

# Report on the South African Open Copyright Review



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# *The South African Open Copyright Review Report*

## Executive Summary

The South African Open Copyright Review aimed to engage civil society and ordinary South Africans in a review of how they understand copyright, and how South African copyright law affects them and the work that they do. It followed the review model used by the Alternative Law Forum (the “ALF”) in Bangalore, India, not only because this is a useful model for commenting on law, but also because the ALF review is a useful model of how a developing nation with an inherited colonial copyright system can approach the law and modulate it to meet the unique needs and features of a developing country.

After many discussions and workshops, and the opportunity to comment on an online wiki, the various concerns, comments and suggestions made were combined into this Report which includes a plain language review of South African copyright law, as well as a critique of the areas of the Copyright Act (referred to as the “Act”) that should be reviewed and recommendations of possible changes that should be made.

In general, the Report focused on access to knowledge resources and learning materials, and examines how the restrictive, European-style law that is currently in place has had a chilling effect on the access of learners to knowledge, especially in the area of electronic resources. Many of the recommendations have the potential to liberate knowledge and make it easier to access for many South Africans.

The huge advances in technology (particularly in the digital realm) since the Act was passed in 1978 have also completely revolutionised the way South Africans engage with content, copyright and media. The 1978 Act preceded these changes and one of the objectives of the Review was to make recommendations that take these advances, and any future development that may take place, into account, and make provision for them in the Act.

The Report also looked at areas of the Act that are vague or poorly defined, like the definition of licence. Fair dealing is also examined; the definition of Fair dealing and the other exceptions allowed for in the Act are very vague. The Report examines concepts inadequately addressed in the legislation: orphan works, parallel imports and the public domain. All three of these areas offer important freedoms, which could improve access to learning materials.

Throughout the review process and the writing of the Report, the authors attempted wherever possible to use plain language, and make the Review as reader-friendly as possible. One of the objectives of the project was to demystify and develop a vocabulary around copyright, so that ordinary South Africans, who may not have legal expertise, are able to engage in the discussions and debates that emanate from the review process.



## Introduction

### How ordinary South Africans infringe copyright without even knowing it ...

Zamo Mamisela is a 23-year-old photography student, who plays bass in an Afro-jazz band in Johannesburg. First thing in the morning, Zamo heads off to varsity, where she stops off at the department resource centre. She makes a copy of a chapter of a book that has been set aside for her by one of her lecturers. Technically, this copying is allowed, since fair dealing allows for copying and reproduction of a portion of a work, if the work is being used for research or private study. But the law is vague, and states that the amount copied needs to be "... compatible with fair practice [and] shall not exceed the extent justified by the purpose ...". Zamo copies the whole chapter, although all she needs are a few pages, so, arguably, she has just made an unauthorised copy of a copyright work.

After going to the library, Zamo heads for the computer lab. In the lab, she accesses a journal article about images of Africa. She decides to make copies of the article, to distribute to the other twelve people in her class. She has just broken the law, since it is permissible to print out a copy for her personal or private use, but Zamo may not further reproduce it for other students without permission from the rights' owner.

At lunch-time, Zamo and her band have been invited to play a free lunch-time concert in the varsity cafeteria. One of the songs they play is a cover of Miriam Makeba's Click Song (Qongqothwane). They have just broken the law, since they have taken part in an unauthorised public performance of a copyright work, and the cafeteria doesn't have a blanket licence from the musical collecting society. One of

their friends recorded the concert on his videophone. He also broke the law, since he has made an unauthorised recording of the public performance of a copyright work.

That afternoon Zamo meets with the education subcommittee of the Student Representative Council. One of them, Zanele, has just come back from a student exchange programme to India. Zanele brought back 20 copies of an important book on photography history (the library only has one copy), because they were really cheap. Although the books were legitimately produced and sold in India with the consent of the UK-based publisher of the books, Zanele's importation of the books into South Africa was illegal because the copyright law prohibits and even criminalises parallel import of legitimate copyright goods.

That night, Zamo's band is performing in a small club in Johannesburg. On the wall behind the stage a video screen shows footage of My Chemical Romance. One of Zamo's friends takes some photos with her cellphone of the band while they're on-stage, and mails them to Zamo from the dance floor. When Zamo gets home, she downloads the photos and puts them onto the band's blog. She has just broken the law by republishing the video of My Chemical Romance, without permission.

Technically speaking, Zamo and her friends have broken the law several times today. And yet she has not engaged in any typical acts of infringement frequently featured in media campaigns, such as sharing music over a P2P network or illegally copying



and distributing music or film for money. Every time she has broken the law, it has been in the day-to-day activities of an ordinary South African, without intending to do so, and without reducing what the artists and authors are paid.

### **How did this situation come about?**

Copyright is seen as a technical area of law, irrelevant to most people. Participation from civil society and SMEs in policy-making and advocacy has been sporadic at best, and largely uncoordinated. Copyright was originally intended to give people an incentive to create and communicate their creative products. The incentive was control over commercial exploitation of what they produced. Copyright grants a monopoly but a limited monopoly, intended to be a balance between the rights of users and creators. How can NGOs, SMEs and ordinary South Africans understand copyright? The Alternative Law Forum's (the "ALF") review of the Indian Copyright Act has shown that a section-by-section review of existing legislation is a helpful analytical tool for those engaged in policy-making in the area of copyright. Inspired by the ALF's model, this review entailed scrutinising provisions of the South African Copyright Act of 1978 with particular focus on sections which impact access to knowledge, especially access to learning materials. The primary current South African copyright legislation, the Copyright Act of 1978, was passed in a policy environment inimical to the present-day South Africa, and its development goals. At the time of its passage the apartheid state was intent on demonstrating the country's identity as European. Unbelievable as such a claim may now

seem, it gave rise to legislation that uncritically mimicked legislation in the global North, and emphasised technocratic mastery of the mechanics of copyright administration without examining the impact on development. In post-apartheid, democratic South Africa, the policy imperatives of development and human rights, enshrined in the Constitution have not yet been used to transform copyright law. Copyright has had to wait while the government tackled important economic structural legislation on competition and companies.

During the decades since the passing of the current Act, technology has changed so dramatically that the changes are referred to as the digital revolution. The Internet, World Wide Web, podcasting and digital music formats are only some of the manifestations of these changes. Copyright law, however, has not changed as rapidly as the revolutionary technological changes of recent decades. Law hasn't kept pace with technology, in South Africa and around the world. The difference in pace of change generates uncertainties about creativity using new media and copyright.

Copyright, like other intellectual property laws, can present technical difficulties to those engaged in socio-economic analysis of the law and its impacts. Undue reliance on technical experts creates the risk of policy capture by experts invested in a mind-set that claims that only a few multinational corporations create while everyone else is simply a consumer. This mind-set threatens to dominate the international crafting of copyright policy in arenas such as the World Intellectual Property Organisation.



How do the mechanics of the current Copyright Act impact on access to knowledge? The following Report provides a series of links between the technical details of current copyright legislation and the knowledge policy debate. The Report uses plain language in the overview, and supplies further legal analysis in the audit, commentary and analysis of the public domain, orphan works and parallel imports.

Copyright legislation in South Africa requires complete revision comparable to the recent revision of the Companies Act. However this will require a lengthy policy process, during which development needs, especially those associated with access to learning materials, will remain unmet. The Report therefore contains recommendations for changes to current legislation. Civil society should advocate for these changes to

be implemented forthwith, while the project of rewriting the legislation takes its lengthy course. At the very least the recommendations should be considered for implementation in new legislation.

### *About the Report*

The Report was written after a review process in which the public and civil society were invited to comment on the provisions of the Act in an online wiki, workshops were held in Johannesburg and Cape Town, and the Copyright Act was reviewed. The Review helped to start another project, the African Copyright and Access to Knowledge project (ACA2K), a study of copyright and access to knowledge in eight African countries in which the Shuttleworth Foundation is partnering with the International Development Research Centre. Two of the authors of this report are members of the South African country team for ACA2K.



## Recommendations

It is recommended that copyright legislation should:

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:

by reducing the term of photographs from fifty to twentyfive years;

by reducing the term of works first made public after the author's death to life of the author plus fifty years;

and not to extend copyright terms beyond those required by treaties binding South Africa;

2. expand copyright exceptions and limitations, stating exceptions and limitations clearly;

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

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

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

by introducing 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 section 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;

by specifically allowing:

- temporary acts of reproduction which are transient or incidental and an integral and essential part of a technological process; and
- time-shifting, format-shifting and space-shifting in certain circumstances (e.g. private use as well as library and archive use);

by clarifying the scope of fair dealing in South Africa;

3. protect the public domain, specifically:

by defining the public domain as a realm in which the public has positive rights to reuse creativity;

introducing 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; and

by explicitly providing that all official, administrative and legal works, of whatever form, are automatically in the public domain;

4. address the orphan works problem, specifically:

by including a simple provision which will enable the reuse of orphan works, after reasonable notice, for a percentage of royalties determined by the Copyright Tribunal or similar body and;

by creating a voluntary online 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. provide 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; and

11. commence government inquiry into the feasibility of making use of the Berne Appendix, with special provisions for developing countries.

Additional recommendations may be found in the commentary on sections.



## Overview of South African Copyright in Plain Language

### The Reason for Copyright

There are a number of different statutes that create rights to intellectual creations: patent, trademark, design and copyright. These statutory rights are sometimes called intellectual property<sup>1</sup>.

Copyright is a right created by the Copyright Act, to give exclusive rights to an intellectual creation. Because it excludes people from certain uses, the rights are referred to as exclusive rights. Copyright is a statutory incentive scheme. Copyright law gives exclusive rights, usually to the creator of an intellectual creation, so that she can prohibit or allow others to make copies of or modifications to the intellectual creation in exchange for money or some other benefit. The primary benefit conferred by a property right is the use and enjoyment of the property such as a car, rather than the ability to exclude others, although it might necessitate the exclusion of others only in order to secure use and enjoyment of the car. However intellectual property rights consist solely of the right to exclude others.

Intellectual creations, governed by intellectual property are what economists term non-rivalrous and non-excludable goods. The term “non-rivalrous” refers to the quality of intellectual creations which allows many people to make use of the same goods simultaneously without diminishing the value of the creation or impairing another’s use. Two people or two thousand people can read a website, at the same time. One

person does not need to forget the contents of a book to enable someone else to learn from it. Because of the qualities of non-rivalrousness and non-excludability intellectual creations are available for sharing and reuse in a way which tangible creations are not.

### South African Copyright – A Brief History

South Africa, like many other developing countries, inherited its intellectual property law system from its colonial rulers, namely Great Britain and Holland. From 1803 until 1916, the constituent parts of South Africa had a type of Roman-Dutch “common law” copyright based on legislation apparently in force in Holland. In 1916 the Patents, Trade Marks, Designs and Copyright Act became the first piece of legislation that created a national copyright regime, granting copyright primarily to authors. This Act effectively adopted the Imperial Copyright Act of 1911 as South African law. The system that South Africa received from the British was ultimately based on the world’s very first piece of copyright legislation, the 1709 Statute of Anne. This law vested authors with control over how their work could be reproduced for a fixed period of time. Before this time, printers had been the ones who controlled the copying of works in exchange for censoring which works were printed.

In 1928, South Africa became a signatory of the Berne Convention on its own behalf. Prior to that event the Convention had been applied to South

1. Some commentators follow US practice in classifying trade secrets, which are protected in South Africa through a combination of contract and common law unfair competition rules as “intellectual property”.



Africa as a colony. The Berne Convention is the oldest and arguably the most important multilateral copyright treaty<sup>2</sup>. The Berne Convention states that copyright is an automatic right, that an author or creator obtains as soon as his or her work has been “fixed” (i.e. recorded or written down) without the author having to declare or assert it. The Berne Convention also makes provision for international reciprocity for copyright works, which means that a work that is created in one country is automatically protected by copyright in any other country that is also a signatory. The third important feature of the Berne Convention is the recognition it gives to moral rights (see the section on moral rights).

Before it became a Republic in 1961, South Africa was a self-governing “dominion” within the British Empire. After South Africa became a Republic, the copyright law was revised, and the 1965 Copyright Act, which was based on the British 1956 Act, was passed. This Act was also very similar to the British legislation, as was another Act passed in 1978, which is still in force in South Africa.

The policy processes which led to these 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.

Neither has South African copyright legislation ever

made mention of the traditional knowledge of indigenous communities in South Africa. This knowledge, which was (and still is) rarely written down, is passed down within a community by oral traditions.

## What Kind of Work Is Controlled By Copyright?

South African copyright law controls the following categories of works<sup>3</sup>:

- Literary works
- Musical works
- Artistic works
- Sound recordings
- Cinematograph films
- Sound and television broadcasts
- Programme-carrying signals
- Published editions
- Computer programs

Within these categories, many different kinds of works are included. The definition of literary works includes plays, textbooks, dictionaries, novels, poetical works, television and film scripts, letters, song lyrics, reports, speeches, sermons and lectures. Musical works mean just that – music only. The words of a song may be copyright separately as a literary work; the same goes for the recording of the song. Artistic works include paintings, sculptures, drawings,

2. The Berne Convention currently has a total of 164 contracting parties.

3. The exclusive rights pertaining to each type of work are set out in as follows: literary or musical works, section 6; artistic works, section 7; cinematograph films, section 8; sound recordings, section 9; roadcasts, section 10; programme-carrying signals, section 11; published editions, section 11A; and computer programs, section 11B.



engravings, pottery, photographs, architectural works and “works of craftsmanship” which may include artisanal works. Sound recordings are defined as the actual recording, (i.e. neither the music nor the lyrics on the recording, which are listed separately). Cinematograph films include celluloid films as well as any videotapes, DVDs, laser discs and microchips that may have a film recorded on them. Sound and television broadcasts defined as the actual broadcast, made up of electromagnetic waves, not the content of the broadcast, is subject to copyright. The content of the broadcast, such as music, could be subject to copyright under another category such as sound recording.

## How Long Does Copyright Last?

In South Africa, the time frame for which a work is controlled through copyright depends on the kind of work. For most types of work copyright lasts for the duration of the life of the author and fifty years after the author’s death. If more than one person created the work, the exclusive rights lasts until fifty years after the death of the longest surviving author. If a work is only published after the author(s) have died, the term of copyright lasts for fifty years from the end of the year in which the work was first published.

It’s important to note that, since the first copyright laws were drafted in the early 18th Century, the duration of copyright has been repeatedly extended by many years. The first copyright law, the Statute of Anne made provision giving an exclusive right over

the book for twenty-one years for work already published, and fourteen years for work published subsequently. Over the centuries these terms have been extended, due to pressure by publishers and other rights holders, and now the usual term of copyright in the European Union and the United States is seventy years after the death of the author.

Some developing nations have been led to believe that longer times of protection will be better. In Mexico the copyright term is life plus one hundred years and Cote d’Ivoire has made the copyright term the life of the author plus ninety-nine years.

The implications of these continued extensions is that works that would normally be entering the public domain and therefore be freely accessible, adaptable and usable are now being kept under lock and key for longer, depriving the general populace of access to many works.

