THE IMPACT OF SOUTH AFRICAN COPYRIGHT LAW ON THE RIGHTS OF PERSONS WITH DISABILITIES WITH PARTICULAR REFERENCE TO THE RIGHT OF ACCESS TO INFORMATION IN ADAPTED FORMAT

by

ODIRACHUKWU STEPHEN MWIM

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Supervisor: Professor Sunelle Geyer
Co-supervisor: Professor Coenraad Visser

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DECLARATION

I, **ODIRACHUKWU STEPHEN MWIM**, student number 32105703, do hereby declare that '**THE IMPACT OF SOUTH AFRICAN COPYRIGHT LAW ON THE RIGHTS OF PERSONS WITH DISABILITIES WITH PARTICULAR REFERENCE TO THE RIGHT OF ACCESS TO INFORMATION IN ADAPTED FORMAT**' is my original work and that it has not been submitted for any degree or examination in any other university or institution of higher learning. I also declare that all the materials and sources used or quoted have been duly acknowledged.

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Date _____

Supervisor: Professor Sunelle Geyer

Signature _____

SUMMARY

In *Blind SA v Minister of Trade, Industry and Competition and Others* (CCT320/21) [2022] ZACC 33 (21 September 2022), the Constitutional Court declared the provisions of sections 6 and 7, read with section 23, of the Copyright Act 98 of 1978 unconstitutional to the extent that these provisions limit the right of person with print disabilities to access copies of copyright-protected works in accessible formats. In addition, instead of ordering the reading-in of section 19D, as the lower court did, the Constitutional Court ruled that the Copyright Act must be deemed to incorporate the section 13A exception, which forms part of the order of the court and remain in place for 24 months. In the next stage of this litigation, on 13 December 2024, the Constitutional Court issued an interim order deeming section 13A to be incorporated into the Copyright Act, pending final determination of the matter. The decision of the Constitutional Court in *Blind SA v Minister of Trade, Industry and Competition and Others* not to rule in favour of reading in section 19D, as contemplated by the Copyright Amendment Bill [B13B-2017] ('CAB')[1], indicates that the proposed section 19D does not yet comply with the Constitution of the Republic of South Africa, 1996, the international human rights treaties, and the international copyright instruments, particularly the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled**,** and the three-step test of the Berne Convention.

The thesis critically analyses the Copyright Act, with particular reference to Bill 13F-2017, to determine the extent to which it complies with the provisions of the Constitution, the international human rights instruments (such as the United Nations Universal Declaration of Human Rights, and the United Nations Convention on Rights of Persons with Disabilities) as well as other international legal documents (particularly the three-step test and the Marrakesh Treaty).

[1] There is a distinction between Bill 13B-2017 and Bill 13F-2017 which is discussed in chapter one. While the Constitutional Court in the case of *Blind SA v Minister of Trade, Industry and Competition & Others* dealt with Bill 13B-2017, this study focuses on Bill 13F-2017 while making reference to the former only as it relates to the case of *Blind S v Minister of Trade, Industry and Competition and Others*

Though the Constitutional Court in *Blind SA v Minister of Trade, Industry and Competition and Others* dealt with the provisions of Bill 13B-2017, this study focuses on the provisions of Bill 13F-2017 which was sent to the President for assent on 27 February 2024 and referred by him to the Constitutional Court on 10 October 2024 to rule on the constitutionality thereof.[2] Also, the thesis was finalised for submission for examination shortly before *Blind SA v President of the Republic of South Africa and Others* [2025] ZACC 9, wherein the Constitutional Court decided that s 19D of Bill 13F-2017 should be read into the Copyright Act. Although Bill 13F-2017 addresses some of the gaps in Bill 13B-2017, Bill 13F-2017 is still lacking in some aspects that make it incomplete for protecting and advancing the interest of persons with disabilities.

The thesis also considers the specific copyright exceptions that South Africa needs to incorporate into its Copyright Act, in order to bridge the access gap between persons with disabilities and those without disabilities in relation to access to copyright-protected works.

The thesis further examines the various obligations imposed by the Marrakesh Treaty, which are subject to the three-step test. It analyses the requirements of this test as contained in the relevant international legal instruments. It then investigates the obligations contained in the different international human rights treaties that are underpinned by the principle of equality for all and the achievement of human freedom. It analyses the various constitutional obligations that require everyone to be treated equally, with respect and dignity, and without unfair discrimination. Finally, the thesis examines the extent to which the Copyright Act, through the adoption of the relevant provisions of the CAB under Bill 13F-2017, has met the various obligations.

The thesis also surveys the corresponding provisions of the copyright law of two foreign jurisdictions: Australia and India. Both countries have dynamic and advanced systems of copyright law, and their drive and imagination in implementing the Marrakesh Treaty

[2] For more information refer to https://pmg.org.za/bill/705/ accessed 27 February 2025.

provide lessons and inspiration for South Africans to finish improving the Copyright Act to satisfy, and even transcend, the Marrakesh Treaty.

The thesis shows that developing a copyright exception framework that is inclusive will address both the legal and technological constraints that hinder access to copyright-protected works for persons with disabilities, while balancing the rights of copyright holders and the interests of disabled persons. In line with the inclusive approach proposed by researchers such as Ncube, Reid, and Oriakhogba, this thesis focuses on persons with different forms of disability where such conditions limit their ability to access copyright-protected materials.

Keywords: Constitution of the Republic of South Africa, 1996; Copyright Act; Copyright exceptions, Copyright Amendment Bill; Marrakesh Treaty; three-step test; persons with disabilities; copyright holders; Blind SA; human dignity; equality; human freedom

OPSOMMING

In *Blind SA v Minister of Trade, Industry and Competition and Others* (CCT320/21) [2022] ZACC 33 (21 September 2022) het die Konstitusionele Hof die bepalings van artikels 6 en 7, saamgelees met artikel 23, van die Wet op Outeursreg, ongrondwetlik verklaar in soverre hierdie bepalings leesgestremde persone se reg op toegang tot kopieë van outeursregbeskermde werke in toeganklike formate beperk. Verder, eerder as om die inlees van artikel 19D te gelas, soos wat die laer hof gedoen het, het die Konstitusionele Hof beslis dat die Wet op Outeursreg geag moet word om die bepalings van die artikel 13A-uitsondering in te sluit, wat deel uitmaak van die hofbevel en vir ’n tydperk van 24 maande van krag bly. In die volgende fase van hierdie litigasie, op 13 Desember 2024, het die Konstitusionele Hof ’n tussentydse bevel uitgereik wat bepaal dat daar geag moet word dat die Wet op Outeursreg artikel 13A insluit, hangende finale uitsluitsel oor die aangeleentheid. Die besluit van die Konstitusionele Hof in *Blind SA v Minister of Trade, Industry and Competition and Others* om nie die inlees van artikel 19D, soos voorgestel in die Wysigingswetsontwerp op Outeursreg [B 13B–2017] (“WoO”),[3] te beveel nie, dui daarop dat die bepalings van artikel 19D nog nie voldoen aan die Grondwet van die Republiek van Suid-Afrika, 1996, verskeie internasionale menseregteverdrae, en die internasionale outeursreginstrumente nie, veral die Marrakesh Verdrag om Toegang tot Gepubliseerde Werke te Fasiliteer vir Mense wat Blind, Visueel of Andersins Leesgestremd Is, en die drie-stap-toets in die Bernse Konvensie vir die Beskerming van Literêre en Artistieke Werke.

Die proefskrif ontleed die Wet op Outeursreg krities, met spesifieke verwysing na Wetsontwerp 13F-2017, om te bepaal in welke mate dié wet aan die bepalings van die Grondwet, internasionale mensereginstrumente (soos die Verenigde Nasies se Universele Verklaring van Menseregte en Konvensie oor die Regte van Persone met

[3] Daar is ‘n onderskeid tussen Wetsontwerp 13B-2017 and Wetsontwerp 13F-2017, wat in hoofstuk 1 bespreek word. Wyl die Konstitusionele Hof of in die saak van *Blind SA v Minister of Trade, Industry and Competition & Others* met Wetsontwerp 13B-2017 gehandel het, fokus hierdie studie op Wetsontwerp 13F-2017, terwyl dit na eersgenoemde verwys net vir so ver dit verband hou met die beslissing in *Blind S v Minister of Trade, Industry and Competition and Others*

Gestremdhede), en ander internasionale regsbronne (in besonder gemelde drie-stap-toets en die Marrakesh-verdrag) voldoen.

Alhoewel die Konstitutionele Hof in *Blind SA v Minister of Trade, Industry and Competition and Others* met die bepalings van Wetsontwerp 13B-2017 gehandel het, fokus hierdie studie op die bepalings van Wetsontwerp 13F-2017 wat op 27 Februarie 2024 na die President gestuur is vir instemming en op 10 Oktober 2024 deur hom na die Konstitusionele Hof verwys is om uitspraak oor die grondwetlikheid daarvan te lewer. Die proefskrif is verder vir eksaminering gefinaliseer kort voor *Blind SA v President of the Republic of South Africa and Others* [2025] ZACC 9, waarin die Konstitusionele Hof besluit het dat art 19D van Wetsontwerp 13F-2017 in die Wet op Outeursreg ingelees moet word. Alhoewel Wetsontwerp 13F-2017 sommige van die gapings in Wetsontwerp 13B-2017 aanspreek, skiet Wetsontwerp 13F-2017 steeds tekort in sekere aspekte wat dit onvolledig maak vir die beskerming en bevordering van die belange van persone met gestremdhede.

Die proefskrif oorweeg ook die spesifieke uitsonderings op outeursreg wat die Wet op Outeursreg moet insluit om die toegangsgaping tussen persone met gestremdhede en dié sonder gestremdhede met betrekking tot toegang tot outeursregbeskermde werke te oorbrug.

Die proefskrif ondersoek verder die verskeie verpligtinge wat deur die Marrakesh-verdrag opgelê word en wat aan die drie-stap-toets onderhewig is. Dit ontleed die vereistes van hierdie toets soos vervat in die relevante internasionale regsbronne. Daaropvolgend word die verpligtinge wat in die verskillende internasionale menseregteverdrae vervat is en wat geskoei is op die beginsels van gelykheid vir almal en die verwesenliking van menslike vryheid, ondersoek. Dit analiseer die verskeie grondwetlike verpligtinge wat vereis dat almal gelyk, met respek en waardigheid, en sonder onbillike diskriminasie behandel moet word. Laastens ondersoek die proefskrif die mate waarin die Wet op Outeursreg, indien die relevante bepalings van die WoO onder Wetsontwerp 13F-2017 regskrag sou kry, aan die verskeie verpligtinge sal voldoen.

Die proefskrif ondersoek verder die ooreenstemmende bepalings van die outeursreg van twee ander regstelsels – Australië en Indië. Beide lande het dinamiese en gevorderde outeursregstelsels, en hulle dryfkrag en verbeelding in die implementering van die Marrakesh-verdrag bied lesse en inspirasie vir Suid-Afrikaners om die verbetering van die Wet op Outeursreg te voltooi ten einde die Marrakesh-verdrag na te volg en selfs te oortref.

Die proefskrif toon aan dat die ontwikkeling van ’n inklusiewe outeursreguitsonderingsraamwerk beide die regs- en tegnologiese beperkings wat toegang tot outeursregbeskermde werke vir persone met gestremdhede belemmer, sal aanspreek, terwyl die regte van outeursreghouers en die belange van gestremde persone gebalanseer word. In ooreenstemming met die inklusiewe benadering wat deur navorsers soos Ncube, Reid, en Oriakhogba voorgestel word, fokus hierdie proefskrif op persone met verskillende vorme van gestremdheid waar sodanige toestande hulle vermoë om toegang tot outeursregbeskermde materiaal te verkry, beperk.

DEDICATION

I dedicate this work to my family, starting with my loving wife, Nwanneka Emilia; my children, Chidera, Chidalu, and Ekene; my late father, Ichie Madueke Mwim; my mother, Gladys Ego Mwim; and my siblings.

I also dedicate the work to all persons who struggle to receive and disseminate copyright-protected materials in accessible formats as a result of disabilities, as well as the individuals and entities assisting those persons.

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I would like to express my sincere appreciation to my supervisor, Professor Sunelle Geyer, and my co-supervisor, Professor Coenraad Visser, for their dedication in making sure that I produce a work of a high standard. Most importantly, I cherish your constructive comments and mentorship, which are valuable towards the completion of my doctoral thesis. Professor Alastair Smith, you played a special role in editing the thesis. Working with you is a great pleasure. I deeply value your work ethic and high level of dedication in making sure that the thesis meets the acceptable standard.

I remain indebted to Professor Tana Pistorius for all her encouragement and support at the beginning of my study. Shortly after the completion of my LLM under her supervision, she guided me in choosing the topic for my doctoral study and in writing my proposal. Professor Pistorius could not continue supervising my study after she immigrated to New Zealand.

I would like to thank my loving and dear wife, Nwanneka Emilia Mwim, for her motivation, support, and prayers. I am highly indebted to her for being the pillar of my strength, especially during the course of my study. And I will never forget the encouragement I received from my children: Chidera, Chidalu, and Ekene. I love you very much.

Above all, I remain grateful to the Almighty God for His goodness and mercy upon me. I could not have completed this study if not for His grace that sustained me, especially during the challenging moments.

EPIGRAPH

From “Little Lord Fauntleroy” I date the beginning of my true interest in books. During the next two years I read many books at my home and on my visits to Boston. I cannot remember what they all were, or in what order I read them…. I read them in the intervals between study and play with an ever-deepening sense of pleasure. I did not study nor analyse them – I did not know whether they were well-written or not; I never thought about style or authorship. They laid their treasures at my feet, and I accepted them as we accept the sunshine and the love of our friends. I loved “Little Women” because it gave me a sense of kinship with girls and boys who could see and hear. Circumscribed as my life was in so many ways, I had to look between the covers of books for news of the world that lay outside my own.

…

It was the Iliad that made Greece my paradise. ... When I read the finest passages of the Iliad, I am conscious of a soul-sense that lifts me above the narrow, cramping circumstances of my life. My physical limitations are forgotten – my world lies upward, the length and the breadth and the sweep of the heavens are mine!

…

In a word, literature is my Utopia. Here I am not disfranchised. No barrier of the senses shuts me out from the sweet, gracious discourse of my book-friends. They talk to me without embarrassment or awkwardness. The things I have learned and the things I have been taught seem of ridiculously little importance compared with their “large loves and heavenly charities.”

Helen Keller: The Story of My Life chapter XXI

LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
ALRC	Australian Law Reform Commission
AU	African Union
AUSFTA	Australia-USA Free Trade Agreement
BIRPI	United International Bureaux for the Protection of Intellectual Property
CAB	Copyright Act Bill
CADA	Copyright Amendment (Digital Agenda) Act 2000
CAT	CAB Academic Team
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
CLRC	Copyright Law Review Committee
COAU	Charter of the Organization of African Unity
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disability
DAISY	Daisy chain authentication
DDA	Disability Discrimination Act
DITC	Department of Trade, Industry and Competition
DRM	Digital Rights Management
DTI	Department of Trade and Industry
DMCA	Digital Management Copyright Act
DRC	Declaration of the Rights of the Child
DRM	Digital rights management
ECHR	European Convention on Human Rights
ECMS	Electronic Copyright Management System
EELC	Equal Education Law Centre
EU	European Union
GATT	General Agreement on Tariffs and Trade
HREOC	Human Rights and Equal Opportunity Commission

IAF	International Authors Forum
ICCPR	International Convention on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Commission of Jurists
ICT	Information and communication technology
IFRRO	International Federation of Reproduction Rights Organisations
IP	Intellectual property
IPA	International Publishers Association
IPR	Intellectual property right
MMA	Media Monitoring Africa
NA	National Assembly
NCOP	National Council of Provinces
OAU	Organization of African Unity
PASA	Publishers' Association of South Africa
SA	South Africa; South African Law Reports
SCCRR	Standing Committee on Copyright and Related Rights
SDG	Sustainable Development Goals
SREOPD	Standard Rules on the Equalization of Opportunities for Persons with Disabilities
SOCOG	Sydney Organising Committee for the Olympic Games
STM	International Association of Scientific, Technical & Medical Publishers
TPM	Technological Protection Measure
TRIPS	Trade-Related Aspects of Intellectual Property Rights Agreement
UCT	University of Cape Town
UK	United Kingdom
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
US	United States
USA	United States of America

VIP	Visually impaired person
W3C	World Wide Web Consortium
WCAG	Web Content Accessibility Guidelines
WCT	WIPO Copyright Treaty
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonograms Treaty

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CHAPTER 1: INTRODUCTION AND OVERVIEW OF THE STUDY

1.1 Background to the study

The background to the study comprises three aspects: the factors underpinning the study; the access gap between persons with disabilities and persons without disabilities; and the need to adopt an inclusive copyright exception for persons with disabilities that accommodates the evolving digital technologies.

Before delving into the various issues to be discussed in this session, a brief analysis of the expression "persons with disability", as considered in this thesis, becomes necessary at the onset of this thesis. The conceptual analysis of persons with disabilities as it relates to this thesis centers more on a human rights model with underlying social human elements, without excluding the medical model that is underpinned by a welfare element. Therefore, the thesis also considers the concept "persons with disability" from the dimension of the medical model referring to the actual impairments suffered by the persons in relation to access to information and other rights considered in the thesis. The view held in this thesis is premised on the model that the challenges confronting persons with disabilities in obtaining and disseminating copyrighted works in accessible formats are caused by legally constructed barriers. There is less emphasis on the physiological conditions of the persons with disabilities in addressing their difficulties in relation to access to copyrighted works. However, the expression of the concept of "disabilities" and different kinds of disabilities is discussed further in this thesis.

1.1.1 Factors underpinning the study

The prevalence of disabilities is one of the factors contributing to the access gap[1] in South Africa and the rest of the world. The 2011 disability report from the World Health Organization ('WHO') and the World Bank showed a billion people around the world experiencing different kinds of disabilities.[2] A year later, the WHO recorded 285 million

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1 The access gap refers to the gap between persons with disabilities and those without disabilities in relation to access to copyright-protected works.

2 World Health Organization (Geneva) and World Bank (Washington, DC), *World Report on Disability* (World Health Organization and World Bank 2011) xi

people worldwide as visually impaired.[3] In 2020, Caroline Ncube, Blake Reid and Desmond Oriakhogba estimated the global prevalence of disability at 15 per cent of the world's population.[4] In 2023, the WHO estimated 253 million people globally as visually impaired, 36 million of them blind and 217 million with severely impaired vision.[5]

More than 90 per cent of visually impaired persons ('VIPs') live in developing countries.[6] Africa's total population forms only about 12 per cent of the world's population. Yet Africa hosts 20 per cent of all VIPs.[7] This means that, statistically, many of the VIPs live in Africa.

