion service, unless such service transmits a lawful television broadcast, including the film, and is operated by the original broadcaster; (e) Make an adaptation of the work; (f) Do, in relation to an adaptation of the work, any of the acts specified in relation to the work in (a) to (d) above; and (g) Let, or offer or expose for hire by way of trade, directly or indirectly, a copy of the film.
9	Sound Recordings	(a) Make, directly or indirectly, a record embodying the sound recording; (b) Let, or offer, or expose for hire by way of trade, directly or indirectly, a reproduction of the sound recording; (c) Broadcast the sound recording; (d) Cause the sound recording to be transmitted in a diffusion service, unless that diffusion service transmits a lawful broadcast, including the sound recording, and is operated by the original broadcaster; and (e) Communicate the sound recording to the public.
10	Broadcasts	(a) Reproduce; (b) Rebroadcast; and (c) Cause the broadcast to be transmitted in a diffusion service, unless such service is operated by the original broadcaster.
11	Programme Carrying Signals	Undertake or authorise, the direct or indirect distribution of such signals by any distributor to the general public or any section thereof in the Republic, or from the Republic.
11A	Published Editions	Make or authorise the making of a reproduction of the edition in any manner.
11B	Computer programs	(a) Reproduce; (b) Publish; (c) Perform; (d) Broadcast; (e) Cause the computer program to be transmitted in a diffusion service, unless such service transmits a lawful broadcast, including the computer program, and is operated by the original broadcaster; (f) Make an adaptation of the work; (g) Do, in relation to an adaptation of the work, any of the acts specified in relation to the work in (a) to (e) above; (h) Let, or offer or expose for hire by way of trade, directly or indirectly, a copy of the computer program.

Each one of these may infringe one or more fundamental rights, and therefore be declared invalid. However an exclusive right might be saved by an exception or limitation or other provision which either eliminates the infringement of the fundamental right altogether or, more probably, reduces the extent of the infringement. Depending on how the exception, limitation or other provision operates it may enable an exclusive right to survive a justification analysis by providing a less restrictive means of achieving the object of the limitation. Thus an inadequate or non existent provision tempering the infringement of a fundamental right is in many cases sufficient to render a grant of exclusivity unconstitutional. The procedure in the remainder of the chapter is to consider briefly how

fundamental rights are infringed by the 1978 Copyright Act, and how in each case this appears to be due to inadequate or non existent exceptions, limitations or other provisions which could reduce the extent of the infringement of the fundamental right. The one exception to this is consideration of the prohibition on parallel import. This approach is adopted because the exclusive rights granted by the Copyright Act largely reflect the requirements of the Berne Convention. There are instances where the 1978 Act grants additional rights or grants broader rights than required by the Berne Convention. These are however not the primary cause of the infringement of fundamental rights by the 1978 Act, although they will certainly require attention in any attempts to draft new copyright legislation for South Africa. Instead it is provisions intended to comply with the Berne Convention which are potentially unconstitutional but which might be saved by appropriate provisions. There may of course be instances where a specific exclusive right cannot be saved from unconstitutionality even by exceptions and limitations. The cumulative effect and total scheme of the 1978 Copyright Act might also render the Act unconstitutional *in toto.* Those possibilities are not considered further in this report. Instead the report considers how the 1978 Copyright Act might be amended appropriately to escape several obvious challenges to its constitutionality.

It is sometimes claimed that intellectual property is a constitutional right. Since there is no mention of any intellectual property rights in the Bill of Rights the claim is sometimes made that intellectual property is included under section 25 of the Bill of Rights. Section 25 (1) states

> "1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

Property is not defined in the property right clause or in the Bill of Rights. However the history of the right in South Africa is concerned with the way in which legal provisions passed during the colonial and apartheid era's enabled the seizure of land from indigenous communities. The Constitutional Court has explicitly rejected the claim that there is a constitutional right to intellectual property. In 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) the Constitutional Court responded to the claim that Constitution could not be adopted because it does not guarantee a right to intellectual property.

> "A further objection lodged was that the ...[text of the 1996 Constitution] fails to recognise a right to intellectual property. Once again the objection was based on the proposition that the right advocated is a 'universally accepted fundamental right, freedom and civil liberty'. Although it is true that many international conventions recognise a right to intellectual property, it is much more rarely recognised in regional conventions protecting human rights is also true that some of the more recent constitutions, particularly in Eastern Europe, do contain express provisions protecting intellectual property, but this is probably due to the particular history of those countries and cannot be characterised as a trend which is universally accepted. In the circumstances, the objection cannot be sustained" (citations omitted).[44]

[44] Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA

This renders any claim that the property clause of the Bill of Rights includes the rights granted by copyright statutes so speculative that it does not warrant further consideration in this report.