The treaties that South Africa are bound by require that South Africa only need grant exclusive rights over photographs for twenty-five years, but South Africa grants an exclusive right for fifty years over photographs<sup>4</sup>. One result is that archives and museums are afraid to digitise photographs to preserve them. As a result important historical photographs are degenerating.

The treaties that South Africa are bound by require that South Africa set a term of the life of the author plus fifty years for literary, artistic and musical works.

4. Section 3(2)(b).



However the Copyright Act grants a much longer term if the author fails to publish the work in his lifetime<sup>5</sup>. This does not make much sense because the objective of copyright law is to give incentives for creation and the communication of that creativity.

## Who is Eligible for Copyright?

The South African Copyright Act provides clear guidelines as to who shall be considered the author of a copyright work<sup>6</sup>. In the case of literary, music and artistic works, the author is the person who first makes or creates the work. For photographs, the author is the person responsible for the composition of the photo. In the case of film and sound recordings, the author is the person who made arrangements for the making of the film or recording. The first broadcaster is the copyright holder for a broadcast and the publisher is the copyright holder for a published edition. The person who emits the signal to a satellite is the copyright holder of a programme-carrying signal, and the person who exercised control over the making of the program is considered the author of a computer program. For broadcasting and the emission of programme-carrying signals, that person is usually a corporation.

There are some exceptions in the Act to these definitions. If someone commissions a photo, painting, film, sound recording or drawing of a portrait, then authorship belongs to the person who commissioned the work. If a literary or artistic work is created by an author who is employed by a

magazine, newspaper or similar publication, authorship vests in the publisher, and any work that is created in the course of an author's employment belongs, ultimately, to the employer.

For many authors, musicians and other artists, this means that, in many cases, they do not hold the rights to their creative works, since they assign or license their copyright to the publishers of the work, who in turn publish and distribute the work. In these scenarios, they are usually paid royalties by the holder of the copyright or licences.

What the Act does not make provision for is the eligibility of communities to hold copyright for any of the creative works, logos, names and designs which may be based on their traditional knowledge. Technically, these works are currently in the public domain. There is currently draft legislation in the pipeline to amend the law in this regard, but at the time of writing, it has not yet been made law.

## Moral Rights

Moral rights are author's rights that are enshrined in the Berne Convention and, therefore, included in South Africa's copyright statutes. Unlike copyright, moral rights are non-economic, and as such they cannot be alienated, transferred, donated or sold. They rest with the creator and nobody else. The moral rights that are contained in the South African Copyright Act state that an author has the right to

5. See the discussion of section 3(2)(a).  
6. Section 21.



claim authorship of a work and be attributed as such<sup>7</sup>. The author also has the right to object to any distortion, mutilation or other modification that is prejudicial to the honour or reputation of the author<sup>8</sup>. The duration of the rights is unclear: does the right to object to distortion persist for the life of the author, or the same duration as economic rights?

## How Does Copyright Apply?

Copyright is an automatic right. This means that as soon as a work is fixed, i.e. written down or recorded, the author's right to claim copyright is assured. As an author, you do not need to register the work, or apply for the copyrights in order to validate your claim as the author<sup>9</sup>.

Once a work has been created and automatically copyright, it is usually illegal for anyone to do any of the following without the author's permission<sup>10</sup>:

- reproduce the work;
- publish the work if it has not been published before;
- perform the work in public;
- broadcast the work;
- adapt the work; or

- cause the work to be transmitted in a diffusion service.

These acts are called “restricted acts” and while the details of the law may differ slightly for different categories of work, in essence they amount to the same restrictions on copying the work, modification of the work and exploiting it commercially by charging for it. Under South African copyright law, using less than a substantial part of a work does not constitute a use that must be authorised by a rights holder<sup>11</sup>.

## Copyright Exceptions and Limitations

Once a work is covered by copyright, however, there are certain cases when it is in the public interest for the work, or substantial parts of it, to be reproduced or used without requiring the agreement of the copyright holder. These cases are usually referred to as exceptions and limitations<sup>12</sup>. One of the most important exceptions is called fair dealing.

### Fair Dealing

Fair dealing is an idea that is enshrined in the copyright laws of many countries that are or have

7. Sometimes referred to as the Right of Paternity.

8. Sometimes referred to as the Right of Integrity. South Africa is obliged to protect moral rights as a signatory of the Berne Convention. Article 6bis, provides “Moral Rights:

1. To claim authorship; to object to certain modifications and other derogatory actions;

(1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation.”

9. It is possible to register films in terms of the Registration of Copyright in Cinematographic Films Act 62 of 1977, but not required for the vesting of copyright.

10. The exclusive acts reserved for the rights holder for each type of work differ from work to work. The exclusive rights pertaining to each type of work are specified in the following sections: literary or musical works, section 6; artistic works, section 7; cinematograph films, section 8; sound recordings, section 9; broadcasts, section 10; programme-carrying signals, section 11; published editions, section 11A; and computer programs, section 11B.

11. Section 1(2A). What constitutes a substantial part of a work cannot be quantified, it is a qualitative inquiry and not always clear.

12. International copyright treaties and agreements contain various requirements for such exceptions and limitations.



been members of the British Commonwealth, or were once British colonies. Essentially, fair dealing allows the use of copyright material without the consent of the copyright owner for certain purposes<sup>13</sup>.

In South Africa, fair dealing allows for copying and modification of a portion of a work, in the following scenarios<sup>14</sup>:

- if the work is being used for research or private study;
- if the work is used for the purposes of criticism or review; or
- if the work is used in the reporting of current events in a newspaper, magazine, broadcast or film.

The author and source of the work has to be attributed. Fair dealing extends to the online realm as well, and is equally applicable to works that are hosted and stored on the Internet<sup>15</sup>. 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.

## Other Copyright Exceptions and Limitations

In addition to fair dealing the Copyright Act contains a number of more specific exceptions for the different kinds of works. These limitations and exceptions are complex and detailed. Each work has a different list of which exceptions apply to it. The result is quite complex, as can be seen in the following table setting out which exceptions apply to which works.

13. Article 9(2) of the Berne Convention also deals with reproduction of copyright protected works. It allows for reproduction in certain special cases provided that the reproduction doesn't conflict with the normal exploitation of the work or unreasonably prejudice the legitimate interests of the author. As a signatory of the Berne Convention, South Africa is allowed to have these exceptions.
14. Section 12(1). Fair dealing applies directly to literary and musical works. In addition, it applies *mutatis mutandis* to artistic works, cinematograph films, sound recordings, broadcasts, published editions and computer programs. It needs to be noted, however, that the scope of fair use is reduced in relation to certain categories of works.
15. Fair dealing applies directly to literary and musical works. In addition, it applies *mutatis mutandis* to artistic works, cinematograph films, sound recordings, broadcasts, published editions and computer programs. It needs to be noted, however, that the scope of fair use is reduced in relation to certain categories of works. For more details see the table.



## Table Setting Application of Exceptions to Categories of Rights

Subsection of section 12	Exception set out in section 12 for literary and musical works	Other works to which exception applies and section applying exception
(1)	Fair dealing; (a) research or private study or personal or private use; (b) criticism or review; (c) reporting current events	artistic works, section 15(4) cinematograph films, section 16(1) – but only (b) and (c) sound recordings, section 17 – but only (b) and (c) broadcasts, section 18 published editions, section 19A computer programs, section 19B – but only (b) and (c)
(2)	Use in the context of judicial proceedings	artistic works, section 15(4) cinematograph films, section 16(1) sound recordings, section 17 broadcasts, section 18 published editions, section 19A computer programs, section 19B
(3)	Quotations	cinematograph films, section 16(1) sound recordings, section 17 broadcasts, section 18 computer programs, section 19B
(4)	Illustrations in any publication, broadcast or sound or visual record for teaching	artistic works, section 15(4) cinematograph films, section 16(1) sound recordings, section 17 broadcasts, section 18 published editions, section 19A computer programs, section 19B
(5)	Ephemeral reproductions by a broadcaster	artistic works, section 15(4) sound recordings, section 17 broadcasts, section 18 published editions, section 19A computer programs, section 19B



(6)	Reproduction in the press or broadcasting of works delivered in public for informatory purposes	
(7)	Reproduction in the press or broadcasting of published articles on current topics	
(8)	No copyright protection for: official texts of a legislative, administrative or legal nature, or official translations of such texts; speeches of a political nature; speeches delivered in the course of legal proceedings; news of the day that are mere items of press information	
(9)	The provisions of subsections (1) to (7) inclusive shall apply also with reference to the making or use of an adaptation of a work	artistic works, section 15(4)
(10)	The provisions of subsections (6) and (7) shall apply also with reference to a work or an adaptation thereof which is transmitted in a diffusion service	artistic works, section 15(4)
(11)	The provisions of subsections (1) to (4) inclusive and (6), (7) and (10) shall be construed as embracing the right to use the work in question either in its original language or in a different language, and the right of translation of the author shall, in the latter event, be deemed not to have been infringed	
(12)	Bona fide demonstration of radio or television receivers or any type of recording equipment or playback equipment	artistic works, section 15(4) cinematograph films, section 16(1) sound recordings, section 17 broadcasts, section 18 published editions, section 19A computer programs, section 19B
(13)	An authorisation to use a literary work as a basis for the making of a cinematograph film or as a contribution of a literary work to such making, shall, in the absence of an agreement to the contrary, include the right to broadcast such film	artistic works, section 15(4) cinematograph films, section 16(1) sound recordings, section 17 broadcasts, section 18 published editions, section 19A computer programs, section 19B



Even under the current Copyright Act various educational uses as well as uses for library, archival or museum purposes are possible without the copyright owners' permission<sup>16</sup> 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. As a result, certain everyday uses, such as copying all rights reserved music from a person's own CD onto an MP3 player that the same person owns, are arguably illegal under the current South African law at the moment<sup>17</sup>. 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 program may currently not be re-engineered or adapted without the permission of the rights owner.

16. For example fair dealing for personal study under section 12(1)(a), educational use for example in section 12(4), or use under the Copyright Regulations promulgated under section 13 of the Act.

17. Section 12(1)(a) which permits copying for personal use does not apply to sound recordings, but section 19B permits backup copies of a computer program. If digital music formats are computer programs as defined by the Copyright Act then a backup copy may be made. However it is not clear whether digital formats are programs or whether backup purposes allows daily use of the backup.



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. There is further discussion of exceptions under the discussion of section 12.

## Restrictions on Access to Public Information

As it stands, the Act only places a few publicly-funded works in the public domain. The Act also has no requirement that requires publicly-funded research to be stored in an institutional repository where it can be easily accessed.

## What is the Public Domain? And Why Should We Care About It?

“Public Domain” refers to those works that the public has an unlimited right to copy, adapt and share. The Public Domain includes works that are not in copyright, either because they have never been under copyright, or because the term of copyright under which they had been protected has expired. The Public Domain also includes creative and intellectual elements, such as plots, which cannot be the subject of copyright, or other intellectual property. The Public Domain is essentially public property and is free for anyone to adapt, build upon, copy, distribute and perform<sup>18</sup>.

Many important historical works are part of the Public Domain. The Mahabharata and the Ramayana, the two major Sanskrit epics of ancient India are Public Domain works, as are the compositions of Mozart, the plays of Shakespeare, the Mali Manuscripts from the 13th century and the novels of Dostoevsky amongst others. The Public Domain is important because it is an accessible, usable collection of the historical, scientific, technological and cultural works of a society. Having access to works like these fosters learning, innovation and the development of new works and encourages creativity. Having access to a rich collection of Public Domain works means that teachers can make materials available for students, publishers can publish low-cost volumes, libraries can develop digital repositories and researchers can access and use each other’s information without having to worry about the cost and logistical issues

18. See also technical legal discussion of the public domain.



involved in finding rights holders and getting their permissions to adapt or use the works.

The Public Domain, however, is under threat. The constant international trend of extending copyright terms for longer periods means that less work is entering into the Public Domain globally, and access to important cultural, scientific and creative knowledge is restricted. The creation of new categories of rights also reduces the Public Domain.

## Works That are not Mentioned by the Act

The Copyright Act is silent about some works or uses of works, for example the Copyright Act does not deal with the problem of orphan works. Advances made by modern technology, particularly in the online realm, have also resulted in some works not being mentioned in the Copyright Act.

**Orphan Works:** Orphan works include works where the rights holder cannot be located and works of which the status is unclear; they may or may not have entered the Public Domain. Because current copyright terms are so long a situation arises in which someone who would like to obtain a licence to make use of a work cannot locate the rights holder. It may be that the rights holder has ceased to exist without passing on the rights. It may be that the work has entered the Public Domain, but because the rights holder cannot be found, it is hard to find out when the author died, so the term cannot be calculated. These are works that either should require no licence, or where someone is willing to negotiate a licence

but cannot do so. The result is inefficiency because there is a legal provision, which prohibits the use without permission, but permission cannot be obtained. While these works are not explicitly mentioned in the Act, this doesn't mean that they are not rendered inaccessible by copyright.

**Webcasts and Podcasts:** The Act makes no specific provisions for works that are communicated over the Internet. It may be that anachronistic provisions regarding "diffusion services" apply to webcasts and podcasts with unexpected results.

**Traditional Knowledge:** No mention is made of traditional knowledge in the South African Copyright Act, however the Department of Trade and Industry has drafted an Intellectual Property Amendment Bill, intended to introduce exclusive rights over traditional knowledge by an amendment of several statutes including the Copyright Act. While granting new rights to indigenous communities, the amendments will significantly reduce the Public Domain. In order to keep the balance between the Public Domain and works subject to exclusive rights it is all the more necessary to introduce appropriate exceptions and limitations to copyright over all kinds of works. A full analysis of the draft legislation (intended to amend multiple statutes) is not possible in this Review of the current Act.

**Parallel Imports:** Parallel imports are articles made in one country with the permission of the copyright holder in that country, which are legitimately sold in that country, which are then imported into a second country, without the consent of the copyright holder



in the second country. For example a publisher in the United Kingdom might give the right to make copies of a book in India to one person and in South Africa to another person. If the book is being sold more cheaply in India than South Africa an importer could buy the books in India and import them into South Africa. Both versions of the book are legitimate, authorised by the copyright holder who has already received payment for them. But importing the legitimate Indian books into South Africa is prohibited by the Copyright Act.

Parallel imports can make products cheaper and increase competition in the market, but in South African law, parallel imports are classified as a secondary infringement of copyright. Imports, except

for personal use, not authorised by the South African copyright licensee are illegal, and this legislation has prevented, in several cases, the parallel imports of non-counterfeit (i.e. legally produced) goods.

Parallel imports are already used extensively to make medication, like anti-HIV drugs available at a lower cost. Medicines are governed by patent, not copyright law, which permits some parallel imports. Parallel imports could also greatly enhance education and access for knowledge – for example, in India books are printed and distributed much more cheaply than they are in South Africa. If parallel imports were permitted educators would be able to import cheap, quality books at a much lower price, and make them available to more South African students.