Vision loss is high in southern sub-Saharan Africa,[8] and so too in South Africa.[9] Thirty-two per cent of people with disabilities in South Africa experience visual impairment, which outnumbers other forms, and up to 5 per cent of South Africa's population

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<https://iris.who.int/bitstream/handle/10665/44575/9789240685215_eng.pdf?sequence=1> accessed 27 February 2025.

3 World Health Organization, 'Blindness and Vision Impairment' (10 August 2023) <https://www.who.int/en/news-room/fact-sheets/detail/blindness-and-visual-impairment> accessed 27 February 2025.

4 Caroline B Ncube, Blake E Reid and Desmond O Oriakhogba, 'Beyond the Marrakesh VIP Treaty: Typology of Copyright Access-Enabling Provisions for Persons with Disabilities' (2020) 23 (3-4) The Journal of World Intellectual Property 149–165, 150.

5 World Health Organization, 'Blindness and Vision Impairment.'

6 World Health Organization, 'Blindness and Vision Impairment.'

7 Emmanuel Kofi Addo and others, 'Prevalence and Associated Factors of Vision Loss in the South African National Health and Nutrition Examination Survey (SANHANES-1)' (2021) BMC Ophthalmology 21 1–15, 2.

8 Rupert A Bourne and others, 'Magnitude, Temporal Trends, and Projections of the Global Prevalence of Blindness and Distance and near Vision Impairment: A Systematic Review and Meta-Analysis' (2017) 5(9) The Lancet Global Health e888–e897. This article does not define the expression 'southern sub-Saharan Africa.' Figure 1: Population-based prevalence studies of blindness and vision impairment in the Global Vision Database appears on p e892. The legend below this figure reads: 'Volume of new studies by region and reporting by vision loss severity are presented with a comparison to those in the original systematic review. New studies were obtained from Afghanistan, Bhutan, Burundi, China, Egypt, Eritrea, Ethiopia, Ghana, Honduras, India, India, Iran, Jordan, Kenya, Laos, Libya, Madagascar, Moldova, Mozambique, Nepal, Nigeria, Norway, Panama, Saudi Arabia, South Africa, South Korea, Taiwan, Tanzania, Timor-Leste, Turkey, Uganda, Vietnam, and Zambia. Black bubbles indicate the number of studies.'

Of these named countries, Burundi, Egypt, Eritrea, Ethiopia, Ghana, Kenya, Madagascar, Mozambique, Nigeria, South Africa, Tanzania, Uganda and Zambia are on the mainland of Africa or, in the case of Madagascar, off the coast of Africa. It is submitted that the likeliest candidates for inclusion in the group of southern sub-Saharan Africa as discussed in the article by Bourne and others are thus Madagascar, Mozambique, South Africa, and Zambia.

9 Bourne and others, 'Magnitude, Temporal Trends, and Projections of the Global Prevalence of Blindness and Distance and near Vision Impairment: A Systematic Review and Meta-Analysis' (2017) Lancet Glob Health 5(9) 888-897.

experiences some form of visual impairment or other.[10] Ten million people in South Africa are aged between 15 and 24 years, and 20 per cent of them have vision difficulties.[11] The 2021 systematic review and meta-analysis concluded that almost 10 per cent of the South African population experiences vision loss.[12]

It is necessary to clarify the meaning and the use of the terms ‘vision impairment’, ‘vision loss’ as well as ‘blindness’ within the context of the thesis. Vision impairment is used in this study as an umbrella term to connote the various instances where people have challenges with their vision to the extent that it affects their ability to read contents particularly in print materials.[13] Though ‘vision loss’ is used in this study as a synonym to ‘vision impairment’, the former has a more limited scope when compared with the later. Comparatively, the term 'blindness', though may also be viewed as synonym to ‘loss of vision’, is used in this study to denote specific instances where reference is made to a complete or near-complete loss of sight which is a severe form of vision impairment.

Before 2014, VIPs throughout the world could access only 5 per cent of the books published in the world.[14] In 2010, of more than 129 million books published globally, fewer than 7 per cent were available in formats that VIPs could read.[15]

There is no specific statistics that are readily available in the public domain showing the exact number of copyrighted works in accessible format distributed between individuals in the developed and developing countries. However, research published in 2014

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10 See also Neli Kaunda and Sabelo Chizwina, ‘Providing Access to Students with Print Disabilities: The Case of the North-West University in South Africa’ (2019) 16(1) Journal of Access Services 6–20, 6.

11 Addo and others, ‘Prevalence and Associated Factors of Vision Loss’ 1. Also see Tanya Farber, ‘Almost Half a Million South African Youths Have Problems with Their Vision’ *Sunday Times* (16 June 2017) 16:14.

12 Addo and others, ‘Prevalence and Associated Factors of Vision Loss’ 13.

13 It means that ‘vision impairment’ connotes other forms of vision related challenges such as ‘vision loss’, ‘blindness’ and ‘low vision’ which refers to an instance where a person still has some usable sight, but still low to the extent that it limits him or her to perform some daily tasks without assistance.

14 Shae Fitzpatrick, ‘Setting Its Sights on the Marrakesh Treaty: The U.S. Role in Alleviating the Book Famine for Persons with Print Disabilities’ (2014) 37(1) Boston College International and Comparative Law Review 139–172, 140.

15 Paul Harpur and Nicolas Suzor, ‘Copyright Protections and Disability Rights: Turning the Page to a New International Paradigm’ (2013) 36(3) University of New South Wales Law Journal 745–778, 745.

concluded that, given about 300 million blind and VIPs in the world, only 7 per cent of all published books were accessible by VIPs in developed countries.[16] The predicament in developing countries was far worse. There, only about 1 per cent of published books became available in formats for VIPs to access.[17]

Such a lack of accessibility, particularly in sub-Saharan Africa, is dismaying. Over 880 000 VIPs[18] in South Africa, for example, can access only 0.5 per cent of the books.[19]

Print materials in alternative formats for VIPs are scant, so VIPs cannot acquire knowledge.[20] The effect on VIPs is drastic,[21] particularly in developing countries such as South Africa.[22] The Copyright Act, prior to the Constitutional Court decision in *Blind SA v Minister of Trade, Industry and Competition and Others*, did not contain appropriate

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16 For further information, see Kaya Köklü, 'The Marrakesh Treaty – Time to End the Book Famine for Visually Impaired Persons Worldwide' (2014) 45(7) IIC - International Review of Intellectual Property and Competition Law 737–739, 737.

17 See World Blind Union – Asia Pacific, 'WIPO Negotiations Treaty For Blind People' (19 December 2012) <https://wbuap.org/archives/516> accessed 27 February 2025; Janice T Pilch, 'Treaty for Improved Access for Blind, Visually Impaired and Other Reading Disabled Persons' (*Library Copyright Alliance*, 12 October 2009) Issue Brief 1–6, 2 <https://www.librarycopyrightalliance.org/wp-content/uploads/2009/10/brieftvifinalrev101509.pdf> accessed 27 February 2025; Francisco Javier Martínez Calvo, 'Technological Advances Benefiting Visually Impaired People' World Intellectual Property Organization Information Meeting on Digital Content for the Visually Impaired' Geneva, 3 November 2003, 1–5 <https://www.wipo.int/edocs/mdocs/mdocs/en/digvi_im_03/digvi_im_03_francisco_mart_nez_calvo.pdf> accessed 27 February 2025.

18 See UCT IP Unit, 'Briefing Paper: Marrakesh Treaty Implementation Guide South Africa' (University of Cape Town Intellectual Property Unit 2015) 2.

19 See also Mara Kardas-Nelson, 'The Rich Turn a Blind Eye to Poor Readers' (*The Mail & Guardian*, 28 March 2013) <https://mg.co.za/article/2013-03-28-00-the-rich-turn-a-blind-eye-to-poor-readers/> accessed 27 February 2025.

20 UCT IP Unit, 'Briefing Paper: Marrakesh Treaty Implementation Guide South Africa' 2.

21 Pilch, 'Treaty for Improved Access for Blind, Visually Impaired and Other Reading Disabled Persons' 2.

22 Dorothy Eneya, Bertha J Mostert and Dennis N Ocholla, 'University of Zululand Library and Inclusive Education: Responding to the Needs of Students with Disabilities' (2020) 38(1) Mousaion #6966 1–20, 6 <https://research.ebsco.com/c/3f6aej/viewer/pdf/cyrs7awabr?route=details> accessed 24 February 2025. See also Kaunda and Chizwina, 'Providing Access to Students with Print Disabilities: The Case of the North-West University in South Africa' 1; Charity Nyaboke Onsinyo, 'Challenges of Accessing Library and Information Services for Persons with Disabilities in University Libraries in Meru County, Kenya' (2018) 2(1) International Journal of Economics, Business and Management Research 429–440, 429; George Firmin Kavishe and Irene Shubi Isibika, 'Provision of Library Services for Users in Wheelchairs at Ardhi University and University of Dar Es Salaam Libraries' (2018) Library Philosophy and Practice (e-journal) 1672 1–11, 1 <https://digitalcommons.unl.edu/libphilprac/1672> accessed 27 February 2025.

copyright exceptions to address the specific challenges confronting VIPs and persons with other forms of disabilities in accessing and disseminating materials in alternative formats.

Evolving digital technologies create further problems for people with disabilities to access copyrighted materials.[23] The world is moving quickly towards online education and other forms of virtual communication.[24] This paradigm shift accelerated during the coronavirus (COVID-19) pandemic, which forced most learning and educational activities to take place online. People with disabilities also need different technologies to enhance their participation in the virtual world.[25]

Copyright lawyers need to develop a copyright exception framework that is inclusive. This creation must address the legal and technological constraints that hinder persons with disabilities from accessing works protected by copyright, particularly literary and artistic works to accommodate the nature and the scope of protection adopted in the international human rights law like the Convention on the Rights of Persons with Disabilities. Regarding the scope of beneficiaries, the Convention on the Rights of Persons with Disabilities considers disability by referring to physical, mental, intellectual or sensory impairments. The need for this creation provides the context for this study. Following the inclusive approach proposed by researchers such as Ncube, Reid and Oriakhogba,[26] this study focuses on people with different forms of disability that limit their ability to access

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23 Albert Olu Adetunji and Nosakhare Okuonghae, 'Challenges of Copyright Protection in the Digital Age: The Nigerian Perspective' (2022) Library Philosophy and Practice (e-journal) 7159 1–23, 1 <https://digitalcommons.unl.edu/libphilprac/7159> accessed 2 March 2025.

24 Aleksander Aristovnik and others, 'Impact of the COVID-19 Pandemic on Online Learning in Higher Education: A Bibliometric Analysis' (2023) 8 Frontiers in Education 1225834. 1–13, 1, 2 <https://www.frontiersin.org/journals/education/articles/10.3389/feduc.2023.1225834/full> accessed 2 March 2025.

25 Mirfa Manzoor and Vivian Vimarlund, 'Digital Technologies for Social Inclusion of Individuals with Disabilities' (2018) 8 Health and Technology 377–390, 377 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6208746/> accessed 2 March 2025.

26 Ncube, Reid and Oriakhogba, 'Beyond the Marrakesh VIP Treaty: Typology of Copyright Access-Enabling Provisions for Persons with Disabilities' 2, 6, and 14.

copyrighted materials. Since extensive legal frameworks have already been developed both internationally[27] and nationally,[28] the study also refers to the experiences of VIPs.

1.1.2 The access gap challenge

People with a disability require access to copyright-protected works in accessible formats for meaningful participation in educational, cultural, scientific, and socio-economic activities. As Caroline Ncube and Sanya Samtani argue, the wide use of the term 'access' in the United Nations Convention on the Rights of Persons with Disabilities ('CRPD')[29] as it refers to disable persons 'has been understood as a precondition to the full and equal participation of people with disabilities in society and the realisation of all their rights.'[30] Adapting or modifying copyrighted works is necessary to make copyrighted works accessible to persons with disabilities, and this improvement can only happen if the copyright law includes appropriate copyright exceptions and limitations.[31]

The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled,[32] when adopted by WIPO in June 2013, harmonised copyright exceptions for persons with visual disabilities.[33] Yet the specific copyright exceptions in the Treaty focus only on blind people and people with visual impairments and exclude people with other forms of disability. So the Marrakesh

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27 The legal framework that comes to mind is the one developed through the Marrakesh Treaty for the benefit of persons who are blind, visually impaired, or otherwise print disabled.

28 Various contracting parties to the Marrakesh Treaty have developed legal frameworks which are incorporated into their copyright law to remain consistent with the provisions of the Treaty.

29 For the electronic version of the CRPD, see United Nations Department of Economic and Social Affairs, 'Convention on the Rights of Persons with Disabilities (CRPD)' <https://social.desa.un.org/issues/disability/crpd/convention-on-the-rights-of-persons-with-disabilities-crpd> accessed 1 March 2025.

30 Caroline B Ncube and Sanya Samtani, 'Copyright, Disability Rights, and the Constitution: *Blind SA v Minister for Trade, Industry and Competition*' (2023) 13(1) Constitutional Court Review 471–503, 492.

31 Ncube, Reid and Oriakhogba, 'Beyond the Marrakesh VIP Treaty: Typology of Copyright Access-Enabling Provisions for Persons with Disabilities' 2.

32 For the Marrakesh Treaty, see 'WIPO Lex, Treaties, Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled' 27 June 2013 (*WIPO.Int*, 2025) <https://www.wipo.int/wipolex/en/treaties/textdetails/13169> accessed 27 February 2025.

33 Neil Yap, 'Fitting Marrakesh into a Consequentialist Copyright Framework' (2017) 6(2) New York University Journal of Intellectual Property & Entertainment Law 351–384, 353; Harpur and Suzor, 'Copyright Protections and Disability Rights: Turning the Page to a New International Paradigm' 746.

Treaty did not align international copyright law with the CRPD objective to promote the interests of persons with disabilities.[34] The Marrakesh Treaty copyright exceptions are also highly restrictive in not accommodating different kinds of disabilities and works other than print materials.[35] Further limitations narrow the Treaty framework even more. These restrictions govern the national copyright exceptions that the member states of the Marrakesh Treaty adopt in their national copyright law. These national copyright exceptions must meet the three-step test.

Member states under the Treaty must meet their obligations in two aspects. The first is the copyright limitation for blind people and those with other forms of visual impairment.[36] The second is the cross-border exchange of accessible copies to benefit blind people and those with other forms of visual impairment.[37] In *Blind SA v Minister of Trade and Industry and Competition & Others* ('*Blind SA CC*'),[38] the Constitutional Court of South Africa[39] allowed temporary relief in dealing with copyright exceptions for people with visual impairments. However, in addition to other limitations found in *Blind SA CC*, the Constitutional Court's decision does not cover the obligations regarding the cross-border exchange of accessible copies.

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34 Ncube, Reid and Oriakhogba, 'Beyond the Marrakesh VIP Treaty: Typology of Copyright Access-Enabling Provisions for Persons with Disabilities' 2.

35 This is one of the shortcomings of the Marrakesh Treaty. The WIPO Standing Committee on Copyright and Related Rights ('SCCR') focuses on this shortcoming and indicates the need to adopt an inclusive use of beneficiary that extends to persons with various kinds of disabilities. For further information about the SCCR, see WIPO, 'Standing Committee on Copyright and Related Rights (SCCR)' (*SCCR*, 2024) <https://www.wipo.int/en/web/sccr/#> accessed 27 February 2025.

36 Marrakesh Treaty, Arts 4(1) and 4(2).

37 The Marrakesh Treaty has expressly provided that signatories to the Treaty should allow the exportation of copyrighted works in accessible formats in order to realise the needs of its beneficiaries. See the Marrakesh Treaty, Art 5(1). In addition, the Marrakesh Treaty requires member states to permit importation of works in accessible versions for VIPs' benefit. See the Marrakesh Treaty, Art 6.

38 *Blind SA v Minister of Trade, Industry and Competition & Others* (CCT 320/21) [2022] ZACC 33 (21 September 2022), 2023 (2) BCLR 117 (CC), 2022 BIP 518 (CC). This abbreviation *Blind SA CC* distinguishes this Constitutional Court decision from the decision of the High Court of South Africa, Gauteng Division, Pretoria, in *Blind SA v Ministry of Trade, Industry and Competition & Others* (14996/21) [2021] ZAGPPHC 871 (7 December 2021), 2021 BIP 14 (GP). That High Court decision has its own abbreviation, '*Blind SA GP*,' in this thesis.

39 For the court website, see Constitutional Court of South Africa, 'Home' (*Concourt.org.za*, 2024) <https://www.concourt.org.za/> accessed 3 March 2025.

1.1.3 Why adopt an inclusive copyright exception for persons with disabilities?

Developing appropriate copyright exceptions for persons with disabilities carries socio-economic relevance. People with disabilities, particularly in developing countries, lack reasonable access[40] to copyright-protected works. This lack deprives them of their rights to meaningful participation in educational and cultural activities, as enshrined in the United Nations Universal Declaration of Human Rights (UDHR).[41] The deficiency severely disadvantages them in competing with the rest of humanity.

The lack of access to copyright-protected works, both print materials and those in virtual formats, led to an information crisis among persons with disabilities who are excluded from accessing most published works, especially in developing countries.[42] These seekers of access to copyrighted works for study, work, and general knowledge, among other purposes, often confront serious challenges in obtaining access.[43] Many individuals with print disabilities, particularly in developing countries, cannot enjoy 'access to educational materials, literature, entertainment, and the free flow of ideas that constitute full participation in society.'[44]

Limiting access to valuable information and 'the world's resources of written knowledge'[45] among persons with disabilities reduces their opportunities of actively participating in society and prevents them from achieving their full potential. Hence, there is a need for

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40 Sean Williams, 'Closing in on the Light at WIPO: Movement Towards a Copyright Treaty for Visually Impaired Persons and Intellectual Property Movements' (2012) 33(4) University of Pennsylvania Journal of International Law 1035–1074, 1036.