It is necessary to consider a possible objection that the right to education constitutes a right against the state only, which does not justify changes to the copyright construed as a private right. The objection might be advanced not only to try to shield copyright from constitutional scrutiny but even to fend off arguments for measures at the margin of copyrights such as exceptions and limitations which enable the exercise of constitutional rights. The objection is fundamentally unfounded in the South African Constitutional system. Not only does the Constitution constitute the supreme law, against which all other laws must be measured for consistency[45], but the Bill of Rights applies to all law[46] and binds natural and juristic persons[47]. As a consequence the monopoly granted by the 1978 Copyright Act must be subject to constitutional scrutiny, and as a law, must be measured against the Bill of Rights. To the extent that the 1978 Copyright Act infringes fundamental rights it requires justification in terms of the limitation analysis of section 36 of the Bill of Rights. In the process it should be borne in mind that the 1978 Act was not passed by a democratic legislature but was passed by the non democratic and repressive apartheid government. Law makers and courts do not need to defer to the 1978 Act because did not emanate from a democratic process.

Access by Sensory-disabled persons

The right to equality in South African law is a right to substantive equality, that is equality in practise and effect[48]. The right is against discrimination that is "indirect" as well as direct.

"Indirect discrimination occurs where differentiation appears to be neutral and hence benign but has the effect of discriminating on a prohibited ground."[49]

Sensory-disabled persons include persons who are visually impaired, as well as those who suffer auditory impairment. The 1978 Copyright Act does not explicitly single out and forbid sensory-disabled persons from using copyright works. Instead it indirectly discriminates against sensory-disabled persons. Due to their impairments sensory-disabled persons are unable to make use of many copyright works in the same way that persons who do not suffer from these impairments are. This does not meant that sensory-disabled persons cannot make use of copyright works, but simply that they must often employ specialised technologies to be able to use the works. Thus a visually impaired person might make use of text to speech technology in order to read a literary text, and an person with an auditory disability might require captioning to view a cinematographic work. By their very nature

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744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996) of the Constitutional Court, §78

45 s2 Constitution of the Republic of South Africa 1996

46 s8(1) Constitution of the Republic of South Africa 1996

47 s8(2) Constitution of the Republic of South Africa 1996, the section provides that a provision in the Bill of Rights binds natural and juristic persons "if, and to the extent that, it is applicable ".

48 Equality, Constitutional Law 35.8-14

49 Equality, Constitutional Law 35-47

these technologies must change the work, and this constitute an adaptation of the work, and usually involve the making of copies, and possibly other acts reserved for copyright holders. But the Act prohibits the making of copies and adaptations except by the rights holders. By doing so the Act interferes with the agency of sensory-disabled persons, and violates their right to equality. It also violates their rights to receive and impart information, education and other rights. Is the inequality necessary to achieve the purpose of the Copyright Act? Authors and publishers often make their works available in a number different formats. While these formats may include formats which are accessible to sensory-disabled persons in a tiny percentage of cases, for most copyright works the rights holders deem the likely returns from converting the works into the formats to be insufficient to make the conversion worthwhile. In other words there is no incentive to do so. If there is no incentive to do so then permitting conversion to formats usable by the sensory-disabled cannot detract from the incentive apparently arising from the grant of exclusive rights. The grant of exclusive rights therefore need not extend to the acts necessary to make works available in appropriate formats for the sensory-disabled. An appropriate exception is one way of preserving the grant of exclusive rights without infringing, or infringing as little as possible, on the fundamental rights of sensory-disabled persons. But the 1978 Copyright Act does not contain an appropriate exception. The Act is therefore unconstitutional to the extent that if discriminates against sensory-disabled persons.

Access to Learning Materials

Access to learning materials must be considered in light of both the rights to education and freedom of expression, which includes the right to receive and impart information. The cost and unavailability of school books has been found to be a serious barrier to access to education[50] in the context of the right to education. The right to education extends to the means of education. The right has two dimensions; a prohibition on barriers to education and a duty on the state to provide education in certain circumstances and to strive to provide it in certain circumstances. The exclusive rights granted by the 1978 Copyright Act as they stand interfere with the first dimension of the right of the right to education because their wide provisions prohibit teachers, learners and individuals from making, distributing and adapting learning materials. They also interfere with the right to freedom of expression, especially the right to receive as well as impart information and ideas, which is cognate with the right to education. A prohibition on copying works conveying information and ideas in many cases effectively prevents the receipt of ideas and information.

The exclusive rights in the 1978 Copyright Act could however be saved by appropriate provisions for learning materials. However recent research, quoted extensively in chapter 2 has shown that the provisions which are in the 1978 Act, and its subordinate regulations are inadequate because they are unclear, inflexible, convoluted and fail to take technological change into account. This is also true of the exceptions apparently intended to permit freedom of expression more generally such as the narrow exceptions for criticism

[50] Education, Constitutional Law “school fees are not the the primary financial obstacle to education. Rather, other education-related costs – transport, uniforms, food, books and stationary – constitute far more serious barriers to access.” 57-27

or reporting.

Access to Knowledge and Freedom of expression.