## Audit of South African Copyright Law 2008

### 1. Introduction

Copyright must reflect a balance of private and public interests. It must create adequate incentive to the creator while enabling (and not hampering) access by users. Particularly when applied within a developing country context, it is crucial to remember that while this audit<sup>19</sup> is concerned with access to knowledge, it is also concerned with the equitably dispersed production of knowledge. It thus relies on a fundamental principle: access to knowledge in turn creates producers of knowledge.

### 2. General Questions

- i) The title of the law which regulates copyright?

**Copyright Act of 1978.**

- ii) Year from which copyright has been legislated nationally?

**Modern South African copyright law commenced with the Patents, Designs, Trade Marks and Copyright Acts, No. 9 of 1916. Chapter 4 of that Act dealt with copyright. This chapter consisted of few sections and it implemented the application of Schedule III to the Act to South Africa. Schedule III consisted of the entire text of**

**the British Copyright Act of 1911, the so-called “Imperial Copyright Act”. In 1965 the South African legislature adopted the Copyright Act, No. 63, of that year. This Act repealed and superseded the Imperial Copyright Act. It was closely based on the British Act of 1956. Unlike the Imperial Copyright Act, the British Copyright Act of 1956 did not become law in South Africa. It was in fact adapted to become the South African Act of 1965.**

- iii) Does copyright protection exist in terms of the common law in South Africa?

**No.**

- iv) What kind of works are currently copyright protected in South Africa?

- a) literary works
- b) musical works
- c) artistic works
- d) cinematograph works
- e) sound recordings
- f) broadcasts
- g) programme-carrying signals
- h) published editions
- i) computer programs

19. This copyright law audit is based upon the **Commonwealth of Learning Copyright Audit: Prepared by Achal Prabhala and Tobias Schonwetter (2006)** with grateful acknowledgement to the following sources: (1) Consumers International Asia Pacific – Report on Copyright & Access to Knowledge, 2005; (2) Consumer Project on Technology & associates – Draft text of the a2k treaty, 2005; (3) Alternative Law Forum – Submission on Indian Copyright Law, 2006; and (4) Wizards of OS working group around EUCD – Best Practices Guide, 2006. With thanks to Julien Hofman, Paul West, Dick Kawooya, Charles Batambuze & Denise Nicholson for suggestions and comments.



v) What is the exact nature of copyright in the different works?

**The nature of copyright in the different works is defined in sections 6 – 9 and 11 – 11B of the South African Copyright Act.**

vi) Are moral rights protected in South Africa, and if so, to what extent?

**Yes.**

**Moral rights, i.e. the right to claim authorship (right of paternity) as well as the right to object to any distortion, mutilation or other modification of the work where such action is or would be prejudicial to the honour or reputation of the creator are granted in South Africa (section 20 of the South African Copyright Act). The right to object to distortions is sometimes referred to as the right of integrity. The extent of the right is unclear, for instance the term is unclear: does the right to object to distortion persist for the life of the author, the same duration as economic rights or indefinitely?**

### 3. International Obligations

As far as copyright legislation is concerned, the South African lawmaker is bound by several bilateral and multilateral treaties and agreements to which the country has become party.

#### A. The Berne Convention of 1886

The Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) is an international treaty on copyright, first adopted in Berne, Switzerland in 1886. As of writing, 164 countries are party to the Berne Convention.

vii) Is South Africa a signatory to the Berne Convention, and if so, to what Act?

**YES. South Africa became a signatory to The Berne Convention in 1928. (This “Entry into force” date is given as the date on which South Africa became an independent contracting party. Previous application of Berne Act by UK: May 1, 1920. Original adherence to Berne Convention by UK: December 5, 1887).**

#### The Appendix to the Berne Convention

For developing countries joining the Berne Convention, access to copyright goods from developed countries was considered a problem. In response to this concern, the Appendix to the Berne Convention was formulated. In essence, the Appendix provides under certain circumstances – and subject to the compensation of the rights holder – for a system of non-exclusive and non-transferable, non-voluntary licences in developing countries regarding (a) the translation for the purposes of teaching, scholarship or research, and for use in connection with systematic



instructional activities (Article II of the Appendix to the Berne Convention), and (b) the reproduction of works protected under the Berne Convention (Article III of the Appendix to the Berne Convention). The actual terms of the Appendix remain controversial, since any use of the Appendix is heavily regulated and requires strict procedures to be followed. Moreover, translation into any major European language is not allowed – though such languages are used in many developing countries. As of writing, the majority of developing countries who are member states to the Berne Convention have not availed of the Appendix to the Berne Convention.

viii) Has South Africa made use of the Appendix to the Berne Convention?

**There is no evidence of this in The Berne Convention list of countries which have made use of the Appendix.**

ix) Are there provisions in South African copyright law that follow the procedures laid out in the Appendix to the Berne Convention?

**No.**

## **B. The Agreement on trade-related aspects of intellectual property rights (TRIPS)**

The agreement on trade-related aspects of intellectual property rights (TRIPS) is an agreement that automatically applies to all members of the World Trade Organisation (WTO).

Currently, the WTO has 151 members. TRIPS deals extensively with copyright-related matters, including the issue of enforcement. Most notably, TRIPS incorporates to a great extent the provisions of the Berne Convention.

x) Is South Africa bound by TRIPS?

**Yes. It has been adhering to the WTO agreement, and thus the Trade-related Aspects of Intellectual Property (TRIPS), since 1994. Since South Africa is a developing country but not a “least developed country” in terms of TRIPS, the temporary exemption from the obligations of TRIPS does not apply to South Africa. The exemption applies to least developed countries close to South Africa such as Lesotho.**

## **C. WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT)**

The so-called WIPO Internet Treaties of 1996 were signed in Geneva, Switzerland with the intention to update and supplement the existing international treaties on copyright (WCT) and neighbouring rights (WPPT) in order to give an adequate response on the level of international copyright legislation to the challenges raised for copyright by digitising and the Internet, particularly with regard to the dissemination of copyright protected material. Currently, 64 countries are contracting parties to the WCT (WPPT: 62).



xi) Is South Africa a signatory to the WCT and/or the WPPT?

**Yes. South Africa is signatory to both the Copyright Treaty and the Performance and Phonograms Treaty. However, South Africa may only accede to them when its Copyright Act has been redrafted to address digital technology and related issues. There is considerable policy debate whether acceding to the WCT is appropriate for South Africa and its development needs. The Final Report of the United Kingdom Intellectual Property Commission found that “Developing countries should think very carefully before joining the WIPO Copyright Treaty and other countries should not follow the lead of the US and the EU by implementing legislation on the lines of the DMCA or the Database Directive.” In particular the anti-circumvention provisions of the Treaty may have the effect of criminalising the removal or disabling of technical protection measures (TPMs) which prevent the use of works authorised under exceptions and limitations, either by criminalising disabling directly or criminalising the production and distribution of technical tools which enable the exceptional uses.**

#### **D. Regional (SADC) Copyright Treaties**

South Africa is one of the Southern African Development Countries (SADC) which also

includes Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe.

xii) Signatory to Regional Co-operation Treaties?

**There are no co-operative copyright treaties within the SADC region nor is there any harmonisation of copyright laws in the southern African region.**

#### **E. Other International Copyright (and Related/Neighbouring Rights) Treaties**

xiii) Is South Africa party to any other multilateral copyright or copyright-related treaty (e.g. the Universal Copyright Convention (UCC) of 1952)?

**South Africa is NOT a party to the UCC. South Africa is NOT a party to the 1961 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations. South Africa is NOT a party to Geneva Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of Their Phonograms. South Africa is NOT a party to the Brussels Convention Relating to the Distribution of Programme-carrying Signals Transmitted by Satellite.**

## **4. Copyright Flexibilities**

Within the copyright system, and cognisant of international obligations that countries may be bound to, a wide variety of flexibilities are allowed



in the legislation of copyright. Usually, the term copyright flexibilities pertains to (1) the scope of copyright protection, (2) the copyright protection term and (3) copyright exceptions and limitations. While the scope of copyright protection was enquired in section A, the questions in this section concern the duration of copyright protection, as well as the issue of copyright exceptions and limitations.

### A. Copyright Protection Term

An important flexibility that countries have is to set the copyright term for works, using the minimum permissible terms set out in international treaties. To consciously extend a copyright term beyond the minimum obligation requires careful consideration regarding the effects from the delay in positing such works in the public domain.

xiv) How long are the different kinds of copyright works protected for in South Africa?

**See section 3 of the South African Copyright Act:**

*Section 3*

*(1) [...]*

*(2) The term of copyright conferred by this section shall be, in the case of –*

*(a) literary or musical works or artistic works, other than photographs, the life of the author and fifty years from the end of the year in which the author dies:*

*Provided that if before the death of the author none of the following acts had been done in respect of such works or an adaptation thereof, namely –*

*(i) the publication thereof;*

*(ii) the performance thereof in public;*

*(iii) the offer for sale to the public of records thereof;*

*(iv) the broadcasting thereof;*

the term of copyright shall continue to subsist for a period of fifty years from the end of the year in which the first of the said acts is done;

*(b) cinematograph films, photographs and computer programs, fifty years from the end of the year in which the work –*

*(i) is made available to the public with the consent of the owner of the copyright; or*

*(ii) is first published,*

whichever term is the longer, or failing such an event within fifty years of the making of the work, fifty years from the end of the year in which the work is made;

*(c) sound recordings, fifty years from the end of the year in which the recording is first published;*



(d) *broadcasts, fifty years from the end of the year in which the broadcast first takes place;*

(e) *programme-carrying signals, fifty years from the end of the year in which the signals are emitted to a satellite;*

(f) *published editions, fifty years from the end of the year in which the edition is first published.*

(3)(a) *In the case of anonymous or pseudonymous works, the copyright therein shall subsist for fifty years from the end of the year in which the work is made available to the public with the consent of the owner of the copyright or from the end of the year in which it is reasonable to presume that the author died, whichever term is the shorter.*

(b) *In the event of the identity of the author becoming known before the expiration of the period referred to in paragraph (a), the term of protection of the copyright shall be calculated in accordance with the provisions of subsection (2).*

(4) *In the case of a work of joint authorship the reference in the preceding subsections to the death of the author shall be taken to refer to the author who dies last, whether or not he is a qualified person.*

## B. Copyright Exceptions and Limitations

Generally speaking, copyright limitations and exceptions curtail the exclusive rights assigned by

copyright law to the copyright holder in order to promote the public interest as well as to respect the users' legitimate interest in making unauthorised reproductions etc. in certain circumstances. The term "exception and limitation" is used here in the widest possible manner and includes non-voluntary (compulsory and statutory) licences.

### Access to knowledge for teachers and learners

Recognising the central role that learning plays in the economic, political and social life of nations, several countries around the world have adopted a specific set of copyright provisions for teaching and learning. Such provisions should recognise that teaching and learning might often be conducted under suboptimal conditions with scarce resources, and seek to provide flexibility in the classroom and outside to facilitate this essential process.

xv) Are there any provisions in South African copyright law specifically for teaching/education? In answering this question, the following set of sub-questions should, inter alia, be considered:

**The most relevant provisions in this context are section 12(4) of the Copyright Act as well as section 13 of the Copyright Act read together with the Copyright Regulations.**

a) Can a whole work be utilised in any way, for education?

**Yes. Section 12(4) of the South African Copyright Act states that the work may**



**be used “to the extent justified by the purpose”.**

- b) Are there any restrictions on how a work can be used in education?

**Yes. Section 12(4) of the Act provides that the work may be used to the extent justified by the purpose, by way of illustration in any publication, broadcast or sound or visual record for teaching: Provided that such use shall be compatible with fair practice and that “the source shall be mentioned, as well as the name of the author if it appears on the work”.**

**Whenever a use is allowed for educational purposes, then translation for that same purpose, and subject to the same restriction of fair practice, is allowed.**

- c) Are there any restrictions on where the work can be used (e.g. at home)?

**No.**

- d) Is distance learning considered in the law?

**Not specifically. The work may be broadcast for teaching purposes however.**

- e) Is e-learning considered in the law?

**Not expressly.**

- f) Are there any limits on number of copies of works or illustrations permitted?

**Not expressly.**

### Access to knowledge from libraries and archives

Libraries and archives, taken together, are perhaps the most commonly accessed knowledge gateways anywhere in the world. The functioning of publicly accessible libraries and archives (including those not necessarily connected to an academic institution) crucially depends upon flexibilities in the copyright system to enable, expand and sustain access.

- xvi) Are there specific provisions in South African copyright law to address libraries/archives?

**Not in the Copyright Act; see, however, the Copyright Regulations.**

- xvii) Are there “public lending rights” or equivalent clauses?

**No.**

- xviii) For publicly accessible libraries/archives:

- a) Is the copying of whole works permitted?

**Not addressed specifically. If copying takes place in terms of section 12(1) it must be in accordance with “fair dealing”, which is not defined.**

- b) Are there limits on the number of copies possible of whole works?

**Not addressed specifically.**



c) Do all publicly accessible libraries/archives qualify?

**Not addressed specifically.**

d) Do commercial libraries/archives qualify?

**Not addressed specifically.**

e) Are there limits on copying by format (e.g. digital/print)?

**Not addressed specifically**

f) Are there provisions for the sharing of out-of-print works?

**No.**

g) Are there provisions for format adaptation of works (e.g. print to digital)?

**No.**

h) Are there restrictions on the delivery of digital works to users?

**Not addressed.**

#### Access to knowledge for people with a disability

People with a sensory disability (such as those who are partially or wholly blind or deaf) face unusually high constraints in accessing knowledge.

To some extent, new technologies create access opportunities – provided that they are regulated with foresight. A responsive system of copyright, which recognises the knowledge needs of sensory disabled people (such as format adaptation) can create the requisite access, particularly when framed within flexible, expansive and simple procedures.

xix) Are there any specific provisions in South African copyright law for people with disabilities? If yes, the following set of sub-questions should be considered:

**No.**

a) Do the provisions cover both organisations and individuals?

**N/A**

b) Is format adaptation (e.g. text to audio) permitted?

**N/A. However, translations to different languages is permitted subject to the restrictions in the Act.**

c) Are there restrictions on format adaptation? (e.g. are only some formats like Braille allowed?)

**N/A**

d) Do permissions for format adaptation have to be applied for?

**N/A**



e) Is remuneration of rights holders required for such adaptation?

**N/A**

f) Do the provisions extend to all users with sensory disability?

**N/A**

g) Are there restrictions on sharing of such adapted material?

**N/A**

h) Are there restrictions on export/import of such adapted material?

**Section 27 of the South African Copyright Act, in more general terms, prohibits the export and import of infringing copies (including adaptations) of an article in which copyright subsists without the authority of the holder of the copyright in South Africa regardless of legality in country of origin.**

### Media freedom and free expression

Copyright also plays a role in stimulating a free and fair media; an important point to consider given the increased use of audiovisual technology in teaching, the diverse ways in which learning takes place and the proliferation of media outlets and consumers, with recent advances in technology.

xx) Is review of copyright protected works in media permitted under South African copyright law?