41 See the UDHR, Art 27(1). See also Williams, 'Closing in on the Light at WIPO: Movement Towards a Copyright Treaty for Visually Impaired Persons and Intellectual Property Movements' 1037–1038. The UDHR was adopted by the United Nations General Assembly on 10 December 1948. For the UDHR, see United Nations, 'Universal Declaration of Human Rights' (*United Nations*, 2023) <https://www.un.org/en/about-us/universal-declaration-of-human-rights> accessed 3 March 2025.

42 For more information, see Gunjan Chawla Arora, 'The Marrakesh Miracle: Affirming the Right to Read for the Blind and Visually Impaired Persons' (2016) 1(1) Amity Law School Gwalior Journal on IPR 1 (ISSN No. 9789384312572) <https://ssrn.com/abstract=3254860> accessed 1 March 2025.

43 Harpur and Suzor, 'Copyright Protections and Disability Rights: Turning the Page to a New International Paradigm' 751.

44 Margot E Kaminski and Shlomit Yanisky-Ravid, 'The Marrakesh Treaty for Visually Impaired Persons: Why a Treaty Was Preferable to Soft Law' (2014) 75(3) University of Pittsburgh Law Review 255–300, 260.

45 Harpur and Suzor, 'Copyright Protections and Disability Rights: Turning the Page to a New International Paradigm' 748.

greater socio-economic and cultural inclusion by promoting the rights of persons with a disability to access copyrighted works in accessible formats.[46]

The preamble to the Marrakesh Treaty declares its aim to build on the existing international legal frameworks that advocate human rights for all by promoting

> the principle of non-discrimination, equal opportunity, accessibility and full and effective participation and inclusion in society, proclaimed in the Universal Declaration of Human Rights and the United Nations Convention on the Rights of Persons with Disabilities.[47]

In reality, though, the Marrakesh Treaty focuses only on how to address the social and legal challenges that prohibit blind people and persons with other forms of visual impairment from enjoying an inclusive right to access.[48] The authors of the Treaty failed to align the Treaty with the CRPD objective that prohibited any act that 'constitutes unreasonable or discriminatory barriers to access by persons with disabilities.'[49] The protection of people experiencing other forms of disabilities, other than the ones pronounced by the Marrakesh Treaty, is captured in the international human right legal framework particularly CRPD. This sets the CRPD and other international human rights treaties and conventions apart from the Marrakesh Treaty that offers a narrow protection within the context of the objectives that underpin the Treaty.

Therefore, the objective of this thesis transcends the Marrakesh Treaty and aims to achieve a set of more inclusive copyright exceptions that protect and promote the interests of persons with disabilities, though not to the detriment of copyright owners, and,

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46 See Nicholas Garnett, *Automated Rights Management Systems and Copyright Limitations and Exceptions* (World Intellectual Property Organization, Document Code SCCR/14/5, 2006) 33.

47 See WIPO, Marrakesh Treaty to Facilitate Access to Published Works by Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, 27 June 2013, preamble ('Marrakesh Treaty'). See also Jingyi Li and Niloufer Selvadurai, 'Reconciling the Enforcement of Copyright with the Upholding of Human Rights: A Consideration of the Marrakesh Treaty to Facilitate Access to Published Works for the Blind, Visually Impaired and Print Disabled' (2014) 36(10) European Intellectual Property Review 653–664, 653; and Graeme W Austin, 'Authors' Human Rights and Copyright Policy' (2017) 40(4) Columbia Journal of Law & the Arts 405–430, 411.

48 See Hope Lewis, 'Introductory Note to Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled' (2013) 52(6) International Legal Materials 1309–1320,1309.

49 CRPD, Art 30(3).

therefore, it is also necessary to factor in the requirements of the three-step test. The above discussions should take place within the legal framework of South Africa.

The Constitutional Court's decision in *Blind SA CC* forms the basis for analysing the impact of copyright law on the rights of persons with disabilities, particularly in South Africa. In discussing this impact, this thesis thoroughly examines the provisions of copyright exceptions, especially in the context of the Marrakesh Treaty.[50] The thesis also examines the provisions of the three-step test as contained, particularly, in the Berne Convention for the Protection of Literary and Artistic Works (1886),[51] the World Intellectual Property Organization Copyright Treaty (1996) ('WIPO Copyright Treaty'),[52] and the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (1995) ('TRIPS Agreement').[53] Since the thesis goes beyond the provisions of the Marrakesh Treaty, it is necessary to review the extent of protection accorded persons with disabilities under the international human rights legal framework.

In its landmark ruling in *Blind SA CC*, the Constitutional Court declared the provisions of sections 6 and 7, read with section 23 of the Copyright Act,[54] unconstitutional to the extent that these provisions limit the access of persons with print disabilities to copies of published literary works in accessible formats.[55] These sections[56] were considered unconstitutional, invalid, and inconsistent with the rights of VIPs as contained in sections 9(3), 10, 16(1)(b), 29(1), and 30 of the Constitution of the Republic of South

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50 The Marrakesh Treaty was adopted on 27 June 2013 and entered into force on 30 September 2016.

51 See WIPO, 'Berne Convention for the Protection of Literary and Artistic Works' (*WIPO.INT*, 2025) <https://www.wipo.int/treaties/en/ip/berne/> accessed 3 March 2025. The Berne Convention was signed on 9 September 1886 and entered into force on 5 December 1887.

52 See WIPO, 'WIPO Copyright Treaty (WCT)' (*WIPO.Int*, 2025) <https://www.wipo.int/treaties/en/ip/wct/> accessed 1 March 2025; this international treaty on copyright law was adopted by the member states of the World Intellectual Property Organization (WIPO) on 20 December 1996.

53 Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 United Nations Treaty Series 299, 33 International Legal Materials 1197 (1994). The TRIPS Agreement is also available at World Trade Organization, 'Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)' <https://www.wipo.int/wipolex/en/text/305736> accessed 3 March 2025.

54 Act 98 of 1978 (Copyright Act).

55 *Blind SA CC* [112].

56 The sections mentioned are ss 6, 7, and 23 of the Copyright Act.

Africa, 1996 ('the Constitution').[57] The court held that the authorisation requirement contained in the Copyright Act infringes VIPs' constitutional rights.[58]

Though the Constitutional Court decision in *Blind SA CC* forms one of the pillars of this study, it has some limitations as the court focused on Bill 13B-2017 which has been replaced by Bill 13F-2017. Whilst the different aspects of this leading case undergo a detailed analysis to determine the gaps in the proposed Copyright Amendment Bill ('CAB') [13B-2017],[59] this thesis does not limit itself to the provisions of Bill 13B-2017. Rather it examines the extent that the updated provisions of sections 19D, as incorporated in Bill 13F-2017, has addressed some of the issues raised in the case of *Blind SA CC*. The thesis then identifies any other gaps in Bill 13F-2017 and how to improve its provisions to align the Copyright Act with the Constitution, the Marrakesh Treaty, and the relevant international human rights treaties.

Though the Constitutional Court in *Blind SA CC* dealt with Bill 13B-2017, the focus of this study is on Bill 13F-2017 while making reference to the former only as it relates to the case of *Blind SA CC*. Except for few provisions that were incorporated in Bill 13F-2017, the contents of the two bills are the same. For example, the use of the term 'authorized entity' and the definition of 'authorized entity' which were omitted in Bill 13B-2017, are now incorporated in Bill 13F-2017 as contained in section 19D(4)(b) and section 1(c) respectively.

While the study focuses on Bill 13F-2017 in drawing the necessary conclusions to achieve the aim of the thesis, the use of Copyright Amendment Bill (CAB) in this study could refer to either Bill 13B-2017 or Bill 13F-2017 depending on the context that it is being used. For example, the study briefly makes reference to processes that took place prior to the

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57 Constitution of the Republic of South Africa, 1996 ('Constitution'); *Blind SA CC* [112].

58 *Blind SA CC* [74].

59 This refers particularly to s 19D of the Copyright Amendment Bill [B 13B–2017] ('CAB'). For the text of the CAB, see Minister of Trade and Industry, 'Copyright Amendment Bill [B 13B–2017]' <https://www.gov.za/sites/default/files/gcis_document/201811/copyright-amendment-bill-b13b-2017.pdf> accessed 1 March 2025. This study shall focus on Bill 13F-2017 and only make reference to Bill 13B-2017 in relation to the Constitutional Court decision in the case of *Blind SA*.

introduction of Bill 13F-2017 in which case the provisions of Bill 13B-2017 becomes applicable. In the same vein, the use of the word 'bill' within the context of the amendment of South African Copyright Act may refer to either Bill 13B-2017 or Bill 13F-2017, depending on the context and circumstance. Strictly, the provisions of Bill 13B-2017 are considered in relation to the case of *Blind SA CC.*

Notwithstanding that the introduction of Bill 13F-2017 has addressed some of the gaps found in Bill 13B-2017, the former is still lacking in some aspects that make the bill incomplete in protecting and advancing the interest of persons with disabilities.

At this juncture it is useful to note that the thesis deals with the law as it applied on 30 April 2025. Afterwards, in *Blind SA v President of the Republic of South Africa and Others* [2025] ZACC 9, the Constitutional Court ordered that s 19D of the 13F-2017 version of the CAB be read into the Copyright Act. Although the said judgment falls outside the scope of this thesis and the reasoning of the Constitutional Court on the reading in of Bill 13F-2017 are therefore not considered, this note about the second Blind SA CC decision was added for clarity when the thesis was finalised.

1.2 Thesis statement

The thesis statement reads: 'In compliance with the provisions of the Constitution,[60] international human rights instruments,[61] the Marrakesh Treaty, and the three-step test, and while considering the evolving digital technologies, the South African copyright law should incorporate copyright exceptions and a limitations framework that is inclusive, and promote the rights of people with disabilities, particularly their right to copyright works in accessible formats.'

This thesis examines four key aspects of the thesis statement:

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60 This phrase 'the Constitution' refers to the Constitution of the Republic of South Africa, 1996.

61 The main focus is on the CRPD. However, the thesis also mentions the relevant provisions of other international legal instruments such as the UDHR, the ICESCR, and the CRC.

(a) a jurisprudential framework that shows the impact of copyright on human rights and how this is addressed.
(b) issues that arise from the copyright exception framework incorporated in the Marrakesh Treaty that focuses only on persons with visual impairments and excludes people experiencing other forms of disability;
(c) the peremptory statement in the preamble to the Marrakesh Treaty that all copyright exceptions contained in the national copyright laws of member states must be consistent with the provisions of the three-step test, which creates a narrow approach;
(d) the Constitutional Court decision in *Blind SA CC* that identified challenges and defects that the Parliament of South Africa ('Parliament')[62] needs to cure by amending the copyright law.[63]
(e) the concept of disability and the nature of copyright works that should be incorporated within the scope of the Marrakesh Treaty, with regard to the beneficiary and work, is narrow in comparison with other international treaties and conventions like Convention on the Rights of Persons with Disabilities.[64]
(f) a comparative study between South Africa, Australia and India is conducted with the aim of South Africa drawing some lessons from the two jurisdictions.

62 For the Parliament website, see Parliament of South Africa, 'Parliament of the Republic of South Africa' (*Parliament.gov.za*, 2024) <https://www.parliament.gov.za/> accessed 3 March 2025.
63 This is formally referred to as the Copyright Amendment Bill [B 13B–2017].
64 The Convention on the Rights of Persons with Disabilities defines disability as physical, mental, intellectual or sensory impairments. Article 2 of the Berne Convention considered the reproduction of work to include the literary, scientific and artistic. While the Marrakesh Treaty refers to printed works, with the intention to solve the issue of "book famine", the Convention on the Rights of Persons with Disabilities is aimed at the realization of the full enjoyment of all human rights and fundamental freedoms by persons with disabilities. This makes the scope of the Convention on the Rights of Persons with Disabilities, in relation to protection, much broader than the one under the Marrakesh Treaty.

1.3 Research questions

Considering the Constitutional Court's decision in *Blind SA CC*,[65] as well as the proposed CAB,[66] this thesis focuses, in no particular order of preference,[67] on addressing the following questions:

1. Which copyright exceptions should Parliament implement to promote easy access to copyrighted works for disabled persons in the digital era; what are the possible limitations and gaps identified in the Marrakesh Treaty and how does South Africa deal with them?
2. Is the methodology of the constitutional analysis in *Blind SA CC* like or unlike that adopted by both the High Court and the Constitutional Court in the case of *Laugh It Off*?[68] If the methodology is different, how is it different, why did the Constitutional Court in *Blind SA CC* adopt a different approach, and what are the implications of such an approach for future cases?
3. How is the scope of the exception "read in" by the Constitutional Court in *Blind SA CC* more limited than the exception "read in "by the High Court in *Blind SA GP* and to what extent did the courts consider the property rights of copyright owners?
4. What lessons can South Africa learn from other jurisdictions like Australia and India in addressing the issue of copyright exceptions for persons with disabilities in order to improve access to copyrighted works in accessible formats?
5. What are the fundamental rights of VIPs and other persons with disabilities that are affected by the copyright paradigm in South Africa; to what extent does the Constitutional Court order in *Blind SA CC* remedy the situation and how does it affect South Africa's readiness to ratify the Marrakesh Treaty?
6. To what extent does the South African Copyright Act, with particular reference to the CAB,[69] comply with the Constitution and international instruments on human

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65 *Blind SA CC* [33].

66 This refers to the CAB, with particular reference to its s 19D.

67 Yet readers should note that this thesis gives some of the questions more attention than others and answers some questions in relation to others.

68 See *South African Breweries International (Finance) BV trading as Sabmark International v Laugh It Off Promotions* (3271/2002) [2003] ZAWCHC 100 (16 April 2003), 2003 BIP 83 (C), [2003] 2 All SA 454 (C) and *Laugh It Off Promotions CC v SA Breweries International (Finance) BV t/a Sabmark International & Another* (CCT42/04) [2005] ZACC 7 (27 May 2005), 2006 (1) SA 144 (CC).

69 Bill 13F-2017.

rights as well as other international legal documents, particularly the three-step test, the Marrakesh Treaty, and technological protection measures ('TPMs') on the one hand; and to what extent do the legal and policy recommendations considered in the thesis addressed the copyright issues on the other?

1.4 Research objective

The objective of this study is to examine, in the light of international copyright law with an emphasis on the Marrakesh Treaty and the relevant international human rights law, particularly the CRPD, the possible limitations and gaps remaining in the South African copyright law after the Constitutional Court decision in *Blind SA CC* and the incorporation of section 19D of CAB[70] into the Copyright Act, whether by the legislature or the Constitutional Court. Though the thesis maps South Africa to the Marrakesh Treaty, it exceeds the standards set in the Treaty by also aligning the South African copyright law to the provisions of the CRPD.

The study also considers the extent to which the paradigm shifts[71] in the South African copyright system have served the interests of persons with disabilities in promoting their right to education as well as other related rights such as the right to freedom of expression and the right of access to information and cultural materials in line with the provisions of the Constitution and the provisions of the appropriate international human rights law.

The study further considers the copyright exceptions that the Parliament should implement to promote easy access to copyrighted works for disabled persons in the digital era as well as the possible limitations and gaps identified in the Marrakesh Treaty and the possible ways South Africa can deal with them. It also examines the extent to which the legal and policy recommendations considered in the thesis can address issues that relate to copyright exceptions that are not covered in the CAB, Bill 13F-2017.

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70 Refer to Bill 13F-2017.

71 The new paradigm in a copyright system in South Africa was ushered in by the milestone decision by the High Court of South Africa, Gauteng Division, Pretoria, in *Blind SA GP*. This High Court decision led to unprecedented reform in South African copyright law.

The study then determines to what extent the evolution of digital technologies affects the ability of persons with disabilities to access copyrighted materials and the possible measures that could be implemented to address these challenges. Online education and other forms of virtual communication have accelerated in response to the effects of the severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) that causes COVID-19.[72] As these educational possibilities have become daily occurrences, persons with disabilities also need access to copyrighted materials through technological methods.

The study further determines the extent to which the copyright perspective in South Africa differs from the corresponding perspectives in other jurisdictions, particularly India and Australia, and the lessons that South Africans could learn from the experiences in those foreign jurisdictions.

1.5 Research in context

Adopting the Marrakesh Treaty led to the harmonisation of the copyright exceptions for VIPs and persons with other forms of visual disabilities. Yet the paradigm shifts in copyright law, through the adoption and implementation of this Treaty, extended only to people with visual impairments. These shifts excluded people with other forms of disability, such as people with hearing impairments and those with dyslexia.[73] Although the adoption of the Marrakesh Treaty opened doors for new perspectives in the copyright system, it still has some serious shortcomings that also feature in this study.

Before the Marrakesh Treaty was adopted, many developed countries such as the United States of America ('USA'), Australia, the United Kingdom ('UK'), and Canada had striven to advance the interests of persons with disabilities by promoting their right of access to copyrighted works. For example, Australia applied well-established copyright exceptions

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72 For discussion of these viruses, see Ben Hu and others, 'Characteristics of SARS-CoV-2 and COVID-19' (2021) 19 Nature Reviews Microbiology 141–154.

73 There are persons, other than those with visual impairments, with various forms of disabilities who have challenges accessing copyright works. For these persons to gain access to copyright works, those works must be adapted into various formats that should suit the needs of these disabled persons.

and limitations to protect and promote the rights of persons with disabilities, including their right to use copyrighted materials in accessible formats.[74]

South Africa is one of the countries that has neither ratified the Marrakesh Treaty nor amended its copyright law to satisfy the Treaty obligations. When this Treaty was adopted, South Africa already lagged behind because the Copyright Act did not provide a copyright exception for persons with disabilities. However, the Constitutional Court's decision in *Blind SA CC* has transformed the paradigm of copyright exceptions in South Africa by confirming that sections 6 and 7, read with section 23 of the Copyright Act, are unconstitutional, invalid, and inconsistent with the rights of blind people and persons with other forms of print disabilities.[75]

The Constitutional Court clearly justified the urgency to implement the legal provisions that would support the access of copyrighted works among VIPs. This justification makes the decision in *Blind SA CC* significant as it addressed the challenges confronting a group that forms part of the larger group of people with disabilities, creating the possibility of extending similar practice to other disabled persons who experience problems accessing copyright works.

The Constitutional Court maintained that Parliament is ultimately responsible for curing the constitutional defect which the court identified.[76] Therefore, one of the main issues in this thesis is to determine the nature and extent of the defects that Parliament must cure by amending the Copyright Act. The thesis proposes various aspects that Parliament should consider in this task to address most of the challenges facing persons with disabilities in obtaining copies of works in accessible formats. Parliament must also align

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74 See further Dilan Thampapillai, 'The Emergence of an Access Right in Australian Copyright Law' (Working Paper (Unpublished), Commercial & Property Law Research Centre, Faculty of Law, Queensland University of Technology (QUT) 2007) 1–22 <https://eprints.qut.edu.au/10854/1/10854.pdf> accessed 1 March 2025.