The right to freedom of expression also extends to the necessary resources for effective expression including, receipt of expression. Thus any legislative bar to resources necessary for expression will be subject to a s36 limitations analysis. The exclusive rights in the 1978 Copyright Act prohibit free expression in a number of ways. They prohibit copying and adapting the work of others in order to read and understand them. This not only inhibits the right to receive information and ideas, and scientific research, but also endangers the creation of new work since the necessary input for almost all expressive work is existing expression. The exclusive rights prohibit expression which makes use of expression by others, even where this expression is commonplace, or through the unequal resources available to the first speaker has acquired cultural power or become a de facto or de jure standard which expression in a particular context must reference or become muted. Copying the expression of others is sometimes necessary to make a particular point, to provide recipients of communication with the best information so that they can assess a situation for themselves or to provide verisimilitude about what someone has said. Copying may even be necessary to convey important issues with compelling power. The ban on creating new works which adapt copyright works is particularly problematic for the right of artistic creativity, since many art forms are defined by the transformative use which they make of existing works; for example, parody, satire and bricolage. As discussed in Chapter 2 although there are a few exceptions in the 1978 Act these unsatisfactory since they are both vague and narrow. This isn't surprising since they come from the British system prior to that system being governed by a guarantee of free speech.

The consequence is that there is a direct clash between freedom of expression and the exclusive rights in the 1978 Copyright Act. That clash cannot be resolved by a series of detailed exceptions however long the list of exceptions and however well crafted the exceptions might be, and the list of exceptions in the 1978 Act is sufficiently extensive, nor are the exceptions particularly well crafted. One reason for this is that it is impossible for even a very well informed law maker effectively envisage all the potential situations in which the exclusive rights would violate freedom of expression. A further reason is that even an exceptionally well informed law maker is not blessed with clairvoyance, and so cannot predict the multitudinous ways in which technology will change

A different type of provision must be used to resolve the infringement of the right to free expression by the grant of a copyright by the legislature. The best candidate in comparative jurisprudence is the right of fair use which originated in the United States. The fair use right is a limitation on copyright, rather than an exception to it, it marks at least one of the boundaries of copyright itself. How fair use operates will be discussed in the next chapter. It is instructive to note that jurisdictions which share common origins of their copyright legislation have also found the detailed exception approach, usually termed 'fair dealing' to be inadequate. A judge, Justice Laddie discussed exceptions in UK Copyright law, which has exercised such an influence on South Africa as follows.

> “Rigidity is the rule. It is as if every tiny exception to the grasp of copyright monopoly has had to be fought hard for, prized out of the unwilling hand of the legislature and

once, conceded, defined precisely and confined within high and immutable walls.[51]"

The treatment of exceptions in Canada has been similarly criticised.

> "For a long time the Canadian approach to fair dealing was one of single minded reliance upon specific rules, together with a distinct unwillingness to consider the purposes of fair dealing within the larger policy aims of copyright law. The result was a lack of principled discussion about the defence and a wide refusal to entertain it. This effectively eviscerated fair dealing".[52]

These criticisms were levelled despite both the U.K and Canadian Copyright Acts boasting more and more up to date exceptions numbers of than the 1978 Copyright Act. In a subsequent case the Supreme Court of Canada interpreted the fair dealing clause in the broadest possible way[53]. Fair use was itself introduced by courts in the United States to ameliorate the anti-free expression effect of copyright, and has subsequently been codified. However the absence of a free expression limitation on the exclusive rights of copyright is not the only way in which the 1978 Copyright Act violates the right to free expression. The prohibition on parallel import does not arise from the exclusive rights granted in the 1978 Copyright Act but from an additional provision in the Act.

The prohibition on parallel import

The exclusive rights set out in sections 6 to 11B of the Act do not grant to a copyright holder in South Africa the power to exclude the import of works made in other jurisdictions with the consent of the copyright holder in the jurisdiction of manufacture. Instead section 23 (2) which is part of a section entitled "Infringement" prohibits the import of copyright works made with permission of the rights holder in the jurisdiction of manufacture without the further authorisation of the rights holder in South Africa. Section 1 of the Act contains the following definition of "infringing copy",

> "infringing copy" in relation to -
>
> (a) a literary, musical or artistic work or a published edition, means a copy thereof;
>
> (b) a sound recording, means a record embodying that recording;
>
> (c) a cinematograph film, means a copy of the film or a still photograph made therefrom;

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51 'Copyrigh: Over-Strength, Over-Regulated, Over-Rated (1996) E.I.P.R 18 (5) 253 at 259

52 'The Changing Face of Fair Dealing in Canadian Copyright Law' Carys Craig *In the Public Interest: the Future of Canadian Copyright Law* Geist, 2005, 443

53 CCH Canada Ltd v Law Society of Upper Canada, 2004 SCC 13, see the discussion in The Changing Face of Fair Dealing in Canadian Copyright Law' Carys Craig *In the Public Interest: the Future of Canadian Copyright Law* Geist, 2005, 443 -461,