**Yes. Subsection 12(1)(b) allows reproduction for review and criticism of literary and musical works and is applied to other works: artistic works, section 15(4); cinematograph films, section 16(1); sound recordings, section 17; broadcasts, section 18; published editions, section 19A; and computer programs, section 19B.**

xxi) Can political speeches be reproduced in media under South African copyright law?

**Section 12(8)(a) of the South African Copyright Act provides that “[n]o copyright shall subsist in [...] speeches of a political nature”.**

xxii) Can public lectures/speeches be reproduced in media under South African copyright law?

**Sub-section 12(6)(a) provides that “[t]he copyright in a lecture, address or other work of a similar nature which is delivered in public shall not be infringed by reproducing it in the press or by broadcasting it, if such reproduction or broadcast is for an informatory purpose”.**

The subsection refers only to copyright in speeches and similar works, but is included in a section on exceptions to literary and musical works. It is therefore unclear whether this



exception applies only to literary and musical works or to all types of work. The sections detailing exceptions to other works do not specifically apply the provisions of section 12(6) to other types of works, but whether that is because it is unnecessary to do so, is unclear.

xxiii) Is file-sharing by means of peer-to-peer networks permitted under South African copyright law?

**The act of sharing computer files is not prohibited in South Africa as such. An act of file-sharing which involves one person making available, and thus arguably distributing an infringing copy is prohibited by section 23(1). South African copyright legislation does not specifically prohibit facilitating infringement except possibly tangentially under the prohibition of parallel import, or permitting a place of public entertainment to be used for an infringing performance. South African copyright law does not have equivalent provisions to the United States Digital Millennium Copyright Act, which extensively prohibit facilitating copying.**

xxiv) Can copyright protected works be excerpted in news reporting under South African copyright law?

**Yes. Subsection 12(3) of the South African Copyright Act permits quotation of literary**

**and musical works; the provisions of section 12(3) are applied to other works: cinematograph films, section 16(1); sound recordings, section 17; broadcasts, section 18; and computer programs, section 19B. Furthermore, subsection 12(1)(c) provides that “[c]opyright shall not be infringed by any fair dealing with a literary or musical work [...] for the purpose of reporting current events – (i) in a newspaper, magazine or similar periodical; or (ii) by means of broadcasting or in a cinematograph film”. The provisions of section 12(1)(c) are applied to other works: artistic works, section 15(4); cinematograph films, section 16(1); sound recordings, section 17; broadcasts, section 18; published editions, section 19A; and computer programs, section 19B.**

**Section 19 is also of importance in this context:**

*19.(1) The copyright in programme-carrying signals shall not be infringed by the distribution of short excerpts of the programme so carried –*

*(a) that consist of reports of current events; or*

*(b) as are compatible with fair practice,*

*and to the extent justified by the informatory purpose of such excerpts.*



*(2) The provisions of this section shall not apply with reference to a programme carried by programme-carrying signals representing a sporting event.*

xxv) Is there a provision for the “remixing” of sound recordings under South African copyright law?

**Yes. Section 14 sets out a statutory licensing scheme which permits remixing provided that statutory notice is given and prescribed royalties are paid. However, this scheme is only available to large-scale commercial enterprises, which intend to sell multiple copies for profit.**

xxvi) Does the “remixing” of sound recordings require permission?

**Yes, except in exceptional cases when statutory notice must be given, and prescribed royalties paid.**

#### Other specific exceptions and limitations regarding access to knowledge

xxvii) Are there any other specific exceptions and limitations in South African copyright law which enable/increase access to knowledge material?

**Specific copyright exceptions and limitations are contained in chapter 1 (“Copyright in original works”) of the South African Copyright Act. These include the following:**

**(1) fair dealing for the purposes of:**

**(a) research and private study: sections 12(1)(a), 15(4), 18, 19A;**

**(b) personal private use: sections 12(1)(a), 15(4), 18, 19A;**

**(c) criticism and review: sections 12(1)(b), 15(4), 16(1), 17, 18, 19A, 19B(1); and**

**(d) reporting current events: sections 12(1)(c), 15(4), 16(1), 17, 18, 19A, 19B(1);**

**(2) uses for judicial proceedings: sections 12(2), 15, 16, 17, 18, 19A, 19B;**

**(3) quotations: sections 12(3), 16, 17, 18, 19B;**

**(4) uses by way of illustration for teaching: sections 12(4), 15, 16, 17, 18, 19A, 19B;**

**(5) ephemeral reproductions by a broadcaster: sections 12(5), 15, 17, 18, 19A, 19B;**

**(6) reproductions or broadcasts of works delivered in public for informatory purposes: section 12(6);**

**(7) reproductions or broadcasts of an article on current events: section 12(7);**

**(8) uses relating to official texts of a legislative, administrative or legal nature; political and legal speeches; news of the day that are**



- mere items of press information: sections 12(8), 19A;
- (9) demonstrations of technical equipment by a dealer in such equipment: sections 12(12), 15, 16, 17, 18, 19A, 19B;
- (10) broadcasts of residual works: sections 12(13), 15, 16, 17, 18, 19A, 19B;
- (11) reproductions permitted by regulations: section 13;
- (12) special exception in respect of records of musical works: section 14;
- (13) background or incidental use of artistic material in a cinematograph film, television broadcast or transmission in diffusion service: section 15(1);
- (14) reconstruction of a work of architecture: section 15(2);
- (15) reproduction or inclusion of artistic works, situated in public places, in a cinematograph film, television broadcast or transmission in a diffusion service: section 15(3);
- (16) three-dimensional reproductions or adaptations of authorised three-dimensional reproductions of artistic works for utilitarian purposes by an industrial process (“reverse engineering”): section 15(3A);
- (17) use of a record which embodies literary and musical works which are also embodied in a soundtrack: section 16(2);
- (18) distribution of short excerpts from programme-carrying signals: section 19(1);
- (19) backup copies of computer programs: section 19B(2).

### Fair dealing

xxviii) Is the principle of fair dealing provisioned for in South Africa? If yes, the following set of sub-questions should be considered:

**Yes, fair dealing in musical and literary works is permitted under section 12(1) of the Act. Fair dealing permits the reproduction of literary or musical works for the purpose of research or private study, or for personal or private use (a), or for criticism or review (b), or for reporting current events in a newspaper or similar periodical, or by means of broadcasting, or in a cinematographic film (c). The provisions of section 12(1) apply to other works: artistic works, section 15(4), cinematograph films, section 16(1) – but only (b) and (c); sound recordings, but only (b) and (c). Section 17; broadcasts, section 18; published editions, section 19A; computer programs, but only (b) and (c). Section 19B. However, fair dealing is not defined, leading to uncertainty.**



- a) To what extent do the fair dealing provisions encompass research and study?

**Section 12(1)(a) of the Act provides that copyright shall not be infringed by any fair dealing with a literary or musical work for the purposes of research or private study by, or the personal or private use of, the person using the work. Research is not confined to non-commercial purposes. The requirements are that the source is mentioned and the name of the author if it appears on the work.**

- b) Do the fair dealing provisions encompass criticism and/or review?

**Yes, see section 12(1)(b) which also applies to some other works than musical and literary works.**

- c) Do the fair dealing provisions encompass news reporting and/or reporting current events?

**Yes. Copyright of a literary or musical work is not infringed when reporting current events in a newspaper, magazine or similar periodical or by means of broadcasting or in a cinematograph film (section 12(1)). Section 12(1)(c) also applies to some other works than literary and musical works.**

- d) Do the fair dealing provisions encompass professional advice?

**No.**

- e) Do the fair dealing provisions encompass judicial proceedings?

**Yes. The copyright in a literary or musical work shall not be infringed by using the work for the purposes of judicial proceedings or by reproducing it for the purposes of a report of judicial proceedings. The provisions of section 12(2) apply to other works: artistic works, section 15(4); cinematograph films, section 16(1); sound recordings, section 17; broadcasts, section 18, published editions, section 19A; and computer programs, section 19B.**

- f) Does South African law specifically determine what amount of a work a user can use under fair dealing (e.g. ten pages, 10%, one chapter)?

**No.**

- g) Is private copying of non-digital works permitted?

**Section 12 of the Act provides that copyright shall not be infringed by any fair dealing with a literary or musical work in connection with personal or private use of the person using the work.**



This is applied to other works: artistic works, section 15(4); broadcasts, section 18; and published editions, section 19A. It would appear therefore copying of non-digital work to the extent that it is merely for personal or private use is permissible. However this raises the question of what constitutes fair dealing.

h) Is private copying of digital works permitted?

The Act does not distinguish between digital and non-digital works. Therefore copying of non-digital work to the extent that it is merely for personal or private use is permissible. However this raises the question of what constitutes fair dealing. Section 19B(2) permits backup copies of computer programs.

### Quotations

xxix) To what extent are quotations permitted under South African copyright law. In answering this question the following set of sub-questions should be considered:

a) Are there any restrictions on quotations?

See section 12(3) of the South African Copyright Act: “The copyright in a literary or musical work which is lawfully available to the public shall not be infringed by any quotation there from, including any quotation from articles in

newspapers or periodicals that are in the form of summaries of any such work: Provided that the quotation shall be compatible with fair practice, that the extent thereof shall not exceed the extent justified by the purpose and that the source shall be mentioned, as well as the name of the author if it appears on the work.” This is applied to other works: cinematographic films, section 16(1); sound recordings, section 17; broadcasts, section 18; and computer programs, section 19B. See also section 19(1) for programme-carrying signals.

b) Are there restrictions on what types of works can be quoted?

Yes, see above.

c) Are there restrictions on the “public” nature of work quoted from?

Yes. One can only quote from a work that is lawfully available to the public.

d) Are there restrictions on the length of the quotation?

Yes. The extent of the quotation shall not exceed the extent justified by the purpose.

e) Are there restrictions on the purpose of a quotation?

No.



## Government works and legal proceedings

Typically, governments are large producers of knowledge: from reports, surveys and statistics to funded projects in every academic discipline. Government-funded work may apply to individuals, academics and institutions. Government resources are public resources: and in many legislations it follows that any work thus carried out is in the public domain – meaning, regardless of some application of copyright, that such works are freely and easily accessible, and adaptable as necessary.

xxx) Government works:

- a) Are all government works (i.e. works prepared by an officer or employee of the government as part of that person's official duties) in the public domain in South Africa?

**No. Section 5(2) of the Copyright Act provides: Copyright shall be conferred by this section on every work which is eligible for copyright and which is made under the direction or control of the state or such international organisations as may be prescribed.**

**Section 5(6) of the Copyright Act provides: Copyright which vests in the state shall for administrative purposes be deemed to vest in such officer in the public service as may be designated by the State President by proclamation in the Gazette.**

**However section 12(8)(a) provides:**

**(a) No copyright shall subsist in official texts of a legislative, administrative or legal nature, or in official translations of such texts, or in speeches of a political nature or in speeches delivered in the course of legal proceedings, or in news of the day that are mere items of press information.**

- b) Are all government-funded works in the public domain in South Africa?

**No.**

- c) Are there any restrictions on the use/adaptation of government works? (Adaptations here include translations.)

**There are no additional restrictions specifically in relation to their character as government works, however copyright in government works results in severe restrictions.**

**Severe additional restrictions may be introduced by the Intellectual Property Rights in Publicly Financed Research Bill, before Parliament (October 2008).**



xxxi) Are judicial proceedings in the public domain in South Africa?

**Section 12(8)(a) of the South African Copyright Act provides: No copyright shall subsist in official texts of a legislative, administrative or legal nature, or in official translations of such texts, or in speeches of a political nature or in speech delivered in the course of legal proceedings, or in the news of the day that are mere items of press information.**

#### Parallel importation

Parallel import refers to import of a copyright product legally produced or sold in one country, which is subsequently imported into a second country without the permission of the copyright holder in the second country. It is a system by which, for instance, anomalous price differentials (such as between similar copyright goods across two countries) can be corrected in the public interest, especially when the copyright good in question is an essential good, such as a textbook.

xxxii) Is parallel importation of copyright protected material permitted in South Africa? If yes, do restrictions exist?

**Parallel import is permitted only for personal use. Section 23 has been interpreted as prohibiting parallel import. See the analysis of parallel import.**

#### Non-voluntary (compulsory and statutory) licences

A non-voluntary copyright licence is an exception to copyright law that is typically explained as a safeguard for governments by which they might correct market failure. The issuance of such a licence usually suggests that the copyright holder has to grant rights over the material to another or others – either to the state or individual producer/s. Usually, the copyright holder does receive some remuneration, either set by law or determined through arbitration. Compulsory licences are widely considered to be a crucial mechanism for creating access where the copyright work in question is unavailable or unaffordable, among other circumstances.

xxxiii) Is non-voluntary licensing provisioned for in South Africa? If yes, under what circumstances?

**Compulsory licensing as generally understood is not provided for. However the Copyright Tribunal is given the power to amend licence schemes in terms of Chapter 3 of the Act. Section 21 of the of the Competition Act 89 of 1998 arguably permits Competition Authorities to grant compulsory licences in circumstances of anti-competitive behaviour.**

## 5. DRMs, TPMs, Anti-circumvention Provisions

Digital Rights Management (DRM) is a term used for technologies that define and enforce



parameters of access to digital media or software. Consequently, rights that are conferred by the law, are enforced by the copyright holder through technological protection measures (TPM) so as to prevent access to such digital media or software in a manner that would infringe the rights of the copyright holder. In most cases, DRM/TPM provisions are introduced in the law as a consequence of obligations under the WIPO Internet Treaties (WCT and WPPT) – however, there are several instances where countries yet to sign these treaties have introduced DRM/TPM provisions into national legislation. DRM systems and TPM remain controversial, since they have the potential to threaten the innovative possibilities opened up by the digitising of material and the advent of the Internet – by allowing copyright holders to restrict access to digital media or software under terms which would be currently permissible under copyright law; with implications thus, not only for legal, personal use but also for future innovation. Of particular concern are anti-circumvention provisions, that is, clauses in the law that make it illegal to circumvent technological protection mechanisms – even while, for instance, a user is exercising fair dealing of a work.

xxxiv) Does South African law contain provisions regarding DRM and/or TPM? If yes, what do these provisions stipulate?

**Not explicitly.**

xxxv) Do copyright holders have the exclusive right to control dissemination in South Africa

(i.e. distribution and/or rental and/or communication/making available)?

**Copyright holders have the exclusive right to control reproduction, publication and the like and for cinematographic films rental rights (section 8(1)(g)), for sound recordings rental rights and the right to communicate the work to the public (section 9(b)) and for computer program rental rights (section 11B(h)), but for other works, rental and communication to the public rights are not set out.**

**These exclusive rights are, however, subject to the exceptions granted by the Copyright Act.**

xxxvi) Does South African law contain provisions regarding anti-circumvention? If yes, what do these provisions stipulate?