75 *Blind SA CC* [112].

76 *Blind SA CC* [102].

the Copyright Act with the Marrakesh Treaty and other relevant international laws that this study considers.

1.6 The significance of the thesis

In line with the Constitution, equal rights to education and information in accessible formats have long been part of the objectives of the 'development agenda'[77] and more specifically South African National Development Plan (NDP).[78] Various international treaties also played a major role in achieving this objective.[79] In the same vein, this thesis demonstrates the need to address the challenges facing persons with disabilities in accessing copyright-protected works to close the access gap between people with disabilities and people without disabilities.

The thesis does not narrow its focus to the compliance of the South African copyright law to the provisions of the Marrakesh Treaty. It takes a holistic approach by examining the relevant provisions of the CAB [13F-2017] and determine the extent they comply with the applicable provisions of the three-step test, the Constitution and the different international laws and treaties. The recommendations of this study are in line with the provisions of section 19D of Bill 13F-2017 to cover all the instances where the rights of persons with

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77 WIPO's Development Agenda was officially adopted in 2007 (see WIPO, 'Overview of the Development Agenda' <https://www.wipo.int/ip-development/en/agenda/overview.html> accessed 1 March 2025).

78 For more information on NDP, see DO Oriakhobga and L Ndlovu, 'Copyright, access to knowledge and SDG 4 in Southern Africa' in B Amani, C Ncube and others (eds) *Elgar Companion to Intellectual Property and the Sustainable Development Goals* (Edward Elgar, 2024).

79 The international treaties in question include the United Nations Universal Declaration of Human Rights (UDHR); the International Covenant on Economic, Social and Cultural Rights ('ICESCR'); the United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities ('SREOPD'); the Convention on the Rights of the Child ('CRC'); and the Convention on the Rights of Persons with Disabilities ('CRPD'). See also United Nations, 'International Covenant on Economic, Social and Cultural Rights' (*OHCHR*, 2025) <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights> accessed 3 March 2025; United Nations, 'Standard Rules on the Equalization of Opportunities for Persons with Disabilities' (*OHCHR*, 2025) <https://www.ohchr.org/en/instruments-mechanisms/instruments/standard-rules-equalization-opportunities-persons-disabilities> accessed 3 March 2025; United Nations, 'Convention on the Rights of the Child' (*OHCHR*, 2025) <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child> accessed 3 March 2025; United Nations, 'Convention on the Rights of Persons with Disabilities' (*OHCHR*, 2025) <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-persons-disabilities> accessed 3 March 2025.

other forms of disabilities have been affected. This will avert any future litigations against the Parliament by any group in favour of persons with disability for further amendment of the Copyright Act.

This thesis also considers the impact of digital technologies that are ever evolving, on the realisation of the objectives which the drafters of the Copyright Act as amended wanted to achieve. The recommendations in the thesis therefore considers the necessary provisions that should address the challenges confronting copyright system as they relate to access to copyright works in applicable formats.

It is crucial to determine the extent to which the South African copyright law and policies satisfy the Constitution and international treaties on human rights, such as the CRPD, and international treaties on copyright-related issues, such as the Berne Convention, the TRIPS Agreement, and, more recently, the Marrakesh Treaty.[80]

This thesis considers the factual and legal developments in the Constitutional Court's decision in *Blind SA CC* and the various defects the court identified that the applicant in that case did not canvass. The thesis then highlights the possible disability-related limitations and gaps in the Copyright Act that the proposed CAB, Bill 13F-2017[81] must cure.

Turning briefly to the Marrakesh Treaty, by creating the mandatory exceptions to the exclusive rights of copyright owners that makes creation and distribution of accessible format copies possible, the Treaty has transformed the copyright paradigm for the benefit of persons with disabilities, particularly the VIPs. This thesis identifies some fundamental limitations of the Marrakesh Treaty, and it proposes frameworks both inclusive and dynamic in addressing the challenges for persons with disabilities in accessing copyright-protected works in the digital era.

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80 The Berne Convention and the TRIPS Agreement are discussed with reference to the three-step test, while the provisions of the Marrakesh Treaty are discussed in detail as one of the essential elements of this study.

81 [B 13F—2017].

A brief overview of the intersectional epistemology of human rights, which is discussed in detail in chapter 2, is relevant at this stage. A new paradigm that focuses on the principle of intersectionality has transformed the human rights discourse. Though it may appear complex, it takes a comprehensive approach in addressing human rights related issues. It offers a lasting solution in addressing the challenges confronting the individuals whose rights are infringed. It also assists in the articulation of the multiple and intersecting forms of actions that have negative impact on the lives of the affected individuals. The theory of intersectionality rejects any approach to human rights discourse that fails to focus on how to remedy the complex and intersectional violations as well as the infringement of the rights of identifiable victims such as disabled persons whose rights to access to information, among others, are infringed.

With reference to developing countries, the thesis makes some recommendations necessary for promoting and protecting the right of access to information in adapted formats for persons with disabilities. These suggestions also improve other rights including the right to education as well as other related rights such as the right to freedom of expression and the right to cultural materials. directly or indirectly,[82] and further recommend how copyright law can advance the learning experiences of persons with disabilities, especially those in developing countries, within the digital environment. Although these recommendations focus on South Africa, they could also help other countries that have the same or similar experiences and could even support future research in other developing countries.

1.7 Methodology and approach

This paragraph of the introductory chapter analyses the method and approach followed in this thesis. So the discussion moves to the applicable literature review and legal comparison of the various jurisdictions that this thesis investigates.

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[82] Examples are the right to education, the right to culture and participation in cultural activities of one's choice, and the right to expression. Ultimately, the rights to equality and human dignity for all will be achieved.

1.7.1 Literature review

The thesis generally adopts a desktop analysis of journal articles, periodicals, copyright legislation of the relevant countries, law books, court cases (particularly the *Blind SA* case in the High Court and the Constitutional Court), policy documents in the area of copyright law and academic writings in the identified jurisdictions, relevant international laws and policies, as well as appropriate sources from the internet. The thesis considers the copyright laws and policies of the three identified countries[83] to analyse how far they have addressed the challenges confronting VIPs and persons with other disabilities in accessing the relevant information that advances their socio-economic development.

The thesis also follows a comparative approach, although comparing the copyright laws of various jurisdictions does not form the central element of the thesis. The reasons for choosing South Africa, Australia, and India as comparative jurisdictions appear in the following paragraph of this introductory chapter. Analysing the copyright laws, policies, legal writings as well as other statutes in these jurisdictions that affect the rights of persons with disabilities enables a considered determination of the objectives attainable in those jurisdictions.

1.7.2 Legal comparison

The Australian and Indian laws offer an attractive legal comparison with the South African law. Australia's copyright law and policies have advanced the interests of VIPs and persons with other forms of disability. Australia enjoys one of the most progressive copyright systems in the world, having tried hard to revise its copyright laws and policies for the benefit of persons with disabilities. Several policy reviews materialised, and some amendments to the Copyright Act 1968 followed.[84] Significantly, since the Australia-USA Free Trade Agreement ('AUSFTA') was signed in 2004,[85] Australia has consistently

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83 This reference to the identified countries denotes Australia, India, and, ultimately, South Africa.

84 Thampapillai, 'The Emergence of an Access Right in Australian Copyright Law' 1.

85 The AUSFTA was signed on 18 May 2004 in Washington DC, USA, and came into effect on 1 January 2005 in both countries (US Free Trade Agreement Implementation Act 2004 (Australia); United States-Australia Free Trade Agreement Implementation Act Pub. L. 108–286 (USA)).

revised its copyright laws to accommodate the interests of VIPs and persons with other print disabilities.[86]

Having ratified the Marrakesh Treaty and amended the Copyright Act 1968, Australia has altered its copyright exceptions to promote inclusive accessibility of copyrighted materials which is consistent with the approach adopted in this thesis. Australia provides lessons on how to address the issue of excluding VIPs and persons with other visual impairments in the learning environment. In line with the shift in the Australian copyright paradigm, the thesis is not limited to access for persons with visual impairments to education. Instead, the thesis extends to persons with other forms of disability and considers access to other reading materials that are not purely for educational purposes. The thesis also deals with other rights of persons with disabilities that are affected by the lack of or limited access to materials in adapted formats.

The choice of India is unique for various reasons. Not only are South Africa and India developing countries, but they also enjoy a special international relationship as co-members of the BRICS nations.[87] South Africa may learn much from Indian experiences in addressing the challenges facing VIPs and persons with other forms of disability in accessing copyrighted materials in learning environments.

Among the developing countries, India excels in having produced some of the most advanced and progressive jurisprudence in copyright law. There are many court decisions that deal with copyright related issues in India.[88] Many of these cases are considered in

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86 Thampapillai, 'The Emergence of an Access Right in Australian Copyright Law' 1. A case in point is *De Garis v Neville Jeffress Pidler Pty Ltd* [1990] FCA 352 (13 September 1990), (1990) 37 FCR 99, (1990) 18 IPR 292.

87 The British economist Jim O'Neill grouped Brazil, Russia, India, and China as BRIC in 2001. South Africa joined in 2010, and the group became known as BRICS. Egypt, Ethiopia, Iran, and United Arab Emirates joined in 2024, and Indonesia in 2025. The acronym 'BRICS,' denoting Brazil, Russia, India, China, and South Africa, continues in use. See thegeoeconomics.com, 'Timeline: How Has BRICS Evolved Over the Years?' (*COGGS - Center of Geoeconomics for the Global South*, 21 October 2024) <https://thegeoeconomics.com/timeline-how-has-brics-evolved-over-the-years/> accessed 1 March 2025; BRICS, 'BRICS Portal' <http://infobrics.org> accessed 1 March 2025.

88 Some of the important court decisions in the area of copyright include the following. In the UK, there are (in chronological order) *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 60 and *Hubbard v Vosper* [1972] EWCA Civ 9 (16 February 1972); [1972] 2 QB 84. In India, there

chapter six. In this way, India constantly strives to ensure the consistency of its copyright law with international law in general and copyright treaties in particular.

India demonstrated its seriousness in addressing the issue of book famine confronting blind people and other persons who experience visual impairment by ratifying the Marrakesh Treaty soon after it was signed into law. India was the first country to ratify this Treaty.[89] This prompt ratification reflects India's commitment to addressing the challenges confronting VIPs and persons with other disabilities in accessing copyrighted materials. India was one of the first countries to adopt the Treaty into law on the day it became effective.[90]

The recommendations for the protection of the rights of people with disabilities in South Africa reflect the experience in some of the developing countries like India. Many developing countries have not adopted the necessary copyright exceptions that are channeled towards promoting the level of human rights protection that would equip the disabled persons in participating actively in the mainstream education system and socio-economic activities. These recommendations are also shared in the experiences of many developing countries characterized by constant pressure from the proponents of equal rights advocacy on the governments to implement the rights-based legislation and policies.

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are (in alphabetical order) *Academy of General Education, Manipal v B Manini Mallya* AIR 2009 SUPREME COURT 1982, 2009 (39) PTC 393 (SC), (2009) 4 SCC 256 (Supreme Court of India); *Blackwood and Sons Ltd & Others v AN Parasuraman & Others* AIR 1959 Mad 410 (Madras High Court); *Civic Chandran v Ammini Amma* 1996 (16) PTC 670 (Kerala High Court); *ESPN Stars Sport v Global Broadcast News Ltd & Others* 2008 (36) PTC 492 (Delhi High Court); *RG Anand v M/S Delux Films* [1978] INSC 140 (18 August 1978), AIR 1978 SC 1613, 1979 (1) SCR 218 (Supreme Court of India); *Syndicate Press of University of Cambridge v Kasturi Lal & Sons* 2006 (32) PTC 487 (Delhi High Court); and *The Chancellor, Masters & Scholars of the University of Oxford & Others v Rameshwari Photocopy Services & Others* CS (OS) 2439/2012 (Delhi High Court).

89 India ratified the Marrakesh Treaty on 24 June 2014 (see WIPO, 'TREATY/MARRAKESH/1: [MARRAKESH Treaty] Ratification by the Republic of India' <https://www.wipo.int/wipolex/en/treaties/notifications/details/treaty_marrakesh_1> accessed 1 March 2025).

90 The Marrakesh Treaty became effective on 30 September 2016, and became enforceable in India on the same day (see WIPO, 'WIPO-Administered Treaties: Contracting Parties Marrakesh VIP Treaty' <https://www.wipo.int/wipolex/en/treaties/ShowResults?lang=en&treaty_id=843> accessed 3 March 2025).

1.8 Limitations and delineation of the study

This study has some limitations. First, it focuses on copyright exceptions and limitations with particular reference to people with disability. It does not discuss other aspects of copyright law that have no bearing on exceptions and limitations. Yet it does relate to exceptions for disabled persons to access all types of copyright work – not only literary works, or the copyright works consisting of books.

Secondly, the study deals with the rights of persons with disabilities in relation to access to copyright-protected works with the aim of advancing their educational, cultural, and socio-economic lives. At the same time, it often mentions persons with visual impairments, given the existing frameworks in international copyright documents, particularly the Marrakesh Treaty.

Thirdly, the study concentrates on the Marrakesh Treaty and also considers the CRPD aspects that deal with persons with disabilities in relation to specific rights such as rights to equality, education, access to information, and culture. The following treaties and conventions of the United Nations may not form the core legal documents for the study, but they are still considered where necessary: the Universal Declaration of Human Rights (UDHR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Standard Rules on the Equalization of Opportunities for Persons with Disabilities (SREOPD); and the Convention on the Rights of the Child (CRC).

Fourthly, the study deals with other WIPO documents, international treaties, and conventions only in relation to the three-step test and technological measures such as technological protection measures (TPMs). It does not discuss other aspects of international copyright law that fall outside the scope of the study.

Fifthly, the analysis of the Constitutional Court's decision in *Blind SA CC* is underpinned by the view that the court restricted itself to the claims and reliefs contained in the court application.

The study considers the Constitution of the Republic of South Africa, 1996 only in relation to individual rights such as the rights to equality, dignity, freedom of expression (which includes the freedom to receive or impart information or ideas), basic education, and participation in the cultural life of one's choice.

The study discusses the principles of fair use and fair dealing only in relation to access to copyrighted works for persons with disabilities in relation to the applicable copyright exceptions. The study does not explore fair use and fair dealing as independent concepts.

The *ubuntu* principle, which forms part of the recommendations in this thesis, is not considered in detail because of limited space.[91]

Lastly, the law is stated as it applied on 30 April 2025.

1.9 Structure of the thesis

Chapter One introduces the thesis topic, announces the thesis statement, lists the research questions, contextualises the research, describes the methodology and approach as well as the limitations, and summarises each chapter. It considers the background of the study and the relevant underpinning factors. The chapter also mentions

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[91] Mokgoro J described *ubuntu* in this way (*S v Makwanyane & Another* (CCT3/94) [1995] ZACC 3 (6 June 1995), 1995 (3) SA 391 (CC) [308]): 'Generally, *ubuntu* translates as "humaneness". In its most fundamental sense, it translates as personhood and "morality". Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation.' See also Bilchitz AJ in *Greater Tzaneen Municipality v Bravospan* (342/22) [2024] ZACC 20 (2 October 2024), 2025 (1) SA 557 (CC) [38]: 'The Constitution recognises that the common law we inherited included elements of significant value whilst also needing to be thoroughly decolonised and adapted to a modern, diverse and democratic African society. That process is an ongoing one and, where relevant, requires a deep interpenetration of constitutional norms into the common law. In transforming the common law, it is important to bear in mind the need to draw on values rooted in South Africa such as *ubuntu*. What emerges from this court's jurisprudence and philosophical writings is that *ubuntu* requires acting in ways that promote harmonious relationships and co-operation with others. That value is of importance not only in the context of public law, but also private law, though there remains much work to be done to develop its implications in the latter area.'

the access gap between persons with disabilities and those without disabilities, and, citing the Constitutional Court's decision in *Blind SA CC*, highlights South Africa's efforts to bridge this gap. Furthermore, the chapter examines the need to adopt inclusive copyright exceptions for persons with disabilities in South Africa.

Chapter Two comprises three main aspects that are interrelated within the context of the study. The first is the analysis of various human rights that are relevant to the study. This analysis proceeds within the context of the Constitution of the Republic of South Africa, 1996 and the relevant international human rights treaties. The second main aspect is the analysis of states' obligation to protect and promote applicable human rights. And the third main aspect is an examination of the impact of the copyright law on protecting and promoting those rights under the heading "2.6 The impact of copyright on human rights: A jurisprudential framework".

Chapter Three deals with the role of copyright exceptions and limitations in protecting and promoting access to copyrighted works in adapted formats for persons with disabilities. The underlying principles of the three-step test and the provisions of the Marrakesh Treaty form part of the substratum of the study, and so a proper understanding of these aspects is essential. The chapter also considers the application of technological protection measures (TPMs) and their implications for access to copyrighted works in digital formats for persons with disabilities.

Chapter Four speaks to the heart of the study. It examines South African copyright law to determine how far it maps to the Constitution, various international human rights treaties and regional legal instruments such as the African Charter on Human and Peoples' Rights (the Banjul Charter; the African Charter),[92] and international copyright law, particularly the

[92] The Constitutive Act of the African Union (2001) was adopted on 11 July 2000 and entered into force on 26 May 2001. See African Union, 'Constitutive Act' (*AU.INT*, 2025) <https://au.int/en/constitutive-act> accessed 3 March 2025.

The African Union has an extensive framework of instruments and institutions to protect human rights. This framework includes the following provisions and institutions: the African Charter on Human and Peoples' Rights ('Banjul Charter'), adopted in 1981 and entered into force in 1986; the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted in 1998 and entered into force in 2004; the Protocol

Marrakesh Treaty, in protecting and advancing the rights of persons with disabilities. Most importantly, Chapter Four critically analyses the Constitutional Court's landmark decision in *Blind SA CC*.

Chapter Five concentrates on Australian copyright exceptions applicable to persons with disabilities. It deals with copyright exceptions and legal frameworks, including the decision by a commission in Australia that ruled on the rights of persons with disabilities, particularly their right to access to information. The chapter considers the copyright exceptions in Australian copyright law in their entirety, though to the extent that they affect the rights of persons with disability, particularly their right to access copyrighted works.

