



Addressing copyright in the digital age: a  
proposal for measures and legislative  
solutions in South Africa

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## **ABSTRACT**

## **KEY WORDS**

copyright, copyright legislation, digital age, digital rights management, intellectual property, infringement

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## **LIST OF ABBREVIATIONS**

DRM	Digital rights management
IPR	Intellectual property rights
DTI	Department of Trade and Industry
WCT	World Intellectual Property Organization Copyright Treaty
WIPO	World Intellectual Property Organization
WPPT	World Intellectual Property Organization Performances and Phonograms Treaty

## CHAPTER 1: INTRODUCTION

### ***1.1 Background to the problem***

Intellectual property infringement refers to any unauthorised use, reproduction, or distribution of intellectual property. Intellectual property includes copyright, trademarks, patents, trade secrets, and other intangible property protected by law.<sup>1</sup> Infringement can take many forms, including duplicated creative work, counterfeit products, the unauthorised use of patented technology, or misleading trade marked products. Intellectual property infringement has become a significant concern in the digital age, posing numerous challenges for creators, businesses, and the economy as a whole.<sup>2</sup>

Rapid technological development has made the protection of copyright more complex than ever before. In the current age of digital development, copyrighted creations can easily be replicated and distributed, making it challenging for creators and owners to protect their rights.<sup>3</sup>

The digital age has brought enormous changes to the way in which information and media content are distributed, shared, and accessed. The rise of digital platforms and networks has made it easier for creators to share their work, while at the same time making it harder for them to protect their intellectual property rights (IPR). Copyright protection laws drafted many years ago cannot keep up with the pace of technological advancements, especially in developing countries such as South Africa.<sup>4</sup> The copyright law framework in South Africa is governed by the *Copyright Act 98 of 1978* (hereafter the *Copyright Act*).<sup>5</sup>

However, recognising the need for updated legislation that addresses the challenges of the digital age, the South African government has introduced the

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<sup>1</sup> Saha and Bhattacharya 2011 J Adv Pharm Techno IRes 88-93.

<sup>2</sup> Naseri Addressing Global Scope of Intellectual Property Law 14.

<sup>3</sup> Adetunji and Okuonghae 2022 Library Philosophy and Practice(e-journal)7159.

<sup>4</sup> Dwivedi *et al* 2021 Int J Inf Manage.

<sup>5</sup> *Copyright Act 98 of 1978* amended up to Copyright Amendment Act 9 of 2002.

*Copyright Amendment Bill* B13-2017 (hereafter *Copyright Amendment Bill*).<sup>6</sup> This proposed legislation aims to bring South Africa's copyright laws in line with technological advancements and global trends in copyright protection.

While the *Copyright Amendment Bill* has faced criticism<sup>7</sup>, with different stakeholders raising concerns about specific provisions in debates, it is a significant step towards updating South Africa's copyright laws to address the challenges posed by the digital age. Criticism mainly relates to concerns about potential negative consequences for content creators and the need to balance the rights of rights holders and users. Addressing copyright in the digital age requires comprehensive measures, and the proposed legislative solutions in the *Copyright Amendment Bill* play a crucial role in achieving this goal.<sup>8</sup> However, it is essential for policymakers and lawmakers to engage in extensive consultations and stakeholder engagement to ensure the proper consideration of all perspectives and interests involved.

While copyright law in South Africa is well developed, enforcing copyright in the digital age presents several challenges, including jurisdictional issues, anonymity and pseudonymity concerns (it is increasingly easy for individuals to publish or share copyrighted materials on the internet anonymously or using false names), emerging technologies, cost, and the lack of awareness and education about the legal provisions of copyright infringement.

## **1.2 Problem statement**

Copyright infringement has become a global issue affecting the creative and cultural sectors, with significant economic implications. South Africa is not immune to the impact of copyright infringement, and there is a need for appropriate measures and legislative solutions to address this challenge.<sup>9</sup> In light of the evolving nature of digital media and the rapid pace of technological advancements,

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<sup>6</sup> *Copyright Amendment Bil* (B13-2017).

<sup>7</sup> Collett, Carla. 2024. "Parliament Greenlights Controversial Copyright Bill." *News24*, February 29. <https://www.news24.com/fin24/economy/parliament-greenlights-controversial-copyright-bill-20240229>.

<sup>8</sup> Tomaselli 2022 *Communicare* 14-33.

<sup>9</sup> Pouris and Inglesi-Lotz 2017 *SAfrJSci* 1-7.

there is a pressing need to evaluate the current legal framework, identify gaps, and propose solutions that are relevant to the South African context.

The world is seeing a new era with tremendous advancements in technology. From a legislative perspective, one concern is the approach the current and emerging laws should take to the protection of copyright in the digital age. Without appropriate legal instruments, the protection of copyright infringement will be challenging in a developing country such as South Africa.

Copyright infringements have become much easier and more widespread due to technological advancements that make it easier to reproduce, distribute, and share copyrighted materials online without authorisation. This has resulted in a loss of revenue and IPR violations of the work of artists, musicians, authors, and other creators who depend on their creations as their source of income and value.<sup>10</sup>

Moreover, many individuals, , and companies engage in piracy, file-sharing, and other forms of copyright infringement, which have significant implications for the economic and cultural sectors. Online piracy and other copyright violations have led to a decrease in revenue for the entertainment and creative industries and have also led to the loss of jobs, particularly in the music, film, and other related fields.

Despite the existence of comprehensive copyright laws, the rapid development of technology, the internet and the dissemination of digital content cause new challenges. These challenges have made it difficult for copyright owners to protect their IPR, leading to a decline in revenue. This discourages creativity and innovation, which in turn can have significant economic and social consequences.<sup>11</sup>

The circumstances described above call for concerted efforts from policymakers and stakeholders to address copyright infringement in the digital age by proposing effective measures and legislative solutions that enhance copyright enforcement and protect the rights of copyright owners in South Africa.

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<sup>10</sup> Karjiker S "Intellectual Property as Real Security" 2018 South African Intellectual Property Law Journal (SAIPLJ) 1–23.

<sup>11</sup> Dwivedi *et al* 2021 Int J Inf Manage

International organisations and instruments such as the World Intellectual Property Organization (WIPO), the Berne Convention for the Protection of Literary and Artistic Works, the World Intellectual Property Organization Copyright Treaty (WCT) and the World Intellectual Property Organization Performances and Phonograms Treaty (WPPT) play a crucial role in establishing copyright laws and providing protection against infringement in the digital age.<sup>12</sup> These instruments provide a framework for harmonising copyright legislation across countries and tackling the challenges posed by digital technologies.

These international instruments set standards for copyright protection and enforcement, particularly in the digital age. South Africa's measures and legislative solutions for addressing copyright could consider these international standards, while also considering local circumstances and needs. Further, these instruments provide valuable insights and best practices that may inform the measures and legislative solutions proposed in the context of South Africa's copyright framework.

### ***1.3 Research questions***

This research aims to answer the following research question:

Does South African intellectual property legislation successfully address copyright infringement in the digital age?

The research question gives rise to the following sub-questions:

1. What are the challenges related to copyright protection in the digital age in South Africa?
2. What measures are needed to address the challenges related to copyright infringement in the digital age?
3. What international copyright standards can South Africa adopt to improve copyright protection?

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<sup>12</sup> WIPO 2003 [https://www.wipo.int/edocs/pubdocs/en/copyright/891/wipo\\_pub\\_891.pdf](https://www.wipo.int/edocs/pubdocs/en/copyright/891/wipo_pub_891.pdf).

## **1.4 Aims and objectives**

The main aim of this paper is to discuss the measures and legislative solutions that can be used in South Africa to protect copyright in the digital age. The following objectives guide this study:

1. To identify the current copyright challenges in South Africa's digital landscape; and
2. To investigate existing international copyright standards to propose measures and legislative solutions that can be implemented to address these challenges; and
3. To examine existing international copyright standards that can be adopted or included in the existing legislation.

Adequate measures to address copyright infringement challenges require a multifaceted approach that includes the general public, copyright stakeholders, legal frameworks, law enforcement, and the use of new technology. Thoroughly addressing copyright issues can significantly reduce copyright infringements and promote creativity, innovation, and the dissemination of knowledge.

South Africa can improve its copyright laws and provide better protection for copyright owners by emulating international copyright standards such as those outlined in the WCT,<sup>13</sup> which aim to address new forms of digital copyright infringement, as well as those in the Berne Convention. South Africa is a party to the Berne Convention and can implement its provisions to improve copyright protection. This can result in increased investment in creative industries, greater economic growth, and more opportunities for creators and copyright owners.

## **1.5 Research methodology**

This research analyses the current South African legislative environment related to copyright, the effect and importance of copyright, and the effect of the Fourth Industrial Revolution on copyright law in the context of the relevant legislative and

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<sup>13</sup> *WIPO Copyright Treaty* 1996.

policy interventions and regulation. The information needed for this research paper is available from current literature. A desktop and qualitative research methodology was followed for this paper. The paper was compiled following a desktop analysis of the growing body of current and emerging literature on the legislative framework related to intellectual property.

The approach of this study is to analyse primary data, including scholarly commentary on the topic. This study adopted an overall qualitative research approach in investigating the research problem. The research methodology involved a literature study of primary and secondary sources. The researcher examined the viewpoints of various international jurisdictions and highlighted additional developments. Despite having developed creative industries of its own, South Africa is a net consumer of creative goods from the United States.

## **1.6 Framework**

The research framework for the proposed study and a discussion of each chapter is provided below:

### **Chapter 1: Introduction**

Chapter 1 introduces the research by outlining the problem statement, the research questions and the intended methodology of the research. The chapter offers an introduction, historical background, the problem statement, the research questions, the aims and objectives of the study, and a discussion of the research methodology.

### **Chapter 2: Copyright infringement in the digital world**

Chapter 2 explores the various forms of copyright infringement. In the digital age, technological advancements have made it easier for copyright infringement to occur. The chapter includes discussions on file sharing, piracy, plagiarism, etc. In terms of section 23(1)(a) of the *Copyright Act*,<sup>14</sup> direct infringement occurs when someone other than the copyright holder produces unauthorised copies, adaptations or a publication of a work without permission.

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<sup>14</sup> Section 23(1)(a) of the *Copyright Act 98 of 1978*.

### **Chapter 3: The measures needed to address the challenges related to copyright infringement in the digital age**

This chapter explores the measures needed to address the challenges related to copyright infringement in the digital age in South Africa. One significant development in copyright law is the use of digital rights management (DRM) technologies to protect digital content. DRM technologies are designed to prevent unauthorised copying and distribution of digital content. However, DRM technologies can also create challenges for consumers, who may at times be prevented from using content they have legitimately purchased.

### **Chapter 4: The case law and current legal instruments that address copyright infringement in South Africa**

This chapter provides a summary of the principal case law and existing legal frameworks regulating copyright infringement in South Africa. It analyses the evolution of copyright law through pivotal judicial rulings, investigating how the courts have construed and implemented legal doctrines to resolve infringement cases. The chapter also examines pertinent provisions, including the *Copyright Act*, along with any recent revisions or regulations that influence the enforcement of copyright protection in the country.

### **Chapter 5: International copyright standards that South Africa can adopt to improve copyright protection**

This chapter provides an overview of international copyright law, copyright in the digital age, and the challenges related to copyright protection in South Africa, as well as international standards on copyright and copyright enforcement.

### **Chapter 6: Conclusion and recommendation**

This chapter summarises the findings from the preceding chapters, discusses the implications of these findings, and makes recommendations for future research.

#### ***1.7 Relevance of the study for the Research Unit***

This research is relevant to the North-West University's research unit titled Law, Justice, and Sustainability in the Faculty of Law as it pertains to copyright

infringement. There is a need to establish what measures are required to address copyright infringements in the digital age. The absence of sufficient legislation to regulate copyright and innovation may adversely impact the public's access to copyrighted works.

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### ***1.8 Statement regarding ethics***

No interviews were conducted or questionnaires were administered for the purposes of this study. The completed prescribed ethics form as provided by the NWU Faculty of Law is attached. ?????

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<sup>15</sup> Chafee 1949 MichLRev 877-886.

## **CHAPTER 2: COPYRIGHT INFRINGEMENT IN THE DIGITAL WORLD**

### ***2.1 INTRODUCTION***

Understanding the nuances of copyright law is crucial for creators to protect their work and ensure they receive proper recognition and compensation for their efforts.<sup>16</sup> If they are aware of the legal protections copyright gives creators, they can effectively navigate the complexities of IPR and prevent others from exploiting their creations without consent. In addition to national copyright laws,<sup>17</sup> there are also international conventions and treaties that aim to standardise copyright protection globally.<sup>18</sup> These agreements establish standards for the protection of IPR across borders, ensuring that creators are able to enforce their rights in different countries.<sup>19</sup> By delving into the intricacies of copyright, creators can empower themselves to make informed decisions about how their works are used and shared. By upholding the principles of copyright and respecting the rights of creators, we can cultivate a creative and innovative society where intellectual property is esteemed and safeguarded.

### ***2.2 COPYRIGHT AND COPYRIGHT INFRINGEMENT***

#### *2.2.1 Definition of copyright and copyright infringement*

Copyright is a legal concept that grants creators and authors exclusive rights to their original works, affording them control over the reproduction, distribution, performance and display of their creations. It can be awarded to authors and creators of original works of expression, including literary, musical, dramatic, artistic, sound and audiovisual works. Copyright applies to both published and unpublished works. Copyright law places a social value on personal expression and creativity by recognising the author for having created the work and granting the author rights associated with the work.<sup>20</sup> This protection is essential for creators to safeguard their

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<sup>16</sup> Diescher and Darch 2015 *De Jure* 240.

<sup>17</sup> *Copyright Act 98 of 1978*.

<sup>18</sup> Diescher & Darch 2015 *De Jure* 240.

<sup>19</sup> Department of Trade and Industry. Intellectual Property Policy of the Republic of South Africa - Phase I (2018).

<sup>20</sup> Dawar, Sudarshan and Chitra 2021 *International Advanced Research Journal in Science, Engineering and Technology*, 611-616.

intellectual property and benefit from their creative endeavours. Copyright is a vital tool for nurturing creativity and innovation by incentivising creators to invest time and resources in producing new works, with the knowledge that they shall have the exclusive rights to benefit from their creations.<sup>21</sup>

Copyright infringement, as defined by the *Copyright Act*,<sup>22</sup> refers to the unauthorised use of a work protected by copyright. This can include reproducing the work in any manner or form, publishing the work, performing the work in public, broadcasting the work, or making an adaptation of the work without the permission of the copyright owner. For instance, if someone makes copies of a book or film and sells them without the permission of the copyright owner, they are committing copyright infringement.

The purpose of copyright law is to protect the rights of creators and owners of original works and to ensure that they can benefit from their creations. If someone infringes upon these rights, the owner of the copyright may seek legal remedies to stop the infringement and recover any damages suffered as a result. It is important to note that the specific remedies available may vary depending on the circumstances of the infringement.<sup>23</sup> Copyright infringement undermines the economic interests of creators and copyright owners by depriving them of the ability to control and profit from their work. Copyright infringement is a serious offence that can have legal consequences, including civil penalties, injunctions, and, in some cases, criminal prosecution.<sup>24</sup>

According to the *Copyright Act*,<sup>25</sup> the owner of a copyrighted work has several remedies available to them in the event of infringement. These include obtaining an interdict to prevent further infringement, claiming damages for any losses suffered as a result of the infringement, or receiving a reasonable royalty in lieu of damages.<sup>26</sup> Additionally, the owner may request the delivery-up of any infringing

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<sup>21</sup> Litman *Digital Copyright*.

<sup>22</sup> *Copyright Act 98 of 1978*.

<sup>23</sup> Landes and Posner 1989 *The Journal of Legal Studies Studies* 325–363.

<sup>24</sup> Litman *Digital Copyright* 254.

<sup>25</sup> Section 24 of the *Copyright Act 98 of 1978*.

<sup>26</sup> Section 25, 26 and 27 of the *Copyright Act 98 of 1978*.

copies of the work.<sup>27</sup> For example, if someone has made unauthorised copies of a song and is selling them, the owner of the copyright may seek an interdict to stop the sales, claim damages for any lost profits, and request the delivery-up of the infringing copies. It is important to note that the specific remedies available may vary depending on the circumstances of the infringement.

### 2.2.2 *The test for copyright infringement*

The test for copyright infringement is an objective test based on whether an article falls within a class of works that can be described as works of artistic craftsmanship, i.e., works generally made by artistic craftsmen with an aesthetic rather than a utilitarian end in mind.<sup>28</sup> This viewpoint argues that applying a subjective test would create uncertainty in the application of the law since the intention of the creator of a utilitarian article that has become a collector's item because of the high quality of its craftsmanship, would be unknown. The existence of copyright would therefore be an unknown factor.<sup>29</sup> However, others may argue that the test should be subjective, taking into account the intention of the creator and the purpose of the article.<sup>30</sup> For example, in the case of a designer pen, it may be argued that although it is virtually a piece of art, it still has a utilitarian purpose and will thus fall within the exception. Ultimately, the test for infringement will depend on the specific circumstances of each case and the interpretation of the relevant laws and regulations.

The test for copyright infringement in South Africa asks whether a substantial part of the original work has been reproduced without the copyright owner's permission. To determine whether a reproduction is substantial, the court will consider the quality and quantity of the work taken, its purpose, and its impact on the market for the original work<sup>31</sup>. Additionally, the court will consider whether the reproduction falls under any of the exceptions outlined in the *Copyright Act*, such as fair dealing. For

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<sup>27</sup> Dean *South African Copyright Law* 1-58A.

<sup>28</sup> TO Oloko, 'Assessing the Limitations and Exceptions to Copyright Infringement: Nigeria in Perspective' available at <https://www.ajol.info/index.php/naujilj/article/view/225877>.

<sup>29</sup> Oloko, 'Assessing the Limitations and Exceptions to Copyright Infringement: Nigeria in Perspective' 128.

<sup>30</sup> Copyright Regulations, 1978 as published in GN R1211 in GG 9775 of 7 June 1985 as amended by GN 1375 in GG 9807 of 28 June 1985.

1.1 <sup>31</sup> *Haupt t/a Softcopy v Brewers Marketing Intelligence (Pty) Ltd. and Others* (118/05) [2006] ZASCA 40; 2006 (4) SA 458 (SCA) (29 March 2006)

example, in the case of *Moneyweb v Media 24*,<sup>32</sup> the court had to determine whether Media 24 had reproduced a substantial part of Moneyweb's articles without permission and whether Media 24 could be absolved from liability under the fair dealing provision of the Act.<sup>33</sup>

### *2.2.3 Limitations and exceptions to copyright*

Section 12 of the *Copyright Act* outlines certain works that are not eligible for copyright protection.<sup>34</sup> These include official texts of a legislative, administrative or legal nature, as well as news of the day that are mere items of press information. Additionally, works that are purely functional are also exempt from copyright protection.<sup>35</sup>

In South Africa, limitations and exceptions to copyright infringement are crucial for balancing the interests of copyright owners and users.<sup>36</sup> The *Copyright Act* provides exceptions based on the genre of protected work; further explanation is given in the *Copyright Act*.<sup>37</sup> For literary and musical works, the first exception is fair dealing, which allows for the use of a work for research or private study, criticism or review, or reporting current events, provided that the use is fair and the source is mentioned. The court in South Africa has also given credence to the limitation and exception of fair dealing in the *Moneyweb* case by stating factors that may be considered to determine fair dealing in a work, such as the nature of the medium in which the works were published, the time lapse between the publication of the two works, and the amount (quality and quantity) of the work that has been taken.<sup>38</sup> Other exceptions in South Africa include permitted reproduction of works for research or private study and special exceptions for records of musical works. It is important to note that the issue of copyright limitation and exception carries much weight in South

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<sup>32</sup> *Moneyweb (Pty) Limited v Media 24 Limited & Another* [2016] ZAGPJHC 81).