**There is no specific provision in the South African Copyright Act, however section 86 of Electronic Communications and Transactions Act 2002 may constitute an anti-circumvention provision. See the discussion by Pistorius in Pistorius, “Developing Countries and Copyright in the Information Age” Potchefstroom Electronic Law Journal 2006, 2. Pistorius finds that TPMs have upset the balance of copyright law, with undesirable effects in developing countries. Exceptions and limitations grant access to data regardless of the rights holder’s refusal to grant permission,**



legislation should ensure that DRMs, TPMs and anti-circumvention provisions enable that access, see the discussion at 4.103 – 4.108 of the Gowers' Final Report. Problems encountered with the implementation of the WCT are discussed at the WIPO Workshop on Implementation Issues of the WCT and WPPT.

Section 86 provides:

86 Unauthorised access to, interception of or interference with data

(1) Subject to the Interception and Monitoring Prohibition Act, 1992 (Act 127 of 1992), a person who intentionally accesses or intercepts any data without authority or permission to do so, is guilty of an offence.

(2) A person who intentionally and without authority to do so, interferes with data in a way which causes such data to be modified, destroyed or otherwise rendered ineffective, is guilty of an offence.

(3) A person who unlawfully produces, sells, offers to sell, procures for use, designs, adapts for use, distributes or possesses any device, including a computer program or a component, which is designed primarily to overcome security measures for the protection of data, or performs any of those acts with regard to a password, access code or any other similar kind of data with the intent to unlawfully utilise such item to

*contravene this section, is guilty of an of an offence. A person who utilises any device or computer program mentioned in subsection (3) in order to unlawfully overcome security measures designed to protect such data or access thereto, is guilty of an offence. A person who commits any act described in this section with the intent to interfere with access to an information system so as to constitute a denial, including a partial denial, of service to legitimate users, is guilty of an offence.*

xxvii) Is circumvention allowed under South African law when exercising permitted uses such as fair dealing, quotation etc.?

**It is not clear. Section 86(1) of the ECTA only criminalises acts of copying without authorisation or permission. If the exceptions and limitations in the Copyright Act are regarded as giving permission then circumvention is permitted for exceptions. If, however, the section does not permit such circumvention then section 86 is most likely unconstitutional and likely to be struck down. The subsection might in any event be struck down as void for vagueness.**

## 6. Incentives for the Public Domain

Other than taking advantage of flexibilities offered under the copyright system, countries have the option to encourage the production, usage and growth of tools such as free and open source software and material such as open access



textbooks – thereby, providing official support to self-determined initiatives that spur access to knowledge. Free and open source software is software which can be used, copied, studied, modified and redistributed without restriction. Open access refers to any material which is freely available (e.g. online) which can be reproduced, adapted and distributed.

xxxviii) Are there incentives for the use, production and dissemination of free and open source software within South African copyright law or elsewhere in national law/policy?

**Yes, South Africa has adopted an official policy and strategy to implement Free and Open Source Software.**

**The Policy on Free and Open Source Software Use for South African Government provides as follows: "1) The South African Government will implement FOSS unless proprietary software is demonstrated to be significantly superior. Whenever the advantages of FOSS and proprietary software are comparable, FOSS will be implemented when choosing a software solution for a new project. Whenever FOSS is not implemented, then reasons must be provided in order to justify the implementation of proprietary software. 2) The South African Government will migrate current proprietary software to FOSS whenever comparable software exists. 3) All new software developed for or by the South African Government will be based on open standards, adherent to FOSS**

**principles, and licensed using a FOSS licence where possible."**

xxxix) Are there incentives for the use, production and dissemination of open access material (e.g. textbooks) within South African copyright law or elsewhere in national law/ policy?

**Yes. The Policy on Free and Open Source Software Use for South African Government provides as follows:**

**"4) The South African Government will ensure all government content and content developed using government resources is made Open Content, unless analysis on specific content shows that proprietary licensing or confidentiality is substantially beneficial. 5) The South African Government will encourage the use of Open Content and Open Standards within South Africa."**

## 7. Miscellaneous

xxxx) Does South African law contain provisions regarding the issue of traditional knowledge/folklore? If yes, what kind of provisions?

**At this point, South African law does not contain provisions regarding the issue of traditional knowledge/folklore. However, a Bill has been drafted by the Department of Trade and Industry which has the intention of amending legislation so that traditional knowledge is protected through the conventional intellectual property system including copyright (Intellectual Property Amendment Bill 2007).**



xxxxi) Does South African law contain provisions regarding the issue of orphan works? If yes, what kind of provisions?

**Not expressly. See, however, section 3(3) of the South African Copyright Act for the duration of copyright in anonymous or pseudonymous works:**

(a) In the case of anonymous or pseudonymous works, the copyright therein shall subsist for fifty years from the end of the year in which the work is made available to the public with the consent of the owner of the copyright or from the end of the year in which it is reasonable to presume that the author died, whichever term is the shorter.

(b) In the event of the identity of the author becoming known before the expiration of the period referred to in paragraph (a), the term of protection of the copyright shall be calculated in accordance with the provisions of subsection (2).

xxxxii) Are any amendments to the current South African copyright law announced or expected in the foreseeable future?

- **Intellectual Property Laws Amendment Bill has not yet been introduced into Parliament (October 2008)**
- **Intellectual Property Rights From Publicly Financed Research And**

**Development Bill (before Parliament October 2008)**

- **Complete overhaul of Copyright Act (projected to take five years) not begun (October 2008)**

xxxxiii) Does “communication to the public” (or equivalent term) exclude private, non-commercial and/or educational communication in South Africa?

**Not specifically addressed. The right of communication to the public is only granted for sound recordings (section 9(b)) and is therefore otherwise not an exclusive right requiring such exclusion.**

xxxxiv) Does “commercial rental” (or equivalent term) exclude non-profit lending or circulation of works, including the use of works in education?

**Not specifically addressed. Rental rights are granted only for cinematograph films rental rights (section 8(1)(g)), for sound recordings (section 9(b)) and for computer programs (section 11B(h)). These provisions all restrict the right to instances which are “by way of trade”.**

xxxxv) Is there any distinction anywhere in South African law between domestic (national) works and foreign (international) works?

**Yes. The definition of an “infringing copy” in the case of an imported article, is an**



**article which would have constituted an infringement of copyright (in a specific work) if the imported article had been made in the Republic.**

## Section 4 of the Copyright Act provides:

*(1) Copyright shall be conferred by this section on every work which is eligible for copyright and which –*

*(a) being a literary, musical or artistic work or a sound recording, is first published in the Republic;*

*(b) being a broadcast, is made in the Republic;*

*(c) being a programme-carrying signal, is emitted to a satellite from a place in the Republic;*

*(d) being a cinematograph film, is first published or made in the Republic;*

*(e) being a published edition, is first published in the Republic;*

*(f) being a computer program, is first published or made in the Republic, and in respect of which copyright is not conferred by section 3.*

*other person to do, in the Republic, any act which the owner has the exclusive right to do or to authorise.*

*(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.*

## Section 23 of the Copyright Act provides:

*(1) Copyright shall be infringed by any person, not being the owner of the copyright, who, without the licence of such owner, does or causes any*



## Comments and Recommendations on Selected Sections of the 1978 Copyright Act

### Section 1

#### Definitions

#### "adaptation"

(1) In this Act, unless the context otherwise indicates

in relation to –

(a) a literary work, includes –

(i) in the case of a non-dramatic work, a version of the work in which it is converted into a dramatic work;

(ii) in the case of a dramatic work, a version of the work in which it is converted into a non-dramatic work;

(iii) a translation of the work; or

(iv) a version of the work in which the story or action is conveyed wholly or mainly by means of pictures in a form suitable for reproduction in a book or in a newspaper, magazine or similar periodical;

(b) a musical work, includes any arrangement or transcription of the work, if such arrangement or transcription has an original creative character;

(c) an artistic work, includes a transformation of the work in such a manner that the original or substantial features thereof remain recognisable; and

(d) a computer program includes –

(i) a version of the program in a programming language, code or notation different from that of the program;

(ii) or a fixation of the program in or on a medium different from the medium of fixation of the program;

#### Comment

The definition does not adequately define adaptation. The second part of the definition applicable to computer programs ((d)(ii)) defines every shift of a program from a CD, DVD to harddrive, online server, and in and out of RAM and ROM, as an adaptation, which serves no purpose, and unduly inhibits modern Information and Communication Technologies. The definition must be revisited.

#### Recommendation

Define adaptation so that it does not apply to mere format changes in digital environments.

#### "artistic work"

means, irrespective of the artistic quality thereof –

(a) paintings, sculptures, drawings, engravings and photographs;

(b) works of architecture, being either buildings or models of buildings; or

(c) works of craftsmanship not falling within either paragraph (a) or (b);



## Comment

The inclusion of photograph in artistic works, although in line with international practice, is confusing, since artistic works and photographs are dealt with differently in a number of provisions, including definitions of authorship (section 1), term (section 3) and vesting of copyright (section 21(1)(c)). Because of international practice it seems that this confusion cannot be resolved at the point of definition, but greater clarity can be obtained by having a separate section for every aspect relating to photographs.

## “author”

*in relation to –*

*(a) a literary, musical or artistic work, means the person who first makes or creates the work;*

*(b) a photograph, means the person who is responsible for the composition of the photograph;*

*(c) a sound recording, means the person by whom the arrangements for the making of the sound recording were made;*

*(d) a cinematograph film, means the person by whom the arrangements for the making of the film were made;*

*(e) a broadcast, means the first broadcaster;*

*(f) a programme-carrying signal, means the first person emitting the signal to a satellite;*

*(g) a published edition, means the publisher of the edition;*

*(h) a literary, dramatic, musical or artistic work or computer program which is computer-generated, means the person by whom the arrangements necessary for the creation of the work were undertaken; and*

*(i) a computer program, the person who exercised control over the making of the computer program;*

## Comment

The term “author” is confusing to the public when applied to works such as programme-carrying signals, broadcasts and the like. The definition of author in the Act is used to vest copyright. One solution would be to avoid using the term author for works which do not have an author as the term is generally understood. Do not attempt to apply the concept of authorship to works for which it is inappropriate, instead simply provide for those works in which copyright first vests.

## “broadcast”

*when used as a noun, means a telecommunication service of transmissions consisting of sounds, images, signs or signals which –*

*(a) takes place by means of electromagnetic waves of frequencies of lower than 3 000 GHz transmitted in space without an artificial conductor; and*



*(b) is intended for reception by the public or sections of the public, and includes the emitting of programme-carrying signals to a satellite, and, when used as a verb, shall be construed accordingly;*

### Comment

The Electronic Communications Act 2005 defines broadcasting in section 1:

**“broadcasting” means any form of unidirectional electronic communications intended for reception by –**

**(a) the public;**

**(b) sections of the public; or**

**(c) subscribers to any broadcasting service,**

**whether conveyed by means of radio frequency spectrum or any electronic communications network or any combination thereof, and “broadcast ” is construed accordingly;**

The Copyright Act definition adequately defines broadcasting, however the exceptions available to broadcasters are confined by the definition. It is necessary to harmonise the different definitions of broadcasting without introducing any restrictions on access to knowledge.

### Recommendation

Extend the exceptions available to broadcasters to those communicating via other ICTs such as the Internet.

**“collecting society”**

*means a collecting society established under this Act;*

### Comment

The Act does not make provision for the establishment of a collecting society, although section 39 (cA) provides that the Minister may make regulations regarding the establishment of collecting societies.

**“country”**

*includes any colony, protectorate or territory subject to the authority or under the suzerainty of any other country, and any territory over which trusteeship is exercised;*

### Comment

This provision is problematic in that it includes the idea of colonies or territories governed by others contrary to the principles of self-determination recognised by the Republic.

### Recommendation

The definition should not contain the words “colony” or “protectorate”, or “suzerainty”.

**“diffusion service”**

*means a telecommunication service of transmissions consisting of sounds, images, signs or signals, which takes place over wires or other paths provided by material substance and intended for reception by specific members of the public; and diffusion shall*



*not be deemed to constitute a performance or a broadcast or as causing sounds, images, signs or signals to be seen or heard; and where sounds, images, signs or signals are displayed or emitted by any receiving apparatus to which they are conveyed by diffusion in such manner as to constitute a performance or a causing of sounds, images, signs or signals to be seen or heard in public, this shall be deemed to be effected by the operation of the receiving apparatus;*

### **Comment**

The definition is technologically bound and therefore anachronistic, and could cause confusion if applied to the technological developments of the last fifteen years such as the Internet.

### **“distribution”**

*in relation to a programme-carrying signal, means any operation by which a distributor transmits a derived signal to the general public or any section thereof;*

### **Comment**

The definition does not actually define distribution other than to include transmission of derived signals into an undefined concept. The WIPO Copyright Treaty introduces the concept of “communication to the public” intended to cover all communication of a work other than by distribution of a physical artifact. Such an approach must be treated with caution since it blurs the line between communications which involve a copy and those which don’t. Furthermore, this

approach introduces redundancies with broadcasting, public performance and publication, and unduly limits access to knowledge.

### **“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;*

*(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;*



## Comment

The extension of the definition to include imported articles which were made without the permission of the rights holder in the Republic is problematic, since an article may be imported which has been made with the permission of the rights holder in another jurisdiction. So for example a book might be legitimately sold in India by a publisher who has obtained the copyright from the original publisher in the UK. The UK publisher might also have given a South African publisher the copyright in South Africa, so that the South African publisher is permitted to make copies, enforce the copyright in court, etc. However, based on this definition the importation of legitimate copies from India would be infringing. As will be discussed in the commentary under section 23 the prohibition of parallel import unduly restricts access to knowledge.

## Recommendations

Remove the inclusion of works made under copyright in other countries from the definition.

Change the wording in respect of imported articles to refer to articles which are infringing articles in the country of manufacture. Alternatively, change the definition to exclude any works which were made with the permission of the copyright holder, or otherwise lawfully permitted.

### “licence”

*[Definition of “licence” deleted by section 1(m) of Act No. 125 of 1992.]*

## Comment

The definition of licence was deleted since the term was originally defined as only one specific type of licence. However, a definition is necessary for the purposes of clarity. In particular the definition should make clear what is implicit in section 22, that licences are legally separate from contracts, and that although they might accompany or even be embodied in contracts, licences constitute permissions which apply to every person to whom such permissions have been granted including classes of persons. They are thus not coterminous with contracts.

## Recommendations

Define licences as a permission without reference to agreement. Define licences as permission or authority to perform any one or more of the exclusive acts granted to copyright holders by the Act.

### “writing”

*includes any form of notation, whether by hand or by printing, typewriting or any similar process.*

## Comment

Clarify whether this includes digital notation.

*(Section 1 continued)*

*(2) Any reference in this Act to a soundtrack associated with a cinematograph film shall be construed as a reference to any record of sounds which is incorporated in any print, negative, tape or other article on which the film or part of it, in so far as it consists of visual*



*images, is recorded or which is issued by the author of the film for use in conjunction with such an article.*

*(2A) Any reference in this Act to the doing of any act in relation to any work shall, unless the context otherwise indicates, be construed as a reference also to the doing of any such act in relation to **any substantial part of such work.***

### **Comment**

Some guidance should be given for the determination of what constitutes a substantial part.