(d) a broadcast, means a cinematograph film of it or a copy of a cinematograph film of it

or a sound recording of it or a record embodying a sound recording of it or a still

photograph made therefrom; and

(e) a computer program, means a copy of such computer program,

being in any such case an article the making of which constituted an infringement of the

copyright in the work, recording, cinematograph film, broadcast or computer program or, in

the case of an imported article, would have constituted an infringement of that copyright if

the article had been made in the Republic;"

The relevant phrase is "in the case of an imported article, would have constituted an infringement of that copyright if the article had been made in the Republic". This is coupled with section 23 (2):

"(2) Without derogating from the generality of subsection (1), copyright shall be infringed by any person who, without the licence of the owner of the copyright and at a time when copyright subsists in a work -

(a) imports an article into the Republic for a purpose other than for his private and

domestic use;

(b) sells, lets, or by way of trade offers or exposes for sale or hire in the Republic any

article;

(c) distributes in the Republic any article for the purposes of trade, or for any other

purpose, to such an extent that the owner of the copyright in question is prejudicially

affected; or

(d) acquires an article relating to a computer program in the Republic,

> if to his knowledge the making of that article constituted an infringement of that copyright or would have constituted such an infringement if the article had been made in the Republic."

The inclusion of the phrase "or would have constituted such an infringement if the article had been made in the Republic" has been interpreted by a judicial predecessor of the Supreme Court of Appeal prior to the Constitution[54]. A holder of the copyright for South Africa or an exclusive licensee, of a particular work, can prevent import of legitimately produced goods by giving notice to the importer and thus introducing the "knowledge" required by the section. The prohibition on parallel importation in so far as it prohibits the importation of learning materials violates the right to education. It also violates the right to free expression. Can these violations be justified with reference to the purpose of copyright?

The prohibition on parallel import is not necessary to achieve the purpose of copyright. A South African author, or successor in title is adequately rewarded by the grant of exclusive rights in South Africa. The South African rights holder is also empowered by the exclusive rights granted to it to insert a restriction into a licence which it issues to others to make copies of the works in other jurisdictions that prohibits them from importing the works into South Africa. It is neither necessary nor practical to grant a copyright holder a monopoly on all further uses of legitimately produced works. This principle of copyright law is often referred to as the principle of "exhaustion" because the copyright holder exhausts his rights during the initial sale or distribution. It is also not the purpose of copyright law in South Africa to give an incentive to authors in other jurisdictions to create works in those jurisdictions. Instead South Africa recognises works created in other jurisdictions in order to obtain recognition of South African works. The Berne Convention which governs this mutual recognition also sets out certain minimum exclusive rights for copyright. Notably a requirement that countries prohibit parallel import cannot be found in Berne. The WTO-TRIPS agreement explicitly states that it does not require a prohibition on parallel import in Article 6.

> "For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights."

South Africa is thus free to permit parallel imports[55]. That neither of these international instruments requires a prohibition on parallel import also demonstrates that such a prohibition is not necessary to achieve the primary purpose of copyright. South Africa can thus achieve the purposes of copyright by prohibiting the importation of copies only when those copies were not authorised in the country of manufacture.

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[54] Frank & Hirsch (Pty) Ltd. v A Roopanand Brothers (Pty) Ltd(580/91) [1993] ZASCA 90; 1993 (4) SA 279 (AD)

[55] See further the discussion by M Rippes and R de Villiers "Legalising parallel imports under intellectual property law" 2004 *Stellenbosch Law Journal* 550

It can be seen the 1978 Act is unconstitutional in a number of ways. It discriminates unfairly against sensory disabled persons, it purports to limit freedom of expression, and it prohibits parallel import unjustifiably. Even if both the discrimination and the restriction on free expression were to be regarded as arguably necessary to achieve the purpose of copyright, in both instances there are less restrictive means of achieving the purpose; a tailored exception for sensory disabled persons in the first instance, a flexible limitation on the exclusive rights in the second. The prohibition on parallel importation is not necessary to achieve the purpose of copyright, it can be readily removed. A ban on importing copies which are infringing in their country of origin would then have to be introduced. There are examples of how to achieve each of these in the legislation of other countries.

Part 2: Legislative Best Practise from Other Countries

4. Legislative Best Practise in Other Countries

Access for the sensory disabled

The Copyright Act of Canada[56] contains an exception to enable use of copyright works.

> " Persons with Perceptual Disabilities
>
> Reproduction in alternate format
>
> 32. (1) It is not an infringement of copyright for a person, at the request of a person with a perceptual disability, or for a non-profit organization acting for his or her benefit, to
>
> (a) make a copy or sound recording of a literary, musical, artistic or dramatic work, other than a cinematographic work, in a format specially designed for persons with a perceptual disability;
>
> (b) translate, adapt or reproduce in sign language a literary or dramatic work, other than a cinematographic work, in a format specially designed for persons with a perceptual disability; or
>
> (c) perform in public a literary or dramatic work, other than a cinematographic work, in sign language, either live or in a format specially designed for persons with a perceptual disability.
>
> Limitation
>
> (2) Subsection (1) does not authorize the making of a large print book.
>
> Limitation

[56] Copyright Act (R.S., 1985, c. C-42)

(3) Subsection (1) does not apply where the work or sound recording is commercially available in a format specially designed to meet the needs of any person referred to in that subsection, within the meaning of paragraph (a) of the definition “commercially available”.