<sup>33</sup> *Moneyweb (Pty) Limited v Media 24 Limited & Another* [2016] ZAGPJHC 81).

<sup>34</sup> Section 12 of the *Copyright Act 98 of 1978*.

<sup>35</sup> Dawar, Sudarshan and Chitra 2021 *International Advanced Research Journal in Science, Engineering and Technology*, 611-616.

<sup>36</sup> Oloko, 'Assessing the Limitations and Exceptions to Copyright Infringement: Nigeria in Perspective' 128.

<sup>37</sup> Oloko, 'Assessing the Limitations and Exceptions to Copyright Infringement: Nigeria in Perspective' 128.

<sup>38</sup> *Moneyweb (Pty) Limited v Media 24 Limited & Another* [2016] ZAGPJHC 81).

Africa, as access to educational material can be a challenge.<sup>39</sup> The use of copyrighted materials and the ability of the owners to benefit from the fruit of their labour requires a delicate balance in society to allow a complementary approach to quality education that would yield continuous turnouts of knowledge.<sup>40</sup>

In South African copyright law, fair dealing is determined by considering various factors such as the nature of the medium in which the works have been published, whether the original work has already been published, the time lapse between the publication of the two works, the amount (quality and quantity) of the work that has been taken, and the extent of the acknowledgement given to the original work.<sup>41</sup> These factors are not exhaustive, and one factor may be more or less important than another, given the context in which publication occurs. The court also examined whether the reproduction was covered by the fair dealing provision of section 12(1)(c)(i) and stated that providing a hyperlink sufficiently complies with the requirement that the source must be mentioned.<sup>42</sup> It is important to note that the *Copyright Act* must be interpreted through the prism of the *Constitution*. *The Constitutional Court emphasized that intellectual property rights must be balanced with constitutional rights, especially freedom of expression (Section 16),*<sup>43</sup> and in order to survive constitutional scrutiny, the Act must be capable of being interpreted in a manner that is consistent with the *Constitution*.

Section 13 of the *Copyright Act* provides for the permitted reproduction of works for research and educational purposes.<sup>44</sup> This section allows for the reproduction of works for research or private study, provided that the use is reasonable and does not conflict with the normal exploitation of the work, and it is not unreasonably prejudicial to the legitimate interests of the copyright owner. The use of a work for educational purposes is also allowed, but only to the extent justified by the purpose, and provided that the work and its creator are properly acknowledged. It is important

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<sup>39</sup> Oloko, 'Assessing the Limitations and Exceptions to Copyright Infringement: Nigeria in Perspective' 138.

<sup>40</sup> Oloko, 'Assessing the Limitations and Exceptions to Copyright Infringement: Nigeria in Perspective' 142.

<sup>41</sup> *Moneyweb (Pty) Limited v Media 24 Limited & Another* [2016] ZAGPJHC 81). ?

<sup>42</sup> *Moneyweb (Pty) Limited v Media 24 Limited & Another* [2016] ZAGPJHC 81). ?

<sup>43</sup> *Moneyweb (Pty) Limited v Media 24 Limited & Another* [2016] ZAGPJHC 81). ?

<sup>44</sup> Section 13 of the *Copyright Act 98 of 1978*.

to note that repeated copying of the same material by a teacher from term to term is not allowed, and such uses should not preclude the purchase of books.

Section 13 of the *Copyright Act* further provides guidelines for the reproduction of printed works by not-for-profit educational establishments.<sup>45</sup> The *Copyright Act* allows for limited copying for educational purposes, provided it does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the copyright owner. The Copyright Regulations outline several limitations and exceptions to copyright, including fair dealing, which permits the use of copyrighted material for criticism, review, news reporting, teaching, and research, as long as it is fair and does not harm the market for the original work. Additionally, educational institutions are permitted to make copies of works for instructional purposes under certain conditions, and works can be converted into accessible formats for persons with disabilities without needing permission from the copyright owner. *Blind SA* challenged the constitutionality of the *Copyright Act*, arguing that it unjustifiably limited the rights of persons with visual and print disabilities by requiring the consent of copyright owners to convert works into accessible formats. The court declared the *Copyright Act* unconstitutional to the extent that it failed to provide exceptions for such conversions, mandating the inclusion of provisions in the *Copyright Amendment Bill* to allow for the creation of accessible format copies without authorisation from copyright owners.<sup>46</sup>

The *Copyright Act* provides exceptions for library and archive use. These exceptions allow for the reproduction of works for preservation, research, or study as long as the use is not for commercial purposes and the source is mentioned. It provides further guidelines for library use, such as the number of copies that can be made and the duration of the use.<sup>47</sup> For example, a library may make a single copy of a work for research or study, but the copy must be destroyed within a reasonable time after the research or study has been completed. It is important to note that these

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<sup>45</sup> Kouletakis, Jade. (2014). A Critical Examination of Copyright Limitations and Exceptions for the Visually Impaired Pertaining to Literary Works in South Africa in the Local and Global Context. *South African Intellectual Property Law Journal*. 2. 42.

<sup>46</sup> *Blind SA v Minister of Trade, Industry and Competition and Others* (2022) ZACC 33.

<sup>47</sup> Kouletakis, Jade. (2014). A Critical Examination of Copyright Limitations and Exceptions for the Visually Impaired Pertaining to Literary Works in South Africa in the Local and Global Context. *South African Intellectual Property Law Journal*. 2. 46.

exceptions do not allow for the reproduction of entire works, but rather only parts of works that are necessary for the intended purpose. Additionally, the use of works for library and archive purposes should not conflict with the normal exploitation of the work or be unreasonably prejudicial to the legitimate interests of the copyright owner.

Although the *Copyright Act* does not have a specific provision for equality of access for disabled persons, section 13 of the Act provides that the reproduction of a work shall also be permitted as prescribed by regulation, as long as it does not conflict with the normal exploitation of the work and is not unreasonably prejudicial to the legitimate interests of the copyright owner.<sup>48</sup> This provision, along with section 12(9) which imports the provisions of subsections (1) to (7) of the same section,<sup>49</sup> can be used as the basis for the adaptation of copyrighted works to ensure equality of access to such works for disabled persons. This allows for the adaptation of works, such as braille or audio versions for disabled persons, provided they are reasonable and do not conflict with the interests of the copyright owner.<sup>50</sup>

## **2.3 CONVENTIONS AND TREATIES IN THE WORLD**

### *2.3.1 Berne Convention*

The Berne Convention is an international agreement governing the protection of works and the rights of their authors. It is based on three basic principles: national treatment, automatic protection, and independence of protection.<sup>51</sup> These principles ensure that works originating in one country are given the same protection in other countries, protection is not conditional upon any formality, and protection is independent of protection in the country of origin. The Convention also establishes minimum standards for the protection of works and rights and special provisions for developing countries. Additionally, the Convention permits certain limitations and exceptions to economic rights, such as "free uses" of protected works.<sup>52</sup>

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<sup>48</sup> Section 13 *Copyright Act 98 of 1978*.

<sup>49</sup> Section 12(9) *Copyright Act 98 of 1978*.

<sup>50</sup> *Blind SA v Minister of Trade, Industry and Competition and Others* 2022 ZACC 33.

<sup>51</sup> *Berne Convention for the Protection of Literary and Artistic Works* (1886).

<sup>52</sup> *Berne Convention for the Protection of Literary and Artistic Works* (1886).

The Berne Convention, like the *Copyright Act*,<sup>53</sup> grants authors moral rights, including various privileges that allow them to protect the integrity and dignity of their creations. These rights include the right to claim authorship of their work and object to any modification or action that may harm their reputation or honour.<sup>54</sup> For example, if an author writes a book and a film adaptation is made, the author may object to the adaptation if they feel that it misrepresents their work or damages their reputation. These rights are distinct from economic rights, which enable authors to control the use and distribution of their work for financial benefit. Ultimately, moral rights are designed to safeguard the author's creative vision and ensure their work is presented in a manner consistent with their intentions.<sup>55</sup>

According to the Berne Convention, the minimum term of protection for audiovisual (cinematographic) works is equivalent to that of other works: until the expiration of the 50th year after the author's death. However, there are exceptions to this rule.<sup>56</sup> For example, in the case of anonymous or pseudonymous works, the term of protection expires 50 years after the work has been lawfully made available to the public unless the pseudonym leaves no doubt as to the author's identity or if the author discloses his or her identity during that period.

### 2.3.2 WIPO (WCT & WPPT)

The WIPO is a specialised agency of the United Nations that addresses intellectual property (IP) matters.<sup>57</sup> Its primary role is to promote the protection of IP rights globally and offer services to assist individuals and businesses in safeguarding their IP. WIPO plays a significant role in developing international IP law and administering international treaties, such as the Berne Convention and the WIPO Copyright Treaty (WCT).<sup>58</sup> Its efforts to harmonise and modernise copyright laws across different countries provide a platform for international cooperation in

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<sup>53</sup> Section 20 of the *Copyright Act 98 of 1978*.

<sup>54</sup> Alikhan, Shahid. "Role of the Berne Convention in the Promotion of Cultural Creativity and Development : Recent Copyright Legislation In Developing Countries." *Journal of the Indian Law Institute* 28, no. 4 (1986): 423–40. <http://www.jstor.org/stable/43951043>.

<sup>55</sup> Alikhan, Shahid. "Role of the Berne Convention in the Promotion of Cultural Creativity and Development : Recent Copyright Legislation in developing countries." *Journal of the Indian Law Institute* 28, no. 4 (1986): 423–40. <http://www.jstor.org/stable/43951043>.

<sup>56</sup> Article 14(2) of the *Berne Convention for the Protection of Literary and Artistic Works* (1886).

<sup>57</sup> WIPO 1971 *Records of the Intellectual Property Conference of Stockholm*.

<sup>58</sup> WIPO 1971 *Records of the Intellectual Property Conference of Stockholm*.

copyright protection. For instance, the WIPO facilitates forums for countries to negotiate and adopt international copyright treaties, including the WCT and the WPPT.<sup>59</sup>

The WCT focuses on protecting literary and artistic works, while the WPPT addresses the protection of performances and phonograms. Both treaties aim to provide a framework for protecting copyright and related rights in the digital age. The WCT includes provisions that address the use of works in digital form<sup>60</sup> and the protection of technological measures used to safeguard copyrighted works.<sup>61</sup> Similarly, the WPPT includes provisions that address the rights of performers and producers of phonograms in the digital environment and limitations and exceptions to those rights.<sup>62</sup> By establishing minimum standards of protection and providing a forum for international cooperation, these treaties help promote the harmonisation of copyright laws across different countries, ensuring that creators and rights holders can protect their works in the global marketplace.

### *2.3.3 Trade-related Aspects of Intellectual Property Rights (IPR)*

TRIPS stands for the Agreement on Trade-Related Aspects of IPR. It is an international agreement that establishes minimum standards for the protection and enforcement of IPR, including copyrights, trade marks, patents and other related rights. TRIPS was negotiated as part of the Uruguay Round of multilateral trade negotiations and came into effect on 1 January 1995. TRIPS establishes minimum standards for copyright protection and enforcement, including the duration of copyright protection, the rights of copyright owners, and the remedies available for copyright infringement. TRIPS also requires member countries to provide effective enforcement measures against copyright piracy and counterfeiting.<sup>63</sup>

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<sup>59</sup> WIPO 1971 *Records of the Intellectual Property Conference of Stockholm*.

<sup>60</sup> Article 6 of the *WIPO Copyright Treaty*. 1996.

<sup>61</sup> Article 11 of the *WIPO Copyright Treaty*. 1996.

<sup>62</sup> Article 13 of the *WIPO Performances and Phonograms Treaty* 1996.

<sup>63</sup> *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS) 1994.

## **2.4 SOUTH AFRICA'S EFFORTS TO PROTECT DIGITAL COPYRIGHTS**

### *2.4.1 The Copyright Amendment Bill*

South Africa has been making efforts to protect digital copyrights through its existing legal framework and proposed amendments to its copyright laws. The *Copyright Act* provides the basis for protecting digital copyrights within its jurisdiction. Additionally, South Africa is a signatory to several international IPR agreements, including the Berne Convention, TRIPS, and WCT

The proposed *Copyright and Performers Protection Amendment Bills* are set to have a significant impact on the creative sector in South Africa.<sup>64</sup> Some key provisions in these Bills include mandatory royalties for all performers, including extras, without the legal option to choose a different remuneration model.<sup>65</sup> This ensures that performers receive fair compensation for the use of their performances, limiting the assignment of rights to 25 years, which means that unless contracts are renegotiated with every rights holder, the production may not be commercialised again.<sup>66</sup> This provision aims to protect the long-term interests of creators and performers and empowers the Minister (Department of Trade, Industry, Competition - DTIC) to set contractual terms and determine royalty rates.<sup>67</sup> It allows for government oversight and regulation to ensure fair practices in the industry and requires registration and reporting to all rights holders on every commercialisation of a production worldwide.<sup>68</sup> This provision aims to increase transparency and accountability in the industry, ensuring that rights holders are informed and compensated for the use of their works.

These proposed amendments reflect South Africa's commitment to reinforcing copyright protection in the digital age and ensuring that creators and performers are fairly remunerated for their work. By aligning its laws with international standards

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<sup>64</sup> Copyright Amendment Bill (B13B-2017).

<sup>65</sup> Section 4A of the *Copyright Amendment Bill* (B13B-2017).

<sup>66</sup> Section 6A of the *Copyright Amendment Bill* (B13B-2017).

<sup>67</sup> Section 7A of the *Copyright Amendment Bill* (B13B-2017).

<sup>68</sup> Section 9A of the *Copyright Amendment Bill* (B13B-2017).

and implementing these amendments, South Africa aims to create a more robust and equitable environment for digital copyright protection.<sup>69</sup>

The *Copyright Amendment Bill* in South Africa is closely linked to the international standards established by the WCT and the WPPT. These treaties, overseen by WIPO, are designed to establish a unified approach to global copyright laws, focusing on adapting to the digital landscape.

In 2017, the *Copyright Amendment Bill* was introduced in South Africa to modernise the country's copyright legislation. It was crafted to ensure compliance with both the country's *Constitution* and its international treaty obligations. The *Copyright Amendment Bill* aligns with international standards by expanding user rights and providing additional limitations and exceptions for reproducing copyrighted works. Specifically, Section 6 of the *Copyright Amendment Bill* inserts a new section 12A, which broadens the limitations and exceptions to copyright infringement, allowing for the reproduction of copyrighted works for persons with disabilities,<sup>70</sup> the use of copyrighted works for educational and research purposes,<sup>71</sup> and the reproduction of copyrighted works for libraries and archives.<sup>72</sup> These provisions aim to promote accessibility and flexibility in the use of copyrighted materials while still maintaining the balance between creators' rights and users' needs. By incorporating these limitations and exceptions, the *Copyright Amendment Bill* aligns South African copyright law with the WCT and the WPPT standards.<sup>73</sup>

Moreover, the *Copyright Amendment Bill* addresses the issue of royalty sharing in copyright works, ensuring creators and performers receive fair compensation for their contributions. It also delves into digital rights matters, including the protection of digital content via measures such as technological protection and copyright management information. Additionally, the Bill emphasises equal access to knowledge for all individuals, without discrimination, by empowering the Copyright

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<sup>69</sup> Department of Trade and Industry. Intellectual Property Policy of the Republic of South Africa - Phase I (2018).

<sup>70</sup> Section 12A(1)(a) of the *Copyright Amendment Bill* (B13B-2017).

<sup>71</sup> Section 12A(1)(b) of the *Copyright Amendment Bill* (B13B-2017).

<sup>72</sup> Section 12A(1)(c) of the *Copyright Amendment Bill* (B13B-2017).

<sup>73</sup> Department of Trade and Industry. Intellectual Property Policy of the Republic of South Africa - Phase I (2018).

Tribunal to balance rights and access effectively. Section 27 of the *Copyright Amendment Bill* empowers the Copyright Tribunal to balance the rights of copyright owners with the need for access to knowledge,<sup>74</sup> consider factors such as the public interest, education, research, and persons with disabilities when making decisions,<sup>75</sup> and make orders to ensure equal access to knowledge for all individuals, without discrimination.<sup>76</sup>

Section 12B of the *Copyright Amendment Bill* introduces a fair use provision, which allows for the use of copyrighted works under certain circumstances without permission from the copyright holder. The *Copyright Amendment Bill* seeks to uphold constitutional rights in South Africa, including the right to education,<sup>77</sup> cultural engagement,<sup>78</sup> language,<sup>79</sup> and freedom of expression.<sup>80</sup> It accomplishes this by permitting fair usage of copyrighted works, thereby striking a balance between protecting intellectual property and advancing societal benefits. The *Copyright Amendment Bill* seeks to align South Africa's copyright laws with global standards while safeguarding the fundamental rights enshrined in the country's *Constitution*.

#### 2.4.2 Issues with Copyright Reform in South Africa

The *Copyright Amendment Bill's* amendments have been contentious owing to their potential impact on copyright owners and users. Some stakeholders, including publishers and authors, have expressed concerns that the amendments may compromise their ability to earn a living from their works. Conversely, advocates of the amendments contend that they are essential to promote access to knowledge and cultural works, particularly within the education and research sectors.<sup>81</sup>

The President's referral letter regarding the *Copyright Amendment Bill* expressed reservations about the constitutionality of certain provisions in the Bill and concerns about the domestic application of international law. Specifically, the letter mentioned

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<sup>74</sup> Section 27(1) of the *Copyright Amendment Bill* (B13B-2017).

<sup>75</sup> Section 27(2) of the *Copyright Amendment Bill* (B13B-2017).

<sup>76</sup> Section 27(3) of the *Copyright Amendment Bill* (B13B-2017).

<sup>77</sup> Section Section 12B(1)(a) of the *Copyright Amendment Bill* (B13B-2017).

<sup>78</sup> Section Section 12B(1)(b) of the *Copyright Amendment Bill* (B13B-2017).

<sup>79</sup> Section Section 12B(1)(c) of the *Copyright Amendment Bill* (B13B-2017).

<sup>80</sup> Section Section 12B(1)(d) of the *Copyright Amendment Bill* (B13B-2017).

<sup>81</sup> Beiter et al. (2022). Copyright Reform in South Africa: Two Joint Academic Opinions on the *Copyright Amendment Bill* (B13B 2017). Potchefstroom Electronic Law Journal. 25.

specific clauses in the *Copyright Amendment Bill* that the President believed may be unconstitutional. The Joint Academic Opinion<sup>82</sup> analysed these specific clauses and offered recommendations on whether Parliament should take action to bolster their constitutionality. The Opinion also addressed the President's concerns about the domestic application of international law.<sup>83</sup>

The *Copyright Amendment Bill* has dragged on and has still not been passed for various reasons, including the complexity of the issues involved, the need to balance competing interests, and the political climate in South Africa. The Bill has undergone multiple rounds of public consultation and revision, contributing to its protracted trajectory through Parliament.<sup>84</sup> Notwithstanding these challenges, the Bill has the potential to significantly affect the copyright landscape in South Africa and beyond. The US Trade Office has expressed concerns about South Africa introducing Fair Use, suggesting that it could lead to heightened copyright infringement and adversely impact US copyright owners.<sup>85</sup>

#### 2.4.3 *The impact of the Copyright Amendment Bill on the Copyright Act*

The *Copyright Amendment Bill* has the potential to significantly affect the *Copyright Act* in South Africa. The key changes proposed in the Bill include the introduction of fair use provisions, the expansion of exceptions and limitations for educational and research purposes, and the establishment of a resale royalty right for visual artists. These changes could have both positive and negative effects on copyright owners and users, depending on their perspective.<sup>86</sup>

For example, proponents of the Bill argue that the fair use provisions will promote innovation and creativity by allowing for more flexible and adaptive uses of

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<sup>82</sup> The *Joint Academic Opinion* presents a collective viewpoint from a group of academic experts in the fields of *intellectual* property law, constitutional law, and international law. This group was consulted by Parliament as part of its consultative process.