Chapter Six examines the copyright exceptions and other relevant legal principles adopted by India to protect and promote the rights of persons with disabilities, particularly their right of access to information as well as the applicable decisions of competent courts in India. The chapter also mentions provisions of the Constitution of India[93] as well as the relevant provisions of the Rights of Persons with Disabilities Act 2016.[94] Then the chapter briefly considers the mapping of the amendment of the Copyright Act 1957[95] and other applicable exceptions such as the principle of fair dealing.

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to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ('Maputo Protocol'), adopted in 2003 and entered into force in 2005; the African Charter on the Rights and Welfare of the Child, adopted in 1990 and entered into force in 1999; the African Commission on Human and Peoples' Rights ('ACHPR'), established in 1987 under the Banjul Charter; the African Court on Human and Peoples' Rights ('AfCHPR'); the African Committee of Experts on the Rights and Welfare of the Child ('ACERWC'); and the AU's 'Human Rights Strategy for Africa.'

93 For the latest version of the Constitution of India, see English Consolidated Text of the Constitution of 1949/50 as Amended to the 106th Amendment Act, 2023, as on 1 May 2024 (1949) <https://0-heinonline-org.oasis.unisa.ac.za/HOL/Page?handle=hein.cow/zzin0117&collection=cow> accessed 1 March 2025. See further Supreme Court of India, 'Constitution' (*SCI.Gov.In*, 2023) <https://www.sci.gov.in/constitution/> accessed 1 March 2025.

94 For the text of the Rights of Persons with Disabilities Act, 2016 (Act No. 49 of 2016), see Indian Kanoon, 'The Rights of Persons with Disabilities Act, 2016' <https://indiankanoon.org/doc/97660308/> accessed 3 March 2025. On this statute, see Bimal Chandra Nanda, 'Disability and Empowerment: A Reading through the Rights of Persons with Disabilities Act, 2016' (2019) 8(1-2) Mind and Society 18–25; Choudhary Laxmi Narayan and Thomas John, 'The Rights of Persons with Disabilities Act, 2016: Does It Address the Needs of the Persons with Mental Illness and Their Families' (2017) 59(1) Indian Journal of Psychiatry 17–20.

95 For the Copyright Act, 1957 (Act No. 14 of 1957), see Indian Kanoon, 'The Copyright Act, 1957' <https://indiankanoon.org/doc/1136195/> accessed 3 March 2025. For developments, see Anjana Girish and Saraswathy Vaidyanathan, 'Visually Impaired Persons and Access to Copyrighted Works: The Indian Roadmap' (2021) 18(4) Indonesian Journal of International Law 501–522.

Finally, Chapter Seven considers the various obligations that emanate from the different legal instruments discussed in this study and examines the extent to which South Africa has met these obligations by adopting the proposed Copyright Amendment Bill ('CAB') particularly Bill 13F-2017. The chapter also develops some recommendations that are relevant for South Africa to adopt appropriate copyright exceptions for persons with disabilities amid continuous technological advancements and that will align the Copyright Act to the Constitution, the relevant international treaties, and the Marrakesh Treaty with reference to the three-step test. The discussion now moves to the main aspects that are interrelated within the context of this study.

CHAPTER 2: JURISPRUDENTIAL ANALYSIS OF HUMAN RIGHTS PERSPECTIVES IN PROMOTING THE INTERESTS OF PERSONS WITH DISABILITIES

2.1 Introduction

In *Blind SA CC*, the Constitutional Court stated that

> the constitutional rights of persons with print and visual impairments in terms of sections 9(2),[1] 10,[2] 16(1)(b),[3] 29(1)(a) and (b)[4] and 30[5] have been infringed by the requirement of authorisation in the Copyright Act as it applies to make published literary works available to persons with print and visual disabilities in accessible format copies.[6]

It is necessary to align the South African Copyright Act[7] with the Constitution of the Republic of South Africa, 1996 (the South African Constitution)[8] and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (2013) (the Marrakesh Treaty).[9] This alignment is also necessary with further international conventions. These include the United Nations Universal Declaration of Human Rights (1948) (UDHR),[10] the United Nations Convention

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1 Section 9(2) of the Constitution deals with the right to equality, which includes the right to full and equal enjoyment of all rights and freedoms. Section 9(2) grants persons with disabilities the right to be protected from unfair discrimination through legislative means and other possible measures.

2 Section 10 of the Constitution concerns the right to human dignity, which must be respected and protected.

3 According to s 16(1)(b) of the Constitution, everyone has the right to freedom of expression, including the freedom to receive information or ideas.

4 In terms of s 29(1)(a) and s 29(1)(b), everyone has the right to both basic education and further education.

5 Section 30 of the Constitution deals with the right to use the language of one's choice and participate in the cultural life of one's choice.

6 *Blind SA v Minister of Trade, Industry and Competition & Others* (CCT 320/21) [2022] ZACC 33 (21 September 2022), 2023 (2) BCLR 117 (CC), 2022 BIP 518 (CC) [74].

7 Act 98 of 1978, which commenced on 1 January 1979, except ss 1, 39, and 40.

8 Previously, this statute was the 'Constitution of the Republic of South Africa, Act 108 of 1996,' the name 'Constitution of the Republic of South Africa, 1996' being substituted by s 1(1) of the Citation of Constitutional Laws Act 5 of 2005 with effect from 27 June 2005. The Constitution was promulgated on 18 December 1996, and most of its provisions commenced on 4 February 1997.

9 Adopted on 27 June 2013 in Marrakesh, Morocco.

10 New York: United Nations General Assembly, 1948.

on the Rights of Persons with Disabilities (2006) (CRPD),[11] and the United Nations International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR).[12]

Further alignment could also occur in Africa. For gaining access to copies of works for disabled persons, the South African Copyright Act could usefully be aligned with the African Charter on Human and Peoples' Rights (1986) (ACHPR) ('the African Charter'). The member states of that Charter reaffirmed 'their adherence to the principle of human and people's rights and freedom contained in the declarations, conventions and other instruments' adopted within the African region[13] and the entire international community.[14] The member states of the African Charter also recognised the importance of human and people's rights and freedom and thus showed a commitment to protecting and advancing them.[15]

While participating in social, cultural and educational activities, persons with disabilities are confronted with several challenges[16] caused by discriminatory policies and law as well as societal mechanisms and systems that are developed to hardly accommodate the interests of those who are disadvantaged due to their disabilities. Heba Hagrass, who is a Special Rapporteur on the rights of persons with disabilities, maintains that despite the global agenda to leave no one behind, persons with disabilities, to a large extent, still face inequalities[17] which restrict them from enjoying their basic human rights. She therefore 'urged the UN to accelerate the implementation of its Disability Inclusion Strategy' by prioritizing the rights of persons with disabilities.[18] It is necessary to adopt, for the benefit

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11 United Nations (2006), Treaty Series, 2515, 3.

12 United Nations, Treaty Series, vol. 993, 16 December 1966.

13 African countries have several organisations that serve regional interests. However, the umbrella regional organisation was the Organization of African Unity (OAU), which subsequently changed to the African Union (AU).

14 The international community has been working together through the operation of international organisations such as the United Nations as an umbrella organisation.

15 African Charter, preamble.

16 See UN Human Rights Office of the High Commissioner, 'Special Rapporteur on the rights of persons with disabilities'< https://www.ohchr.org/en/special-procedures/sr-disability> accessed 6 March 2025 2

17 Heba Hagrass, 'Special Rapporteur urges greater inclusion of persons with disabilities in global development efforts' <https://srdisability.org/news/special-rapporteur-urges-greater-inclusion-of-persons-with-disabilities-in-global-development-efforts/> accessed 6 March 2025 1.

18 Heba Hagrass, 'Special Rapporteur urges greater inclusion of persons with disabilities in global development efforts' 2.

of persons with disabilities, inclusive policies and legal frameworks that promote accessibility of fundamental information and participation in social, cultural and educational activities.[19]

Accordingly, several legal instruments recognise the need to protect and promote the rights and freedoms of every human being, including persons with disabilities. These instruments include the South African Constitution, various international treaties and conventions such as the Marrakesh Treaty, the ICESCR, the CRPD, and the UDHR, and regional conventions such as the African Charter. The Parliament of South Africa must reform legislation to give equal access to persons with disabilities. How will Parliament achieve this objective?

Overlap connects the various human rights instruments,[20] the South African Constitution,[21] international and regional laws,[22] and the relevant jurisprudential frameworks.[23] The provisions of most of the legal instruments complement one another. For example, most human rights instruments advocate for protecting and advancing human dignity and freedom, which are underpinned by the principle of equality for all. Respect for human dignity is a gateway to creating the platform and an enabling environment for persons with disability to enjoy other human rights such as right to access to information, right to education, right to freedom and right to participate in cultural activities.[24] Generally, the provisions of the South African Constitution accord with the objectives of the international legal instruments promoting human rights.

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19 UN HRC, Committee on the Rights of Persons with Disabilities Opens Thirty-Third Session (2025) <https://reliefweb.int/report/world/committee-rights-persons-disabilities-opens-thirty-third-session> accessed 6 October 2025 3.

20 References are made to various human rights instruments such as the ICESCR, the CRPD, and the UDHR.

21 This is the supreme law of the Republic of South Africa. Chapter 2 of the Constitution contains the Bill of Rights.

22 This thesis considers various international laws, treaties, and conventions. The one that plays a central role in this thesis is the Marrakesh Treaty. The thesis also refers to a few laws that apply within certain regions. Examples of those regions are the European Union (EU) and the African Union (AU). However, the thesis discusses only the provisions of the African Charter in detail.

23 Various jurisprudential frameworks considered the human rights issues and the relation between human rights and the rights of the authors of works. For example, various panels constituted by WIPO and WTO developed some frameworks.

24 See UN Human Rights Council, A/HRC/11/8 (2009) 'Promotion and Protection of Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development' para 19.

Yet the Constitution differs in an essential respect from international laws and human rights instruments. Constitutional rights enshrined in the Bill of Rights are stronger than those in international laws and human rights instruments. This is because section 1(c) of the Constitution mentions the supremacy of the Constitution. Section 2 adds that the 'Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'[25]

Among the other obligations it imposes, the Constitution deals with the issue of protecting and promoting the fundamental human rights as contained in the Bill of Rights.[26] The Constitution renders invalid and unlawful any law or conduct conflicting with the provisions of the Bill of Rights[27] and the underlying principles[28] of the Constitution. The Constitution is unique. In pursuing the objective of this study with particular reference to the equal protection of human rights and the upliftment of human dignity and freedom, one needs to discuss the Constitution separately from other human rights instruments.

The Constitution does not mention or protect rights other than those it enshrines in the Bill of Rights. So it does not mention other rights such as the rights of authors of works or other copyright holders. The rights not mentioned in the Constitution are subject to contestation. In not mentioning and protecting these other rights, the Constitution differs from international laws and treaties, such as the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention),[29] the World Intellectual Property Organization Copyright Treaty (the WIPO Copyright Treaty),[30] the WIPO Copyright Treaty and Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement),[31] and the Marrakesh Treaty.

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25 Constitution of the Republic of South Africa, 1996, s 2.

26 It should be noted that the rights enshrined in the Bill of Rights do not enjoy absolute protection. Their protection can be limited in accordance with the limitation clause in s 36 of the Constitution.

27 Chapter 2 of the Constitution contains the Bill of Rights, where the various rights are enshrined.

28 As regards the underlying principle of the Constitution, s 1 provides that the Republic of South Africa is founded on values such as '[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms.' See the Constitution of the Republic of South Africa, 1996, s 1(a).

29 Signed on 9 September 1886 and entered into force on 5 December 1887.

30 This is an international treaty on copyright law adopted by the member states of the World Intellectual Property Organization (WIPO) in 1996.

31 April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 UNTS 299, 33 ILM 1197 (1994).

This chapter of the thesis focuses on the persons with disability whom the South African Copyright Act[32] disadvantages because of their condition which affects their ability to read copyrighted works in their ordinary format or understand the contents. Section 13A, as incorporated by the Constitutional Court, applies only to VIPs and those with other forms of print disabilities.[33] Deaf persons, for example, unlike people without disabilities, also experience challenges in accessing copyrighted works.[34] Yet the leading copyright frameworks[35] and the relevant research[36] concentrate on copyright exceptions for blind people and persons with other visual disabilities. So this chapter of the thesis refers specifically to these persons. Here, the phrase 'visually impaired persons' ('VIPs') refers to persons with print and visual disabilities.

The preamble to the Marrakesh Treaty declares its objective to promote

> the principle of non-discrimination, equal opportunity, accessibility and full and effective participation and inclusion in society, proclaimed in the Universal Declaration of Human Rights and the United Nations Convention on the Rights of Persons with Disabilities.[37]

This objective matches some fundamental values underpinning the South African Constitution.[38] Like the Marrakesh Treaty, section 1(1)(a) of the Constitution stipulates achieving human equality as one of its fundamental values. Echoing the same sentiment, the Constitutional Court recently, in *Blind SA CC*,[39] discussed the discriminatory nature of some provisions of the Copyright Act that infringe VIPs' rights to receive and

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32 The provisions of ss 6 and 7 of the Copyright Act 98 of 1978 limit persons with disabilities from accessing copyrighted works in accessible formats. Hence, the difficulty lies in securing the required authorisation of the owners of copyright in literary works.

33 See *Blind SA v Minister of Trade, Industry and Competition & Others* [6].

34 *Blind SA v Minister of Trade, Industry and Competition & Others* [4].

35 Examples of such legal frameworks are those in the Marrakesh Treaty that focus on blind people and VIPs.

36 Most recent research projects that deal with copyright exceptions derived their point of reference from the provisions of the Marrakesh Treaty which concentrate only on blind people and VIPs.

37 See the WIPO, Marrakesh Treaty to Facilitate Access to Published Works by Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, June 27, 2013 ('Marrakesh Treaty').

38 Constitution of the Republic of South Africa Act, s 1(1)(a). It is clearly stated at the beginning of the Constitution that the Republic of South Africa is founded on, among others, the principle of human dignity, which aims to achieve equality and advance human rights and freedom.

39 See *Blind SA v Minister of Trade, Industry and Competition & Others* (CCT 320/21) [2022] ZACC 33 (21 September 2022), 2023 (2) BCLR 117 (CC), 2022 BIP 518 (CC).

disseminate copyrighted works in accessible formats.[40] The court ruled those provisions unconstitutional.

Disabled people's lack of access or limited access to copyright-protected works specifically affects their exercise of certain rights. These include the rights to culture and science, education, and information access. Central to all these rights is the issue of full, equal enjoyment of all rights and freedoms under section 9 of the Constitution. Against this backdrop, this chapter of the thesis sets out to analyse the specific rights of disabled persons pertaining to this study.

The study explores the legal and technological challenges that affect the rights of persons with disabilities. While technology has extensively improved the lives of individuals across the world, the risk to human rights violation and inequality caused by lack of access to information among persons with disabilities still persist.[41] This chapter considers how far the adoption of the Marrakesh Treaty has addressed the legal challenges. It also examines how far the paradigm shift in South African copyright law has promoted the relevant persons' rights to access copyright-protected works in accessible formats.

Accordingly, this chapter revolves around the rights of persons with disabilities and the extent to which the legal frameworks developed through international copyright law and domestic copyright law concerning South African law have addressed the challenges these people confront in accessing copyrighted works in formats that suit their conditions. The chapter considers the relevant laws and policies developed nationally and internationally. It also identifies other measures that could be adopted to address the challenges identified. At the centre of the thesis is to consider a jurisprudential framework on the impact of copyright on human rights.

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40 See the Copyright Act, ss 6 and 7 read with s 23.

41 See UN High Commissioner for Human Rights, A/HRC/58/33 (2025) 'Rights of Persons with disabilities and digital technologies and devices, including assistive technologies' 3.

2.2 Advocacy for the rights of persons with disabilities: An overview of the background

Human rights activists, academics, commentators on jurisprudence, and international organisations have all consistently tried to address various human rights issues, including the ones that persons with disabilities confront. These concerned individuals and organisations have developed various international conventions, declarations, and treaties to promote human rights and advance social inclusion among all human beings. These international instruments include the UDHR, the ICESCR, the Standard Rules on the Equalization of Opportunities for Persons with Disabilities (1993) (SREOPD), the CRC, and the CRPD. This chapter of the thesis discusses the various provisions of those instruments as they address human rights challenges that disabled people confront. So the analysis evaluates the specific international legal instruments about the salient human rights concerns.

Promoting the rights of persons with disabilities has taken centre stage in many discussions about human rights issues and the development of legal principles at a regional and international level. Many legal documents, such as the CRPD, sought to protect and ensure the full and equal enjoyment of rights by people with different forms of disability. Significant to this advocacy, the CRPD builds on existing human rights and clarifies them as they relate to persons with disabilities.[42] The CRPD has finally given disabled persons a voice to participate in decision-making about their rights. It has also made it easier for the advocacy institutions and all interested parties to hold the member states responsible for actualising the rights of persons with disabilities.[43]

This study must critically examine how various factors, particularly copyright-related ones, have historically influenced and continue to shape the landscape of human rights

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42 For more information on the significance of the CRPD, see Delia Ferri, 'The Conclusion of the UN Convention on the Rights of Persons with Disabilities by the EC/EU: Some Reflections from a "Constitutional" Perspective' in Lisa Waddington and Gerard Quinn (eds), *European Yearbook of Disability Law* (Intersentia 2010) vol 2 47–71, 52.

43 Lida Ayoubi, 'Deciphering the Right to Read under International Human Rights Law: A Normative Framework for Equal Access' (2019) 36(3) Wisconsin International Law Journal 425–473, 433–434.

concerning the rights of persons with disabilities. The study explores these factors in detail.

As the supreme law of South Africa, the Constitution advocates for protecting the rights of everyone who lives in the Republic. In doing so, the Constitution accords with various international declarations and treaties. Closer to home, the Constitution also matches the provision of the African Charter that promotes the equal enjoyment of human rights and freedom by all without exception.[44] This thesis examines the constitutional provisions on the relevant basic human rights, within the jurisprudential framework of disabled persons' rights to education and access to information and other rights affected.