South Africa's Bill of Rights drew upon the Canadian Charter of Fundamental Rights and Freedoms[57]. The Canadian Charter contains an equality guarantee which is similar to the guarantee in the South African Bill of Rights in explicitly prohibiting discrimination against disabled persons.

“Equality Rights

Equality before and under law and equal protection and benefit of law

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

The Canadian exception can be viewed as a in line with the Canadian guarantee of equality, and a similar provision in the law of South Africa would be in line with the South African equality clause. Unlike legislation from some other jurisdictions the Canadian legislation does not require the implementation of complex and costly bureaucratic measures to enable sensory-disabled persons to make use of copyright works. Instead any person can in the appropriate circumstances make copies for sensory-disabled persons. This makes the provision suitable for South Africa where resources, especially government resources are scare. What resources are available should not be spent administering a scheme to permit access by sensory-disabled persons when they could be spent on actually converting works to appropriate formats. The Canadian provisions would have to be clarified on one respect, It should be clear that a disabled person is herself entitled to make a copy in the circumstances envisaged by the section. The agency of disabled persons to act for themselves should be explicitly vindicated in such legislation, since discrimination is also constituted by perceptions that disabled persons lack ability to help themselves.

The Canadian provision does require further refinement. It is a waste of resources if s South Africa devotes the limited resources available for sensory-disabled persons to convert to special formats the same copyright works that are being similarly converted in other countries. Therefore South Africa should permit the import of works in similar circumstances to their manufacture. This would require provisions something like the following to be added to the list of permitted acts: (it is not an infringement to)

[57] Part 1 of the Constitution Act 1982

" import a copy of a literary, musical, artistic or dramatic work, other than a cinematographic work, in a format specially designed for persons with a perceptual disability"

and

"import a translation, adaptation or reproduction in sign language of a literary or dramatic work, other than a cinematographic work, in a format specially designed for persons with a perceptual disability"

Parallel Importation

A number of countries, notably Switzerland, Japan, New Zealand, Malaysia and Singapore permit parallel importation of goods which are subject to copyright. The Swiss Federal Law on Copyright and Neighbouring Rights[58] explicitly states a principle of exhaustion.

"Principle of exhaustion

Article 12.—
1. Where the author has sold a copy of a work or has consented to sale, such copy may be further sold or otherwise distributed."[59]

Given the strong judicial precedent for prohibiting parallel importation in South Africa such a statement while useful would not be sufficient. Instead the explicit language of the New Zealand Copyright Act 1994 is recommended as the best basis for amendment of the 1978 Act. The Act deals with the issue under the definition of infringing copy in section 12.

"An object that a person imports, or proposes to import, into New Zealand is an infringing copy if—

(a) the making of the object constituted an infringement of the copyright in the work in question in the country in which the object was made; or

(b) the importer would have infringed the copyright in the work in question in New Zealand had the importer made the object in New Zealand, unless the object is one to which subsection (5A) or subsection (6) applies."

Section 12 (5A-6) provides:

"5A. An object that a person imports or proposes to import into New Zealand is not an infringing copy under subsection (3)(b) if—

(a) it was made by or with the consent of the owner of the copyright, or other equivalent intellectual property right, in the work in question in the country in which the object was made; or

(b) where no person owned the copyright, or other equivalent intellectual property

[58] Law of October 9, 1992, as amended by the Law of December 16, 1994

[59] Translation into English provided by the World Intellectual Property Organization. Available at http://www.wipo.int/clea/docs_new/pdf/en/ch/ch004en.pdf

right, in the work in question in the country in which the object was made, any of the following applies:

(i) the copyright protection (or other equivalent intellectual property right protection) formerly afforded to the work in question in that country has expired:

(ii) the person otherwise entitled to be the owner of the copyright (or other equivalent intellectual property right) in the work in question in that country has failed to take some step legally available to them to secure the copyright (or other equivalent intellectual property right) in the work in that country:

(iii) the object is a copy in 3 dimensions of an artistic work that has been industrially applied in that country in the manner specified in section 75(4):

(iv) the object was made in that country by or with the consent of the owner of the copyright in the work in New Zealand.

(6) In this Act, an infringing copy does not include a literary work or an artistic work that—

(a) relates to a medicine that has been imported by the Crown pursuant to section 32A of the Medicines Act 1981; and

(b) has been made, copied, published, adapted, or distributed, in an overseas country, by or with the licence of the owner of the copyright in the work in that country."[60]

Section 35 of the New Zealand Act deals with infringing imports.