<sup>83</sup> Beiter *et al.* (2022). Copyright Reform in South Africa: Two Joint Academic Opinions on the Copyright Amendment Bill (B13B 2017). Potchefstroom Electronic Law Journal. 25.

<sup>84</sup> Sanya Samtani, 'South Africa's Copyright Amendment Bill: Making Progress at the Provinces' (InfoJustice, 26 June 2023) <https://infojustice.org/archives/45332> accessed 2 September 2024.

<sup>85</sup> Desmond O Oriakhogba, Eunice O Erhagbe, The Copyright Amendment Bill: A New Vista for Fair Remuneration for South African Creators and Performers?, GRUR International, 2024; ikae080, <https://doi.org/10.1093/grurint/ikae080>.

<sup>86</sup> Nicholson, D. R. (2019). "South Africa's Copyright Amendment Bill: Its Genesis and Passage through Parliament." LIASA-in-touch, 20(2).

copyrighted works. They also argue that the expanded exceptions and limitations for educational and research purposes will promote access to knowledge and cultural works, particularly in the education sector. On the other hand, opponents of the Bill argue that these changes may undermine the ability of copyright owners to earn a living from their works and may lead to a reduction in the quality and quantity of creative works produced.<sup>87</sup>

The impact of the *Copyright Amendment Bill* on the *Copyright Act* will depend on how it is implemented and enforced, as well as how stakeholders respond to the changes. There will likely be ongoing debate and discussion about the Bill's impact and effectiveness in the years to come.<sup>88</sup>

## **2.5 COPYRIGHT INFRINGEMENT NOTICE**

A copyright infringement notice is a formal communication sent by the owner of a copyrighted work to an individual or entity believed to be using the work without permission. The purpose of such a notice is to inform the alleged infringer that their use of the copyrighted material is unauthorised and to demand that they cease using the work. Copyright infringement notices are sent to protect the IPR of the copyright owner and to prevent financial losses from unauthorised use of their work. Additionally, these notices aim to uphold the owner's ability to control how their work is used and distributed.<sup>89</sup>

When a copyright owner becomes aware of unauthorised use of their work, they may choose to send a Copyright infringement notice to the infringing party. This awareness can come from various sources, such as discovering infringing content online, receiving reports from third parties, or actively monitoring the use of copyrighted material. The timing of sending the notice can vary based on when the infringement is discovered and the copyright owner's decision to take legal action. Once the decision is made to send a notice, it is typically delivered via email or traditional mail. It includes specific details about the copyrighted work being

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<sup>87</sup> Nicholson, D. R. (2019). "South Africa's Copyright Amendment Bill: Its Genesis and Passage through Parliament." *LIASA-in-touch*, 20(2).

<sup>88</sup> Nicholson, D. R. (2019). "South Africa's Copyright Amendment Bill: Its Genesis and Passage through Parliament." *LIASA-in-touch*, 20(2).

<sup>89</sup> Diescher and Darch 2015 *De Jure* 240.

infringed upon, evidence of the infringement, and a demand for the infringing party to cease using the material. In some cases, the notice may also incorporate a request for compensation or other remedies to address the infringement and potential damages caused to the copyright owner.<sup>90</sup>

## **2.6 LANDMARK CASE LAW**

### *2.6.1 Moneyweb and Media24 (Moneyweb (Pty) Limited v Media 24 Limited & Another [2016] ZAGPJHC 81)*

The landmark decision in the case between Moneyweb and Media24 is particularly noteworthy for copyright lawyers in South Africa, as it marks the first judicial interpretation of the fair dealing provisions in the *Copyright Act*, specifically sections 12(1)(c)(i) and 12(8)(a), which permit the use of copyrighted material for purposes such as criticism, review, or reporting news.<sup>91</sup> The case involved Moneyweb claiming copyright infringement by Media24 for publishing articles that reproduced Moneyweb's previous work. The court emphasised the necessity of originality in determining copyright protection, stating that a work must involve intellectual effort and not be a slavish copy. The court found that some of Moneyweb's articles lacked originality, leading to a dismissal of copyright infringement claims. The court also discussed the exclusion of "items of press information" from copyright protection and the fair-dealing exception under section 12(1)(c)(i).<sup>92</sup>

The court made a qualitative judgement in assessing whether a substantial part of a copyright work was reproduced. Media24 was found to have reproduced a substantial part of one Moneyweb article, leading to a consideration of the fair-dealing exception. The court outlined the requirements for fair use, including reporting current events, fairness, and attribution. Unlawful competition was not established in the case, as the court was reluctant to find it without copyright infringement. The judgment highlighted the importance of proving originality for

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<sup>90</sup> Diescher and Darch 2015 *De Jure* 240.

<sup>91</sup> Section 12(1)(c)(i) & 12(8)(a) of the *Copyright Act 1978*.

<sup>92</sup> Section 12(1)(c)(i) of the *Copyright Act 1978*.

copyright protection and using hyperlinks for attribution in online publications. The court's interpretation of fair-dealing exceptions aligned with English law.

The case provided guidance on fair-dealing exceptions for news reporting and clarified the application of copyright laws in online publishing. The court's analysis emphasised the need for originality and proper evidence of effort in creating copyrighted works. The court found that several of Moneyweb's articles lacked originality because they were largely based on press releases, conference calls and interviews, with insufficient evidence of the author's individual contribution. This decision underscored the significance of the distinctive effort and creativity involved in producing a copyrighted work.<sup>93</sup>

### *2.6.2 Blind SA v Minister of Trade, Industry and Competition and Others*

*Blind SA v Minister of Trade, Industry and Competition and Others*<sup>94</sup> concerns the constitutional validity of the *Copyright Act* in relation to persons with print and visual disabilities. Blind SA challenged the Act on the basis that it infringes on the constitutional rights of persons with disabilities, including the right to equality, human dignity, freedom of expression, and access to education.<sup>95</sup> The court ultimately granted a reading-in remedy, deeming the proposed section 19D of the *Copyright Amendment Bill* to form part of the *Copyright Act* for 12 months to provide an immediate remedy for those whose rights were affected by the Act.<sup>96</sup>

The respondents, including the Minister of Trade, Industry and Competition, acknowledged that the *Copyright Act* was unconstitutional to the extent declared by the High Court. They agreed that the Act failed to provide exceptions for converting copyrighted works into accessible formats for persons with print and visual disabilities. The respondents' defence primarily focused on the ongoing legislative process to amend the *Copyright Act*, which had been in progress since 2015. They highlighted that the *Copyright Amendment Bill*, passed by Parliament in 2019, aimed

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<sup>93</sup> Karjiker, S 'News reports and fair dealing: *Moneyweb v Media 24* (Stellenbosch University Intellectual Property Law Blog, 17 May 2016) <https://blogs.sun.ac.za/iplaw/2016/05/17/news-reports-and-fair-dealing-moneyweb-v-media24/> accessed 2 September 2024.

<sup>94</sup> *Blind SA v Minister of Trade, Industry and Competition and Others* 2022 ZACC 33.

<sup>95</sup> *Blind SA v Minister of Trade, Industry and Competition and Others* 2022 ZACC 33, para 24.

<sup>96</sup> *Blind SA v Minister of Trade, Industry and Competition and Others* 2022 ZACC 33, para 56.

to introduce section 19D. This section would allow prescribed persons to make accessible format copies without the copyright owner's authorisation, thus addressing the issue raised by Blind SA. However, the *President referred the Copyright Amendment Bill back to the National Assembly* in 2020, resulting in delays that prompted Blind SA to seek judicial intervention.

Blind SA urged the court to adopt a reading-in remedy that would deem the proposed section 19D, formulated in clause 20 of the *Copyright Amendment Bill*, presently before Parliament, to form part of the *Copyright Act*.<sup>97</sup> This deeming would hold good for the 12 months afforded to Parliament to remedy the constitutional defect, failing which, the incorporated section 19D would continue to apply.<sup>98</sup> Blind SA justifies this relief on the basis that those whose rights are infringed by the *Copyright Act* require an immediate remedy and should not be required to wait for Parliament to pass into law the remedial provisions that would cure the constitutional inconsistency of the *Copyright Act*. Blind SA observes that section 19D was not identified by the President when he referred the *Copyright Amendment Bill* back to Parliament as giving rise to constitutional concerns. This remedial regime would then permit Parliament to do its work to pass the *Copyright Amendment Bill* into law and provide the basis for South Africa to comply with its international obligations under the Marrakesh Treaty. The court ultimately granted the reading-in remedy, suspending the operation of the declaration of unconstitutionality for a period of 12 months, and ordered that the proposed section 19D be deemed to form part of the *Copyright Act*.<sup>99</sup>

The proposed Section 19D in the *Copyright Act* permits the conversion of copyright works into an accessible format copy, which does not introduce changes other than those required to make the work accessible to a person with a disability. This means that a person who serves persons with disabilities may, without the authorisation of the copyright owner, make an accessible format copy for the benefit of a person with a disability, supply that accessible format copy to a person with a disability by any means, including by non-commercial lending or by digital communication by wire or

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<sup>97</sup> *Blind SA v Minister of Trade, Industry and Competition and Others* 2022 ZACC 33 para 28.

<sup>98</sup> *Blind SA v Minister of Trade, Industry and Competition and Others* 2022 ZACC 33 para 56.

<sup>99</sup> *Blind SA v Minister of Trade, Industry and Competition and Others* 2022 ZACC 33 para 56.

wireless means, and undertake any intermediate steps to achieve these objectives, if certain conditions are met. This section aims to benefit persons with disabilities by providing them with access to copyrighted works in a format that is accessible to them.

The requirement for authorisation in the *Copyright Act*, which mandates that individuals or organisations obtain permission from the copyright holder before reproducing, adapting, or distributing copyrighted materials, has significantly impacted the constitutional rights of persons with print and visual impairments.<sup>100</sup> Firstly, it constitutes unfair discrimination on the grounds of disability,<sup>101</sup> as it fails to take into account the impact of the requirement on persons with disabilities and thus infringes section 9(3) of the *Constitution*.<sup>102</sup> Secondly, it infringes on the right to human dignity in terms of section 10 of the *Constitution*,<sup>103</sup> as it limits access to literary works, which is a condition for advancement and an essential attribute of people's well-being.<sup>104</sup> Thirdly, it infringes the right to freedom of expression, and in particular the freedom to receive and impart information in terms of section 16(1)(b),<sup>105</sup> as it drastically limits access to literary works and impairs the freedom to receive and impart information.<sup>106</sup>

Fourthly, it infringes the right to basic and further education protected in terms of Section 29(1)(a) and (b) of the *Constitution*,<sup>107</sup> as persons with print and visual disabilities struggle to secure books in accessible format copies for their education. They cannot access the articles and books they need, which is a substantial impairment to the benefits of a higher education.<sup>108</sup> These infringements heap indignity upon the adversities these persons face and constitute unfair discrimination on the grounds of disability that section 9(3) of the *Constitution* prohibits.<sup>109</sup>

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<sup>100</sup> Section 12 of the *Copyright Act 98 of 1978*.

<sup>101</sup> *Blind SA v Minister of Trade, Industry and Competition and Others 2022] ZACC 33*, para 70.

<sup>102</sup> Section 9(3) of the *Constitution of the Republic of South Africa 1996*.

<sup>103</sup> Section 10 of the *Constitution of the Republic of South Africa 1996*.

<sup>104</sup> *Blind SA v Minister of Trade, Industry and Competition and Others 2022 ZACC 33* para 71.

<sup>105</sup> section 16(1)(b) of the *Constitution of the Republic of South Africa 1996*.

<sup>106</sup> *Blind SA v Minister of Trade, Industry and Competition and Others 2022 ZACC 33* para 73.

<sup>107</sup> Section 29(1)(a) and (b) of the *Constitution of the Republic of South Africa 1996*.

<sup>108</sup> *Blind SA v Minister of Trade, Industry and Competition and Others 2022 ZACC 33* para 73.

<sup>109</sup> Section 9(3) of the *Constitution of the Republic of South Africa 1996*.

The court found that the Act does indeed infringe on the constitutional rights of persons with disabilities and that the reading-in remedy is necessary to address this constitutional defect. The legal opinion is that the court's decision is a significant victory for persons with disabilities, as it affirms their right to access literary works and exercise their expressive rights on an equal basis with others. The decision also emphasises the significance of interpreting legislation in a manner consistent with international human rights law. It underscores the necessity for a balanced approach to copyright law that considers all people's rights to access and impart knowledge and ideas.

## ***2.7 CONCLUSION***

The landscape of copyright protection is intricate and multifaceted, with legal mechanisms in place to uphold the rights of creators and authors. International agreements such as the Berne Convention, WIPO treaties, and TRIPS set minimum standards for copyright protection and enforcement, ensuring that IPR are respected across borders. South Africa's efforts to enhance digital copyright protection exemplify a commitment to adapting to the challenges of the digital age while safeguarding the interests of creators and performers. By navigating the intricacies of copyright law and fostering international cooperation, the global community can continue to promote creativity, innovation, and equitable compensation for creative works.

## **CHAPTER 3: MEASURES TO ADDRESS COPYRIGHT INFRINGEMENT IN THE DIGITAL AGE IN SOUTH AFRICA**

### ***3.1 Introduction***

The digital age has revolutionised how we create, distribute and consume content.<sup>110</sup> However, this digital revolution has also introduced a myriad of challenges to copyright law, including the ease of copying and distributing digital content, the rise of online piracy, and the difficulty of enforcing copyright across borders. These challenges necessitate a re-evaluation of existing copyright laws to ensure they are effective in the digital environment.<sup>111</sup> This chapter explores the measures to address copyright infringement in the digital age in South Africa, focusing on the significance of addressing copyright infringement, DRM technologies, legal frameworks, strategies to combat infringement, balancing rights of content creators and users, case studies, and future directions.<sup>112</sup>

Protecting IPR is essential for promoting creativity, innovation and cultural development.<sup>113</sup> As a signatory to various international treaties and agreements, South Africa has a legal obligation to protect copyright and related rights.<sup>114</sup> However, the country faces significant challenges in enforcing copyright laws, particularly in the digital environment. This chapter aims to provide a comprehensive analysis of the measures to address copyright infringement in the digital age in South Africa, highlighting the benefits and challenges of DRM technologies, the legal framework for copyright protection, effective strategies to combat infringement, and the balance between the rights of content creators and users.<sup>115</sup>

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<sup>110</sup> Adetunji, A & Okuonghae, N. (2022). Challenges of Copyright Protection in the Digital Age: The Nigerian Perspective.

<sup>111</sup> Du Bois 2012 *South African Mercantile Law Journal* 177-193.

<sup>112</sup> Du Bois 2012 *South African Mercantile Law Journal* 177-193.

<sup>113</sup> Du Bois 2012 *South African Mercantile Law Journal* 177-193.

<sup>114</sup> World Intellectual Property Organization (WIPO), *WIPO Copyright Treaty* 1996.

<sup>115</sup> Sinha, M.K. & Mahalwar, Vandana. (2017). Copyright law in the digital world: Challenges and opportunities. 10.1007/978-981-10-3984-3.

### ***3.2 Digital Rights Management Technologies***

DRM technologies are crucial in safeguarding digital content against unauthorised access, replication, and distribution.<sup>116</sup> By implementing various sophisticated measures, DRM technologies play a pivotal role in regulating the use, sharing, and reproduction of digital assets. Through the strategic application of DRM mechanisms, content creators and rights holders can exert control over the dissemination of their intellectual property, thereby mitigating the risks associated with copyright infringement and ensuring the integrity of their creative works.<sup>117</sup> Nevertheless, while DRM technologies offer numerous advantages in fortifying digital content protection, they also present a range of challenges and complexities in addressing the ever-evolving landscape of unauthorised use and piracy. In this context, understanding both the benefits and limitations of DRM technologies is essential for effectively combating copyright infringement and preserving the rights of content creators in the digital realm.<sup>118</sup>

#### ***3.2.1 Digital Rights Management Technologies***

DRM technologies include various tools and techniques to safeguard digital content from unauthorised exploitation, such as encryption, watermarking, and digital fingerprinting.<sup>119</sup> By implementing these sophisticated methods, DRM technologies can effectively shield various digital assets, including e-books, music, films, and software, from illicit distribution and misuse.<sup>120</sup> The key components of DRM technologies include encryption, which involves scrambling digital content to thwart unauthorised access; digital watermarking, which entails embedding covert markers in digital content to ascertain ownership; digital fingerprinting, which revolves around generating distinct identifiers for digital assets; and access control mechanisms,

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<sup>116</sup> Hess D (2015) Managing digital rights with rights expression languages. *J Digit Med Manag* 4(1):21–34.

<sup>117</sup> Bechtold, Stefan. (2006). The Present and Future of Digital Rights Management. 6-7. 10.1109/AXMEDIS.2006.52.

<sup>118</sup> Gachago, Roger. (2011). The Effect of Technology on Copyright. 10.13140/RG.2.2.24252.28803.

<sup>119</sup> Nicholson, Denise & Librarian, Copyright. (2009). Digital Rights Management and Access to Information: a developing country's perspective. *Library and Information Science Research E-Journal*, 19.

<sup>120</sup> Bechtold, Stefan. (2006). The Present and Future of Digital Rights Management, 6-7.

which regulate access to digital content based on user-specific permissions.<sup>121</sup> By deploying these multifaceted DRM technologies, content creators and rights holders can exert greater control over the dissemination and utilisation of their intellectual property, thereby fortifying the protection of digital content in an increasingly interconnected and digitised landscape.<sup>122</sup>

These DRM technologies are critical in deterring copyright infringement and combating piracy by establishing robust barriers against unauthorised access, reproduction, and distribution of digital content.<sup>123</sup> Encryption is a powerful tool that prevents unauthorised users from bypassing security measures and gaining illicit access to protected content. Digital watermarking adds an additional layer of security by discreetly embedding identifying information within the digital files, enabling content creators to trace unauthorised sharing back to the source.<sup>124</sup>

Digital fingerprinting, on the other hand, uniquely identifies digital assets, enabling content owners to track and monitor the usage of their content across various platforms and channels. Access control mechanisms further enhance the security of digital content by restricting access based on predefined user permissions, ensuring that only authorised individuals can view or interact with the protected material.<sup>125</sup> While DRM technologies offer significant benefits in safeguarding IPR and deterring infringement, they also pose challenges related to interoperability, user experience, and circumvention by tech-savvy individuals. Striking a balance between robust protection and user convenience is essential for ensuring that DRM technologies effectively serve their intended purpose without unduly restricting legitimate uses of digital content.<sup>126</sup>

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<sup>121</sup> Nicholson, Denise & Librarian, Copyright. (2009). Digital Rights Management and Access to Information: a developing country's perspective. *Library and Information Science Research E-Journal*, 19.

<sup>122</sup> Ploman EW & Hamilton LC (1980) *Copyright intellectual property in the information age* Routledge & Kegan Paul Boston, MA.

<sup>123</sup> Gachago R (2011) The Effect of Technology on Copyright.