The Constitutional Court decision in *Blind SA CC* transformed the rights of persons with disabilities, particularly VIPs, in South Africa. The government is obliged to promote the rights of persons with disabilities. This obligation concerns their right to education, access to information and culture, and other rights affected, such as equality and freedom.[45] In this context, the court's decision thus promotes the interests of persons with disabilities, who are considered equal to other persons in the Republic.[46]

2.3 The underlying principles of human rights – their interrelatedness[47] and subsistence

Human rights are a subset of rights inherent to all human beings, regardless of factors such as nationality, gender, religion, sexual orientation, and ethnicity.[48] Generally, human

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44 African Charter, Art 2.

45 The Bill of Rights applies to everyone who lives in the Republic of South Africa, including persons with disabilities. One of the cornerstones of the Constitution of the Republic of South Africa, 1996 is that everyone is equal before the law and should be treated equally.

46 Section 9 of the Constitution stipulates that everyone who lives in the Republic is equal and has the right to the equal protection of the law. The Copyright Act has failed to protect the interests of persons with disabilities by preventing them from enjoying their rights to education, access to information, and other related rights.

47 For more information on the interrelatedness of the various human rights, see *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) & Others* (CCT5/03) [2003] ZACC 19 (15 October 2003), 2004 (1) SA 406 (CC) [55]. See also *Centre for Child Law & Others v Media 24 Limited & Others* (CCT261/18) [2019] ZACC 46 (4 December 2019), 2020 (4) SA 319 (CC) [50].

48 Human rights are enshrined in various international human rights instruments such as the UDHR and the ICCPR.

rights are considered universal,[49] inalienable,[50] and indivisible.[51] These human rights take various forms. Only a few of them are relevant here because many fall outside the scope of this study.[52] Helfer explains that '[a]s treaties, institutions, and jurisprudence evolved the regime developed a de facto separation of human rights into categories'[53] that include fundamental rights, civil and political rights, economic and social rights, and cultural rights.[54]

The underlying principles of human rights perspectives include the realisation of non-discrimination, societal inclusion for all, and advancement of human development through equal opportunity. All human rights documents rest on the principle of non-discrimination:[55] everyone is treated fairly and equally.[56] Therefore, the principle of non-

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49 Human rights generally apply to all human beings, regardless of their individual characteristics and status.

50 This set of rights is inherent in all human persons and underpins their dignity. Human rights, therefore, cannot be taken away or forfeited.

51 Generally, human rights are interdependent and interconnected. The violation of one human right often affects other human rights.

52 Only a few human rights are discussed in this study, while others are mentioned in passing. The categories of human rights discussed in detail are the right to culture and science, the right to education, the right of access to information, and the right to read in relation to other rights. In addition, the rights to dignity, equality, and freedom will be discussed as the cornerstone of human rights.

53 Laurence R Helfer, 'Toward a Human Rights Framework for Intellectual Property' (2007) 40(3) UC Davis Law Review 971–1020, 981. Several human rights categories are stipulated in various international documents, literature, jurisprudential research commentaries, and other sources.

54 Various categories of human rights were considered in Arts 2 to 21 of the Universal Declaration of Human Rights (UDHR). These rights include freedom from discrimination; freedom from slavery; freedom from torture and from cruel, inhumane, and degrading treatment; freedom from arbitrary arrest and detention; the right to a fair and public trial; freedom of thought, conscience, and religion; freedom of opinion and expression; and the right to participate in government through free elections. These categories of human rights derive primarily from seventeenth- and eighteenth-century political theories. Articles 22 to 27 of the UDHR regard human rights as including the right to social security, the right to work, the right to a standard of living adequate for the health and well-being of self and family, and the right to education. These are referred to as the second generation of rights, which originated primarily in the socialist traditions of Karl Marx and Vladimir Lenin. Generally, individual civil rights include rights to life, liberty, and security of the person; privacy and freedom of movement; ownership of property; freedom of thought, conscience, and religious belief and practice; prohibition of slavery, torture, and cruel or degrading punishment. Rights to political expression include freedom of expression, assembly, and association; the right to take part in government; and periodic and meaningful elections with universal and equal suffrage. Economic and social rights include an adequate standard of living, free choice of employment, protection against unemployment, the right to form and join trade unions, free elementary education, and social security.

55 Generally, this means that human rights must be upheld without discrimination based on factors such as nationality, race, religion, colour, sex, language, social or political orientation, and physical conditions.

56 Bruce Abramson, *A Commentary on the United Nations Convention on the Rights of the Child, Volume 2 Article 2: The Right of Non-Discrimination* (Brill 2008)

discrimination forbids differential treatment on the grounds of disability[57] that would hamper the enjoyment of the relevant human rights.[58] This principle appears in some post-World War II documents that form the main body of international human rights law.[59] The provisions of most of the international documents remain applicable to every human being without distinction or discrimination.[60]

Human rights could be considered subsets to achieve a common cause. Each subset depends on other subsets to achieve its objectives. Therefore, the subsistence of human rights derives from the principles of interrelatedness and interdependence.[61] Human rights are not only universal and indivisible but also interdependent and interrelated.[62] This insight accords with the Constitutional Court's recognition of the interdependence

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<https://public.ebookcentral.proquest.com/choice/publicfullrecord.aspx?p=467877> accessed 17 April 2025, 18–25. The common elements of the non-discrimination principle refer to the following factors: (1) the non-discrimination principle prohibits differential treatment based on prohibited grounds; (2) such differential treatment would hinder the enjoyment of a number of rights; and (3) the right in question needs to be recognised as a human right.

57 According to Art 2 of the CRPD, discrimination on the basis of disability refers to 'any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all social, cultural, civil or any other field.'

58 Ayoubi, 'Deciphering the Right to Read under International Human Rights Law: A Normative Framework for Equal Access' 435. For example, unjustified differential treatment may occur where a visually impaired person cannot access a copyrighted material because of his or her disability.

59 Ayoubi, 'Deciphering the Right to Read under International Human Rights Law: A Normative Framework for Equal Access' 432.

60 This view is represented in Art 1 of the UDHR, Art 2(1) of the International Covenant on Civil and Political Rights (ICCPR), and Arts 2(2) and 3 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Also, some human rights instruments contain provisions that deal specifically with the issue of discrimination. The relevant regional human rights instruments include the European Convention for the Protection of Human Rights and Fundamental Freedoms (1954), Art 15; Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (2005), Art 1; the European Social Charter (1965), preamble; the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (1998); the American Convention on Human Rights 'Pact of San José, Costa Rica' (1978), Art 1; the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights 'Protocol of San Salvador' (1999), Art 3; and the African Charter on Human and Peoples' Rights (1986), Art 2. See also Ayoubi, 'Deciphering the Right to Read under International Human Rights Law: A Normative Framework for Equal Access' 434–435.

61 As stated in *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) & Others* [55].

62 For more information, see Abigail P Rekas, 'Access to Books: Human Rights, Copyright and Accessibility' 382–388, *Universal Access in Human-Computer Interaction. Applications and Services for Quality of Life: 7th International Conference,* UAHCI 2013, Held as Part of HCI International 2013, Las Vegas, NV, USA, July 21-26, 2013, Proceedings, Part III (2013) <http://dx.doi.org/10.1007/978-3-642-39194-1_45> accessed 5 March 2025.

and interrelatedness of all rights in *De Reuck v Director of Public Prosecution, Witwatersrand Local Division*.[63] More recently, it was confirmed in *Centre for Child Law & Others v Media 24 Limited*.[64]

So this chapter examines human rights perspectives relevant to protecting and promoting disabled persons' rights to education, access to information, and culture, among others. The Constitution and other international instruments such as the CRPD play a central role in this consideration of human rights.[65]

Infringement or absence of a specific human right may seriously affect the realisation and subsistence of other rights. For example, lack of access to information may impact other human rights for persons with disabilities, such as their rights to education and culture and science, thus ultimately affecting their dignity as human beings. The interrelatedness and interdependency of human rights show that discriminatory access to copyrighted materials could affect different human rights.[66]

In line with the recent *Blind SA CC* decision advancing VIPs' interests, this chapter holistically examines the perspectives of the various human rights principles relevant to this study. The Constitutional Court mentioned different aspects of human rights that could be affected by the lack of access to copyrighted works in accessible format for VIPs.[67]

In keeping with the approach taken by the High Court in interpreting the provisions of the Constitution and the underlying principles of the CRPD, the study does not consider the various human rights in isolation.[68] Although each of the human rights constitutes an individual unit, the different human rights depend on each other for the realisation of the

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63 2004 (1) SA 406 (CC) [55].

64 2020 (4) SA 319 (CC) [50].

65 Both the Constitution of the Republic of South Africa, 1996 and the CRPD champion promoting the interests of persons with disabilities by advocating for equality for all.

66 See *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) & Others* [55]; *Centre for Child Law & Others v Media 24 Limited & Others* [50].

67 *Blind SA v Minister of Trade, Industry and Competition & Others* (CCT 320/21) [2022] ZACC 33 (21 September 2022), 2023 (2) BCLR 117 (CC), 2022 BIP 518 (CC).

68 The right to equality remains the cornerstone for all human rights as discussed in both the Constitution and the CRPD; however, all rights in the Bill of Rights are considered with reference to each other.

individual objectives. The chapter must therefore examine the interrelatedness of the various rights as enshrined in the Bill of Rights and the CRPD. The multiple rights considered in this chapter include the right to education, the right to information, and the right to culture and science. The right to freedom of expression receives attention only to the extent that it relates to other rights. The rights to dignity, equality, respect, and freedom are featured in this study as the cornerstone of other human rights.

2.4 Jurisprudential analysis of human rights within the context of persons with disabilities

The human rights framework protects every person's interest, including those with disabilities. The African Charter recognised this fact by insisting that persons with disabilities are also entitled to 'the right to special measures of protection in keeping with' their various needs.[69]

Appreciating the underlying principles supporting the need and obligation to promote and advance the applicable human rights is essential. Having considered various human rights as interrelated and interdependent, one must also examine them as independent concepts to establish their specific challenges. The chapter explores relevant human rights such as the right to culture and science, education, and access to information, though not in any order of importance. While interwoven in relation to their underlying value, the concepts of 'education' and 'information' receive separate treatment in this study for easy reading. So, in this study, disabled persons' access to newspapers, magazines, novels, and films for relaxation and entertainment falls, not under the right to education, but under the right to information, and they feature primarily within the context of freedom of expression. Freedom of expression, a bedrock of fundamental human rights in general, is not discussed separately since its value is realised within the context of other rights such as the rights to education, information, culture, and science. The absence of appropriate copyright exceptions and limitations can affect the freedom of expression of persons with disabilities, hindering their right to access various works. This

69 African Charter, Art 18(4).

chapter limits the examination of freedom of expression to its relationship with other relevant fundamental rights.

2.4.1 Right to culture and science

2.4.1.1 An overview of the right to culture and science

Views vary on the nature of culture and science in the context of human rights.[70] Just as everyone has the right to share in the cultural life of his or her choice, everyone also has the right to share in scientific advancement and its benefits, and to enjoy the benefits of scientific progress and its applications.[71] The States are required to protect and promote the diversity of cultural expression by addressing limitations of cultural rights and to take measures to improve the participation of everyone in cultural activities.[72] While the international documents regard rights as joint phenomena the views of researchers[73] on this issue vary. Despite the differences in the way researchers view the connection between the various rights, this chapter emphasises the cultural aspect of the right.

Establishing the meaning of culture is necessary to point to its relevance as an important phenomenon for human development. Culture endures as an essential aspect of the life of every human being, including people with disabilities, so they deserve uncompromised, active participation in a culture of their choice. The term culture may be defined from different perspectives. In one instance, it constitutes the 'set of distinctive spiritual, material, intellectual and emotional features of society or a social group,' in relation to 'art and literature, lifestyle, ways of living together, value systems, traditions and beliefs.'[74] In another instance, it is the 'sum total of the material and spiritual activities and products of

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70 Although rights to culture and science are considered in many international documents and by many researchers as joint phenomena, this work emphasises the cultural aspect of the right.

71 See Art 27 of the UDHR and Art 15 of the ICESCR.

72 UN Human Rights Council, A/HRC/RES/58/4 'Cultural rights and the protection of cultural heritage' (2025) para 13.

73 For more information see Oriakhogba, Desmond. "The Right to Research in Africa." *Exploring the Copyright and Human Rights Interface. Recuperado de: https://link. springer. com/book/9783031332838* (2023). Also see Beiter Klaus D, 'Where have all the scientific and academic freedoms gone? And what is 'adequate for science'? The right to enjoy the benefits of scientific progress and its applications' 233-291.

74 See UNESCO, Records of the General Conference, 31st session, Paris, 15 October to 3 November 2001, v. 1: Resolutions, 62.

a given social group which distinguishes it from other similar groups' together with 'a system of values and symbols as well as a set of practices that a specific cultural group reproduces over time and which provides individuals with the required signposts and meanings for behaviour and social relationships in everyday life.'[75] And the concept of 'culture' is also mentioned as a 'social phenomenon resulting from individuals joining and co-operating in creative activities;' so it is 'not limited to access to works of art and humanities, but is at one and the same time the acquisition of knowledge, the demand for a way of life and the need to communicate.'[76]

In the framework of international treaties such as the ICESCR, the concept of 'culture' refers to various aspects of human persons and their communities.[77] It encompasses crucial elements necessary for fostering human development. A widely accepted premise about the significance of culture for human life explains the importance of cultural accessibility.

The ICESCR summarised the various aspects of culture.[78] For implementing ICESCR Article 15(1)(a), culture refers to

> ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief system, rites and ceremonies, sport and games, methods of production or technology, national and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives.[79]

The right to access culture is paramount, as it contributes significantly to realising other human rights.[80] The question is whether the right to access culture has received the

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75 Rodolfo Stavenhagen, 'Cultural Rights: A Social Science Perspective' in Halina Nieć (ed), *Cultural Rights and Wrongs: A Collection of Essays in Commemoration of the 50th Anniversary of the Universal Declaration of Human Rights* (UNESCO Publishing / Institute of Art and Law, Leicester 1998) 3. From another point of view, culture was defined in relation to 'those values, beliefs, convictions, languages, knowledge and the arts, traditions institutions and ways of life through which persons or a group expresses their humanity and the meanings that they give their existence and to their development' (see Fribourg Group, 'Fribourg Declaration on Cultural Rights' (2007) <http://hrlibrary.umn.edu/instree/Fribourg%20Declaration.pdf> accessed 6 March 2025).

76 See UNESCO, Records of the General Conference, 1976, SESSION 19, 29.

77 See the ICESCR (2009) General Comment No. 21: Right of Everyone to Take Part in Cultural Life.

78 ICESCR, General Comment No. 21.

79 ICESCR (2009) General Comment No. 21: Right of Everyone to Take Part in Cultural Life.

80 The importance of culture is contained in the United Nations Charter (see Arts 13 and 55 of the United Nations Charter) and UNESCO (see Art 1 of the UNESCO Constitution).

attention it deserves.[81] Every human being should have the right to culture and science. So, including persons with disabilities in enjoying this aspect of human rights is essential for their holistic development.[82] Advancing access to culture and enhancing opportunities for cultural participation, in line with the provisions of CRPD, are critical steps to foster their inclusion within their communities.[83] States are encouraged to create the appropriate legal framework and mechanisms that would promote meaningful access to cultural materials and enhance active participation in cultural life[84] among members of the communities, particularly those who suffer from disabilities.

Persons with disabilities need maximum access to cultural and scientific materials to participate in cultural life within their community and enjoy the benefits of scientific progress globally.[85] In this way, they receive the opportunity to contribute positively to their communities' cultural lives by having a say in the policies affecting their rights to culture. Arguably, someone can only contribute to cultural life if allowed to become familiar with previous productions. Copyright-protected works in accessible formats are thus critical for full and equal participation in cultural and scientific life. These materials help people with disabilities achieve self-development and contribute meaningfully to their communities' cultural and scientific advances.[86]

Since access to written cultural materials such as books remains essential to participation in cultural life, denying that access seriously infringes human rights. Disabled people's

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81 Ayoubi, 'Deciphering the Right to Read under International Human Rights Law: A Normative Framework for Equal Access' 453-454. See also Stephen A Hansen, 'The Right to Take Part in Cultural Life: Toward Defining Minimum Core Obligations Related to Article 15(A) of the International Covenant on Economic, Social and Cultural Rights' 279–304 in Audrey R Chapman and others, *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia 2002).

82 It should be noted that such cultural participation among persons with disabilities cannot be achieved in isolation but in collaboration with other human rights. For more information on this aspect, see B Boutros-Ghali, 'The Right to Culture and the Universal Declaration of Human Rights' 73–75, 75 in UNESCO *Cultural Rights as Human Rights* (Document Code SHC.68/XIX.3/A 75) <https://unesdoc.unesco.org/ark:/48223/pf0000001194> accessed 6 March 2025.

83 See the CRPD, Art 30(1). Also, for more information on the importance of cultural life, see Arts 13 and 55 of the United Nations Charter and Art 1 of the UNESCO Constitution.

84 UN Human Rights Council, A/HRC/RES/58/4 'Cultural rights and the protection of cultural heritage' (2025) para 17.

85 For more information, see the Universal Declaration of Human Rights (1948).

86 For more information, see CRPD Committee, General Comment NO. 5 on Article 19, 2017, CRPD/C/GC/5, para. 88. Also, see Ayoubi, 'Deciphering the Right to Read under International Human Rights Law: A Normative Framework for Equal Access' 456.

right of access to cultural materials in accessible format is violated every moment they are dismissed because of, for example, their disability either to read for those who are visually impaired or to listen to cultural materials for those who suffer from hearing impairment and are thus treated differently from people without disabilities. States are therefore encouraged to address all forms of limitations of cultural rights especially those experienced by persons with disabilities.[87]

2.4.1.2 Promoting the right to culture among persons with disabilities within the framework of international legal documents

This paragraph of the thesis considers the provisions of international documents such as declarations and treaties concerning rights to cultural life as they apply to disabled persons. Under UDHR Article 27, disabled persons, as part of society, should participate in cultural life and enjoy the cultural activities and benefits that flow from that participation.[88] Article 27 laid the basis for recognising the right to culture and science as forming part of human rights, setting the tone for the subsequent international documents.

Articles 15(1)(a) of the ICESCR[89] and 30(1) of the CRPD[90] pertinently addressed the issue of the right to culture and science. They incorporated additional safeguards in establishing the right of access to and participation in cultural life among specific individuals, such as disabled persons, in communities.[91]

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87 UN Human Rights Council, A/HRC/RES/58/4 'Cultural rights and the protection of cultural heritage' (2025) para 18.