"Section 35(1) Infringement by importation

(1) A person infringes copyright in a work if—

(a) that person imports into New Zealand an object that is an infringing copy of the work and,—

(i) in the case of a work that is a sound recording, film, or computer program to which subsection (6) applies, that person knows or ought reasonably to know that the object is an infringing copy; or

(ii) in the case of other works, that person knows or has reason to believe that the object is an infringing copy; and (b) the object was imported into New Zealand without a copyright licence; and

[60] Section 12(5A): inserted, on 19 May 1998, by section 5(2) of the Copyright (Removal of Prohibition on Parallel Importing) Amendment Act 1998 (1998 No 20).

(c) the object was imported into New Zealand other than for that person's private and domestic use."

The New Zealand provision does contain jurisdiction specific references such as that in 12 (5A) (iii) and 12 (6) (a) which can be omitted. There is no reason to confine the operation of the provision to the works listed in the New Zealand definition.

Fair Use

Section 107 of Chapter 1 of Title 17 (Copyrights) of the United States provides for fair use.

> "Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.
> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors."

Fair use is necessary in United States copyright law to save the copyright legislation from unconstitutionality. The United States Court of Appeals for the 11th Circuit recounts this history.

> "Until the codification of the fair-use doctrine in the 1976 Act, fair use was a judge-made right developed to preserve the constitutionality of copyright legislation by protecting First Amendment values. Had fair used not be recognised as a right under the 1976 Act, the statutory abandonment of publication as a condition of copyright that had existed for over 200 years would have jeopardized the constitutionality of the new Act because there would be no statutory guarantee that new ideas or new expressions of old ideas, would be accessible to the public."[61]

Fair use this provides a way in which a law maker could amend the 1978 Copyright Act so as to limit its infringement of the rights to freedom of expression and the right to education. Critics of the provision charge that it is too vague and too broad. However it is this flexibility which enables fair use to be used in a multitude of different contexts, and to be adapted to changing technology. Adoption of a fair use provision does not preclude the creation of exceptions which are narrowly tailored, detailed, the limits of which are

[61] Suntrust v Houghton Mifflin 252 F. 3d 1165 (11th Cir. 2001)

therefore easier for users to understand. Instead the two approaches are complementary, with detailed provisions providing a set of clear, if limited and inflexible exceptions, and fair use providing a limitation to the exclusive rights albeit one which must be fleshed out in law and practise. In 2008 Isreal adopted a list of exceptions drawn primarily from UK and European law, but also included a fair use provision modelled on US law[62]. If the 1978 Act were amended to include a fair use limitation on the exclusive rights of copyright it would afford South African courts the opportunity to consider the rich case law of the United States without being bound to follow any of it. In addition to the United States, the Philippines and Israel (2008) have adopted fair use in their copyright laws. South African could thus benefit from the experience of other jurisdictions without slavishly following them.

Conclusion

Opportunities for Legislative Innovation

During the research for this report a number of important access to knowledge issues which touch on fundamental rights were identified for which legislative best practise was not found. That is not to say that there is no existing legislation which deals with the issues in some other jurisdiction. Instead that the legislation failed to optimise access to knowledge in some way or alternatively, and these instances were far more rare, would probably not be regarded as complying with the Berne Convention or the WTO-TRIPS agreement.

A good example is translation. The right to language is protected in sections 30 and 31 of the Bill of Rights, and the state is enjoined in section 6 to promoted indigenous languages. The right to use language is dealt with in sections 30 and 31 of the Bill of Rights.

> "30. Language and culture
>
> Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.
>
> 31. Cultural, religious and linguistic communities
>
> 1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community :
>
> a) to enjoy their culture, practise their religion and use their language; and
>
> b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
>
> 2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights."

The South African Constitution lists eight languages as official languages in Section 6 (1):

> "1) The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati,

[62] Fair Use under Israel's New Copyright Act, Tony Greenman, http://www.tglaw.co.il/full_news_e.asp?cat=6&newsid=144 (visited 19 September 2010)

Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu."

While many South Africans are able to speak, read and write in several of the official languages, language remains a barrier to access to knowledge for many people in South Africa. Translation of books, broadcast and other electronic media is therefore an important means of enabling access to knowledge in South Africa. This is especially so for translation into indigenous languages. Section 6(2) requires a special regard for indigenous languages:

> "2) Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages."

While the state may not always have the resources to translate or pay for the translation of various media into indigenous languages it should ensure that laws and administrative actions do not become barriers to the translation of media into indigenous languages. However South Africa's copyright Act does create a a barrier to the translation of media into indigenous languages, because it prohibits anyone but the copyright holder from making "adaptations of the work, and adaptations include translations.

The right to translate a copyright work is a right reserved to an author or successor in title by the Berne Convention. Article 8 provides.

> "Right of Translation
>
> Authors of literary and artistic works protected by this Convention shall enjoy the exclusive right of making and of authorizing the translation of their works throughout the term of protection of their rights in the original works."

Although a number of statutory provisions were examined to address the issue, they were all unsatisfactory in some respect. For example the a provision in Egyptian law allows translation of works into Arabic without permission. Article 148 of Law No. 82 of 2002 Pertaining to the Protection of Intellectual Property Rights
deals with translation.