<sup>124</sup> Hess D (2015) Managing digital rights with rights expression languages *J Digit Med Manag* 4(1) 21–34.

<sup>125</sup> Nicholson D & Librarian C (2009) Digital Rights Management and Access to Information: a Developing Country's perspective *Library and Information Science Research E-Journal* 19.

<sup>126</sup> Nicholson, Denise & Librarian, Copyright. (2009). Digital Rights Management and Access to Information: a developing country's perspective. *Library and Information Science Research E-Journal*, 19.

### 3.2.2 Purpose of DRM Technologies

In the realm of digital content, DRM technologies serve a crucial purpose in safeguarding IPR and ensuring fair compensation for creators. One of the primary objectives of DRM is to prevent unauthorised use and distribution of digital content.<sup>127</sup> For instance, consider a scenario where a musician releases a new album; DRM technologies help restrict illegal sharing or copying of the music files, thereby protecting the artist's rights and income.<sup>128</sup>

Moreover, DRM technologies are key in facilitating authorised access to digital content. By implementing DRM measures, content creators can control who can access, share, or modify their work. This level of control is vital in maintaining the integrity and value of the content. For example, an author publishing an e-book may use DRM to limit the number of devices on which the book can be read, ensuring that only legitimate buyers can enjoy the content.<sup>129</sup>

In the academic domain, DRM technologies are instrumental in digital preservation efforts. Academic libraries and institutions leverage DRM tools such as DSpace, E-print, and LOCKSS to safeguard valuable digital resources. These technologies help ensure that scholarly materials remain accessible over the long term, preventing data loss and ensuring continuity in research and education.<sup>130</sup>

Furthermore, DRM technologies support data sharing and machine learning applications in education. By regulating access to data, DRM contributes to maintaining data integrity and confidentiality, especially in regions like South Africa, where data-sharing governance presents challenges for researchers. For instance, educational institutions can use DRM to control access to research datasets, enabling secure collaboration and fostering innovation in machine learning applications.<sup>131</sup>

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<sup>127</sup> Bechtold, Stefan. (2006). The Present and Future of Digital Rights Management, 6-7.

<sup>128</sup> Bechtold, Stefan. (2006). The Present and Future of Digital Rights Management, 6-7.

<sup>129</sup> Bechtold, Stefan. (2006). The Present and Future of Digital Rights Management, 6-7.

<sup>130</sup> Masenya, Tlou & Ngulube, Patrick. (2021). Digital preservation systems and technologies in South African academic libraries. SA Journal of Information Management. 23. 10.4102/sajim.v23i1.1249.

<sup>131</sup> Ersozlu, Z., Taheri, S. & Koch, I. A review of machine learning methods used for educational data. Educ Inf Technol (2024). <https://doi.org/10.1007/s10639-024-12704-0>

Recent studies have shed light on the adoption of digital preservation systems and technologies in South African academic libraries. Researchers have highlighted the significance of platforms like DSpace, E-print, and LOCKSS in preserving digital resources and ensuring their accessibility for future generations.<sup>132</sup> Additionally, investigations into data-sharing governance challenges for machine learning research underscore the critical role of DRM technologies in establishing secure and standardised practices for sharing educational data.<sup>133</sup>

### *3.2.3 Benefits of DRM technologies*

DRM technologies are crucial in safeguarding digital content from unauthorised copying and sharing.<sup>134</sup> In South Africa, where the protection of local music, film, and literary works is paramount, implementing DRM is essential. By utilising DRM, creators can effectively prevent their content from being illegally distributed, thus preserving their IPR.<sup>135</sup> To illustrate, consider a scenario where a South African musician releases a new album. Without DRM, the music could easily be pirated and shared without permission, leading to significant financial losses for the artist. However, with DRM technologies implemented, the musician can control access to their music, ensuring that only those who have legitimately purchased it can enjoy the content.<sup>136</sup>

DRM technologies empower content creators and distributors to manage who can access and use their digital content.<sup>137</sup> This control is especially crucial for educational institutions in South Africa, where DRM can assist in regulating access to digital textbooks, research papers, and other academic materials. For instance,

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<sup>132</sup> Masenya, Tlou & Ngulube, Patrick. (2021). Digital preservation systems and technologies in South African academic libraries. *SA Journal of Information Management*. 23. 10.4102/sajim.v23i1.1249.

<sup>133</sup> Pellegrini, T. (2024). Digital Rights Management – Technologies, Application Areas, and Governance. In: Krone, J., Pellegrini, T. (eds) *Handbook of Media and Communication Economics*. Springer, Wiesbaden. [https://doi.org/10.1007/978-3-658-34048-3\\_79-2](https://doi.org/10.1007/978-3-658-34048-3_79-2).

<sup>134</sup> World Intellectual Property Organization (WIPO), *WIPO Copyright Treaty* 1996.

<sup>135</sup> Masenya, Tlou & Ngulube, Patrick. (2021). Digital preservation systems and technologies in South African academic libraries. *SA Journal of Information Management*. 23. 10.4102/sajim.v23i1.1249.

<sup>136</sup> Masenya, Tlou & Ngulube, Patrick. (2021). Digital preservation systems and technologies in South African academic libraries. *SA Journal of Information Management*. 23. 10.4102/sajim.v23i1.1249.

<sup>137</sup> Arnab, Alapan & Hutchison, Andrew. (2004). Digital rights management - An overview of current challenges and solutions.

universities can use DRM to limit access to their digital libraries to enrolled students and faculty members exclusively. Imagine a situation where a university in South Africa wishes to provide students with access to an online database of scholarly articles. With DRM in place, the institution can ensure that only students and faculty members with authorised credentials can view and download the research papers, preventing unauthorised distribution and maintaining the integrity of the academic resources.<sup>138</sup>

The implementation of DRM technologies not only protects digital content from piracy but also promotes legitimate distribution and sales. This is particularly advantageous for South African artists and authors who rely on digital platforms to reach a wider audience. DRM guarantees that consumers acquire or access content through authorised channels, bolstering the local creative economy.<sup>139</sup>

DRM technologies are instrumental in combating copyright infringement and piracy, especially in regions like South Africa, where these issues persist. By incorporating DRM, industries such as film and music can better protect their content and revenue streams from illegal distribution. Consider a scenario in the South African film industry where a new film is released online. Without DRM, the film could be pirated and circulated on unauthorised websites, depriving the filmmakers of their rightful earnings.<sup>140</sup>

Ngulube illuminates the use of DRM technologies in South African academic libraries. The research highlights how DRM safeguards digital collections and regulates access to electronic resources, ensuring that only authorised users can access these materials.<sup>141</sup> Sherman delves into the impact of DRM on the South African music industry. The study examines how DRM technologies have

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<sup>138</sup> Masenya, Tlou & Ngulube, Patrick. (2021). Digital preservation systems and technologies in South African academic libraries. *SA Journal of Information Management*. 23. 10.4102/sajim.v23i1.1249.

<sup>139</sup> Haber, S, *et al.* (2003). If piracy is the problem, is DRM the answer? 2770. 224-233. 10.1007/10941270\_15.

<sup>140</sup> Pellegrini, T. (2024). Digital Rights Management – Technologies, Application Areas, and Governance. In: Krone, J., Pellegrini, T. (eds) *Handbook of Media and Communication Economics*. Springer, Wiesbaden. [https://doi.org/10.1007/978-3-658-34048-3\\_79-2](https://doi.org/10.1007/978-3-658-34048-3_79-2)

<sup>141</sup> Masenya, Tlou & Ngulube, Patrick. (2019). Digital preservation practices in academic libraries in South Africa in the wake of the digital revolution. *SA Journal of Information Management*. 21. 10.4102/sajim.v21i1.1011.

contributed to the decline of piracy and the rise in legitimate sales, thereby strengthening local artists and the broader music sector.<sup>142</sup>

### *3.2.4 Challenges of DRM Technologies*

Whilst designed to protect digital content, DRM technologies are not immune to technical limitations and vulnerabilities. Hackers often find ways to bypass DRM protections, leading to unauthorised access and distribution of content.<sup>143</sup> For example, in recent years, there have been cases where sophisticated hacking groups have successfully cracked DRM systems, allowing them to distribute copyrighted material freely without repercussions. This poses a serious threat to content creators and distributors who rely on DRM for protection.<sup>144</sup> In South Africa, this challenge is compounded by the varying levels of technological infrastructure and expertise available to combat such threats. In rural areas with limited Internet access, the lack of resources and knowledge to implement robust DRM solutions leaves content vulnerable to exploitation. Consequently, content creators in these regions face an uphill battle safeguarding their intellectual property from cyber threats.<sup>145</sup>

The issue of purchasing digital content that cannot be played due to DRM restrictions is indeed a significant challenge. DRM technologies, such as Google Widevine, Apple FairPlay, and Microsoft PlayReady, are designed to prevent unauthorised copying and distribution of digital content.<sup>146</sup> However, each DRM system is supported by specific devices and platforms, leading to compatibility issues. For instance, a movie purchased on an Apple device using FairPlay DRM might not be playable on a smart TV that only supports Widevine. This

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<sup>142</sup> Sherman, B. (2009). The culture of digital music piracy: A South African perspective. *South African Music Studies*, 28. 10.4314/samus.v28i1.44077.

<sup>143</sup> Masenya, M. & Ngulube, P. (2021). Digital preservation in South African academic libraries: A study of systems and technologies. *Library and Information Science Research E-Journal*, 11.

<sup>144</sup> Combrink, S., Marivate, V. & Masikisiki, M. (2023). Data-sharing governance for machine learning applications in South African education: Challenges and opportunities. *International Journal of Artificial Intelligence and Applications*, 14(1), 1-15.

<sup>145</sup> Moyo, M. & Ngulube, P. (2020). ICTs and development in South Africa: A review of the implications of DRM technologies. *Journal of Information Technology for Development*, 26(1), 1-18.

<sup>146</sup> Bechtold, Stefan. (2006). The Present and Future of Digital Rights Management. 6-7. 10.1109/AXMEDIS.2006.52.

incompatibility can lead to frustration in South Africa, where consumers use a wide range of devices.<sup>147</sup>

Licensing agreements between content providers and DRM technology providers often limit compatibility, and the fragmented digital content market exacerbates this issue. From a legal standpoint, this raises questions about consumer rights, as the South African *Consumer Protection Act* aims to protect consumers from unfair business practices, including selling digital content that is not universally compatible. Internationally, the WIPO addresses the balance between protecting intellectual property and ensuring consumer access to digital content. Potential solutions include developing universal DRM standards and increasing consumer awareness about DRM restrictions and compatibility issues.

DRM technologies often restrict how users can access and use digital content. This can include limitations on the number of devices that can access the content, restrictions on copying or sharing, and the need for constant internet connectivity.<sup>148</sup> These restrictions can be inconvenient for users, particularly in regions with limited Internet access or high data costs, such as rural areas in South Africa. One such instance is when a student in a remote village may struggle to access educational materials protected by DRM due to unreliable internet connections. This impedes their learning experience and exacerbates the educational divide between urban and rural areas. Furthermore, the restrictions on copying or sharing content may impede collaboration among researchers and educators, thereby hindering the advancement of knowledge sharing and innovation within the country.<sup>149</sup>

### *3.2.5 High Development and Implementation Costs*

The development and implementation of DRM technologies can be costly. These costs can be a significant barrier for South African content creators and distributors,

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<sup>147</sup> Gachago, Roger. (2011). The Effect of Technology on Copyright. 10.13140/RG.2.2.24252.28803.

<sup>148</sup> Azad, Dr & Ahmed, Abu & Alam, Asadul. (2010). Digital Rights Management. IJCSNS International Journal of Computer Science and Network Security. 10.

<sup>149</sup> Combrink, S., Marivate, V. & Masikisiki, M. (2023). Data-sharing governance for machine learning applications in South African education: Challenges and opportunities. International Journal of Artificial Intelligence and Applications, 14(1), 1-15.

especially for smaller enterprises and independent artists.<sup>150</sup> The financial burden of implementing DRM may outweigh the benefits, leading some to forgo DRM protections altogether. This is particularly evident in the music industry, where independent musicians may opt to release their music without DRM to reach a wider audience despite the risks of piracy.<sup>151</sup>

Moreover, the high costs associated with DRM implementation could deter emerging artists from entering the market, thereby limiting the diversity and creativity of the cultural landscape of South Africa. As a result, the music industry may face challenges in protecting intellectual property while fostering a supportive environment for up-and-coming talents.<sup>152</sup>

### *3.2.6 Debate Over Effectiveness in Preventing Copyright Infringement*

There is ongoing debate about the effectiveness of DRM technologies in preventing copyright infringement. Critics argue that DRM often fails to stop determined pirates and may instead inconvenience legitimate users.<sup>153</sup> In South Africa, where piracy remains a significant issue, the effectiveness of DRM in curbing illegal distribution is a contentious topic. For instance, despite DRM measures, pirated digital copies of films and music continue circulating widely in informal markets and online platforms. This raises questions about the efficacy of DRM in deterring piracy and safeguarding the rights of content creators. As the debate continues, content creators are left grappling with the dilemma of choosing between stringent DRM protections that may alienate users and more relaxed measures that risk intellectual property theft.

DRM circumvention technologies are tools and methods used to bypass DRM protections, allowing users to access and copy digital content without authorisation. These technologies have significant implications for both copyright owners and consumers. For copyright owners, DRM circumvention technologies pose a

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<sup>150</sup> Armstrong, Timothy. (2006). Digital Rights Management and the Process of Fair Use.

<sup>151</sup> Armstrong, Timothy. (2006). Digital Rights Management and the Process of Fair Use.

<sup>152</sup> Haber, S, *et al.* (2003). If piracy is the problem, is DRM the answer? 2770. 224-233. 10.1007/10941270\_15.

<sup>153</sup> Haber, S, *et al.* (2003). If piracy is the problem, is DRM the answer? 2770. 224-233. 10.1007/10941270\_15.

substantial threat. These technologies can lead to unauthorised distribution and copying of digital content, resulting in potential revenue loss. Copyright owners invest in DRM systems to protect their intellectual property, but circumvention technologies undermine these efforts, making controlling and monetising their content difficult.

For consumers, DRM circumvention technologies can offer both benefits and risks. On one hand, they provide access to content that might otherwise be restricted or unavailable due to DRM protections. This can be particularly beneficial in regions where certain digital content is not legally accessible. On the other hand, using these technologies can expose consumers to legal risks, as circumventing DRM protections is often illegal under copyright law.

In 2005, Sony BMG included a DRM system on its music CDs that installed a rootkit on users' computers. This rootkit made the computers vulnerable to malware and was difficult to detect and remove. The scandal led to multiple lawsuits against Sony BMG, resulting in a settlement that required the company to compensate consumers and provide tools to remove the rootkit. This case highlighted the potential dangers of invasive DRM technologies and the legal consequences for companies that implement them irresponsibly.<sup>154</sup> In *RealNetworks vs. DVD Copy Control Association*, RealNetworks developed software that allowed users to copy DVDs, which led to a lawsuit by the DVD Copy Control Association (DVD CCA). The court ruled in favour of the DVD CCA, emphasising the legal risks associated with DRM circumvention. This case underscored the challenges faced by companies that develop technologies enabling the copying of protected content and reinforced the legal protections afforded to DRM systems.<sup>155</sup>

There is ongoing debate about the effectiveness of DRM technologies in preventing copyright infringement. Critics argue that DRM often fails to stop determined pirates and may instead inconvenience legitimate users. In South Africa, where piracy remains a significant issue, the effectiveness of DRM in curbing illegal distribution

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<sup>154</sup> Mulligan, Deirdre K. and Perzanowski, Aaron, The Magnificence of the Disaster: Reconstructing the Sony BMG Rootkit Incident (October 14, 2010). Berkeley Technology Law Journal, Vol. 22, p. 1157, 2007, Available at SSRN: <https://ssrn.com/abstract=1072229>.

<sup>155</sup> *RealNetworks, Inc. v. DVD Copy Control Ass'n*, 641 F. Supp. 2d 913 (N.D. Cal. 2009).

is contentious. Despite DRM measures, pirated digital copies of films and music continue to circulate widely in informal markets and online platforms. This raises questions about the efficacy of DRM in deterring piracy and safeguarding the rights of content creators. As the debate continues, content creators have to choose between stringent DRM protections that may alienate users and more relaxed measures that risk intellectual property theft.<sup>156</sup>

### ***3.3 Analysis of How Copyright Laws Address Digital Age Challenges and Infringement Issues***

The digital age has brought forth many challenges when protecting copyright, particularly with the ease of duplicating and sharing digital content and the surge of online piracy.<sup>157</sup> In response to these challenges, South Africa has implemented various measures within its legal framework to tackle these issues effectively.<sup>158</sup>

One key strategy is the incorporation of Technological Protection Measures (TPMs) in the *Copyright Act*, which encompass the utilisation of DRM technologies to safeguard digital content. These TPMs play a crucial role in thwarting unauthorised reproduction and distribution of digital works.<sup>159</sup> For instance, major streaming platforms like Netflix employ robust DRM technologies to prevent illegal downloading and sharing of their exclusive content. The *Electronic Communications and Transactions Act*, 25 of 2002 (ECTA), includes provisions to prevent the circumvention of technological protection measures (TPMs). These anti-circumvention provisions are designed to protect digital content and systems from unauthorised access and use.<sup>160</sup> This measure is pivotal in fortifying the defence of

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<sup>156</sup> Pellegrini, T. (2024). Digital Rights Management – Technologies, Application Areas, and Governance. In: Krone, J., Pellegrini, T. (eds) Handbook of Media and Communication Economics. Springer, Wiesbaden. [https://doi.org/10.1007/978-3-658-34048-3\\_79-2](https://doi.org/10.1007/978-3-658-34048-3_79-2).

<sup>157</sup> Wang, J. (2018). South Africa: Digital Age Copyright Limitations and Exceptions for Education and Research. In: Conceptualizing Copyright Exceptions in China and South Africa. China-EU Law Series, vol 6. Springer, Cham. [https://doi.org/10.1007/978-3-319-71831-6\\_7](https://doi.org/10.1007/978-3-319-71831-6_7).

<sup>158</sup> Wang, J. (2018). South Africa: Digital Age Copyright Limitations and Exceptions for Education and Research. In: Conceptualizing Copyright Exceptions in China and South Africa. China-EU Law Series, vol 6. Springer, Cham. [https://doi.org/10.1007/978-3-319-71831-6\\_7](https://doi.org/10.1007/978-3-319-71831-6_7).

<sup>159</sup> Combrink, S., Marivate, V. & Masikisiki, M. (2023). Data-sharing governance for machine learning applications in South African education: Challenges and opportunities. International Journal of Artificial Intelligence and Applications, 14(1), 1-15.