88 Universal Declaration of Human Rights, Art 27. Article 27(1) of the UDHR provides that everyone has 'the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.' And according to Art 27(2) of the UDHR, 'everyone has the right to the protection of the moral and material interests resulting from any scientific literary or artistic production of which he is the author.' See Christophe Geiger, '"Constitutionalising" Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union' (2006) 37(4) IIC: International Review of Intellectual Property and Competition Law 371–500, 382. The right to culture and science was first explained in Art 27 of the UDHR. However, it could be argued that, at this stage, it was in a declaratory form and not binding.

89 United Nations International Convention on Economic, Social and Cultural Rights (1976), Art 15. Article 15(1) of the ICESCR 'adopted almost verbatim the wording of the UDHR' (Geiger, '"Constitutionalising" Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union' 382).

90 United Nations Convention on the Rights of Persons with Disabilities (2006) (CRPD).

91 For example, article 4(2) of the CRPD provides that States Parties are required to take measures to achieve cultural rights for people with disabilities.

At this stage, the rights to culture and science became part of the binding normative framework. Article 30(1) of the CRPD shows that contracting parties are expected to recognise the right of persons with disabilities to participate equally with others in cultural life.[92] Article 30(3) obliges the contracting parties 'to ensure that the laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.'[93] Moreover, Article 10(1) of the European Convention on Human Rights (1950) (ECHR)[94] adopted the principle of freedom of expression and communication which connects to the right of culture.[95] The African Charter also provides that everyone, without exception, 'may freely participate in the cultural life of his community.'[96]

Appreciating the importance of participation in the cultural activities for persons with disabilities, the Human Rights Council has taken the discussion to another level. During its fitty-eight session, it maintains that the right of persons with disabilities to participate in cultural activities deserves special attention due to the impact of digital technologies. In its resolution, States are encouraged to make cultural digitisation easily accessible to disabled persons,[97] which was reiterated by the Committee on the Right of Persons with Disabilities.[98] This would make cultural participation meaningful in the digital era.

2.4.2 Right to education

2.4.2.1 The unique nature of the right to education

Education is not merely a right. It also promotes the subsistence of other human rights in general and the advancement of human dignity in particular.[99] It significantly contributes

92 For more information, see the CRPD, Art 30(1).
93 See the CRPD, Art 30(3).
94 ETS No. 005 (Vol. 1).
95 Geiger, '"Constitutionalising" Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union' 382.
96 African Charter, Art 17(3).
97 See Human Rights Council, Fifty-eight session, A/HRC/58/2 (2025)
98 UN HRC(/organization/un-hrc) https://reliefweb.int/report/world/committee-rights-persons-disabilities-opens-thirty-third-session (2025) 3.
99 Coomara Pyaneandee, International Disability Law: A Practical Approach to the United Nations Convention on the Rights of Persons with Disabilities (1 edn Routledge 2018) 156 and Ayoubi, 'Deciphering the Right to Read under International Human Rights Law: A Normative Framework for

to realising other human rights. It creates opportunities, and its possessors have choices in life. In this context, it is considered 'a social good.'[100]

Comparably, education is regarded both as a welfare factor and a well-being component[101] central to human self-realisation and achievement. Thus, it is one of the essential means to enjoy equal opportunity in a learning environment and to participate actively in the socio-economic life, achieve self-fulfilment, and possibly pursue a decent career, especially for disabled persons.[102] Therefore, achieving the right to education for all without exception should be the priority of every State. The right to education is considered 'as encompassing the provision of an education that is available, accessible, adaptable and acceptable.'[103]

2.4.2.2 Promoting the right to education for persons with disabilities within the framework of international legal documents

Many legal instruments addressing the challenges of the universal right to education date from the 1990s. Some of these documents focused on the right to education for persons with disabilities.[104] In declarations and treaties, many international documents have striven to address the challenges confronting the right to education in general and the

Equal Access' 441. See also UNESCO, *The Right to Education: Towards Education for All throughout Life* (UNESCO Pub 2000) 16. See further the ICESCR, Art 13(1).

100 Fons Coomans, 'Content and Scope of the Right to Education As a Human Right and Obstacles to Its Realisation' 183–230, 185 in Yvonne Donders, Vladimir Volodin and UNESCO, *Human Rights in Education, Science, and Culture: Legal Developments and Challenges* (Ashgate Pub 2007).

101 Lida Ayoubi, 'Human Rights Perspectives on Access of the Blind, Visually Impaired and Other Reading Disabled Persons to Copyright Materials' (LLM thesis, Lund University 2011) 46.

102 Coomara Pyaneandee, International Disability Law: A Practical Approach to the United Nations Convention on the Rights of Persons with Disabilities (1 edn Routledge 2018) 143. Also, see Ayoubi, *Human Rights Perspectives on Access of the Blind, Visually Impaired and Other Reading Disabled Persons to Copyright Materials* 47.

103 See UN Human Rights Council, A/HRC/11/8 'Promotion and Protection of Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development' (2009) para 23.

104 See, for example, UNESCO, World Conference on Special Needs Education, The Salamanca Statement and Framework for Action on Special Needs Education, Salamanca, Spain, 7–10 June 1994 https://www.european-agency.org/sites/default/files/salamanca-statement-and-framework.pdf accessed 6 March 2025; UNESCO, World Conference on Education for All, Paris 26 April 1990 https://unesdoc.unesco.org/ark:/48223/pf0000085625 accessed 6 March 2025; Standard Rules on the Equalization of Opportunities for Persons with Disabilities 1994 (see OHCHR, 'Standard Rules on the Equalization of Opportunities for Persons with Disabilities' <https://www.ohchr.org/en/instruments-mechanisms/instruments/standard-rules-equalization-opportunities-persons-disabilities> accessed 6 March 2025).

experiences of disabled persons in particular. Several provisions recognise the right to education for everyone and thus for disabled persons.

According to UDHR Article 26,[105] every person, without exception, has the right to education. This provision also featured in ICESCR Article 13,[106] where it was reinforced as part of the covenant and a binding provision for member states. Along analogous lines, the UN General Assembly's Declaration of the Rights of the Child also recognised the right to education.[107] The UNCRPD is clear on the importance of inclusive education as the preferred approach to address the challenge of education among people with disability.[108]

Other international documents also considered the importance of the right to education.[109] This right was promoted in many regional treaties on human rights.[110] For example, Article 24 of the CRPD demonstrates a clear commitment to the goal of inclusive education to

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105 UDHR, Art 26.

106 ICESCR, Art 13.

107 Declaration of the Rights of the Child (1959), princ. 7 (see 'Declaration of the Rights of the Child (1959)' (*OHCHR*) <https://www.ohchr.org/en/resources/educators/human-rights-education-training/1-declaration-rights-child-1959> accessed 6 March 2025).

108 Tsitsi Chataika and others, 'Access to Education in Africa: Responding to the United Nations Convention on the Rights of Persons with Disabilities' (2012) 27(3) Disability & Society 385–398, 387, stating that 'children with disabilities should have entitlement to free and compulsory primary education. In addition, disabled people should have access to secondary and tertiary education, vocational training, adult education and lifelong learning.' According to the CRPD, people with disabilities should be guaranteed the right to inclusive education based on equal opportunity at all levels.

109 Some of the international documents include: the Convention against Discrimination in Education (1962) 429 (see 'Convention against Discrimination in Education' (*OHCHR*) <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-discrimination-education> accessed 6 March 2025; the Declaration on the Rights of Disabled Persons (1975), princ. 6 (see 'Declaration on the Rights of Disabled Persons' (*OHCHR*) <https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-rights-disabled-persons> accessed 6 March 2025); the UNESCO Convention on Technical and Vocational Education (1989) (see 'Convention on Technical and Vocational Education - Legal Affairs' <https://www.unesco.org/en/legal-affairs/convention-technical-and-vocational-education> accessed 6 March 2025); the United Nations Convention on the Rights of the Child (1989) (CRC). In Art 28 of the CRC, the UN General Assembly provided an elaborate definition of the right to education. See also Ayoubi, 'Deciphering the Right to Read under International Human Rights Law: A Normative Framework for Equal Access' 443.

110 See, for example, the African Charter, Art 17; the African Charter on the Rights and Welfare of the Child (1999), Art 11; the Charter of Fundamental Rights of the European Union (2000), Art 14; the Charter of the Organization of American States (1951), Arts 30 and 31; the American Convention on Human Rights, Art 26; the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (1954), Art 2; the Additional Protocol on the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights 'Protocol of San Salvador' (1999), Art 13.

promote the interests of every person.[111] And the African Charter provides that the right to education applies to everyone without exception.[112]

In terms of UDHR Article 22, the right to education forms the essential aspect of the economic, social, and cultural category of human rights which is indispensable for the development of a human being as well as the full development of his or her personality. This critical function of education was also emphasised in the preamble to the World Declaration on Education for All.[113] Equally, ICESCR Article 13(1) maintains that education must be directed to the full development of the human personality and the sense of its dignity.[114] Inclusive education, as prescribed by the provision of CRPD, allows everyone to participate effectively in society.[115] At the same time, the Convention on the Rights of the Child (1989) (CRC) acknowledged the reality that the right to education among disabled children remains a challenge.[116] The inequality that exists within the educational environments has been exacerbated by the coronavirus disease (COVID-19)

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111 For more information, see Art 24 of the CRPD. It provides that persons with disabilities 'should have full rights to education in inclusive settings.' See Chataika and others, 'Access to Education in Africa: Responding to the United Nations Convention on the Rights of Persons with Disabilities' 385. In line with the provisions of the CRC, the CRPD conspicuously contains inclusive principles demonstrating the necessity of free and equal education, especially for children with disabilities. See also Ayoubi, 'Deciphering the Right to Read under International Human Rights Law: A Normative Framework for Equal Access' 443.

112 See the African Charter, Art 17(1).

113 UNESCO, 'World Declaration on Education for All and Framework for Action to Meet Basic Learning Needs' <https://unesdoc.unesco.org/ark:/48223/pf0000127583> accessed 6 March 2025. It states that 'education is an indispensable key to, though not a sufficient condition for, personal and social development' (UNESCO p 3). Access to education for visually impaired persons helps develop their human persons and benefits their respective communities. Similarly, Ayoubi maintains that 'personal and professional development of persons with disabilities through education could accelerate development of the states' (Ayoubi, 'Deciphering the Right to Read under International Human Rights Law: A Normative Framework for Equal Access' 442).

114 See Art 13(1) of the ICESCR.

115 See Art 24 of the CRPD. Also, see Coomara Pyaneandee, International Disability Law: A Practical Approach to the United Nations Convention on the Rights of Persons with Disabilities (1 edn Routledge 2018) 155-156. It is emphasised that the benchmark to measure the extent Member States have met their obligation of providing universal education for all is through the quality of education received by disabled persons, which is only realisable through an inclusive education.

116 UN Secretary-General, 'Status of the Convention on the Rights of the Child: Report of the Secretary-General' <https://digitallibrary.un.org/record/3885167> accessed 6 March 2025. It is submitted that the challenges that children with disabilities confront in realising their right to education are still evident. It is further indicated that these children remain highly marginalised in education.

pandemic that has a serious negative impact on the realization of an inclusive education.[117]

2.4.2.3 Realising the essence of human rights through the right to education

The right to education contributes enormously towards realising the essence of other human rights,[118] and is a 'precondition for the[ir] effective enjoyment.'[119] It contributes to the realization of other human rights that are necessary for human development and sustenance.[120] According to the Incheon Declaration, it is proper to treat education as a key driver of development required for human fulfilment.[121] A reasonable education enhances most human rights, including socio-economic, civil, and political ones. Other civil and political rights, including 'freedom of expression, freedom of association or the right to political participation, only obtain substance and meaning when a person is educated.'[122] Therefore, the Incheon Declaration focuses, inter alia, on achieving an 'inclusive and equitable quality education'[123] for the benefit of everyone without exception.

In an attempt to demonstrate the role of education in enhancing the full enjoyment of other rights such as equal dignity and human freedom, the ICESCR provides that 'education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedom.'[124] It could be argued that, like the right to education, the right to access information is also a cornerstone for realising other human rights. The discussion moves to that right.

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117 UN General Assembly, Seventy-ninth session, A/79/L.56 'Education for democracy' (2025) 2.

118 Coomans, 'Content and Scope of the Right to Education As a Human Right and Obstacles to Its Realisation' 186.

119 Ayoubi, 'Deciphering the Right to Read under International Human Rights Law: A Normative Framework for Equal Access' 441.

120 UN General Assembly, Seventy-ninth session, A/79/L.56 'Education for democracy' (2025) 4.

121 See UN Educational, Scientific and Cultural Organization, 'First Report of the World Education Forum' (2025), Incheon, Republic of Korea, 19-22 May 2015.

122 Audrey R Chapman, 'Development of Indicators for Economic, Social and Cultural Rights: The Rights to Education, Participation in Cultural Life and Access to the Benefits of Science' 111–152, 127 in Yvonne Donders, Vladimir Volodin and UNESCO, *Human Rights in Education, Science, and Culture: Legal Developments and Challenges* (Ashgate Pub 2007).

123 See UN Educational, Scientific and Cultural Organization, 'First Report of the World Education Forum' (2025), Incheon, Republic of Korea, 19-22 May 2015 preamble.

124 See the ICESCR, Art 13(1).

2.4.3 Right of access to information

2.4.3.1 The essence of the right of access to information within the context of persons with disabilities

The right of access to information is considered a fundamental human right.[125] This access, especially during the information revolution, is critical for the development of the human person to enable meaningful participation in society. It is essential for the formation of ideas and opinions, and persons with disabilities require accessible informative content for the formation of their individual ideas and opinions.[126] The right to access to information connects to the right to freedom of expression,[127] and access to relevant information promotes the realisation and enjoyment of other human rights.[128]

Many countries have regarded the right of access to information as a part of human rights. Between 1950s and 1990s, only few countries developed rules of law on access to information.[129] As at 2017, about seventy countries developed rules of law on freedom of information that allow access to records held by government agencies, and about fifty other countries have draft laws dealing with access to information.[130]

Limited access or lack of access to information may result in several levels of disparities in access. These disparities may manifest in various ways, including the lack of accessible copies, the difficulty of obtaining them, and limited options for access to information. As regards access, other sub-disparities that especially affect persons with disabilities include the geographic unavailability of existing information and the high price

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125 Ahsanollah Radmehr, 'Access to Information and Intellectual Property in the International System of Human Rights: Coexistence or Conflict' (2017) 3(2) Scinzer Journal of Humanities 41–46, 41.

126 Ayoubi, 'Deciphering the Right to Read under International Human Rights Law: A Normative Framework for Equal Access' 464.

127 CRPD, Art 21.

128 Mupangavanhu 'Copyright law and human rights: *Blind SA v Minister of Trade, Industry and* Competition and its Potentially far-reaching implications' 322. See also Ayoubi, 'Deciphering the Right to Read under International Human Rights Law: A Normative Framework for Equal Access' 463 and Graham Austin and Laurence R Helfer, *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge University Press 2011) 221–227.

129 This includes: Finland in 1951, United States in 1966, Norway and Denmark in 1970, France and the Netherlands in 1978, Australia and New Zealand in 1982, Canada in 1983 and Italy in 1990.

130 Radmehr, 'Access to Information and Intellectual Property in the International System of Human Rights: Coexistence or Conflict' 42.

of accessible materials. These disparities harm persons with disabilities and hinder their enjoyment of other human rights.[131]

2.4.3.2 The role of the right of access to information towards realising other human rights

The right to access to information may serve as a cornerstone of the human rights movement. Civil and political rights require an educated citizenry with access to information. Economic, social, and cultural rights also depend on this access.[132]

The right to access to information plays a critical role in the actualisation of other human rights. Those rights include education, health, environment and development, labour, political participation, and interaction with other people and communities.[133]

In particular, this right of access interlinks with realising the right to culture and education. Accessible informative content would arguably increase awareness among persons with disabilities about their human rights and the importance of achieving them. The first step for the people with disabilities to become successful in claiming their human rights is being aware of their rights. The next step is to become aware when the appropriate copyright materials become available and accessible for the enjoyment of other human rights.[134]

2.4.3.3 Advancing the right of access to information among persons with disabilities within the framework of international legal documents

The concept of access to information[135] as a form of human right, in the broad sense, first received recognition under international human rights law in Article 18 of the UDHR,[136]

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131 Ayoubi, 'Deciphering the Right to Read under International Human Rights Law: A Normative Framework for Equal Access' 435.

132 Lateef Mtima, 'Copyright and Social Justice in the Digital Information Society: "Three Steps" toward Intellectual Property Social Justice' (2015) 53(2) Houston Law Review 459–504, 495.

133 Radmehr, 'Access to Information and Intellectual Property in the International System of Human Rights: Coexistence or Conflict' 42.

134 Mupangavanhu 'Copyright law and human rights: *Blind SA v Minister of Trade, Industry and* Competition and its Potentially far-reaching implications' 322. Also see Ayoubi, 'Deciphering the Right to Read under International Human Rights Law: A Normative Framework for Equal Access' 463.

135 Note that here this concept is used inclusively and considered in relation to the right to freedom of opinion and expression as well as the right to seek, receive, and impart information and ideas.

136 See the UDHR, Art 18.

which was later revisited under Article 19(2) of the International Covenant on Civil and Political Rights (1966) (ICCPR).[137] The UN General Assembly realised the significance of this right by passing the Resolution confirming freedom of information as one of the most fundamental human rights and freedoms.[138] Correspondingly, Article 13 of the CRC[139] and Articles 9(1), 9(6), and 21 of the CRPD[140] all emphasised the importance of this right. Article 9(1) of the African Charter provides that all individuals are entitled to enjoy the right to receive information. Again, Article 3 of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (1979) (CEDAW) gave general recognition to the right to freedom of opinion and expression. This is in line with the provision of the African Charter that every person 'shall have the right to express and disseminate his opinions within the law.'[141]

Article 19 of the UDHR also referred to the right to freedom of opinion and expression concerning the right to search, disseminate, and obtain information.[142] The content of the right of access to information and the corresponding obligations originate from Article 11 of the UDHR,[143] Article 11 of the ICCPR,[144] Article 13 of the American Convention,[145] Article 12 of the European Convention on Human Rights,[146] and Chapter 1 of the African

137 See the ICCPR, Art 19(2).

138 Radmehr, 'Access to Information and Intellectual Property in the International System of Human Rights: Coexistence or Conflict' 42. Freedom of information is then considered a fundamental human right and a touchstone of all the freedoms. The United Nations called on the Economic and Social Council to convene a conference on the issue to be held in Geneva. In 1949, the first two plans were approved by the UN General Assembly, and in 1962, the third plan was issued and announced as a Declaration by the Economic and Social Council.