> "Protection granted to the copyright and the right of the translator of the work thereof into another foreign language, with respect to the translation of such work into the Arabic language shall terminate; unless the author or the translator assume such right directly or through an intermediary, within three years calculated from the date of first publication of the original or translated work."

This provision seems to be contrary to the Berne Convention, and has been the source of severe criticism by developed countries. Adopting provision such as this one would almost result in a country being subject to a WTO dispute resolution process, and possible penalties. An alternative approach is taken in the Indian Copyright Act 1957.

“Licence to produce and publish translations

32.—(1) Any person may apply to the Copyright Board for a licence to produce and publish a translation of a literary or dramatic work in any language after a period of seven years from the first publication of the work.

(1A) Notwithstanding anything contained in sub-section (1), any person may apply to the Copyright Board for a licence to produce and publish a translation, in printed or analogous forms of reproduction, of a literary or dramatic work, other than an Indian work, in any language in general use in India after a period of three years from the first publication of such work, if such translation is required for the purposes of teaching, scholarship or research:
Provided that where such translation is in a language not in general use in any developed country, such application may be made after a period of one year from such publication.

(2) Every application under this section shall be made in such form as may be prescribed and shall state the proposed retail price of a copy of the translation of the work.

(3) Every applicant for a licence under this section shall, along with his application, deposit with the Registrar of Copyrights such fee as may be prescribed.

(4) Where an application is made to the Copyright Board under this section, it may, after holding such inquiry as may be prescribed, grant to the applicant a licence, not being an exclusive licence, to produce and publish a translation of the work in the language mentioned in the application—

(i) subject to the condition that the applicant shall pay to the owner of the copyright in the work royalties in respect of copies of the translation of the work sold to the public, calculated at such rate as the Copyright Board may, in the circumstances of each case, determine in the prescribed manner; and

(ii) where such licence is granted on an application under sub-section (1A), subject also to the condition that the licence shall not extend to the export of copies of the translation of the work outside India and every copy of such translation shall contain a notice in the language of such translation that the copy is available for distribution only in India:

Provided that nothing in clause (ii) shall apply to the export by Government or any authority under the Government of copies of such translation in a language other than English, French or Spanish to any country if—

(1) such copies are sent to citizens of India residing outside India or to any association of such citizens outside India; or

(2) such copies are meant to be used for purposes of teaching, scholarship or research and not for any commercial purpose; and

(3) in either case, the permission for such export has been given by the Government of that country:

Provided further that no licence under this section shall be granted, unless—

(a) a translation of the work in the language mentioned in the application has not been published by the owner of the copyright in the work or any person authorised by him, within seven years or three years or one year, as the case may be, of the first publication of the work, or if a translation has been so published, it has been out of print;

(b) the applicant has proved to the satisfaction of the Copyright Board that he had requested and had been denied authorisation by the owner of the copyright to produce and publish such translation, or that he was, after due diligence on his part, unable to find the owner of the copyright;

(c) where the applicant was unable to find the owner of the copyright, he had sent a copy of his request for such authorisation by registered airmail post to the publisher whose name appears from the work, and in the case of an application for a licence under sub-section

(1), not less than two months before such application;
(cc) a period of six months in the case of an application under sub-section (1A) (not being an application under the proviso thereto), or nine months in the case of an application under the proviso to that sub-section, has elapsed from the date of making the request under clause (b) of this proviso, or where a copy of the request has been sent under clause (c) of this proviso, from the date of sending of such copy, and the translation of the work in the language mentioned in the application has not been published by the owner of the copyright in the work or any person authorised by him within the said period of six months or nine months, as the case may be;

(ccc) in the case of any application made under sub-section (1A),—

(i) the name of the author and the title of the particular edition of the work proposed to be translated are printed on all the copies of the translation;

(ii) if the work is composed mainly of illustrations, the provisions of section 32A are also complied with;

(d) the Copyright Board is satisfied that the applicant is competent to produce and publish a correct translation of the work and possesses the means to pay to the owner of the copyright the royalties payable to him under this section;

(e) the author has not withdrawn from circulation copies of the work; and

(f) an opportunity of being heard is given, wherever practicable, to the owner of the copyright in the work.

(5) Any broadcasting authority may apply to the Copyright Board for a licence to

produce and publish the translation of—

(a) a work referred to in sub-section (1A) and published in printed or analogous forms of reproduction; or

(b) any text incorporated in audio-visual fixations prepared and published solely for the purpose of systematic instructional activities,for broadcasting such translation for the purposes of teaching or for the dissemination of the results of specialised, technical or scientific research to the experts in any particular field.

(6) The provisions of sub- sections (2) to (4) in so far as they are relatable to an application under sub-section (1A), shall, with the necessary modifications, apply to the grant of a licence under sub-section (5) and such licence shall not also be granted unless—

(a) the translation is made from a work lawfully acquired;

(b) the broadcast is made through the medium of sound and visual recordings;

(c) such recording has been lawfully and exclusively made for the purpose of broadcasting in India by the applicant or by any other broadcasting agency; and

(d) the translation and the broadcasting of such translation are not used for any commercial purposes.