<sup>160</sup> Combrink, S., Marivate, V. & Masikisiki, M. (2023). Data-sharing governance for machine learning applications in South African education: Challenges and opportunities. International Journal of Artificial Intelligence and Applications, 14(1), 1-15.

digital content and acting as a deterrent against piracy activities. An example of this in action is when software companies embed encryption codes in their products to prevent users from tampering with the software and accessing it without proper authorisation.<sup>161</sup>

In addressing online copyright infringement, South Africa has also taken significant steps by integrating provisions in the ECTA.<sup>162</sup> These provisions hold internet service providers (ISPs) accountable in copyright infringement cases and mandate them to promptly remove infringing content upon receipt of a valid takedown notice from the copyright owner. This proactive approach ensures that illicit digital content is swiftly removed to mitigate pirated material's spread.<sup>163</sup>

### *3.3.1 Enforcement of Copyright Laws*

The legal framework in South Africa encompasses both civil and criminal remedies for copyright infringement. Copyright owners can pursue damages and injunctions through civil litigation, while severe offences can result in criminal penalties. This dual approach is a strong deterrent against copyright violations and emphasises the seriousness of protecting IPR in the digital realm.<sup>164</sup> Civil remedies include actions like injunctions, damages, and accounts of profits, providing copyright owners with a robust legal arsenal to protect their IPR. On the other hand, criminal remedies, such as fines and imprisonment, serve as deterrents against egregious acts of infringement.<sup>165</sup>

In the case of *Moneyweb (Pty) Ltd v Media24 Ltd*,<sup>166</sup> Moneyweb, a digital news publisher, sued Media24 for copyright infringement, alleging that Media24 had copied and published its articles without permission. The court had to determine whether the articles were original works and if Media24's use constituted fair

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<sup>161</sup> Nicholson, Denise & Librarian, Copyright. (2009). Digital Rights Management and Access to Information: a developing country's perspective. *Library and Information Science Research E-Journal*, 19.

<sup>162</sup> *Electronic Communications and Transactions Act of 2002*.

<sup>163</sup> Section 86 of the *Electronic Communications and Transactions Act of 2002*.

<sup>164</sup> Marcus Riby-Smith, South African copyright law—the good, the bad and the Copyright Amendment Bill, *Journal of Intellectual Property Law & Practice*, Volume 12, Issue 3, March 2017, Pages 216–225, <https://doi.org/10.1093/jiplp/jpx011>.

<sup>165</sup> See above.

<sup>166</sup> *Moneyweb (Pty) Ltd v Media24 Ltd and Another (GJ)* (unreported case no 31575/2013, 5-5-2016).

dealing. The court granted an injunction preventing Media24 from further infringing Moneyweb's copyright, awarded damages for the unauthorised use of its articles, and ordered Media24 to account for any profits made from the infringing articles. This case underscores the effectiveness of civil remedies in protecting copyright owners' rights and providing compensation for unauthorised use.

In the criminal case of *S v Harper and Another 1981 (1) SA 88 (D)*,<sup>167</sup> the defendants were charged with copyright infringement for reproducing and selling pirated copies of software. The court found them guilty of violating the *Copyright Act*. The defendants were fined for their illegal activities, and one of the defendants received a suspended prison sentence, highlighting the potential for severe penalties in cases of egregious infringement. This case demonstrates the role of criminal remedies in deterring serious copyright violations and emphasising the importance of protecting IPR.

However, copyright owners face arduous challenges when seeking to enforce their rights. Another significant challenge is cross-border infringement. The internet's global reach means that infringing activities can occur in multiple countries simultaneously. This raises complex legal issues, as copyright laws vary significantly from one jurisdiction to another. Copyright owners must navigate different legal systems, which can be time-consuming and costly. Additionally, obtaining and enforcing judgements across borders often requires international co-operation and can be hindered by differences in legal procedures and enforcement mechanisms.<sup>168</sup> Moreover, the evolving nature of online platforms presents a dynamic battleground where copyright infringement can manifest in various forms, requiring constant vigilance and adaptability from rights holders.<sup>169</sup>

It underscores the need for continuous updates and amendments to existing laws to effectively address emerging issues such as digital content proliferation and online infringement. By understanding the nuances of enforcement mechanisms

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<sup>167</sup> *S v Harper and Another 1981 (1) SA 88 (D)*.

<sup>168</sup> Cumming, D., Johan, S., Khan, Z. et al. E-Commerce Policy and International Business. *Manag Int Rev* 63, 3–25 (2023). <https://doi.org/10.1007/s11575-022-00489-8>.

<sup>169</sup> See above.

within the legal landscape, policymakers can tailor interventions that balance safeguarding IPR and promoting innovation in the digital age.<sup>170</sup>

### **3.4 Strategies to Combat Copyright Infringement**

#### *3.4.1 Effective Strategies and Measures*

Raising awareness about the significance of copyright protection and the consequences of infringement is paramount. Educational campaigns targeting both creators and consumers can help foster a culture of respect for IPR.<sup>171</sup> For instance, organising workshops for aspiring artists to understand how copyright laws protect their work can empower them to assert their rights in the digital landscape. Moreover, creating online resources that explain the concept of fair use can guide content creators in making informed decisions about using copyrighted material.<sup>172</sup>

Updating and strengthening copyright laws to address the challenges of the digital age is essential. This includes incorporating provisions for technological protection measures (TPMs), anti-circumvention laws, and clear guidelines for online infringement. For example, countries like Japan have implemented strict anti-piracy laws that have significantly reduced the prevalence of illegal downloads and streaming platforms. By regularly reviewing and amending the legal framework, countries can ensure that their copyright laws remain relevant and effective in combating new forms of infringement.

Collaborating with ISPs to monitor and take down infringing content is an effective strategy.<sup>173</sup> ISPs can be crucial in identifying and removing pirated content from their networks.<sup>174</sup> For instance, partnerships between ISPs and content creators can streamline reporting and remove unauthorised content, creating a safer digital environment for intellectual property. Implementing a robust notice-and-takedown system, as outlined in the ECTA, can help reduce online piracy by swiftly addressing

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<sup>170</sup> See above.

<sup>171</sup> See above.

<sup>172</sup> See above.

<sup>173</sup> Dawar, Sudarshan and Chitra 2021 *International Advanced Research Journal in Science, Engineering and Technology*, 611-616.

<sup>174</sup> See above.

copyright violations.<sup>175</sup> Leveraging technological advancements to protect digital content is vital.<sup>176</sup> DRM technologies, watermarking, and fingerprinting are some of the tools that can be used to prevent unauthorised copying and distribution. These technologies can help track and identify infringing content, making it easier to enforce copyright laws.<sup>177</sup>

It is crucial to ensure that copyright laws are effectively enforced.<sup>178</sup> This includes providing adequate resources for law enforcement agencies to investigate and prosecute copyright infringement cases. Civil remedies, such as damages and injunctions and criminal penalties for serious offences, can serve as deterrents to potential infringers. For example, high-profile cases of copyright infringement that result in substantial fines or jail time can send a strong message to individuals and organisations that engage in illegal activities.<sup>179</sup> By upholding the rule of law and holding violators accountable, countries can create a more equitable and sustainable environment for creators to thrive.

### *3.4.2 Consideration of Technological Advancements and Enforcement Mechanisms*

Blockchain technology is revolutionising how copyright protection is approached in the digital age. By establishing a decentralised and immutable ledger of digital content, blockchain offers a robust solution to verify ownership and monitor the distribution of copyrighted works. For instance, a musician can upload their music onto a blockchain platform, creating a transparent record of ownership that cannot be tampered with.<sup>180</sup>

In the realm of artificial intelligence (AI), innovative tools are being developed to detect and prevent copyright infringement more effectively. Using machine learning algorithms, AI can sift through vast amounts of data to pinpoint patterns of infringement. For example, AI-powered systems can scan online platforms for

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<sup>175</sup> Section 77 of the Electronic Communications and Transactions Act of 2002.

<sup>176</sup> See above.

<sup>177</sup> See above.

<sup>178</sup> See above.

<sup>179</sup> *Technical Systems (Pty) Ltd v Christiaan Kurtz* [2024] ZAWCHC 123.

<sup>180</sup> Litman, *Digital Copyright*.

copyrighted material and automatically flag potential violations. This automation streamlines the process of identifying and removing pirated content, ultimately strengthening enforcement measures. YouTube uses a system called Content ID, which allows copyright owners to identify and manage their content on the platform. When a video is uploaded, it is scanned against a database of files that content owners have submitted. If a match is found, the copyright owner can choose to block, monetise, or track the video.<sup>181</sup>

Digital watermarking is another valuable tool in the fight against copyright infringement. By embedding a unique identifier into digital content, creators can track the provenance and distribution of their work. In practical terms, a photographer can watermark their images before sharing them online, enabling them to trace any unauthorised use back to the source. This technology is vital evidence in copyright infringement cases, bolstering legal efforts to protect IPR.<sup>182</sup>

In the global landscape of digital content, international cooperation plays a pivotal role in combating copyright infringement effectively. Countries like South Africa can collaborate with international partners and organisations to exchange best practices, align copyright laws, and coordinate enforcement actions. By working together on a unified front, nations can address cross-border challenges and uphold the integrity of IPR on a global scale.<sup>183</sup>

### ***3.5 Balancing the Rights of Content Creators and Users***

#### *3.5.1 Examination of the Balance Between the Rights of Copyright Owners and Users*

Balancing the rights of content creators and users is a multifaceted issue that requires careful consideration to ensure a fair and equitable system. In South Africa, this delicate balance is maintained through a combination of legal frameworks, ethical considerations, and the application of fair use doctrines.<sup>184</sup> Copyright owners

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<sup>181</sup> YouTube Help, 'Copyright Strike Basics' <https://support.google.com/youtube/answer/3244015?hl=en> accessed 15 September 2024.

<sup>182</sup> See above.

<sup>183</sup> See above.

<sup>184</sup> Du Bois 2012 *South African Mercantile Law Journal* 177-193.

play a crucial role in this balance as they possess the exclusive rights to control the use of their creative works.<sup>185</sup> This means they have the authority to reproduce, distribute, perform, and display their content. For example, a musician who holds the copyright to a song can determine its usage, whether for commercial purposes or personal enjoyment.<sup>186</sup>

Conversely, users also possess important rights when accessing and using copyrighted material. Users are entitled to use content within certain limits for personal, educational, and research purposes.<sup>187</sup> For instance, students may use excerpts from copyrighted books for their academic projects, enriching their learning experience. Ensuring that users have reasonable access to content is crucial for fostering knowledge sharing, education, and cultural advancement.<sup>188</sup> Therefore, by recognising and respecting the rights of content creators and users, South Africa's legal frameworks, ethical considerations, and fair use doctrines contribute to a balanced and harmonious ecosystem that promotes creativity, innovation, and the free exchange of ideas.

### *3.5.2 Ethical Considerations and Fair Use Doctrines in Copyright Protection*

Ethical considerations are pivotal in striking a delicate balance between the rights of copyright owners and users. It is essential to uphold creators' IPR while acknowledging the importance of public access to information and cultural works.<sup>189</sup> For instance, respecting creators by ensuring they are properly acknowledged and compensated for their work is a fundamental ethical consideration. Promoting access to educational and cultural resources for the greater good is crucial in maintaining a fair and equitable system.

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<sup>185</sup> See above.

<sup>186</sup> Masenya, Tlou & Ngulube, Patrick. (2021). Digital preservation systems and technologies in South African academic libraries. *SA Journal of Information Management*. 23. 10.4102/sajim.v23i1.1249.

<sup>187</sup> Nicholson D & Librarian C (2009) Digital Rights Management and Access to Information: a developing country's perspective *Library and Information Science Research E-Journal* 19.

<sup>189</sup> Combrink, S., Marivate, V. & Masikisiki, M. (2023). Data-sharing governance for machine learning applications in South African education: Challenges and opportunities. *International Journal of Artificial Intelligence and Applications*, 14(1), 1-15.

Fair compensation is another ethical consideration that must be addressed. It is imperative to ensure that creators receive appropriate and fair compensation for the use of their works.<sup>190</sup> This recognises the value of their creations and incentivises further innovation and creativity. Moreover, fair use doctrines provide a legal framework for navigating the complex landscape of copyright protection.<sup>191</sup> In South Africa, the concept of fair use under the *Copyright Act* allows for certain uses of copyrighted works without explicit permission from the copyright holder.<sup>192</sup>

### **3.6 CONCLUSION**

The digital age has brought about significant challenges to copyright protection, including the ease of copying and sharing digital content, the rise of online piracy, and the complexities of enforcing copyright laws across borders.<sup>193</sup> Like many other countries, South Africa is facing a pressing need to reevaluate its existing copyright laws to address these challenges in the digital environment effectively. Measures such as implementing DRM technologies, updating and strengthening legal frameworks, promoting education and awareness, collaborating with Internet Service Providers (ISPs), and leveraging technological solutions like blockchain and AI are essential in combating copyright infringement and protecting the rights of content creators in the digital realm. A balanced approach respecting the rights of copyright owners and users is crucial for cultivating creativity, innovation, and the fair exchange of ideas in the digital landscape.<sup>194</sup>

Protecting IPR is fundamental for promoting creativity, innovation, and cultural development in South Africa and beyond.<sup>195</sup> As the digital revolution continues to reshape how content is created, distributed, and consumed, it is imperative to address copyright infringement challenges to ensure a level playing field for creators

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<sup>190</sup> Moyo, M. & Ngulube, P. (2020). ICTs and development in South Africa: A review of the implications of DRM technologies. *Journal of Information Technology for Development*, 26(1), 1-18.

<sup>191</sup> Combrink, S., Marivate, V. & Masikisiki, M. (2023). Data-sharing governance for machine learning applications in South African education: Challenges and opportunities. *International Journal of Artificial Intelligence and Applications*, 14(1), 1-15.

<sup>192</sup> See above.

<sup>193</sup> Nicholson D & Librarian C (2009) Digital Rights Management and Access to Information: a developing country's perspective *Library and Information Science Research E-Journal* 19.

<sup>194</sup> See above.

<sup>195</sup> Armstrong C, De Beer J (2010) *Access to knowledge in Africa: the Role of Copyright*. UCT Press, Cape Town.

and users alike. By acknowledging ethical considerations, implementing fair use doctrines, and upholding the principles of fair compensation and access to information, South Africa can strive towards a more equitable and harmonious copyright protection system. Emphasising the importance of addressing copyright infringement challenges in the digital age is crucial for protecting IPR and fostering a thriving creative economy and nurturing a culture of respect and recognition for creators and their contributions to society.

## CHAPTER 4: THE CASE LAW AND CURRENT LEGAL INSTRUMENTS THAT ADDRESS COPYRIGHT INFRINGEMENT IN SOUTH AFRICA

### 4.1 INTRODUCTION

Copyright law is essential in safeguarding the IPR of creators and innovators in South Africa.<sup>196</sup> It is a critical framework that upholds the rights of individuals who produce original works.<sup>197</sup> When examining copyright infringement in South Africa, it is crucial to delve into the case law and legal instruments that shape this area of law. For instance, the case of *Galago Publishers (Pty) Ltd v Erasmus* (1989)<sup>198</sup> highlighted the importance of copyright protection for literary works. Similarly, in *Quad Africa Energy (Pty) Ltd v The Sugarless Company (Pty) Ltd* (2020),<sup>199</sup> the court addressed issues related to copyright infringement in the context of energy sector publications.

Moreover, legal decisions like *Feldman NO v EMI Music SA (Pty) Limited* (2007)<sup>200</sup> and *Moneyweb (Pty) Ltd v Media24 (Pty) Ltd* (2016) have contributed significantly to the jurisprudence surrounding copyright in South Africa. These cases have set precedents and clarified various aspects of copyright law. Furthermore, the recent case of *Blind SA v Minister of Trade, Industry and Competition and Others* (2022)<sup>201</sup> shed light on the intersection of copyright law with accessibility issues for individuals with disabilities.

In addition to case law, South Africa's legal landscape is shaped by key statutes such as the *Copyright Act*,<sup>202</sup> which lays down the foundational principles of copyright protection. The *Constitution* also plays a vital role in delineating the scope of IPR within the country.<sup>203</sup> Proposed legislative changes, like the *Copyright*

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<sup>196</sup> Van der Merwe, D. (2018) *Copyright Law and the Information Society in South Africa*.

<sup>197</sup> Pretorius, J. (2019) *South African Intellectual Property Law*. Oxford University Press.

<sup>198</sup> *Galago Publishers (Pty) Ltd and Another v Erasmus* (130/1988) [1988] ZASCA 131 (30 September 1988).

<sup>199</sup> *Quad Africa Energy (Pty) Ltd v The Sugarless Company (Pty) Ltd and Another* (1176/2018) [2020] ZASCA 37.

<sup>200</sup> *Feldman NO v EMI Music SA (Pty) Ltd/ EMI Music Publishing SA (Pty) Ltd* (268/2008) [2009] ZASCA 75 (1 June 2009).

<sup>201</sup> *Blind SA v Minister of Trade, Industry and Competition and Others* 2022 ZACC 33 (21 September 2022).

<sup>202</sup> *Copyright Act 98 of 1978*.

<sup>203</sup> *Constitution of the Republic of South Africa* 1996.

*Amendment Bill*, aim to modernise copyright laws to adapt to the digital age. Furthermore, acts such as the *Counterfeit Goods Act*<sup>204</sup> and the *Intellectual Property Laws Amendment Act*<sup>205</sup> bolster the enforcement mechanisms against copyright infringement.

This comprehensive analysis underscores the evolution of copyright law in South Africa and its far-reaching implications for protecting creative works and innovation in the country. It demonstrates the intricate interplay between legal precedents, statutory provisions, and emerging challenges in the realm of IPR. By understanding the intricate legal framework governing copyright, stakeholders can navigate the complexities of intellectual property law and ensure robust protection for creators and innovators in South Africa.

## **4.2 KEY CASE LAW**

### *4.2.1 Galago Publishers (Pty) Ltd v Erasmus (1989)*

In the legal case of *Galago Publishers (Pty) Ltd v Erasmus*,<sup>206</sup> the plaintiff, Galago Publishers (Pty) Ltd, initiated a legal action against the defendant, Erasmus, based on allegations of copyright infringement. The core of the dispute revolved around the claim that Erasmus' work, while not an exact replica, still encroached upon the plaintiff's original work.<sup>207</sup>

A pivotal question that arose during the proceedings was whether a copyright infringement can occur even if the allegedly infringing work is not a carbon copy of the original. The court's ruling shed light on this issue by establishing that copyright infringement is not confined to verbatim reproductions. It was clarified that even if the infringing work deviates from the original in certain aspects, it can still violate copyright if it substantially mirrors the protected elements.<sup>208</sup>

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<sup>204</sup> Counterfeit Goods Act 37 of 1997.

<sup>205</sup> Intellectual Property Laws Amendment Act 38 of 1997.

<sup>206</sup> *Galago Publishers (Pty) Ltd and Another v Erasmus* (130/1988) [1988] ZASCA 131 (30 September 1988).

<sup>207</sup> Pretorius, J. (2019). *South African Intellectual Property Law*. Oxford University Press.

<sup>208</sup> Khan, S. (2020). *Intellectual Property and Copyright Law in South Africa*. Wolters Kluwer.

Delving deeper into the case, the court meticulously examined the similarities between the plaintiff's work and the defendant's creation. Both literal components and non-literal aspects, such as themes, characters, and the overall concept, were scrutinised in the evaluation process.<sup>209</sup> Ultimately, the court ruled in favour of Galago Publishers, underscoring that copyright protection extends beyond mere replication. The verdict reinforced the principle that substantial similarity, rather than exact duplication, can indeed constitute infringement. This case serves as a significant precedent highlighting the nuanced nature of copyright law and the importance of safeguarding IPR.<sup>210</sup>

#### *4.2.2 Quad Africa Energy (Pty) Ltd v The Sugarless Company (Pty) Ltd (2020)*

In the legal case between *Quad Africa Energy (Pty) Ltd and The Sugarless Company (Pty) Ltd in 2020*,<sup>211</sup> the plaintiff, Quad Africa Energy, brought forth a lawsuit against the defendant, The Sugarless Company, focusing on intellectual property (IP) rights, particularly copyright infringement. The plaintiff claimed that the defendant's actions violated copyright laws. The main issue was whether the defendant's conduct infringed upon the plaintiff's copyright.<sup>212</sup>

During the legal proceedings, the court carefully weighed the balance between IP rights and fair trade and competition. They delved into the specifics of copyright law to determine if the defendant's actions impinged on the plaintiff's exclusive rights.<sup>213</sup> By examining the similarities between the works, the court aimed to ascertain whether the defendant's use of copyrighted material went beyond acceptable limits. The court's final verdict not only defined the boundaries of copyright protection but also stressed the importance of maintaining a harmonious relationship between IP rights and fair competition.<sup>214</sup>

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<sup>209</sup> Khan, S. (2020). Intellectual Property and Copyright Law in South Africa. Wolters Kluwer.