*(5) For the purposes of this Act the following provisions shall apply in connection with the publication of a work:*

*(a) Subject to paragraph (e), a work shall be deemed to have been published if copies of such work have been issued to the public with the consent of the owner of the copyright in the work in sufficient quantities to reasonably meet the needs of the public, having regard to the nature of the work.*

*(b) Publication of a cinematograph film or sound recording is the sale, letting, hire or offer for sale or hire, of copies thereof.*

*(c) A publication shall not be treated as being other than the first publication by reason only of an earlier publication elsewhere within a period of 30 days.*

*(d) Publication shall not include –*

*(i) a performance of a musical or dramatic work, cinematograph film or sound recording;*

*(ii) a public delivery of a literary work;*

*(iii) a transmission in a diffusion service;*

*(iv) a broadcasting of a work;*

*(v) an exhibition of a work of art;*

*(vi) a construction of a work of architecture.*

*(e) For the purposes of sections 6, 7 and 11(b), a work shall be deemed to be published if copies thereof have been issued to the public.*

### **Comment**

The definition does not explicitly confine the events regarded as publication to the Republic, however the provision might be interpreted as referring only to such events in the Republic. This is inappropriate since technological developments result in innumerable publications across the world becoming available in South Africa immediately. If confined to events in the Republic this would have the absurd result that anyone who distributed a digital copy of a work or made a copy, for example anyone who viewed a webpage originating in another country would require permission from the creator of the webpage to do so in South Africa, even though the rights holder had placed the work on the Internet to enable people to view it.

### **Recommendation**

Update definition of publication so that it refers to publication anywhere in the world.



### Section 3

*Copyright by virtue of nationality, domicile or residence, and duration of copyright.*

*(1) Copyright shall be conferred by this section on every work, eligible for copyright, of which the author or, in the case of a work of joint authorship, any one of the authors is at the time the work or a substantial part thereof is made, a qualified person, that is –*

*(a) in the case of an individual, a person who is a South African citizen or is domiciled or resident in the Republic; or*

*(b) in the case of a juristic person, a body incorporated under the laws of the Republic:*

*Provided that a work of architecture erected in the Republic or any other artistic work incorporated in a building or any other permanent structure in the Republic, shall be eligible for copyright, whether or not the author was a qualified person.*

*(2) The term of copyright conferred by this section shall be, in the case of –*

*(a) literary or musical works or artistic works, other than photographs, the life of the author and fifty years from the end of the year in which the author dies: Provided that if before the death of the author none of the following acts had been done in respect of such works or an adaptation thereof, namely –*

*(i) the publication thereof;*

*(ii) the performance thereof in public;*

*(iii) the offer for sale to the public of records thereof;*

*(iv) the broadcasting thereof,*

*the term of copyright shall continue to subsist for a period of fifty years from the end of the year in which the first of the said acts is done;*

#### **Comment**

There is an extensive discussion on the effect of changing the term of copyright for performers and owners of copyright in the Gowers' Final Report, at 4.20 – 4.28.

The already long term of copyright gives rise to the problem of orphan works, discussed in the legal analysis portion of the report. The Gowers' Final Report discusses orphan works in 4.91– 4.101.

Section 3(2)(a) has proven difficult to interpret by lay persons, giving rise to at least two discussion on its meaning coming to the attention of the writers during the course of the review. One instance is the discussion on copyright term held/website in Afrikaans Wikipedia. It is sometimes thought that the section limits the copyright term for works which have been published to fifty years. It is also sometimes thought that when a work is published for the first time after the death of the author that the term is calculated by reference to the life of the author and fifty years.



Neither of these is correct. The subsection sets out that the usual term for copyright in literary, artistic and musical works is the life of author plus fifty years. This is the term which applies to almost all literary, artistic and musical works, because almost all works are published during the lifetime of their authors, or alternatively performed, or copies are offered for sale or the works are broadcast.

However it is possible that a work might not be published etc during the life of the author. In a case of that kind, copyright in the work is, according to the section extended for a further fifty years from the date of publication or similar act. This is the meaning of the proviso in subsection (2)(a) which states that if none of the listed acts (publish, perform, etc) have been done “before the death of the author” then the term will be for fifty years from the first of the listed acts (publish, perform, etc).

This reading of the first part of the subsection is, it is suggested, the correct reading. It is also the most likely to be adopted by a court, since South Africa is obliged by the Berne Convention to grant a term of copyright to literary, artistic or musical works of the life of the author and fifty years. Article 7(1) provides “The term of protection granted by the Berne Convention shall be the life of the author and fifty years after his death.”

The Berne Convention does not oblige South Africa to make the additional provision for works of which the author dies before the work is made public.

The following example illustrates how subsection (2)(a) operates. A writes an historical account and hides it

in a drawer in his desk. A dies. Eighty years pass after A’s death. B finds A’s historical account. A’s historical account is published. The proviso states that the literary copyright will (continue) to run for fifty years from the date of publication. However since A has passed away but had not considered the manuscript worthy of publication the title to the copyright fell into his estate which was divided in equal parts between his children D, E and F, who have in the ensuing eighty years also passed away, each leaving their estates to two heirs; D1 and D2, E1 and E2, F1 and F2 respectively. In each case there was no specific testamentary provision so the devolution of the copyright must be inferred in each case. If B wants to publish the historical account he must obtain the consent of all six heirs, and ensure that there was no other disposition of the copyright in four separate estate accounts. Copyright is intended to provide incentives for the creation and publication of work, but the proviso creates barriers to publication of work.

If B published the historical account which had fallen in the public domain, B would have a published edition copyright, which runs for fifty years from publication, as an incentive. The proviso constitutes a limitation on access to knowledge and freedom of expression which cannot be justified by reference to the purpose of copyright, which is to grant an incentive to authors to create and disclose works. It is questionable whether this confusing proviso is necessary or constitutional. Article 7(1) of the Berne Convention sets out the minimum term of copyright in relation to literary, musical and artistic works, as the life of the author plus fifty years from his death. The provision grants a far longer term.



## Recommendation

Do not extend copyright terms beyond existing terms.

Reduce copyright terms to those required by binding obligations in the Berne Convention and TRIPS.

Specifically, delete the proviso for deceased works in section 3(2)(a).

### *Section 3(2)(b)*

*(b) cinematograph films, photographs and computer programs, fifty years from the end of the year in which the work –*

*(i) is made available to the public with the consent of the owner of the copyright; or*

*(ii) is first published,*

*whichever term is the longer, or failing such an event within fifty years of the making of the work, fifty years from the end of the year in which the work is made;*

## Comment

Article 7(4) of the Berne Convention requires that South Africa protect photographs only for twenty-five years. The current period is far in excess of that. Therefore the copyright term for photographs in South Africa should be reduced to twenty-five years. This need not be done in a disruptive way. The law could simply be amended to state that from the date of the amendment all photographs taken after that date shall have a term of twenty-five years only.

## Recommendation

Amend the term for photographs from fifty years to twenty-five years for photographs taken after the date of amendment.

### *Section 3(2) continued*

*(c) sound recordings, fifty years from the end of the year in which the recording is first published;*

*(d) broadcasts, fifty years from the end of the year in which the broadcast first takes place;*

*(e) programme-carrying signals, fifty years from the end of the year in which the signals are emitted to a satellite;*

*(f) published editions, fifty years from the end of the year in which the edition is first published.*

## Comment

There have been determined efforts in many jurisdictions to extend the term of copyright. The Gowers Review in the United Kingdom commissioned economic research into the impact of term extension, and as a result Gowers' Final Report found:

**Paragraph 3.23** *A balanced copyright system would be one in which the length of protection equals the necessary incentive to produce a creative work. Given the variety of incentives that stimulate artistic endeavour, and the number of different classes of work that copyright protects, it is not possible to arrive at any definitive optimal length.*



Nevertheless, future increases or decreases, to the length of copyright should certainly be dependent on economic evidence that such a change would be positive. However, as the UK is a signatory to certain international treaties, it is bound by minimum standards and can make no unilateral change to the length of the copyright.

**Recommendation 3:** The European Commission should retain the length of protection on sound recordings and performers' rights at fifty years.

**Paragraph 2.6** Larger markets and increased competition as a result of globalisation have caused some debate as to whether the length of IP protection should be reduced to strike a more effective balance between public accessibility and the producer's right to recoup his investment through a limited monopoly on copyright.

## Section 5

*Copyright in relation to the state and certain international organisations.*

(1) *This Act shall bind the state.*

(2) *Copyright shall be conferred by this section on every work which is eligible for copyright and which is made by or under the direction or control of the state or such international organisations as may be prescribed.*

(3) *Copyright conferred by this section on a literary or musical work or an artistic work, other than*

*a photograph, shall subsist for fifty years from the end of the year in which the work is first published.*

(4) *Copyright conferred by this section on a cinematograph film, photograph, sound recording, broadcast, programme-carrying signal, published edition or a computer program shall be subject to the same term of copyright provided for in section 3 for a similar work.*

(5) *Sections 3 and 4 shall not confer copyright on works with reference to which this section applies.*

(6) *Copyright which vests in the state shall for administrative purposes be deemed to vest in such officer in the public service as may be designated by the State President by proclamation in the Gazette.*

## Comment

Section 12(8)(a) of the South African Copyright Act provides:

*No copyright shall subsist in official texts of a legislative, administrative or legal nature, or in official translations of such texts, or in speeches of a political nature or in speech delivered in the course of legal proceedings, or in the news of the day that are mere items of press information.*

This is a designation of subject-matter of copyright and so should appear in the section which governs



what falls into copyright rather than as an exception. It should not be confined to texts and speeches and must address new technology. Official works should be placed in the public domain, positively defined. It is not sufficient merely that these works should not be subject to copyright, but there should be a limitation on what additional copyright may be asserted in them, so that when an official public work is incorporated in another work, for example an official zoning map is included in a published edition of a work, then copyright shall not extend to the map, so that anyone who copies the pages of the published edition with the map should be entitled to do so.

In order to avoid the anti-competitive effects of government copyright serving as the basis for private monopolies, the general principle should be that government works communicated to the public, whenever not automatically in the public domain should be freely available to the public on a non-discriminatory basis. Exceptions should be specifically justified.

### **Recommendation**

All official legislative, administrative and legal works, and official translations should be in the public domain.

Wherever a government work is incorporated into copyright work, the rights in that copyright work shall not extend to or constitute exclusive rights in the reproduction, adaptation, etc of the portions of the work containing the official work.

### *Section 6*

*Nature of copyright in literary or musical works.*

*Copyright in a literary or musical work vests the exclusive right to do or to authorise 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;*

### **Comment**

The definition of publication in section 1(5) coupled with this provision burdens the wholesale import of copyright works legitimately disposed of in another country.

### **Recommendation**

Explicitly authorise the importation of copyright works which were made with the permission of the copyright holder in the country of production.

Amend section (6)(b) to “publishing the work if it was hitherto unpublished anywhere in the world”.

### *Section 12*

*General exceptions from protection of literary and musical works.*

*Section 12(1) Fair dealing (research or private study or personal or private use; criticism or review; reporting current events)*



Copyright shall not be infringed by any fair dealing with a literary or musical work –

(a) for the purposes of research or private study by, or the personal or private use of, the person using the work;

(b) for the purposes of criticism or review of that work or of another work; or

(c) for the purpose of reporting current events –

(i) in a newspaper, magazine or similar periodical; or

(ii) by means of broadcasting or in a cinematograph film:

Provided that, in the case of paragraphs (b) and (c)(i), the source shall be mentioned, as well as the name of the author if it appears on the work.

### Comment

Section 12(1) also applies *mutatis mutandis* entirely to: artistic works, section 15(4); broadcasts, section 18; and published editions, section 19A. Section 12(1)(b) and (c) apply *mutatis mutandis* to: cinematograph films, section 16(1); sound recordings, section 17; and computer programs, section 19B(1). Fair dealing is not defined.

*The Australian Copyright Act gives guidance in respect of fair dealing:*

*The Australian Copyright Act 1968.*

### 40 Fair dealing for purpose of research or study

(2) For the purposes of this Act, the matters to which regard shall be had, in determining whether a dealing with a literary, dramatic, musical or artistic work or with an adaptation of a literary, dramatic or musical work, being a dealing by way of reproducing the whole or a part of the work or adaptation, constitutes a fair dealing with the work or adaptation for the purpose of research or study include:

(a) the purpose and character of the dealing;

(b) the nature of the work or adaptation;

(c) the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price;

(d) the effect of the dealing upon the potential market for, or value of, the work or adaptation; and

(e) in a case where part only of the work or adaptation is reproduced – the amount and substantiality of the part copied taken in relation to the whole work or adaptation.

(3) Despite subsection (2), a reproduction, for the purpose of research or study, of all or part of a literary, dramatic or musical work, or of an adaptation of such a work, contained in a periodical publication is taken to be a fair dealing with the work or adaptation for the purpose of research or study.



(4) Subsection (3) does not apply if another in the publication is also reproduced for the purpose of different research or a different course of study.

(5) Despite subsection (2), a reproduction, for the purpose of research or study, of not more than a reasonable portion of a work or adaptation that is described in an item of the table and is not contained in a periodical publication is taken to be a fair dealing with the work or adaptation for the purpose of research or study. For this purpose, reasonable portion means the amount described in the item.

#### **Works, adaptations and reasonable portions**

*Item 1: Work or adaptation: A literary, dramatic or musical work (except a computer program), or an adaptation of such a work, that is contained in a published edition of at least ten pages; Amount that is reasonable portion: (a) 10% of the number of pages in the edition; or (b) if the work or adaptation is divided into chapters – a single chapter*

*Item 2: Work or adaptation: A published literary work in electronic form (except a computer program or an electronic compilation, such as a database), a published dramatic work in electronic form or an adaptation published in electronic form of such a literary or dramatic work; Amount that is reasonable portion: (a) 10% of the number of words in the work or adaptation; or (b) if the work or adaptation is divided into chapters – a single chapter*

(6) Subsection (5) applies to a reproduction of a work or adaptation described in both items of the table

*in that subsection even if the amount of the work or adaptation reproduced is not more than a reasonable portion (as defined in that subsection) on the basis of only one of those items.*

(7) If:

(a) a person makes a reproduction of a part of a published literary or dramatic work or published adaptation of a literary or dramatic work; and

(b) the reproduction is of not more than a reasonable portion (as defined in subsection (5)) of the work or adaptation; subsection (5) does not apply in relation to any subsequent reproduction made by the person of any other part of the same work or adaptation.

(8) Subsections 10(2), (2A), (2B) and (2C) do not affect subsection (5), (6) or (7) of this section.

#### **41 Fair dealing for purpose of criticism or review**

*A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, does not constitute an infringement of the copyright in the work if it is for the purpose of criticism or review, whether of that work or of another work, and a sufficient acknowledgement of the work is made.*

Guidelines for updating and revising copyright exceptions and limitations can also be found in Article 5 of the European Copyright Directive. It should be noted that various research projects (e.g. the African Copyright and Access to Knowledge



(ACA2K) project) have started to further scrutinise the problem of access to knowledge in general and access to learning material in particular in southern African countries.