Explanation.—For the purposes of this section,—

(a) “developed country” means a country which is not a developing country;

(b) “developing country” means a country which is for the time being regarded as such in conformity with the practice of the General Assembly of the United Nations;

(c) “purposes of research” does not include purposes of industrial research, or purposes of research by bodies corporate (not being bodies corporate owned or controlled by Government) or other associations or body of persons for commercial purposes;

(d) “purposes of teaching, research or scholarship” includes—

(i) purposes of instructional activity at all levels in educational institutions, including

Schools, Colleges, Universities and tutorial institutions; and

(ii) purposes of all other types of organised educational activity.”

This is obviously so complex that it is unlikely to be usable by the vast majority of South Africans. It requires government to commit resources to administer the procedures prescribed. The approach taken in the Indian legislation is basically that taken in Appendix

to the Berne Convention. The Berne Appendix is unsuited for digital media[63], and use by a developing country is unable to increase access to knowledge on the scale needed by developing countries. The Berne Appendix is regarded as a failure.[64]

Neither approach to translation is therefore satisfactory and there is thus a need for legislative innovation in South Africa to deal with translation. However legislative innovation cannot taken place quickly, it requires extensive research, debate and refinement. An important reason to adopt provisions based on the legislative best practise set out below is that it will enable access to knowledge for millions of South Africans for year, while the far longer process of completely redrafting copyright legislation takes place.

Other issues which affect fundamental rights and which require legislative innovation include:

- orphan works.
- positive protection for the public domain,
- right to make copies and adaptations in order to re-engineer for research purposes,
- right to make copies and adaptations to extract public domain elements,
- right to make adaptations to ensure technical inter-operability,
- anti-circumvention provisions,
- rights of authors to reclaim works disused by subsequent rights holders,
- the default award of rights in commissioned works to parties other than authors.

There are no doubt other issues which will emerge in future. The listed issues provide an opportunity for South Africa to take an international lead in promoting access to knowledge and fundamental rights. This process will inevitably take some time. However the three issues identified by this report cannot wait, and must be dealt with urgently.

The urgency of access to knowledge

The immediate amendment of the 1978 Copyright Act to introduce fair use will grant increased access to knowledge to South Africans now. The introduction of an exception for sensory-disabled persons will finally treat sensory-disabled persons equally. The repeal of the prohibition on parallel import will finally allow the import of cheaper books from India. Seventeen years have elapsed since the introduction of freedom of expression in South Africa, fourteen of them under the current Constitution, and yet the 1978 Copyright Act has not been amended to accord with the constitutional right to equality, freedom of expression, education, or to give South Africans access to knowledge. The drafting of detailed exceptions to the copyright monopoly is a resource intensive endeavour which will become more arduous as interest groups contest various proposals. It will be years before detailed exceptions are passed into law in South Africa. In the meantime a generation of children and young people is being denied learning materials. In the meantime the vast majority of South Africans are blocked from access to knowledge. In the meantime the

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63 See R Okediji 'Development in the Information Age: Issues in the Regulation of Intellectual Property Rights, Computer Software and Electronic Commerce' ICTSD 2005. (http://www.iprsonline.org/unctadictsd/docs/CS_Okediji.pdf)

64 R Okediji "The International Copyright System: Limitations,Exceptions and Public Interest Considerations for Developing Countries" ICTSD 2005, (http://www.iprsonline.org/unctadictsd/docs/Okediji_Copyright_2005.pdf)

1978 Act is unconstitutional. Law makers should act quickly to cure this unconstitutionality.

Legislative best practise from other jurisdictions can help. Specifically the Canadian provisions on the sensory-disabled, the New Zealand repeal of the prohibition on parallel import and the United States fair dealing provision offer ways in which to address the unconstitutionality of the Act quickly by amending the current Act. If law makers fail to seize the opportunity then the Copyright Act may be declared unconstitutional by the courts, and struck down.

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Andrew Rens thinks and writes about the interaction of law, knowledge and innovation, and blogs his thoughts at www.aliquidnovi.org. Currently an SJD candidate at Duke Law School , Andrew Rens recently completed a three year fellowship as the Intellectual Property Fellow at the Shuttleworth Foundation, as well as conducting research through *Intellectual Property Law and Policy Research* at the University of Cape Town, where he taught Master's courses in Telecommunications Law and Electronic Intellectual Property Law at the University of Cape Town Law School.

Andrew Rens was the founding Legal Lead of Creative Commons South Africa, a co-founder and former director of The African Commons Project, a charter member and director of Freedom to Innovate South Africa, a fellow at the Stanford Center for Internet and Society, and a research associate at the LINK Center at the School of Public and Development Management, University of the Witwatersrand, Johannesburg. Andrew Rens qualified as an attorney in South Africa, and was awarded a Master of Laws from the Law School at the University of the Witwatersrand where he where he subsequently taught Master's courses in Intellectual Property, Telecommunications, Broadcasting, Space and

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