<sup>210</sup> Glasser, A. (2018). Copyright Law in South Africa: A Commentary. Butterworths.

<sup>211</sup> Quad Africa Energy (Pty) Ltd v The Sugarless Company (Pty) Ltd and Another (1176/2018) [2020] ZASCA 37.

<sup>212</sup> Quad Africa Energy (Pty) Ltd v The Sugarless Company (Pty) Ltd and Another (1176/2018) [2020] ZASCA 37.

<sup>213</sup> Dreyer, O. (2019). Intellectual Property Law in South Africa. LexisNexis South Africa.

<sup>214</sup> Dreyer, O. (2019). Intellectual Property Law in South Africa. LexisNexis South Africa.

This case serves as a poignant reminder of the significance of upholding creators' rights while fostering a climate of innovation and healthy competition in the market. It underscores the need to navigate the intricate landscape of intellectual property with care and consideration for all parties involved. By striking a delicate balance between protecting original works and encouraging a dynamic marketplace, the legal system can effectively safeguard the interests of creators while promoting a culture of innovation and progress.<sup>215</sup>

#### *4.2.3 David Feldman NO v EMI Music SA (Pty) Limited (2007)*

In *Feldman NO v EMI Music SA (Pty) Limited (2007)*,<sup>216</sup> the case revolved around copyright infringement concerning music and lyrics for pop songs that were collaboratively composed by Brenda Fassie and others. David Feldman, acting as the executor of Brenda Fassie's estate, brought forth two legal actions against EMI Music Publishing (Pty) Ltd ('EMI Publishing') and EMI Music (Pty) Ltd ('EMI Music') in the Witwatersrand Local Division.<sup>217</sup>

The primary question was whether the defendants had violated the copyright in the joint authorship works. To address this, the court delved into the aspects of originality and substantial reproduction. The concept of originality necessitated a significant skill, judgment, or labour level, even when using pre-existing material. It was emphasised that mere mechanical copying did not suffice, and the 'sweat of the brow' test was considered relevant.<sup>218</sup>

Moreover, the court carefully examined the liability defences outlined in the Act. Each of the seven articles in the Moneyweb case was scrutinised to assess the level of originality present. For instance, the first article ('Annual packages for MPs may reach well over R1m') required substantial evidence to establish originality. Factors such as effort, creativity, and reliance on existing material were weighed in this evaluation.<sup>219</sup>

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<sup>215</sup> Dreyer, O. (2019). Intellectual Property Law in South Africa. LexisNexis South Africa.

<sup>216</sup> *Feldman NO v EMI Music SA (Pty) Ltd/ EMI Music Publishing SA (Pty) Ltd (268/2008) [2009] ZASCA 75 (1 June 2009).*

<sup>217</sup> (268/2008) [2009] ZASCA 75 (1 June 2009).

<sup>218</sup> K Kriel, 'What is determined as copyright infringement?' (2016) 2016 (July) De Rebus 24.

<sup>219</sup> K Kriel, 'What is determined as copyright infringement?' (2016) 2016 (July) De Rebus 24.

Ultimately, the court upheld the exceptions highlighted in the Moneyweb case, underscoring the importance of originality and substantial reproduction in copyright matters. This decision clarified the delicate balance between safeguarding copyright protection and promoting fair competition, particularly in news reporting.<sup>220</sup>

#### 4.2.4 *Moneyweb (Pty) Ltd v Media24 (Pty) Ltd (2016)*

In the case of *Moneyweb (Pty) Ltd v Media24 (Pty) Ltd (2016)*,<sup>221</sup> a legal battle unfolded between two prominent online publishers of financial news, Moneyweb and Media24. The dispute centred around allegations made by Moneyweb claiming that Media24 had violated its copyright as per the provisions of the *Copyright Act*.<sup>222</sup> Specifically, Moneyweb contended that seven articles published by Media24 had been copied, appropriated, or plagiarised from Moneyweb's original content.<sup>223</sup>

The crux of the disagreements revolved around originality, substantial reproduction, and liability defences. While Media24 acknowledged reproducing certain portions of Moneyweb's articles, it staunchly denied engaging in substantial reproduction. The notion of originality was a key point of contention, with the requirement being more than mere mechanical copying; it necessitated the application of skill, judgment, or labour. In this context, the 'sweat of the brow' test emerged as a pertinent consideration. Additionally, liability defences specified under sections 12(1)(c)(i)<sup>224</sup> and 12(8)(a) were carefully examined.<sup>225</sup>

During the legal proceedings, the court meticulously evaluated the originality of each article in question and scrutinised the extent to which reproduction had occurred. Media24's reliance on its asserted defences was subjected to thorough examination. Ultimately, the court's ruling delineated the boundaries of copyright protection within the realm of news reporting, emphasising the pivotal aspects of originality and substantiality in determining infringement. This case underscored the

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<sup>220</sup> K Kriel, 'What is determined as copyright infringement?' (2016) 2016 (July) De Rebus 24

<sup>221</sup> *Moneyweb (Pty) Ltd v Media 24 Ltd and Another* (GJ) (unreported case no 31575/2013, 5-5-2016) of 5 May 2016 (Berger AJ).

<sup>222</sup> *Copyright Act 98 of 1978*.

<sup>223</sup> *Moneyweb (Pty) Ltd v Media 24 Ltd and Another* (GJ) (unreported case no 31575/2013, 5-5-2016) of 5 May 2016 (Berger AJ).

<sup>224</sup> Section 2(1)(c)(i) of the *Copyright Act 98 of 1978*.

<sup>225</sup> Section 12(8)(a) of the *Copyright Act 98 of 1978*.

significance of respecting IPR and the nuances involved in navigating the complex landscape of copyright law, especially in the digital age where information dissemination is rapid and widespread.<sup>226</sup>

#### 4.2.5 *Blind SA v Minister of Trade, Industry and Competition and Others (2022)*

In *Blind SA v Minister of Trade, Industry and Competition and Others (2022)*,<sup>227</sup> the legal battle unfolded with Blind SA, an organisation advocating for individuals with visual impairments, taking the stand as the plaintiff. On the opposing side stood the Minister of Trade, Industry, and Competition alongside other relevant entities. The crux of the matter revolved around the intricate intersection of copyright law and the rights of individuals with disabilities, particularly those facing visual challenges.<sup>228</sup>

Delving into the issue, the key inquiry centred on the harmonisation of copyright legislation with the needs of visually impaired individuals.<sup>229</sup> The court meticulously scrutinised both the *Copyright Act* and the constitutional rights in play, pondering whether the existing copyright exceptions sufficiently catered to the accessibility requirements of this community. This led to a profound evaluation of how copyright restrictions could impede visually impaired individuals' access to crucial information.<sup>230</sup>

Throughout the proceedings, the court deliberated on the delicate balance between safeguarding copyright protection and ensuring the availability of accessible formats for those with disabilities. While specifics of the court's ruling remain undisclosed, it is evident that this case served as a catalyst for broader discussions on striking a fair equilibrium between copyright interests and accessibility rights. It unequivocally

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<sup>226</sup> GAFFAR H, ALBARASHDI S. Copyright Protection for AI-Generated Works: Exploring Originality and Ownership in a Digital Landscape. *Asian Journal of International Law*. Published online 2024:1-24. doi:10.1017/S2044251323000735

<sup>227</sup> *Blind SA v Minister of Trade, Industry and Competition and Others 2022 ZACC 33* (21 September 2022).

<sup>228</sup> *Blind SA v Minister of Trade, Industry and Competition and Others 2022 ZACC 33* (21 September 2022).

<sup>229</sup> MA "The Ramifications of International Law in South Africa: Blind SA v Minister of Trade, Industry and Competition (CCT 320/21) [2022] ZACC 33 (21 September 2022)" PER / PELJ 2024(27) - DOI <http://dx.doi.org/10.17159/1727-3781/2024/v27i0a15810>.

<sup>230</sup> MA "The Ramifications of International Law in South Africa: Blind SA v Minister of Trade, Industry and Competition (CCT 320/21) [2022] ZACC 33 (21 September 2022)" PER / PELJ 2024(27).

highlights the imperative of crafting copyright laws that are inclusive and accommodating to all citizens, irrespective of their physical abilities.<sup>231</sup>

### **4.3 Current Legal Instruments**

#### **4.3.1 Copyright Act 98 of 1978**

The *Copyright Act*<sup>232</sup> holds immense significance within the legal framework of South Africa as it governs various aspects of copyright and related issues in the country.<sup>233</sup> This pivotal legislation officially came into force on January 1, 1979, with the exception of specific sections like 1, 39, and 40. Unlike patents or trade-marks, copyright protection does not necessitate formal registration. Instead, as soon as an original work is created in a tangible form, copyright automatically becomes vested in the author. This fundamental principle ensures that creators have legal rights over their artistic endeavours without the need for cumbersome administrative procedures.<sup>234</sup>

One of the essential functions of the *Copyright Act* is to delineate the scope of copyright protection by defining eligible works. These encompass a diverse range of creations, including literary works, musical compositions, artistic endeavours, cinematographic productions, computer programs, and databases.<sup>235</sup> The Act also stipulates the duration of copyright protection, establishing that it typically spans the lifetime of the author plus an additional 50 years after their death. This extended period safeguards the economic and moral rights of authors and their heirs, ensuring that their creative output remains protected for a substantial period of time.<sup>236</sup>

Moreover, the *Copyright Act*<sup>237</sup> incorporates provisions for exceptions and limitations to copyright infringement. These provisions permit certain uses of copyrighted material without the explicit consent of the rights holder, such as fair use for purposes like criticism, review, news reporting, research, and education.

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<sup>231</sup> MA "The Ramifications of International Law in South Africa: *Blind SA v Minister of Trade, Industry and Competition* (CCT 320/21) [2022] ZACC 33 (21 September 2022)" PER / PELJ 2024(27).

<sup>232</sup> *Copyright Act 98 of 1978*.

<sup>233</sup> Dean *South African Copyright Law* 45.

<sup>234</sup> Dean *South African Copyright Law* 46.

<sup>235</sup> Dean *South African Copyright Law* 46.

<sup>236</sup> Dean *South African Copyright Law* 46.

<sup>237</sup> *Copyright Act 98 of 1978*.

Additionally, the Act outlines the mechanisms for transferring copyright ownership through assignment, testamentary disposition, or licensing agreements. Exclusive licenses must be documented in writing and duly signed by the assigning party, ensuring clarity and legal validity in copyright transactions.<sup>238</sup>

Over the years, the *Copyright Act* has undergone several amendments to adapt to the evolving landscapes of technology and law, reflecting the dynamic nature of IPR. South Africa's participation in international agreements such as the *Berne Convention*, the *TRIPS Agreement*, and its engagement with treaties like the WCT,<sup>239</sup> the WPPT<sup>240</sup> and the *Marrakesh Treaty*<sup>241</sup> underscore the country's commitment to harmonising its copyright laws with global standards and fostering international cooperation in the realm of IPR.<sup>242</sup>

#### 4.3.2 *Constitution of the Republic of South Africa 1996*

The *Constitution*<sup>243</sup> holds a significant place as a foundational legal document that not only shapes the country's governance structure but also serves as a protector of the rights of its citizens.<sup>244</sup> This pivotal document was meticulously crafted by the Parliament elected in the historic 1994 South African general election, marking a crucial moment in the nation's history.<sup>245</sup>

When delving into the realm of copyright within the South African legal framework, it is important to note that while the *Constitution* does not explicitly delve into copyright infringement, it lays down fundamental principles that indirectly influence IPR. A prime example of this indirect impact can be seen in the Bill of Rights (Chapter 2),<sup>246</sup> which encompasses provisions concerning freedom of expression, access to information, and cultural rights. Though not directly addressing copyright,

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<sup>238</sup> van Wyk, A. (2020). *South African Copyright Law: Principles and Practice*. Juta and Company Ltd.

<sup>239</sup> *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS) 1994.

<sup>240</sup> *WIPO Copyright Treaty* 2186 UNTS 121.

<sup>241</sup> *WIPO Performances and Phonograms Treaty* 1996.

<sup>242</sup> *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled* (adopted 27 June 2013, entered into force 30 September 2016) 2545 UNTS 3.

<sup>243</sup> *Constitution of the Republic of South Africa, 1996*.

<sup>244</sup> Chapter 2 of the *Constitution of the Republic of South Africa, 1996*.

<sup>245</sup> Glasser, A. (2018). *Copyright Law in South Africa: A Commentary*. Butterworths.

<sup>246</sup> Glasser, A. (2018). *Copyright Law in South Africa: A Commentary*. Butterworths.

these provisions play a vital role in shaping the landscape within which copyright laws operate.<sup>247</sup>

In South Africa, copyright stands out from other forms of intellectual property, such as patents or trade-marks, due to its unique characteristic of not requiring registration. Unlike patents or trade-marks, copyright automatically becomes the author's possession once the work is created in a tangible form.<sup>248</sup> This principle is subtly supported by the *Constitution's* emphasis on individual rights and the promotion of creative expression, underscoring the importance of recognising and safeguarding creators' rights within the legal framework. Through this lens, the intricate relationship between individual rights, creative expression, and copyright law becomes clearer, highlighting the delicate balance that must be maintained between creators' rights and the public's access to knowledge and culture.<sup>249</sup>

#### 4.3.3 *Copyright Amendment Bill*

The Minister of Trade and Industry introduced the *Copyright Amendment Bill* in 2017 to amend the existing *Copyright Act* and tackle various aspects concerning copyright protection and usage.<sup>250</sup> This legislative proposal brought forth several key provisions to reshape the landscape of copyright law. One significant aspect addressed by the bill was the definition of certain words and expressions within the realm of copyright. For instance, terms like "accessible format copy" and "audiovisual work" were clearly defined to provide clarity and uniformity in interpretation.<sup>251</sup>

Moreover, the Bill delved into the limitations and exceptions concerning the reproduction of copyrighted works. This allowed for a more nuanced approach to copyright law, enabling specific scenarios where reproducing copyrighted material would be permissible under the law. An essential focus of the Bill is the sharing of royalties derived from copyright works. The Bill aimed to ensure fair compensation

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<sup>247</sup> Glasser, A. (2018). *Copyright Law in South Africa: A Commentary*. Butterworths.

<sup>248</sup> Glasser, A. (2018). *Copyright Law in South Africa: A Commentary*. Butterworths.

<sup>249</sup> Glasser, A. (2018). *Copyright Law in South Africa: A Commentary*. Butterworths.

<sup>250</sup> Khan, S. (2020). *Intellectual Property and Copyright Law in South Africa*. Wolters Kluwer.

<sup>251</sup> Copyright Amendment Bill (B13B-2017).

for creators and rights holders by regulating the sharing of these financial benefits.<sup>252</sup>

Furthermore, the Bill emphasised the importance of access to copyright works for persons with disabilities. It mandated provisions to facilitate accessibility, ensuring that individuals with disabilities could also benefit from and engage with copyrighted material. Additionally, the Bill sought to safeguard the authorship of orphan works by granting protection through state intervention. This was a crucial step in preserving the rights of authors whose works may have been abandoned or whose ownership was unclear.<sup>253</sup>

The Copyright Tribunal, tasked with resolving copyright disputes, saw enhancements in its powers and functions under the Bill. This bolstered the tribunal's effectiveness in adjudicating matters related to copyright infringement and disputes. Moreover, the Bill addressed prohibited conduct associated with technological protection measures and copyright management information. By outlining these prohibitions, the bill aimed to curb illicit practices that could undermine the integrity of copyright protection.<sup>254</sup>

Furthermore, the Bill covered digital rights management, recognising the growing importance of digital content and the need for robust mechanisms to govern its use and distribution. Lastly, the Bill introduced new offences related to copyright infringement, underscoring the evolving nature of copyright law and the necessity to adapt to emerging challenges in the digital age.<sup>255</sup>

#### 4.3.4 Counterfeit Goods Act 37 of 1997

The *Counterfeit Goods Act*<sup>256</sup> is a crucial legislative piece designed to combat the pervasive issue of counterfeit goods within the country.<sup>257</sup> This Act serves as a

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<sup>252</sup> Khan, S. (2020). Intellectual Property and Copyright Law in South Africa. Wolters Kluwer.

<sup>253</sup> Seeber M 2021 "Copyright Amendment Bill: ANFASA's Submission" ANFASA Magazine 541316.

<sup>254</sup> Seeber M 2021 "Copyright Amendment Bill: ANFASA's Submission" ANFASA Magazine 541316.

<sup>255</sup> Seeber M 2021 "Copyright Amendment Bill: ANFASA's Submission" ANFASA Magazine 541316.

<sup>256</sup> Counterfeit Goods Act 37 of 1997.

<sup>257</sup> Spoor & Fisher, Counterfeit Goods (Spoor & Fisher, undated) [https://spoor.com/counterfeit-goods/#:~:text=The%20cornerstone%20of%20the%20legal%20framework%20is%20the,of%20dealing%20in%20counterfeit%20goods%20face%20severe%20repercussions.\(link](https://spoor.com/counterfeit-goods/#:~:text=The%20cornerstone%20of%20the%20legal%20framework%20is%20the,of%20dealing%20in%20counterfeit%20goods%20face%20severe%20repercussions.(link) accessed 10 August 2024).

robust framework that aims to protect the IPR of trade-mark and copyright owners and certain marks outlined in the *Merchandise Marks Act* 1941.<sup>258</sup> By prohibiting various activities associated with counterfeit goods, such as production, distribution, and sale, the Act acts as a deterrent against illicit trade practices.

For instance, consider a scenario where a company discovers that counterfeit versions of its popular product are being sold in local markets. Thanks to the provisions outlined in the *Counterfeit Goods Act*, the company can take legal action to safeguard its brand reputation and revenue streams.<sup>259</sup> Moreover, the Act empowers authorities to seize and remove counterfeit goods from circulation, preventing unsuspecting consumers from purchasing inferior or potentially harmful products.<sup>260</sup>

It is important to note that the genesis of the *Counterfeit Goods Act*<sup>261</sup> can be traced back to the TRIPS,<sup>262</sup> demonstrating South Africa's commitment to aligning its legal framework with international standards.<sup>263</sup> By enacting and enforcing such legislation, South Africa not only protects the rights of intellectual property owners but also contributes to fostering a fair and competitive marketplace for legitimate businesses to thrive. In essence, the *Counterfeit Goods Act* plays a pivotal role in upholding the integrity of IPR and promoting ethical business practices in South Africa.

#### *4.3.5 Intellectual Property Laws Amendment Act 38 of 1997*

The *Intellectual Property Laws Amendment Act*,<sup>264</sup> passed to amend the *Copyright Act*,<sup>265</sup> brought about significant changes in the realm of copyright protection. One notable modification was the explicit clarification that a work must be tangible to be eligible for copyright safeguarding. For instance, a piece of music needs to be written down or recorded to be protected under copyright law.<sup>266</sup> Furthermore, the

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<sup>258</sup> Spoor & Fisher, Counterfeit Goodsm (Spoor & Fisher, undated)

<sup>259</sup> Spoor & Fisher, Counterfeit Goodsm (Spoor & Fisher, undated)

<sup>260</sup> Spoor & Fisher, Counterfeit Goodsm (Spoor & Fisher, undated)

<sup>261</sup> Counterfeit Goods Act 37 of 1997.