There is some debate about whether exceptions and limitations should be phrased as lengthy detailed provisions or shorter flexible, yet less predictable, provisions. In a developing country such as South Africa it appears that both are required; the detailed provisions which will enable non-lawyers to know precisely what they may or may not do and flexible provisions which will enable courts to deal with new technologies and unprecedented situations in a manner appropriate to a free, open and democratic society.

## Section 20

### *Moral rights.*

*(1) Notwithstanding the transfer of the copyright in a literary, musical or artistic work, in a cinematograph film or in a computer program, the author shall have the right to claim authorship of the work, subject to the provisions of this Act, and to object to any distortion, mutilation or other modification of the work where such action is or would be prejudicial to the honour or reputation of the author: Provided that an author who authorises the use of his work in a cinematograph film or a television broadcast or an author of a computer program or a work associated with a computer*

*program may not prevent or object to modifications that are absolutely necessary on technical grounds or for the purpose of commercial exploitation of the work.*

*(2) Any infringement of the provisions of this section shall be treated as an infringement of copyright under Chapter 2, and for the purposes of the provisions of the said chapter the author shall be deemed to be the owner of the copyright in question.*

### **Comment**

The duration of moral rights protection in South Africa should be clarified! Some commentators argue the right applies only as long as an author is alive since they are intimately connected to an author's personality, some say these rights last as long as the economic rights, others believe moral rights are perpetual despite the difficulties in ascertaining the attitudes of deceased authors' attitudes towards reworking of their work. For the argument that moral rights in South Africa extend only for the life of the author see Handbook of South African Copyright Law (Juta, 2006), at 1 – 62. It is unclear whether the exceptions listed in sections 12 – 19 are exceptions to moral rights as well as to copyright, since the sections themselves are formulated "Copyright shall not be infringed ...". Some commentators (O H Dean in Handbook of South African Copyright Law, at 1 – 64) argue that this means that exceptions do not apply to moral rights. If that is correct that may render section 20 an unconstitutional limitation on freedom of expression.



## Section 22

### *Assignment and licences in respect of copyright.*

*(1) Subject to the provisions of this section, copyright shall be transmissible as movable property by assignment, testamentary disposition or operation of law.*

*(2) An assignment or testamentary disposition of copyright may be limited so as to apply only to some of the acts which the owner of the copyright has the exclusive right to control, or to a part only of the term of the copyright, or to a specified country or other geographical area.*

*(3) No assignment of copyright and no exclusive licence to do an act which is subject to copyright shall have effect unless it is in writing signed by or on behalf of the assignor, the licensor or, in the case of an exclusive sublicense, the exclusive sublicensor, as the case may be.*

*(4) A non-exclusive licence to do an act which is subject to copyright may be written or oral, or may be inferred from conduct, and may be revoked at any time: Provided that such a licence granted by contract shall not be revoked, either by the person who granted the licence or his successor in title, except as the contract may provide, or by a further contract.*

*(5) An assignment, licence or testamentary disposition may be granted or made in respect of the copyright in a future work, or the copyright*

*in an existing work in which copyright does not subsist but will come into being in the future, and the future copyright in any such work shall be transmissible as movable property.*

*(6) A testamentary disposition of the material on which a work is first written or otherwise recorded shall, in the absence of a stipulation to the contrary, be taken to include the disposition of any copyright or future copyright in the work which is vested in the deceased at the time of his death.*

*(7) A licence granted in respect of any copyright by the person who, in relation to the matters to which the licence relates, is the owner of the copyright, shall be binding upon every successor in title to his interest in the copyright, except a purchaser in good faith and without notice, actual or constructive, of the licence or a person deriving title from such a purchaser, and any reference in this Act to the doing in relation to any copyright of anything with or without the licence of the owner of the copyright shall be construed accordingly.*

*(8) Where the doing of anything is authorised by the grantee of a licence or a person deriving title from the grantee, and it is within the terms, including any implied terms, of the licence for him to authorise it, it shall for the purpose of this Act be deemed to be done with the licence of the grantor and of every person, if any, upon whom the licence is binding.*



## Comment

It can be inferred from the section that licence is distinct from contract, as in other Anglo-American jurisdictions. It would however be useful to clarify this in the definitions. There is some ambiguity in respect of the effect of the revocation of non-exclusive licences on copies and adaptations made under the non-exclusive licence prior to the revocation. Since these are authorised at the time of making it does not seem that the revocation can affect their status as authorised works. The revocation provision is evidently aimed at non-exclusive licences which are oral or inferred from conduct, since these are granted informally they should not bind rights holders for the remainder of the term of the work. However it is not appropriate for a written non-exclusive licence which can set out clearly whether it is irrevocable or otherwise. There are many free copyright licences which are contained in written deeds, which clearly set out the conditions of the licence. The effect of the Electronic Transactions and Communication Act 2002 is that digital licences, such as Creative Commons licences are in writing.

There is no good reason why licensors should not be able to make such licences irrevocable. A prohibition on doing so interferes unduly with the rights of the rights holder.

There is no provision which sets out how a rights holder may dedicate the work to the public domain. This does not mean that a rights holder cannot dedicate a work to the public domain but rather that no procedure to do so is set out in the Copyright Act.

## Recommendations

Amend subsection (4) so that written non-exclusive licences may be revocable or irrevocable.

Introduce a provision which sets out how rights holders may dedicate their works to the public domain, through a written deed of donation, which is irrevocable.

### *Section 23*

#### *Infringement.*

*(1) Copyright shall be infringed by any person, not being the owner of the copyright, who, without the licence of such owner, does or causes any other person to do, in the Republic, any act which the owner has the exclusive rights to do or to authorise. [Subsection (1) substituted by section 20(a) of Act No. 125 of 1992.]*

*(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.*

*(3) The copyright in a literary or musical work shall be infringed by any person who permits a place of public entertainment to be used for a performance in public of the work, where the performance constitutes an infringement of the copyright in the work: Provided that this subsection shall not apply in a case where the person permitting the place of public entertainment to be so used was not aware and had no reasonable grounds for suspecting that the performance would be an infringement of the copyright.*

### **Comment**

The wording of this section concerning parallel importation gave rise to a problematic interpretation and decision by the Appellate Division in *Frank & Hirsch (Pty) Ltd. v A Roopanand Brothers (Pty) Ltd*(580/91) [1993] ZASCA 90; 1993 (4) SA 279 (AD) (2 June 1993). In essence, parallel importation of legally obtained legitimate products can easily be outlawed by way of a simple assignment of copyrights

to a domestic distributor. (For more see M Rippes and R de Villiers “Legalising parallel imports under intellectual property law” 2004 *Stellenbosch Law Journal* 550). South Africa is obliged under TRIPS only to prevent the import of articles which were not authorised in their country of manufacture.

Note 14b to Article 51 of TRIPS provides: “For the purposes of this Agreement:

*(a) ‘counterfeit trademark goods’ shall mean any goods, including packaging, bearing without authorisation a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country of importation;*

*(b) ‘pirated copyright goods’ shall mean any goods which are copies made without the consent of the rights holder or person duly authorised by the rights holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation.”*

Despite the problematic use of the term “pirated” this provision permits greater access to knowledge than the current provision in South Africa as interpreted by South African courts prior to the constitutional dispensation.



## Recommendation

Amend section 23(2) to refer to proscribed actions in respect of an infringing article, and define an infringing article so as to exclude articles made with the authorisation of the rights holder in the country of production.

### Section 28

*Provision for restricting importation of copies.*

*(1) The owner of the copyright in any published work may give notice in writing to the Commissioner for Customs and Excise (in this section referred to as “the Commissioner”) –*

*(a) that he is the owner of the copyright in the work; and*

*(b) that he requests the Commissioner to treat as prohibited goods, during a period specified in the notice, copies of the work to which this section applies:*

*Provided that the period specified in a notice under this subsection shall not extend beyond the end of the period for which the copyright is to subsist: Provided further that the Commissioner shall not be bound to act in terms of any such notice unless the owner of the copyright furnishes him with security in such form and for such amount*

*as he may require to secure the fulfilment of any liability and the payment of any expense which he may incur by reason of the detention by him of any copy of the work to which the notice relates or as a result of anything done by him in relation to a copy so detained.*

*(2) This section shall apply to any copy of the work in question made outside the Republic which if it had been made in the Republic would be an infringing copy of the work.*

## Comment

This section is deeply problematic as it allows a rights holder in South Africa to criminalise the import of goods made and produced with the consent of the rights holder in another jurisdiction. It is also problematic invoking state police powers to enforce private rights. The provision is contrary to the Promotion of Access to Justice Act 2002 in that it fails to comply with the procedures and principles set out therein.

## Recommendation

Replace the section with a section which provides an administratively just procedure for the customs authorities to prohibit the import of infringing articles as redefined i.e. articles which were not authorised in the country of production.



## Additional Legal Analysis

### The Public Domain

The South African Copyright Act does not explicitly mention the Public Domain, a serious omission since the primary objective of copyright is to create incentives for the creation of works, some aspects of which will be in the Public Domain immediately, while the copyright works themselves will ultimately be available in the Public Domain.

The Public Domain refers to the reserve of ideas, images, works and systems which are freely available for anyone to use for the creation of new ideas. Intellectual property rights such as copyright are the exception rather than the norm; the norm is the Public Domain<sup>20</sup>. The Public Domain, in respect of copyright has been described as “a commons that includes those aspects of copyright works which copyright does not protect”<sup>21</sup>. However this must not be understood as suggesting that the Public Domain is unregulated, or even unprotected, instead copyright and other statutes must safeguard the public right to use of the Public Domain. The expansion of the Public Domain is the primary objective of copyright law. Authors are granted limited rights in order to encourage them to create works, aspects of which are immediately into the Public

Domain, and aspects of which are subject to exclusive but limited rights for limited periods.

The Public Domain includes works which pre-exist copyright, such as the works of Shakespeare, works for which the copyright has expired such as the works of Solomon Tshekisho Plaatjies, works which are ineligible for copyright such as legislation, and aspects of creative works not within the ambit of the exclusive rights granted by intellectual property law. This latter category includes intellectual creations outside the ambit of intellectual property such as ideas<sup>22</sup>.

The Public Domain is characterised by the entitlement of members of the public to make use of it, so that the law recognises “the Public Domain not merely as an unexplored abstraction but as a field of individual rights”<sup>23</sup>. This might be best understood in South African law by analogy to the law of property in which the public is entitled to make use of *res publicae* such as the sea-shore.

The Public Domain functions as the necessary base for creativity. “The Public Domain furnishes a crucial device to an otherwise unworkable system by reserving the raw material of authorship to the

20. “That baseline – intellectual property rights are the exception rather than the norm; ideas and facts must always remain in the public domain – is still supposed to be our starting point.” *The Second Enclosure Movement and the construction of the Public Domain*, James Boyle 66 *Law & Contemporary Problems* 33 (Winter/Spring 2003). “The general rule of law is, that the noblest of human productions – knowledge, truths ascertained, conceptions, and ideas – become, after voluntary communication to others, free as the air to common use.” Boyle relies on *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting). See also Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 *N.Y.U. L. REV.* 354, 361, 424 (1999).

21. “The Public Domain” Jessica Litman, 39 *EMORY L.J.* 965, 1010-11 (1990) at 1023.

22. “The most important part of the public domain is a part we usually speak of only obliquely: the realm comprising aspects of copyrighted works that copyright does not protect”. Litman, *ibid.* Professor Litman lists plot, character, theme, titles, ideas and situations as examples of elements of copyright work which are in the public domain.

23. “Recognising the Public Domain”, David Lange, *Law & Contemporary Problems*, Autumn 1981 at 147, at <http://www.law.duke.edu/fac/lange/>



commons, thus leaving that raw material available for other authors to use.”<sup>24</sup> The Public Domain is necessary as the basis for creative work. It is also necessary to enable access to knowledge. Access to knowledge serves to promote economic, social and cultural development. It also benefits intellectual property rights holders by providing a society in which there is the capacity to create, appreciate, and a market for intellectual creations. Accordingly protection of the Public Domain is a necessary part of a functioning intellectual property system, in which the public has rights to use the Public Domain in the same way that authors have rights to their intellectual creations<sup>25</sup>. The Public Domain requires affirmative protection from the encroachment of expansionist campaigns<sup>26</sup>.

## Conclusion

The South African Copyright Act should explicitly define the Public Domain to include those creative works which everyone has the right to use, and from which no one has the right to exclude others, as well as those aspects of creativity which cannot be made subject to copyright. The Copyright Act should reflect that the creation and sustenance of the Public Domain is the primary objective of the Act. When creative

works contain both Public Domain and copyright works, such as a recent edition of a play by Shakespeare which contains both the Public Domain text of the play and the published edition copyright, then exceptions should enable reproduction and adaptation necessary to make use of the Public Domain elements, such as digitisation of the edition to allow the extraction of the Public Domain work from the copyright edition. Similarly a computer program may contain Public Domain elements, for example an algorithm and copyright elements such as lines of code. It should be explicitly permissible to re-engineer the program so as to identify and re-use the algorithm. While such re-engineering is implicitly lawful under a constitutional reading of the 1978 Copyright Act the lack of explicit permission inhibits innovative reuse of Public Domain creativity.

The problem of orphan works also inhibits the use of public domain works. It is discussed separately.

## Orphan Works

### The problem of orphan works

Orphan works include works where the rights holder cannot be located, and works of which the status is

24. 'The Public Domain', Litman supra at 2.

25. The argument is not “that intellectual property is undeserving of protection, but rather that such protection as it gets ought to reflect its unique susceptibility to conceptual imprecision and to infinite replication. These attributes seem to me to require the recognition of two fundamental principles. One is that intellectual property theory must always accept something akin to a “no-man’s land” at the boundaries; doubtful cases of infringement ought always to be resolved in favour of the defendant. The other is that no exclusive interest should ever have affirmative recognition unless its conceptual opposite is also recognised. Each right ought to be marked off clearly against the public domain ‘Recognising the Public Domain’ Lange, supra at 5.

26. “The public domain” demanded recognition as an affirmative entity, conferring its own protection (which I imagined as in the [\*pg 466] nature of rights) upon individual creators; this would be necessary if creativity itself was to survive the tendency toward expansionism that seemed to be burgeoning everywhere among the intellectual property doctrines. Reimagining the Public Domain, Davide Lange, 66 Law & Contemporary Problems 463 (Winter/Spring 2003) 463, at <http://www.law.duke.edu/shell/>. Further discussion of the public domain is available in a special interest edition of Law and Contemporary Problems, Volume 66, Winter/Spring 2003 No.'s 1 & 2, edited by James Boyle, available at <http://www.law.duke.edu/journals/journaltoc>



unclear. They may or may not have entered the Public Domain.

Because current copyright terms are so long a situation arises in which someone who would like to obtain a licence to make use of a work cannot locate the rights holder or cannot ascertain if the work is still subject to copyright. It may be that the rights holder has ceased to exist without passing on the rights. It may be that the work has entered the Public Domain, but because the rights holder cannot be found, it is hard to find out when the author died, so the term cannot be calculated. The result causes inefficiency because there is a legal provision, which prohibits the use without permission, but permission cannot be obtained.