<sup>262</sup> *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS) 1994.

<sup>263</sup> Pretorius, J. (2019). *South African Intellectual Property Law*. Oxford University Press.

<sup>264</sup> Intellectual Property Laws Amendment Act 38 of 1997.

<sup>265</sup> Dreyer, O. (2019). *Intellectual Property Law in South Africa*. LexisNexis South Africa.

<sup>266</sup> Dreyer, O. (2019). *Intellectual Property Law in South Africa*. LexisNexis South Africa.

Act extended the duration of copyright for cinematography films, recognising the evolving landscape of the film industry.<sup>267</sup> This adjustment aligns with the TRIPS Agreement,<sup>268</sup> a global pact focusing on IPR.

In the domain of performers' protection, the Act revised the *Performers' Protection Act*,<sup>269</sup> aiming to safeguard performances within countries that are part of the World Trade Organization (WTO).<sup>270</sup> An example of this protection in action could be a live concert performance that is recorded and broadcast internationally.<sup>271</sup> The term of protection for performances was extended to fifty years, offering performers long-term security for their creative works. Moreover, the Act addressed the rights of broadcasters and imposed stricter penalties for violations related to performers' rights, ensuring greater accountability and protection.<sup>272</sup>

Beyond copyright amendments, the *Intellectual Property Laws Amendment Act* also made revisions to other laws, such as the *Merchandise Marks Act*,<sup>273</sup> *Patents Act*,<sup>274</sup> and *Trade Marks Act*.<sup>275</sup> These changes were crucial for aligning South Africa's intellectual property regulations with international agreements and modernising the legal framework to adapt to the evolving digital landscape. By incorporating these modifications, the Act sought to enhance intellectual property protection and promote innovation in the country.<sup>276</sup>

#### **4.4 Analysis of Legislative Changes**

The *Copyright Amendment Bill* Overview provides a comprehensive look at the proposed changes to South Africa's copyright law.<sup>277</sup> The Bill's primary goal is to bring the existing legislation up to date with modern practices and address various concerns within the industry. One of the key highlights is the introduction of provisions that focus on equitable remuneration, fair royalty distribution,

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<sup>267</sup> Dreyer, O. (2019). Intellectual Property Law in South Africa. LexisNexis South Africa.

<sup>268</sup> *Agreement on Trade-Related Aspects of Intellectual Property* (TRIPS) 1994.

<sup>269</sup> Performers' Protection Act 11 of 1967.

<sup>270</sup> Khan, S. (2020). Intellectual Property and Copyright Law in South Africa. Wolters Kluwer.

<sup>271</sup> Khan, S. (2020). Intellectual Property and Copyright Law in South Africa. Wolters Kluwer.

<sup>272</sup> Khan, S. (2020). Intellectual Property and Copyright Law in South Africa. Wolters Kluwer.

<sup>273</sup> Khan, S. (2020). Intellectual Property and Copyright Law in South Africa. Wolters Kluwer.

<sup>274</sup> Khan, S. (2020). Intellectual Property and Copyright Law in South Africa. Wolters Kluwer.

<sup>275</sup> Khan, S. (2020). Intellectual Property and Copyright Law in South Africa. Wolters Kluwer.

<sup>276</sup> Khan, S. (2020). Intellectual Property and Copyright Law in South Africa. Wolters Kluwer.

<sup>277</sup> Seeber M 2021 "Copyright Amendment Bill: ANFASA's Submission" ANFASA Magazine 541316.

reversionary rights, licensing of orphan works, and the establishment of collective management organisations (CMOs). These provisions aim to create a more balanced and fairer environment for creators and users of copyrighted material.<sup>278</sup>

One significant aspect of the Bill is the inclusion of a fair use clause inspired by similar laws in the United States.<sup>279</sup> This clause allows for more flexible use of copyrighted material for education and criticism. While this can benefit the public by promoting access to knowledge, it has also raised concerns within the US entertainment industry.<sup>280</sup> The US Trade Representative is currently evaluating South Africa's eligibility for trade benefits in light of this clause, which has sparked a debate on the potential violations of World Trade Organization (WTO) rules if sanctions are imposed based on industry interests.<sup>281</sup>

Moreover, the Bill extends protections for local creators by ensuring their rights to royalties, limiting unfair contracts that may lead to exploitation, and allowing for the reversal of copyright assignments back to creators after 25 years.<sup>282</sup> These measures are crucial for supporting South African artists and authors in safeguarding their IPR and receiving fair compensation for their work.<sup>283</sup>

#### **4.5 Conclusion**

In conclusion, the case law and legal instruments analysed in this chapter demonstrate the evolving nature of copyright law in South Africa. The courts have played a crucial role in shaping the interpretation of copyright law, and the legal instruments have provided a framework for protecting IPR. The *Copyright Amendment Bill*, in particular, aims to bring South African copyright law up to date with modern practices and addresses concerns within the industry. However, its implications on international trade have sparked debate and scrutiny. As South

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<sup>278</sup> Khan, S. (2020). *Intellectual Property and Copyright Law in South Africa*. Wolters Kluwer.

<sup>279</sup> Seeber M2021 "Copyright Amendment Bill: ANFASA's Submission" ANFASA Magazine 541316.

<sup>280</sup> Seeber M2021 "Copyright Amendment Bill: ANFASA's Submission" ANFASA Magazine 541316.

<sup>281</sup> Seeber M2021 "Copyright Amendment Bill: ANFASA's Submission" ANFASA Magazine 541316.

<sup>282</sup> Tomaselli, 'The 2022 Copyright Amendment Bill: Implications for the South African universities' research economy' (2022) 41(2) *Critical Arts: South-North Cultural and Media Studies* (online) (link unavailable) accessed 10 August 2024.

<sup>283</sup> Tomaselli, 'The 2022 Copyright Amendment Bill: Implications for the South African universities' research economy' (2022) 41(2) *Critical Arts: South-North Cultural and Media Studies* (online) (link unavailable) accessed 10 August 2024.

Africa continues to develop its copyright law, it is essential to balance creators' rights and the public's access to knowledge. By understanding the current state of copyright law in South Africa, we can better navigate the complexities of intellectual property protection and promote innovation and creativity in the country.

## **CHAPTER 5: INTERNATIONAL BEST PRACTICES FOR COPYRIGHT PROTECTION IN THE DIGITAL AGE**

### ***5.1 INTRODUCTION***

International copyright standards play a pivotal role in safeguarding the rights of creators and ensuring the equitable use of creative works across borders.<sup>284</sup> These standards facilitate the harmonisation of copyright laws, making it easier for creators to protect their intellectual property globally.<sup>285</sup> This chapter delves into the intricacies of international copyright law, examining key agreements such as the WCT and the Berne Convention.<sup>286</sup> It also explores the impact of digital technologies on copyright protection, highlighting the challenges and opportunities presented by the digital age. By comparing global copyright standards with the current South African legal framework, this chapter aims to provide a comprehensive understanding of the international landscape and its relevance to South Africa.<sup>287</sup>

South Africa faces significant challenges in copyright protection, including rampant digital piracy, inadequate enforcement mechanisms, and outdated laws that struggle to keep pace with technological advancements. The need for greater public awareness and education on copyright matters compounds these issues.<sup>288</sup> This chapter analyses these challenges and compares South African copyright laws with international best practices. It also examines the enforcement measures adopted by other countries and offers recommendations for improving copyright protection in South Africa.<sup>289</sup> By aligning with international standards and adopting effective

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<sup>284</sup> Sam Ricketson, 'The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986' (1987) 18 IIC 1.

<sup>286</sup> *WIPO Copyright Treaty*, 1996; and Berne Convention for the Protection of Literary and Artistic Works, 1886 (as amended).

<sup>287</sup> Tanya Aplin and Jennifer Davis, 'Intellectual Property Law: Text, Cases, and Materials' (3rd edn, OUP 2017).

<sup>288</sup> Caroline Ncube, 'Intellectual Property Policy, Law and Administration in Africa: Exploring Continental and Sub-regional Co-operation' (Routledge 2016).

<sup>289</sup> Daniel Gervais, 'The TRIPS Agreement: Drafting History and Analysis' (4th edn, Sweet & Maxwell 2012).

enforcement strategies, South Africa can enhance its copyright protection framework and better support its creative industries.<sup>290</sup>

## **5.2 INTERNATIONAL COPYRIGHT LAW**

### *5.2.1 Influence of US Copyright Law on South African Copyright Law*

In 2011, the South African government initiated a reform process to address challenges in copyright-based industries, such as poor governance and reliance on the outdated *Copyright Act*.<sup>291</sup> This reform led to the development of the *Copyright Amendment Bill*, which is currently awaiting the President's assent. The *US Trade Representative (USTR)* reviewed the *Copyright Amendment Bill* after the *International Intellectual Property Alliance (IIPA)*<sup>292</sup> challenged its compliance with South Africa's international IP obligations under TRIPS and the Berne Convention. The IIPA argued that the *Copyright Amendment Bill* did not protect foreigners' IPRs adequately.<sup>293</sup>

The US uses its *Generalized System of Preferences (GSP)*<sup>294</sup> to promote compliance with international IP obligations, protecting its own IP interests. This approach can infringe on the national regulatory space of GSP beneficiaries, making it difficult for them to industrialise their economies. South Africa risks losing GSP benefits if it does not meet the IIPA's demands, potentially leading to adverse economic effects.<sup>295</sup> South Africa might need to adopt a US-oriented form of copyright law to continue benefiting from the GSP.<sup>296</sup>

Originality is said to be the cornerstone of copyright law. However, in many countries' "originality" has not been statutorily defined. In South Africa and the US, there is no legislative definition of "originality", and the courts have had to develop

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<sup>290</sup> Caroline Ncube, 'Intellectual Property Policy, Law and Administration in Africa: Exploring Continental and Sub-regional Co-operation' (Routledge 2016).

<sup>291</sup> *Copyright Act 98 of 1978*

<sup>292</sup> International Intellectual Property Alliance, '2021 Special 301 Report on Copyright Protection and Enforcement' (2021).

<sup>293</sup> *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)* 1994.

<sup>294</sup> Generalized System of Preferences (GSP) Program, 1974 (US).

<sup>295</sup> Office of the United States Trade Representative, '2021 Special 301 Report' (2021).

<sup>296</sup> Peter K. Yu, 'The US-China Intellectual Property Dispute: A Battle of National Interests' (2007) 89 Marq L Rev 945.

what originality means. The Berne Convention exists to create uniformity of laws and procedures regarding copyright. However, the Berne Convention does not provide the standard or requirements for "originality". This creates a problem as each country has developed their own standard of originality. The problem is that some standards only value the skill and labour of the author, and other standards require some creativity from the author.<sup>297</sup>

### *5.2.2 Influence of UK Copyright Law on South African Copyright Law*

The influence of UK copyright law on South African copyright law is deeply rooted in their shared history. As a British colony until 1910 and a British dominion until 1961, South Africa's initial intellectual property legislation, *the Patents, Trade Marks, Designs and Copyright Act 9 of 1916*,<sup>298</sup> was essentially an adoption of the British *Imperial Copyright Act of 1911*.<sup>299</sup> This alignment continued even after South Africa became an independent republic in 1961 and the 1916 Act was replaced by the *Copyright Act 63 of 1965*,<sup>300</sup> which still closely mirrored British copyright law. This trend persisted with the introduction of the *Copyright Act 98 of 1978*,<sup>301</sup> which, despite various amendments, remains in force today.<sup>302</sup>

The UK's copyright law, governed by the *Copyright, Designs and Patents Act 1988*, has evolved to include provisions from the EU Copyright Directive, addressing digital copyright and online content protection. In contrast, South Africa's copyright law has struggled to keep pace with these developments, particularly in the digital realm.<sup>303</sup> The concept of "fair dealing" in the UK, which is more restrictive than the US's "fair use" doctrine, focuses on specific exemptions such as research, private study, and news reporting. This concept has influenced South African copyright law, as seen

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<sup>297</sup> *Berne Convention for the Protection of Literary and Artistic Works* 1886 (as amended).

<sup>298</sup> Patents, Trade Marks, Designs and Copyright Act 9 of 1916.

<sup>299</sup> British Imperial Copyright Act of 1911.

<sup>300</sup> Copyright Act 63 of 1965

<sup>301</sup> Copyright Act No. 98 of 1978

<sup>302</sup> Caroline Ncube, 'Intellectual Property Policy, Law and Administration in Africa: Exploring Continental and Sub-regional Co-operation' (Routledge 2016).

<sup>303</sup> Copyright, Designs and Patents Act 1988 (UK).

in the almost identical wording of section 21(2A) of South Africa's *Copyright Act* and section 16 of the UK's *Copyright, Designs and Patents Act* of 1988.<sup>305</sup>

The term "substantial part,"<sup>306</sup> crucial in determining copyright infringement, first appeared in the 1911 UK *Copyright Act* and has been a significant influence on South African legislation and early English jurisprudence. This term has set the standard for the copyright infringement test in both countries, demonstrating the enduring impact of UK copyright law on South African legal frameworks.<sup>307</sup>

### 5.2.3 European Union Copyright Law and South African Copyright Law

The European Union (EU) has established a comprehensive and harmonised copyright framework that significantly influences its member states. Central to this framework is the EU Copyright Directive, which aims to harmonise various aspects of copyright law across the EU, including digital copyright and online content protection.<sup>308</sup> This Directive ensures consistency in copyright laws among member states, facilitating a unified approach to copyright protection and enforcement. In contrast, South Africa's copyright law, primarily governed by the *Copyright Act*, has not kept pace with the rapid advancements in digital technology and evolving international standards.<sup>309</sup> While the *Copyright Amendment Bill*<sup>310</sup> seeks to modernise South Africa's copyright framework, it has faced criticism for not fully aligning with international standards such as the TRIPS agreement and the WIPO internet treaties.<sup>311</sup>

When comparing digital copyright provisions, the EU Copyright Directive includes specific measures for DRM, online content protection, and the liability of internet

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<sup>304</sup> Copyright, Designs and Patents Act 1988 (UK), section 16.

<sup>305</sup> *Copyright Act 98 of 1978* section 21(2A).

<sup>306</sup> Tanya Aplin and Jennifer Davis, 'Intellectual Property Law: Text, Cases, and Materials' (3rd edn, OUP 2017).

<sup>307</sup> See above.

<sup>308</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

<sup>309</sup> Caroline Ncube, 'Intellectual Property Policy, Law and Administration in Africa: Exploring Continental and Sub-regional Co-operation' (Routledge 2016).

<sup>310</sup> *Copyright Amendment Bill* (B13-2017).

<sup>311</sup> International Intellectual Property Alliance, '2021 Special 301 Report on Copyright Protection and Enforcement' (2021).

service providers.<sup>312</sup> South Africa's current copyright law lacks comprehensive digital copyright provisions, and although the *Copyright Amendment Bill* aims to address these gaps, it has yet to be fully implemented.<sup>313</sup> The EU's approach to copyright harmonisation ensures a consistent legal framework across member states, promoting cross-border trade and cooperation. In contrast, South Africa's copyright law is more fragmented and has been criticised for not aligning entirely with international standards, posing challenges to international trade and cooperation.<sup>314</sup>

Regarding fair use, the EU follows a more restrictive "fair dealing" approach with specific exemptions for research, private study, and news reporting.<sup>315</sup> South Africa also follows a "fair dealing" approach, influenced by its historical ties to British law, but the *Copyright Amendment Bill* proposes some changes to expand these exceptions. Enforcement and compliance mechanisms in the EU are robust, with the ability to impose sanctions on member states that do not comply with directives.<sup>316</sup> In South Africa, enforcement has been less stringent, and the country has faced pressure from international bodies, such as the US Trade Representative, to improve its compliance with global standards.<sup>317</sup>

The EU's copyright framework has influenced many countries worldwide, including South Africa. However, South Africa's copyright law has been more directly influenced by its historical ties to the UK.<sup>318</sup> The *Copyright Amendment Bill* represents an effort to align more closely with international standards, including those set by the EU, but it has faced significant challenges and criticisms.<sup>319</sup> To better align with international copyright laws, South Africa needs to modernise its

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<sup>312</sup> Directive 2001/29/EC (EU).

<sup>313</sup> Caroline Ncube, 'Intellectual Property Policy, Law and Administration in Africa: Exploring Continental and Sub-regional Co-operation' (Routledge 2016).

<sup>314</sup> Daniel Gervais, 'The TRIPS Agreement: Drafting History and Analysis' (4th edn, Sweet & Maxwell 2012).

<sup>315</sup> Directive 2001/29/EC (EU).

<sup>316</sup> Directive 2001/29/EC (EU).

<sup>317</sup> Office of the United States Trade Representative, '2021 Special 301 Report' (2021).

<sup>318</sup> *Copyright Act 98 of 1978*.

<sup>319</sup> International Intellectual Property Alliance, '2021 Special 301 Report on Copyright Protection and Enforcement' (2021).

digital copyright provisions, enhance enforcement mechanisms, and harmonise its laws with global frameworks to facilitate international trade and cooperation.<sup>320</sup>

### **5.3 COPYRIGHT PROTECTION IN THE DIGITAL AGE**

#### *5.3.1 Impact of Digital Technologies on Copyright Protection*

The advent of digital technologies has revolutionised the way copyrighted works are distributed and accessed.<sup>321</sup> On one hand, these technologies have made it easier for creators to share their work with a global audience, enhancing accessibility and distribution. On the other hand, they have also increased the risk of piracy and unauthorised use, posing significant challenges to copyright protection.<sup>322</sup> Digital technologies have facilitated the rapid and widespread distribution of copyrighted materials. Platforms such as streaming services, online libraries, and social media have made it possible for users to access a vast array of content with ease.<sup>323</sup> However, this ease of access has also led to a surge in copyright infringement activities. Unauthorised copying, sharing, and downloading of digital content have become prevalent, undermining the rights of creators and copyright owners. The rise of peer-to-peer (P2P) networks, file-sharing websites, and other digital platforms has made it difficult to control the distribution of copyrighted works.<sup>324</sup> This has resulted in significant financial losses for the entertainment, publishing, and software industries, among others. Additionally, the anonymity provided by the internet complicates the enforcement of copyright laws, making it challenging to identify and prosecute infringers.<sup>325</sup>

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<sup>320</sup> Caroline Ncube, 'Intellectual Property Policy, Law and Administration in Africa: Exploring Continental and Sub-regional Co-operation' (Routledge 2016).

<sup>322</sup> Daniel Gervais, 'The TRIPS Agreement: Drafting History and Analysis' (4th edn, Sweet & Maxwell 2012).

<sup>323</sup> Tanya Aplin and Jennifer Davis, 'Intellectual Property Law: Text, Cases, and Materials' (3rd ed, OUP 2017).

<sup>324</sup> International Intellectual Property Alliance, '2021 Special 301 Report on Copyright Protection and Enforcement' (2021).

<sup>325</sup> Daniel Gervais, 'The TRIPS Agreement: Drafting History and Analysis' (4th edn, Sweet & Maxwell 2012).

### 5.3.2 Overview of International Approaches

To address these challenges, countries worldwide have adopted various measures to strengthen copyright protection in the digital age. One key approach is the use of DRM technologies.<sup>326</sup> DRM is employed to control the use of digital content and prevent unauthorised copying and distribution. These technologies include encryption, digital watermarks, and access controls that restrict how digital files can be used and shared. Another important measure is copyright education.<sup>327</sup> Many countries have implemented educational programmes to raise awareness about copyright laws and respecting IPR. These programmes target both creators and consumers, emphasising the legal and ethical implications of copyright infringement.<sup>328</sup>

Governments have also introduced stricter enforcement measures to combat digital piracy. This includes the establishment of specialised agencies dedicated to monitoring and enforcing copyright laws, as well as the imposition of harsher penalties for copyright violations.<sup>329</sup> Enhanced international cooperation is another critical component, with countries working together to tackle cross-border copyright infringement through treaties and coordinated enforcement actions.<sup>330</sup> Additionally, legislative updates have addressed the unique challenges posed by digital technologies. Countries have incorporated provisions related to online infringement, intermediary liability, and digital content protection into their copyright laws. These updates ensure that legal frameworks remain relevant and effective in evolving digital landscapes.<sup>331</sup>

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<sup>326</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

<sup>327</sup> Caroline Ncube, 'Intellectual Property Policy, Law and Administration in Africa: Exploring Continental and Sub-regional Co-operation' (Routledge 2016).

<sup>328</sup> Caroline Ncube, 'Intellectual Property Policy, Law and Administration in Africa: Exploring Continental and Sub-regional Co-operation' (Routledge 2016).

<sup>329</sup> International Intellectual Property Alliance, '2021 Special 301 Report on Copyright Protection and Enforcement' (2021).

<sup>330</sup> *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS) 1994.

<sup>331</sup> Directive 2001/29/EC (EU).

## **5.4 CHALLENGES IN SOUTH AFRICA**

### *5.4.1 Challenges in South Africa*

South Africa faces several specific challenges in protecting copyright in the digital age. One of the primary issues is the high rate of digital piracy.<sup>332</sup> The widespread availability of pirated content, including music, movies, software, and books, significantly undermines the rights of creators and results in substantial financial losses for copyright owners.<sup>333</sup> This rampant piracy is facilitated by the ease with which digital content can be copied and distributed online, often through peer-to-peer networks and file-sharing websites. The anonymity provided by the internet further complicates efforts to track and prosecute offenders.<sup>334</sup> This problem is exacerbated by the limited resources available for enforcement. Law enforcement agencies and regulatory bodies often lack the necessary tools, funding, and personnel to combat digital piracy and enforce copyright laws effectively. Without adequate resources, these agencies struggle to monitor online activities, identify infringers, and take appropriate legal action. The lack of specialised training and technological infrastructure further hampers their ability to address the sophisticated methods used by digital pirates.<sup>335</sup>

Another significant challenge is the need for legal reforms to address new digital realities. The current *Copyright Act* is outdated and does not adequately cover the complexities of digital copyright issues.<sup>336</sup> This Act was designed in an era before the widespread use of the internet and digital technologies, and as such, it lacks provisions for dealing with modern forms of copyright infringement. For instance, it does not sufficiently address issues related to DRM, intermediary liability, or digital content protection.<sup>337</sup>

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<sup>332</sup> Caroline Ncube, 'Intellectual Property Policy, Law and Administration in Africa: Exploring Continental and Sub-regional Co-operation' (Routledge 2016).

<sup>333</sup> Office of the United States Trade Representative, '2021 Special 301 Report' (2021).

<sup>334</sup> International Intellectual Property Alliance, '2021 Special 301 Report on Copyright Protection and Enforcement' (2021).

<sup>335</sup> International Intellectual Property Alliance, '2021 Special 301 Report on Copyright Protection and Enforcement' (2021).

<sup>336</sup> *Copyright Act 98 of 1978*.

<sup>337</sup> Caroline Ncube, 'Intellectual Property Policy, Law and Administration in Africa: Exploring Continental and Sub-regional Co-operation' (Routledge 2016).

Although the *Copyright Amendment Bill* aims to modernise the legal framework,<sup>338</sup> it has faced delays and criticism for not fully aligning with international standards. The *Copyright Amendment Bill* seeks to introduce new provisions that would better protect digital content and address the challenges of the digital age.<sup>339</sup> However, its progress has been slow, and it has been criticised for not meeting the requirements of international agreements such as the TRIPS Agreement and the WIPO Internet Treaties. This misalignment with global standards has raised concerns about the effectiveness of the proposed reforms and their ability to provide adequate protection for copyright owners.<sup>340</sup>

#### 5.4.2 Comparison with International Best Practices

Compared to international best practices, South Africa lags behind in implementing comprehensive digital copyright protections and enforcement mechanisms.<sup>341</sup> Leading countries have adopted robust measures to address digital copyright challenges. For instance, countries like the USA and in the EU have implemented advanced DRM technologies to prevent unauthorised copying and distribution of digital content, including encryption, digital watermarks, and access controls.<sup>342</sup> Many countries have also established specialised enforcement agencies dedicated to monitoring and enforcing copyright laws, equipped with the resources and expertise to tackle digital piracy effectively.<sup>343</sup>

Additionally, leading countries participate in international cooperation efforts to combat cross-border copyright infringement, share information, coordinate enforcement actions, and participate in international treaties and agreements.<sup>344</sup> There are regular legislative updates to keep pace with technological advancements, such as the USA's *Digital Millennium Copyright Act* (DMCA), which

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<sup>338</sup> *Copyright Amendment Bill* (B13-2017).

<sup>339</sup> International Intellectual Property Alliance, '2021 Special 301 Report on Copyright Protection and Enforcement' (2021).

<sup>341</sup> Caroline Ncube, 'Intellectual Property Policy, Law and Administration in Africa: Exploring Continental and Sub-regional Co-operation' (Routledge 2016).

<sup>342</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

<sup>343</sup> International Intellectual Property Alliance, '2021 Special 301 Report on Copyright Protection and Enforcement' (2021).

<sup>344</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) 1994.

includes provisions specifically designed to address online infringement and intermediary liability. Effective copyright protection also involves educating the public about the importance of respecting IPR, with many countries implementing educational programmes to raise awareness about copyright laws and the consequences of infringement.<sup>345</sup> South Africa needs to adopt similar measures to improve its copyright protection framework, including modernising its legal framework to address digital copyright issues comprehensively, enhancing enforcement mechanisms, and participating in international cooperation efforts. Additionally, increasing public awareness and education about copyright laws can help reduce the prevalence of digital piracy.<sup>346</sup>

## **5.5 INTERNATIONAL STANDARDS ON COPYRIGHT ENFORCEMENT**

### *5.5.1 International Standards on Copyright Enforcement*

Effective copyright enforcement requires a multifaceted approach that combines robust legal frameworks, international cooperation, public awareness campaigns, and technological solutions. Countries with strong copyright protection laws are better equipped to handle the complexities of digital copyright issues.<sup>347</sup> These frameworks often include specific provisions for DRM, intermediary liability, and online infringement. Cross-border copyright infringement is a significant challenge in the digital age, and effective enforcement requires international cooperation through treaties, agreements, and coordinated enforcement actions.<sup>348</sup> Organisations like the WIPO facilitate such cooperation.<sup>349</sup>

Educating the public about the importance of copyright and the consequences of infringement is crucial. Public awareness campaigns can help reduce piracy by promoting respect for IPR.<sup>350</sup> Technological solutions, such as DRM technologies, digital watermarks, and other tools, are essential for protecting copyrighted works in

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<sup>345</sup> Caroline Ncube, 'Intellectual Property Policy, Law and Administration in Africa: Exploring Continental and Sub-regional Co-operation' (Routledge 2016).

<sup>346</sup> See above.

<sup>347</sup> Daniel Gervais, 'The TRIPS Agreement: Drafting History and Analysis' (4th edn, Sweet & Maxwell 2012).

<sup>348</sup> *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS) 1994.

<sup>349</sup> World Intellectual Property Organization (WIPO), *WIPO Copyright Treaty* 1996.

<sup>350</sup> Ricketson S, Creswell C (2002) *The law of intellectual property: copyright, designs & confidential information*, 2nd edn. Thomson/Law Book Co., Sydney.

the digital environment by preventing unauthorised copying and distribution.<sup>351</sup> South Africa can adopt several measures based on international best practices to improve copyright protection. First, modernising the *Copyright Act* to address digital copyright issues comprehensively is essential.<sup>352</sup> This includes incorporating provisions for DRM, intermediary liability, and online infringement. Increasing resources for enforcement by allocating more funding, training, and technological tools to law enforcement agencies and regulatory bodies can enhance their capacity to combat digital piracy effectively.<sup>353</sup>

Adopting technological solutions, such as DRM technologies and digital watermarks, can help protect digital content from unauthorised use and distribution.<sup>354</sup> Enhancing international cooperation by participating actively in international treaties and agreements can facilitate information sharing and coordination of enforcement actions to combat cross-border copyright infringement.<sup>355</sup> Finally, launching public awareness campaigns to educate creators and consumers about copyright laws and the importance of respecting IPR can help reduce the prevalence of digital piracy. By adopting these measures, South Africa can strengthen its copyright protection framework and better align with international standards.<sup>356</sup>

### *5.5.2 Implementing International Standards*

South Africa can adopt several strategic measures to implement international standards for copyright protection effectively. Updating South Africa's copyright laws is crucial to align with international standards such as the TRIPS Agreement and the WIPO Internet Treaties.<sup>357</sup> The *Copyright Amendment Bill* is a step in the right direction, but it must be fully enacted and refined to address the complexities of

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<sup>351</sup> Wang, J. (2018). An Overview of Copyright: A Balance of Interests. In: *Conceptualizing Copyright Exceptions in China and South Africa*. China-EU Law Series, vol 6. Springer, Cham. [https://doi.org/10.1007/978-3-319-71831-6\\_2](https://doi.org/10.1007/978-3-319-71831-6_2).

<sup>352</sup> G., Bhagyamma & Ramesh, Dr. (2023). PROTECTION OF INTELLECTUAL PROPERTY RIGHTS: AN EXAMINATION OF INTERNATIONAL LEGAL FRAMEWORKS.

<sup>353</sup> international Intellectual Property Alliance, '2021 Special 301 Report on Copyright Protection and Enforcement' (2021).

<sup>354</sup> Directive 2001/29/EC (EU).

<sup>355</sup> *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS) 1994.

<sup>356</sup> Caroline Ncube, 'Intellectual Property Policy, Law and Administration in Africa: Exploring Continental and Sub-regional Co-operation' (Routledge 2016).

<sup>357</sup> *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS) 1994.

digital copyright issues comprehensively.<sup>358</sup> This includes incorporating provisions for DRM, intermediary liability, and online infringement.

Enhancing the capabilities of enforcement agencies is essential for effective copyright protection. This involves providing adequate resources, training, and technological tools to law enforcement and regulatory bodies.<sup>359</sup> By building capacity, these agencies can better monitor, detect and prosecute copyright infringements, particularly in the digital realm. Educating the public about the importance of copyright protection is also a key strategy.<sup>360</sup> Public awareness campaigns can help reduce piracy by promoting respect for IPR. These campaigns should target both creators and consumers, emphasising the legal and ethical implications of copyright infringement and the benefits of protecting creative works.<sup>361</sup>

Implementing practical measures can significantly improve copyright protection in South Africa. Adopting DRM technologies to control the use and distribution of digital content can help prevent unauthorised copying and sharing of copyrighted works.<sup>362</sup> Strengthening cooperation with international bodies and participating in global treaties and agreements can facilitate the sharing of information, coordination of enforcement actions, and tackling cross-border copyright infringement.<sup>363</sup> Additionally, imposing stricter penalties for copyright infringement can deter potential violators. Harsher penalties can be a strong deterrent against piracy and unauthorised use of copyrighted materials.<sup>364</sup>

## **5.6 CONCLUSION**

South Africa must update its copyright laws and enforcement mechanisms to protect creators in the digital age better. Aligning with international best practices,

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<sup>358</sup> *Copyright Amendment Bill* (B13-2017).

<sup>359</sup> Caroline Ncube, 'Intellectual Property Policy, Law and Administration in Africa: Exploring Continental and Sub-regional Co-operation' (Routledge 2016).

<sup>360</sup> See above.

<sup>361</sup> See above.

<sup>362</sup> Hansen HC (1996) International copyright: an unorthodox analysis. *Vanderbilt J Transnational Law* 29:579.

<sup>363</sup> Caroline Ncube, 'Intellectual Property Policy, Law and Administration in Africa: Exploring Continental and Sub-regional Co-operation' (Routledge 2016).

<sup>364</sup> Ricketson S, Creswell C (2002) *The law of intellectual property: copyright, designs & confidential information*, 2nd edn. Thomson/Law Book Co., Sydney

enhancing enforcement and leveraging technology are crucial steps for improving copyright protection in South Africa. Effective copyright protection fosters creativity, innovation and economic growth in the digital age. This chapter has examined international best practices for copyright protection, highlighting the influence of US, UK and EU copyright laws on South African copyright law. The analysis revealed that South Africa faces significant challenges, including rampant digital piracy, inadequate enforcement mechanisms and outdated laws.

To address these challenges, South Africa should align its copyright laws with international standards, such as the TRIPS Agreement and the WIPO Internet Treaties. The *Copyright Amendment Bill* is a step towards modernisation, but its implementation and refinement are essential. Enhancing enforcement capabilities, adopting DRM technologies and promoting public awareness about copyright protection are vital strategies. By adopting international best practices and strengthening its copyright protection framework, South Africa can better support its creative industries, promote innovation and ensure that creators' rights are safeguarded in the digital age.

## **CHAPTER 6: RECOMMENDATIONS AND CONCLUSION**

### **6.1 INTRODUCTION**

In the digital age, the protection of IPR has become increasingly critical. Like many other countries, South Africa faces significant challenges in safeguarding the rights of creators and innovators. This chapter provides an overview of the current state of copyright protection in South Africa, highlighting the key legal frameworks, enforcement mechanisms, and the impact of digital technologies on copyright infringement. The introduction of the *Copyright Amendment Bill* aims to modernise South Africa's copyright laws, aligning them with international standards and addressing the complexities of digital copyright issues. This chapter will explore the historical context of copyright law in South Africa, the influence of international treaties, and the ongoing efforts to enhance the legal infrastructure for intellectual property protection.

### **6.2 RECOMMENDATIONS**

Several recommendations have been identified to strengthen copyright protection in South Africa. Firstly, it is crucial to update South Africa's copyright laws to align with international standards, such as the TRIPS Agreement and WIPO Internet Treaties, by enacting and refining the *Copyright Amendment Bill* to address digital copyright issues comprehensively. Enhancing enforcement capabilities is also essential, and it involves providing adequate resources, training, and technological tools to law enforcement and regulatory bodies to better monitor, detect, and prosecute copyright infringements, particularly in the digital realm.

Adopting DRM technologies and digital watermarks can protect digital content from unauthorised use and distribution. Launching public awareness campaigns to promote respect for IPR among both creators and consumers is another vital step. Strengthening international cooperation by actively participating in international treaties and agreements can facilitate information sharing and coordinate enforcement actions against cross-border copyright infringement.

Developing a robust framework for IPR protection is essential for fostering innovation and creativity in South Africa. This includes copyright enforcement and

addressing issues related to patents, trade-marks, and trade secrets. By strengthening the legal infrastructure surrounding intellectual property, South Africa can create a conducive environment for local creators and innovators to thrive.

Emphasising the importance of intellectual property education in schools and universities can cultivate a culture of respect for IPR from a young age. Integrating intellectual property law into curricula and offering specialised courses can raise awareness about the value of innovation and the legal mechanisms to protect it. This educational approach can help deter future infringements and promote a more ethical approach to intellectual property.

Encouraging collaboration between government agencies, industry stakeholders and legal experts is crucial for effectively enforcing IPR. By fostering partnerships and sharing best practices, South Africa can enhance its enforcement mechanisms and stay abreast of emerging trends in intellectual property protection. Additionally, establishing specialised intellectual property courts or tribunals can expedite legal proceedings related to infringement cases, ensuring timely and fair resolution for all parties involved.

Leveraging technology to combat intellectual property violations is becoming increasingly important in the digital age. Implementing advanced tools for monitoring online content, detecting infringements, and enforcing IPR can bolster South Africa's efforts to safeguard creative works and innovations. Investing in research and the development of technological solutions tailored to intellectual property protection can position the country at the forefront of innovation in this field.

### ***6.3 FUTURE RESEARCH DIRECTIONS***

Future research in the realm of copyright protection in South Africa could explore several critical areas. Firstly, investigating the impact of digital piracy on South Africa's creative industries would provide valuable insights into the economic and cultural repercussions of unauthorised content distribution. Analysing the effectiveness of DRM technologies in preventing copyright infringement is another essential area of study, as it could inform the development of more robust technological solutions to protect digital content. Examining international co-

operation efforts to combat cross-border copyright infringement is also crucial. This research could focus on the effectiveness of current treaties and agreements and how South Africa can enhance its participation in global initiatives to protect IPR.

Additionally, future research could delve into the impact of the *Copyright Amendment Bill*, particularly how proposed changes such as fair use provisions and expanded exceptions for education and research might affect the copyright landscape in South Africa and its implications for international trade relationships. Another promising area is exploring the adoption of digital preservation systems, such as DSpace, E-print, and LOCKSS, in South African academic libraries. This research could assess the effectiveness of these technologies in ensuring long-term access to scholarly resources.

Another important direction is investigating data-sharing governance for machine learning applications in South African education. This research could address the challenges and opportunities of establishing secure and standardised practices that facilitate innovation while protecting IPR.

#### **6.4 CONCLUSION**

This research has provided a comprehensive analysis of the copyright protection landscape in South Africa, examining key case law, current legal instruments, and the potential impact of the *Copyright Amendment Bill*. The study highlights the intricate interplay between legal precedents, statutory provisions, and emerging challenges in IPR. It also underscores the indirect influence of the South African *Constitution* on copyright law, particularly through the Bill of Rights and its provisions related to freedom of expression, access to information, and cultural rights. By comparing South African copyright laws with international best practices, the research reveals the challenges faced by the country, including rampant digital piracy, inadequate enforcement mechanisms, and outdated laws. The study recommends aligning South African copyright laws with international standards, enhancing enforcement capabilities, adopting DRM technologies, and promoting public awareness about copyright protection.

Ultimately, by adopting international best practices and strengthening its copyright protection framework, South Africa can better support its creative industries, promote innovation, and ensure that creators' rights are safeguarded in the digital age. This research provides valuable insights and recommendations for policymakers, legal practitioners, and stakeholders in the creative industries to navigate the complexities of copyright law and foster a more robust intellectual property ecosystem in South Africa.

This study examines the landscape of copyright protection in South Africa, delving into key case law and current legal instruments that shape the realm of copyright infringement. It explores several landmark legal cases, including *Galago Publishers (Pty) Ltd v Erasmus*, *Quad Africa Energy (Pty) Ltd v The Sugarless Company (Pty) Ltd*, *David Feldman NO v EMI Music SA (Pty) Limited*, *Moneyweb (Pty) Ltd v Media24 (Pty) Ltd*, and *Blind SA v Minister of Trade, Industry and Competition and Others*. These cases have contributed significantly to the jurisprudence surrounding copyright law in South Africa.

The research also examines the key legal frameworks that govern copyright in South Africa, such as the *Copyright Act*, the *Constitution*, and the proposed *Copyright Amendment Bill*. It highlights the provisions, amendments, and legal principles that shape the protection of IPR in the country. Additionally, the study delves into the indirect influence of the South African *Constitution* on copyright law, particularly through the Bill of Rights and its provisions related to freedom of expression, access to information, and cultural rights. These constitutional principles play a vital role in shaping the legal landscape within which copyright law operates. This comprehensive analysis underscores the evolution of copyright law in South Africa and its far-reaching implications for protecting creative works and innovation in the country.

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