### Definition

It is often the case that existing material is used to create new works. Creators of new works must seek permission to use existing material unless an exception or limitation applies, but may not be able to locate the copyright owner. The term “orphan works” is used to describe works that are potentially subject to copyright, yet the current owner of the copyright is unknown or cannot be located through a reasonable enquiry. The term “orphan works” is often used loosely to describe any work where attempts to locate the copyright owner have been unsuccessful.

Orphan works can create economic value for new users and current copyright holders. Copyright

exclusivity prohibits anyone other than the copyright holder using or authorising use of a work. For all those works putatively subject to copyright for which the copyright owner is unknown or cannot be located, innovation and creativity are inhibited and the economic incentive to use these works is diminished.

### How do works become “orphaned”?

There are a number of reasons why some works are classified “orphan works”. Potential users may encounter a number of difficulties in locating the copyright owner and/or status of copyright. As a result, many of these works go unused or are inaccessible by the general public. In a paper prepared for the Gowers Review of Intellectual Property<sup>27</sup>, the British Screen Advisory Council<sup>28</sup> identifies some underlying problems users may encounter when trying to locate the copyright owner. These include works with insufficient information identifying the copyright owner; multiple copyright ownerships with inadequate information to locate the copyright owner; or in the case where the copyright owner is a business, dissolution of the business may also make identifying the copyright owner challenging. To protect the exclusive rights of copyright owners and to grant potential users the legal protection to use orphan works if the copyright owner cannot be located, the problem of “orphan works” must be understood in its entirety.

27. Gowers Review of Intellectual Property. (2006).

Available at [http://www.hm-treasury.gov.uk/media/6/E/pbr06\\_gowers\\_report\\_755.pdf](http://www.hm-treasury.gov.uk/media/6/E/pbr06_gowers_report_755.pdf)

28. British Screen Advisory Council. (2006). Copyright and Orphan Works – A Paper Prepared for The Gowers Review of Intellectual Property Rights. Available at <http://www.bsac.uk.com/reports/orphanworkspaper.pdf>



According to the Duke University Proposal and Analysis on Orphan Works<sup>29</sup>, new works created and distributed in new ways (i.e. multimedia, cellphones, internet) make locating or determining the author difficult. As a result, an increasing number of works have been designated “orphan works”.

Finally, the number of people that want access to “orphan works” has increased. However, those wishing to access “orphan works” are often unable to pursue a reasonable search due to lack of resources, adequate knowledge, or finances for legal representation.

### **Why should we solve the orphan work problem?**

Solving the “orphan works” problem would provide some (legal) reassurance to copyright owners, new authors, researchers and libraries and archives, so that existing material can be legally used; and to ensure that the public is not denied access to valuable material.

### **International solutions**

There are some countries that have implemented systems to address the problem of “orphan works”, yet there are many more countries that are still considering a variety of options to address “orphan works”. For most jurisdictions, these solutions must

meet the requirements of international treaties, such as the Berne Convention and TRIPS.

### **Canada**

Provisions related to “orphan works” are found under the Canadian Copyright Act<sup>30</sup> – they require a prospective user to make a “reasonable effort” to locate the copyright owner of a published work, and submit an application to the Copyright Board of Canada<sup>31</sup> which is authorised to grant a non-exclusive licence to the applicant if it determines that a “reasonable effort” has been made. The applicant is required to pay a royalty fee, determined by the Copyright Board, should the copyright owner emerge.

Criticisms of and recommendations on Canada’s legislative solution to “orphan works” are set out in the Bulte Report<sup>32</sup>. One of the most obvious criticisms stems from the lack of clarity in “reasonable effort”; there are no clear guidelines defining “reasonable effort” or sufficient explanations of what might satisfy a “reasonable effort”. Furthermore, the Copyright Board of Canada issues non-exclusive licences on a case-by-case basis, which is deemed inefficient and reflects the difficulty in determining that “reasonable effort” has been achieved. As of 1 May, 2007, only 197 licences have been issued.<sup>33</sup>

29. Center for the Study of the Public Domain. (2005). Orphan Works Analysis and Proposal- Submission to the Copyright Office. Duke Law School. Available at <http://www.law.duke.edu/cspd/pdf/cspdproposal.pdf>

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## Nordic countries

Copyright law in Denmark, Finland, Iceland, Norway and Sweden claim extended collective licensing as a solution to “orphan works”<sup>34</sup>. Under extended collective licensing, a collective management organisation (CMO) would be granted the authority to represent copyright holders in a specific sector. The duties of the CMO would include granting licences for the use of orphan works and negotiating the terms and conditions of a licence agreement. Extended collective licensing is not mandatory, and copyright holders can choose to opt out. However opt-out amounts to an effective transfer of copyright holders’ rights to determine what happens to their works to collecting societies. When copyright holders cannot be found it is assumed that they will not realise their works.

## Japan

Japan has instituted a system of compulsory licensing to address the problem of “orphan works”<sup>35</sup>. Under the compulsory licensing system, applicants must demonstrate “due diligence” in locating the copyright owner. The Agency for Cultural Affairs has the authority to approve the quality of the search and grants licences to applicants where “due diligence” has been demonstrated. By granting a licence, the Agency protects the infringer from lawsuit. Before

using an “orphan work”, applicants are required to pay royalty fees to a fund that is held for cases where the copyright owner resurfaces and damages are sought. There are few criticisms of the Japanese compulsory licensing system, yet “due diligence” is considered a vague requirement for locating a copyright owner.

Unique to the Japanese compulsory licensing system is a “marking requirement,” indicating the date a compulsory licence was issued to use an orphaned work<sup>36</sup>. This marking requirement gives notice to copyright owners that their work has been used under a compulsory licence in the case that the copyright owner wishes to make a claim against the fund.

## United States<sup>37</sup>

In January 2006, the United States Copyright Office issued a request for comments on a proposal to address the matter of “orphan works”<sup>38</sup>. The proposal sought to limit the remedies (penalties) available to a copyright owner where the infringer performs a “reasonable search” to locate the copyright owner. The proposal applies to domestic and foreign published and unpublished works. The US proposal attempts to promote the use of “orphan works” while protecting the exclusive rights of copyright ownership. Among other things, the US proposal also recommends the creation and maintenance of

34. Ibid.

35. Copyright Law of Japan. Available at [http://www.cric.or.jp/cric\\_e/clj/clj.htm](http://www.cric.or.jp/cric_e/clj/clj.htm)

36. Ibid.

37. Cornell University table on works which have entered the public domain in the United States, see [http://www.copyright.cornell.edu/public\\_domain/](http://www.copyright.cornell.edu/public_domain/)

38. Register of Copyrights. (2006) Report on Orphan Works. Library of Congress, U.S. Copyright Office. Available at <http://www.copyright.gov/orphan/orphan-report.pdf>



databases of copyright protected works to assist individuals trying to locate copyright owners.

This proposal, however, has garnered significant criticism. Firstly, “reasonable search” has not been adequately defined. As in Canadian and Japanese copyright law, there are no guidelines for determining a satisfactory search for a copyright holder. Lack of resources, knowledge and financial limitations are cited as barriers to fulfilling a “reasonable search”. Professor Lawrence Lessig’s critique on the Copyright Office’s Orphan Works Report adds that the cost of performing a reasonably diligent search is imposed on a user with no guarantee that his search will be diligent enough<sup>39</sup>. Further, Lessig argues that imposing the burden on users for works with “orphan” status is unfair because owners were not under any obligation to ensure that they could be located should a prospective user want to seek permission to use their work.

## Europe

Europe has shown interest in the United States’ proposed approach to address “orphan works”. The impetus for addressing this problem stems from the European Union’s “i2010” series of initiatives aimed at providing citizens with greater access to available information through collection and digitising copyright works<sup>40</sup>. The “i2010” series of initiatives seeks to “centralise repositories of copyright works” to assist individuals seeking to locate a copyright owner<sup>41</sup>.

In 2006 the Gowers Review of Intellectual Property was published providing recommendations on solutions to the “orphan work problem”<sup>42</sup>. Recommendations are based primarily on the notion of “reasonable search” and the need for public institutions to establish guidelines that adequately define a “reasonable search”. The Gowers Review also recommends a voluntary registry that would enable searches for copyright owners. Compulsory registration is against international treaty obligations (Berne and TRIPS); however, copyright owners and users could utilise a volunteer register as a repository of copyright information.

## Orphan works in South Africa

The solutions discussed are solutions adopted or considered by developed countries. It is no coincidence then that they are resource intensive, and require complex bureaucratic mechanisms. Developing countries such as South Africa require far simpler methods.

One possible solution would be a voluntary register for copyright holders coupled with a simple notice mechanism for those wishing to use orphan works. The voluntary register for copyright holders would enable copyright holders to register their copyright, and would include a copy of the work in which exclusive rights are claimed, details which would

39. Library Copyright Alliance. (2006). Analysis of Professor Lessig’s Critique of the Copyright Office Orphan Works Report. Available at <http://www.sla.org/Documents/ppolicy/080706lessigorphanJune06.doc>

40. European Communities. (2006). i2010: Digital Libraries. Available at [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/doc/brochures/dl\\_brochure\\_2006.pdf](http://ec.europa.eu/information_society/activities/digital_libraries/doc/brochures/dl_brochure_2006.pdf)

41. Bezos, Salvador. International Approaches to the Orphan Works Problem. Social Science Research Network Working Papers.

42. Gowers Review of Intellectual Property. (2006). Available at [http://www.hm-treasury.gov.uk/media/6/E/pbr06\\_gowers\\_report\\_755.pdf](http://www.hm-treasury.gov.uk/media/6/E/pbr06_gowers_report_755.pdf)



enable calculation of the term, and information which would enable the rights holder to be approached for a licence. This would enable rights holders to take affirmative steps to assert their copyright, an option not currently available. In addition persons who wished to make use of a work could give notice through a central government-authorized registry of their intention to engage in one of the exclusives uses of a work, and their inability to locate the rights holder. If the rights holder failed to respond within a set period of time, the putative user would give further notice that she is making use of the work, which would again be recorded in a central government record. The user would be authorised to make use of the work against an undertaking to pay a percentage of the royalties or profits received for the use. Copies or adaptations of the work would bear a notice that the work was produced under authorisation from the orphan works provision. A percentage of the royalty or profit set for classes of work by the government would better protect the interests of rights holders than a set amount.

## Parallel Import

Parallel importation<sup>43</sup> 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 rights holder in the country of export, where the importation is without the authorisation of the particular intellectual property rights holder in the country to which the product is imported.

Often the importer can purchase the product in the country of export at a price below the market price in South Africa (set by the South African IP rights holder), allowing the resale of the product in South Africa at a profit, and undercutting the national intellectual property rights holder's monopoly price. The exhaustion doctrine in regards to intellectual property rights and the regulation of parallel importation of products under South African IP law will be discussed below.

### Parallel import in copyright law

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<sup>44</sup> deals with the matter of unauthorised importation as a form of secondary or indirect infringement and not as a matter of exhaustion.<sup>45</sup> The Copyright Act also provides for criminal sanctions for unauthorised imports. The purpose of these sections within the Copyright Act is to apparently prohibit counterfeit or wholly unauthorised infringing goods from being imported. However, the aforementioned sections within the Act have also prevented the parallel importation of non-counterfeit goods.

In the *Frank and Hirsch*<sup>46</sup> decision, decided before the South African legal system changed radically with the 1996 Constitution incorporating the Bill of

43. The findings of this commentary are based on *Legalising Parallel Imports under Intellectual Property Law* (2004) Rippel, K and de Villiers, Stellenbosch Law Review 15, 550.

44. The South African Copyright Act 98 of 1978.

45. Section 23(2)(a).

46. *Frank & Hirsch (Pty) Ltd v A Roopanand Brothers (Pty) Ltd* 1993 4 SA 279 (A).



Rights, the South African Appellate Division was faced with the parallel importation of a well-known brand of audio cassettes tapes. After failing in a trademark action largely as a result of the genuine goods defence, the appellants relied on the copyright in the packaging, in respect of which the foreign manufacturer simply assigned the copyright for the region of South Africa to the appellant prior to the appellant instituting the court action. The decisive question in that case then became whether the manufacturer of the tapes could have made the copies of the packaging in South Africa without infringing the appellant's copyright. Since the manufacturer had divested itself of the copyright for the South African region by assigning it to the appellant and since it received no licence back to make such copies in South Africa, the court found that the making of such copies in South Africa by the manufacturer would amount to infringement of the appellant's copyright. Consequently, the parallel importation was not permitted.

The imported goods could not in any way be described as counterfeit or unauthorised infringing goods since the making of the goods did not constitute an infringement of copyright in the country of manufacture. The result of this judgement is to

make it possible by way of simple assignment of copyright for the South African region, effectively to render genuine goods into unauthorised infringing goods for the purposes of importation. This grants the appellant a monopoly on the importation of the copyrighted product for the duration of the copyright, which could well be in excess of fifty years. In addition, the copyright holder can criminalise an otherwise lawful act by making a simple assignment and notifying the parallel importer thereof. Furthermore, the low standard of originality could render every feature of a package subject to copyright protection without requiring it to undergo any examination or registration process by a state authority. It is argued that this extends copyright far beyond its originally intended purpose. For example, the packaging of a pharmaceutical product and insert would ordinarily qualify for copyright.

The TRIPS Agreement<sup>47</sup> states that for unauthorised infringing goods the authorisation to copy must be absent in the country of production. However, infringement is to be judged under the law of the country of importation. It is argued that section 23(2)(a) of the Copyright Act<sup>48</sup> should be interpreted so that the state of affairs surrounding the reproduction of copyright goods in the country of production is to be judged in terms of South

47. Article 6 specifically precludes a reading of TRIPS to address exhaustion of intellectual property rights, i.e. TRIPS cannot be construed to require granting rights to rights holders which extend beyond the first sale of a good.

48. Section 23 – Infringement:

(1) Copyright shall be infringed by any person, not being the owner of the copyright, who, without the licence of such owner, does or causes any other person to do, in the Republic, any act which the owner has the exclusive rights to do or to authorise.

(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.



African law in order to determine whether or not such a reproduction is infringing, and not whether such a reproduction would have amounted to an infringement had it occurred in South Africa in the geographical sense. Better still would be the amendment of section 23(2)(a) to only limit importation of unauthorised goods.

### **Common Law Unlawful Competition Law**

The Appellate Division in the Taylor and Horne<sup>49</sup>, case clearly held that parallel importation does not amount to unlawful competition. Accordingly, common law unlawful competition does not present any difficulties for the parallel importation of goods.

### **Conclusion**

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. Depending on the type of products, health and safety requirements, consumer deception and innovation policy arguments may be decisive in regulating the parallel importation of goods into South African territory in terms of both international and national parallel importation.

Parallel importation can increase competition in South Africa. There are however, also potential negative effects which can arise from this form of trade which may be managed by suitable consumer regulation such as required labelling. For example, certain products may require technical expertise for after sales services and the parallel importer may be unable to provide this service. Furthermore, the parallel importer may also be unable to provide warranties like an authorised dealer. However, the 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.

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## Contributors

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