139 See the CRC, Art 13.

140 See the CRPD, Art 9(1)(b) and Art 21.

141 See the African Charter, Art 9(2).

142 Radmehr, 'Access to Information and Intellectual Property in the International System of Human Rights: Coexistence or Conflict' 42. It is noted that the right to freedom of opinion and expression is linked to the right of access to information.

143 See the UDHR, Art 11.

144 ICCPR, Art 11.

145 See the American Convention on Human Rights ('Pact of San José, Costa Rica'), signed at San José, Costa Rica, on 22 November 1969, Art 13.

146 See the European Convention for the Protection of Human Rights and Fundamental Freedoms (1954), Art 12 (ECHR).

Charter.[147] The right of access to information also expanded in Europe through Article 10 of the European Convention on Human Rights.[148]

2.4.4 Fundamental rights to dignity, equality and freedom as the cornerstone for other human rights

In their preambles, most international legal documents on human rights[149] recognised the importance of achieving human dignity, equality, and freedom for all. Furthermore, the values that underpin the realisation of the legitimate aspirations of the African people include dignity, equality, and freedom.[150] Although these rights[151] are independent, they are considered together because they are highly interrelated and form the basis of all other fundamental human rights.

To achieve the highest respect[152] for all human beings, one must recognise their innate dignity.[153] This recognition stems exclusively from their status as human beings, independent of any other factors. Achieving this maximum respect requires treating people equally, without discrimination, direct or indirect, based on factors such as disability, gender, and race. On this note, the African Charter recognises the equality of all human beings by stating: 'All peoples shall be equal; they shall enjoy the same respect and shall have the same rights.'[154]

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147 See the African Charter, ch 1.

148 Article 10 of the ECHR on freedom of expression states that everyone has the right to freedom of expression, which includes the freedom to receive or send information or ideas without interference from public authorities. See Radmehr, 'Access to Information and Intellectual Property in the International System of Human Rights: Coexistence or Conflict' 43.

149 See the international human rights legal documents such as the UDHR, the ICCPR, the CRC, the ICESCR, and the CRPD.

150 In its preamble, the African Charter refers to the COAU, which stipulates that 'freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples.'

151 There are specific references to rights to human dignity, equality, and freedom.

152 Only a few international human rights instruments, such as the CRPD, refer to respect as one of the fundamental principles of human rights. Even where the term 'respect' does not explicitly appear in some international human rights instruments, the principle of respect is embedded in the notion of human dignity.

153 The significance of human dignity is spelt out clearly in the preambles to the ICCPR and the ICESCR by recognising that the inherent dignity of the human person serves as the cornerstone for the various rights contained in the documents.

154 African Charter, Art 19.

The preambles to most international human rights instruments clearly refer to human dignity, equality, and freedom as the essential aspects of human rights. The three principles receive specific mention, demonstrating their importance in promoting the various forms of human rights. In line with the UDHR preamble,[155] the preambles to various international human rights documents recognised the inherent dignity and worth as well as the equal rights of every human being as the foundation for achieving freedom, justice, and peace.[156] The UDHR indicates that maintaining the dignity and worth of human beings as well as equal rights for every person are essential for realising social progress and promoting freedom.[157] It is acknowledged that the UDHR member states aspired to promote respect for inalienable human rights and fundamental freedoms for all.[158] Realising that all human 'rights derive from the inherent dignity of the human person,'[159] everyone is entitled to all human rights and freedoms in order to enjoy human dignity.[160]

Article 1 of the UDHR provides that everyone is 'born free and equal in dignity and rights.' So every person is entitled to enjoy all human rights and freedoms enshrined in the UN Charter, and should not be discriminated against.[161] This principle makes it necessary to treat everyone as equal before the law; everyone should receive the equal protection and benefit of the law without discrimination.[162] This principle accords with the explicit provision of the African Charter that every person 'shall be equal before the law'[163] and 'shall be entitled to equal protection of the law.'[164] Similarly, the ICESCR provides that

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155 At the beginning of its preamble, the UDHR recognised human dignity, equality, and inalienable rights as the threshold to achieve human freedom, justice, and peace.

156 See the beginning of the preamble to the various international human rights instruments, including the CRPD, the CRC, and the ICESCR.

157 See the UDHR, preamble. Most international human rights instruments, such as the CRPD, the CRC, and the ICESCR, also refer to this part of the UDHR in their preambles.

158 For more information, see the UDHR, preamble.

159 See the ICESCR, preamble.

160 See the CRC, preamble.

161 See the UDHR, Art 2. Everyone, without any form of distinction, should enjoy the rights and freedoms enshrined in the UN Charter. The factors listed in Art 2 of the UDHR as the possible basis of discrimination are not exclusive. This aspect allows new factors, such as disability, to be included in the list.

162 See the CRPD, Art 5(1). See also the UDHR, Art 7.

163 African Charter, Art 3(1).

164 African Charter, Art 3(2).

men and women, without distinction, have the equal right to enjoy all economic, social, and cultural rights contained in the ICESCR.[165]

Again, CRPD Article 3[166] concerns the general principles that underpin the Convention.[167] These principles concern respect for inherent dignity;[168] non-discrimination;[169] complete, effective participation and inclusion in society;[170] difference and acceptance of persons with disabilities as part of human diversity and humanity;[171] and equality for all.[172] In CRPD Article 2, 'discrimination on the basis of disability' refers to any form of 'distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms'[173] in 'the political, economic, social, cultural, civil or any other field.'[174] To the same effect, the African Charter advocates equal respect of human dignity for all.[175]

As for human freedom, the UDHR recognises the need to actualise a world in which every person shall enjoy freedom[176] in realisation of the advocacy that all human beings have the right to various forms of freedom, including, but not restricted to, freedom of opinion and expression as well as the right to 'seek, receive and impart information and ideas

165 See the ICESCR, Art 3.
166 See the CRPD.
167 This refers to the CRPD.
168 CRPD, Art 3(a). The respect under this sub-article also extends to individual autonomy, which comprises the freedom to make choices and the independence of all human beings.
169 Another important principle is non-discrimination, which is embedded in the right to equality. See the CRPD, Art 3(b).
170 This principle refers to a situation in which all human beings experience 'full and effective participation and inclusion in society.' See the CRPD, Art 3(c).
171 This principle is based on the concept of human diversity and accepting people who are or look different due to factors such as disabilities. See the CRPD, Art 3(d).
172 Based on this principle, all human beings are entitled to equal opportunity. See the CRPD, Art 3(e). However, there are circumstances that may make it unrealistic for everyone to enjoy equal opportunity. The different dimensions of the principle of discrimination in relation to the right to equality will be discussed in detail later in this chapter.
173 See the CRPD, Art 2.
174 Reference is made to various areas of human life, such as socio-economic, political, and cultural activities, in which all human beings, including persons with disabilities, should be granted an equal opportunity to participate.
175 Every person is entitled to enjoy the 'right to the respect of the dignity inherent in a human being and to the recognition of his legal status.' See the African Charter, Art 5.
176 See the UDHR, preamble.

through any media and regardless of frontiers.'[177] With particular reference to persons who have disabilities, measures must be implemented to ensure that they enjoy the 'freedom to seek, receive and impart information and ideas on an equal basis'[178] with persons without such disabilities.

Everyone, without exception, must also enjoy the freedom to read whatever and whenever they want without unfair restrictions. Reading is so essential for everyone that it is described as 'an essential conduit to imagining and re-imagining worlds, social and cosmic, material and abstract.'[179] Having the freedom to choose reading materials and the opportunity to read freely helps, among other things, to improve social participation, open doors for economic empowerment, and strengthen self-worth[180] – experiences that no human being should be denied.[181] In fact, not enjoying the freedom to read because of factors such as poverty and disability stunts the human person's development and may administer 'a potential death blow to advancing economic participation.'[182] It is difficult for persons with disabilities to participate in the activities of the world and actively engage others without enjoying the freedom to read. But if disabled persons can freely choose what and when to read, their existence becomes more meaningful, which may give them a sense of belonging.

2.4.5 Obligation of the states to promote the relevant human rights

Member states play critical roles in realising the objectives of the various international and regional treaties, declarations, and policies about human rights, especially for disabled persons. The relevant treaties and declarations aim to achieve and advance the equal enjoyment of all human rights and freedoms by all, without exception. Member states have obligations to realise these objectives. To maintain and promote appropriate

177 See the UDHR, Art 19.
178 See the CRPD, Art 21.
179 Brian Watermeyer, 'Freedom to Read: A Personal Account of the "Book Famine"' (2014) 3(1) African Journal of Disability Art. #144 1–6, 2 <https://ajod.org/index.php/ajod/article/view/144> accessed 6 March 2025.
180 See Watermeyer, 'Freedom to Read: A Personal Account of the "Book Famine"' 1.
181 This experience is what many people with disabilities are deprived of by the unavailability of reading materials of their choice in accessible formats.
182 Watermeyer, 'Freedom to Read: A Personal Account of the "Book Famine"' 2.

respect for human rights and freedom, the African Charter requires contracting parties to adopt relevant measures through education and publications to create awareness of the various human rights and their corresponding duties.[183]

Generally, member states are obliged to assist persons with disabilities in living independently and participating fully in all aspects of life. On the one hand, civil and political rights are connected to negative liberties and freedoms from interference, requiring the state and its government to refrain from specific actions. On the other hand, economic, social, and cultural rights place the responsibility on the state to ensure basic standards of living and well-being for individuals and groups.[184]

Member states should take relevant steps to ensure that persons with disabilities share equal access to information and communications with others.[185] According to Article 21 of the CRPD, member states must take the necessary measures to ensure that disabled persons can exercise the right to freedom of expression and opinion, including the freedom to seek, obtain, and share 'information and ideas on an equal basis with others and through all forms of communication of their choice.'[186]

As for the right of access to cultural life, member states are expected to take all relevant measures to ensure that persons with disabilities enjoy, among others, access to cultural materials in accessible formats.[187] The ICESCR stipulates the significant roles the member states should perform for persons with disabilities to realise their right to cultural

183 African Charter, Art 25.
184 Helfer, 'Toward a Human Rights Framework for Intellectual Property' 981.
185 See the CRPD, Art 9(1).
186 CRPD, Art 21.
187 See the CRPD, Art 30(1). Note that the ICESCR recognises the rights of persons with disabilities to participate in their cultural life. Indeed, these persons need special protection to realise their cultural rights. The specific obligations of member states 'towards the visually impaired can be deduced from Committee's interpretation of States' general obligation regarding the right to culture' (Ayoubi, 'Deciphering the Right to Read under International Human Rights Law: A Normative Framework for Equal Access' 457).

life, being required 'to respect,[188] protect[189] and fulfil[190] the right to take part in cultural life.'[191]

Member states also have specific obligations regarding the human right to education for disabled persons. Obliged to respect everyone's right to education, they must refrain from any action that harms that right. Under the ICESCR, member states' failure to address existing discrimination in education results in a violation of Article 13 of the ICESCR.[192]

Furthermore, member states are expected to ensure that their respective copyright laws accord with international law and relevant treaties to achieve the inclusion of disabled persons' interests in protecting the right to education.[193] Likewise, member states must prevent third parties from interfering with anyone's right to education.[194] They must also fulfil the objective of the ICESCR, which includes the elements of facilitation[195] and provision[196] of education in the interests of everyone.[197] And Article 24 of the CRPD

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188 In this respect, member states are expected to refrain from interfering, directly or indirectly, with VIPs' enjoyment of the right to take part in cultural life. See the ICESCR, General Comment 2009 No. 21: Right of Everyone to Take Part in Cultural Life.

189 This refers to the obligation of member states to prevent third parties from interfering with the right of human beings, including visually impaired persons, to participate in cultural life. See the ICESCR, General Comment 2009 No. 21: Right of Everyone to Take Part in Cultural Life.

190 This aspect of the obligation imposes a positive obligation on member states to facilitate, promote, and provide for everyone's right to participate in cultural life. See the ICESCR, General Comment 2009 No. 21: Right of Everyone to Take Part in Cultural Life.

191 ICESCR, General Comment 2009 No. 21: Right of Everyone to Take Part in Cultural Life.

192 See the ICESCR, 1999 General Comment No. 13 Implementation of the International Covenant on Economic, Social and Cultural Rights.

193 Coomara Pyaneandee, *International Disability Law: A Practical Approach to the United Nations Convention on the Rights of Persons with Disabilities* (1 edn Routledge 2018) 145. See also Ayoubi, 'Deciphering the Right to Read under International Human Rights Law: A Normative Framework for Equal Access' 448.

194 ICESCR, 1999 General Comment No. 13 Implementation of the International Covenant on Economic, Social and Cultural Rights 59.

195 For further discussion on the obligation of states to facilitate the right to education, see Coomara Pyaneandee*, International Disability Law: A Practical Approach to the United Nations Convention on the Rights of Persons with Disabilities* (1 edn Routledge 2018) 144-147. Also see Ayoubi, 'Deciphering the Right to Read under International Human Rights Law: A Normative Framework for Equal Access' 449. This obligation requires member states to take positive measures that may assist individuals in various communities to enjoy their rights to education. Member states have responsibilities to ensure that everyone enjoys quality education.

196 This aspect of states' obligation regarding the right to education expects the states to provide teaching materials in general and accessible materials for visually impaired students.

197 ICESCR, 1999 General Comment No. 13 Implementation of the International Covenant on Economic, Social and Cultural Rights 46.

shows that disabled persons should be educated through modes and means of communication that are most appropriate under the circumstances.[198]

To achieve compliance with the provisions of Article 24 of the CRPD, there are specific obligations that member states must fulfil. The obligations have three legs. Firstly, member states are required to adopt and implement appropriate legislative policies with the aim of promoting equal right to education. Secondly, member states are obliged to abolish all laws and policies that do not favour the achievement of an inclusive educational system. Finally, member states are required to conduct the necessary research programs for the purpose of enhancing the level of participation of disabled persons in the mainstream education. In the same vein, they should make available to disabled persons the evolving information and communication technologies (ICT) and the appropriate assistive devices that would promote inclusive education.[199]

By extension, member states are further obliged, in line with the provisions of Article 24 of CRPD and in developing programs and policies that would serve the interests of persons with disabilities in enjoying their right to education, to always consult with the disabled persons and various organisations as well as individuals[200] representing or assisting such persons. It is recommended that access to the vital information that would enhance active participation of the disabled persons in the mainstream education should also be made available to parents and legal guardians.[201]

Several international conventions and treaties, such as the CRPD and the CRC, oblige states to maintain and promote rights to access to information and freedom of expression. The CRPD expounds the obligations of states on the right to access information. Article 9(1) requires states to act appropriately to ensure that disabled persons enjoy access to

198 CRPD, preamble.

199 For more information on the various levels of obligations by member states in line with the provisions of Article 24 of CRPD, see Pyaneandee, *International Disability Law: A Practical Approach to the United Nations Convention on the Rights of Persons with Disabilities* (1 edn Routledge 2018) 145.

200 This include parents and legal guardians, but not limited to them, who are in the position to assist persons with disabilities.

201 This is necessary where the disabled persons fall within the category of 'minor' either as a result of age or their personal circumstances caused by the nature of disabilities that they deal with.

information on an equal basis with other people.[202] To accomplish this objective, member states must work to remove all forms of obstacles and barriers that prevent equal access to information.[203] Article 9(2) imposes the additional obligation to ensure that persons with disabilities can exercise their right to access information.[204] Article 21 adds procedures to help persons with disabilities to seek, obtain, and communicate information and ideas on an equal basis with other people, through communication channels they prefer.[205]

Also concentrating on persons with different forms of disabilities, Article 4 of the CRPD provides general obligations that member states should meet. To address the challenge of discrimination faced by individuals with disabilities and to advance the full actualisation of inalienable human rights and fundamental human freedom for them, member states must perform the obligations such as adopting appropriate measures for the realisation of all human rights for persons with disabilities;[206] eradicating all forms of discrimination against individuals with disabilities;[207] making sure that all relevant policies and programmes protect and advance the rights of individuals with disabilities;[208] never allowing any act or practice inconsistent with CRPD provisions;[209] preventing any persons, organisation, or private entities from perpetuating discrimination against persons with disabilities;[210] undertaking and supporting research that aims at developing equipment as well as designing goods and services for the benefits of persons with

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202 CRPD, Art 9(1). The provision of the CRPD contains detailed guidelines on how member states will maintain and promote equality and accessibility for disabled persons in enjoying their right to information.

203 See the CRPD, Art 9(1).

204 See the CRPD, Art 9(2). To achieve access to information among persons with disabilities, it contains important measures such as providing training for stakeholders on accessibility and promoting necessary forms of help to disabled persons.

205 See the CRPD, Art 21. Both Arts 2 and 21 maintain that member states are specifically obliged to provide visually impaired persons with reasonable access to the copyright content necessary for realising their right to information and freedom of expression.

206 The appropriate measures may take a legislative, administrative, or any other approach to improve the situation. See the CRPD, Art 4(1)(a).

207 To achieve this objective, state parties must also implement appropriate measures. The measures include modifying or abolishing 'existing laws, regulations, customs and practices that, in one way or the other, promote discrimination against individuals with disabilities.' See the CRPD, Art 4(1)(b).

208 See the CRPD, Art 4(1)(c).

209 State parties to the CRPD should avoid conducting any act or practice that does not accord with the provisions of the Convention. In addition, they should make sure that the actions of public authorities and institutions are consistent with the provisions of the Convention. See the CRPD, Art 4(1)(d).

210 State parties must take appropriate measures to eliminate such discrimination. See the CRPD, Art 4(1)(e).

disabilities;[211] carrying out research that will 'promote the availability and use of new technologies, including information and communication technologies,' that will advance the interests of persons with disabilities; [212] equipping individuals with disabilities with the necessary skills and information on how to operate technologies that may help them improve their situations;[213] and, finally, ensuring that professionals and individuals assisting people with disabilities are properly trained on the rights of such persons as provided in the Convention.[214]

With specific reference to equality and non-discrimination, contracting parties to the CRPD are obliged to 'prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.'[215] The CRPD stipulates that treating persons with disabilities differently to achieve equality should not be considered a form of discrimination.[216] It is acceptable, where necessary, to take additional steps, beyond the status quo, to make sure that situations for persons with disabilities are improved in order to achieve the objectives of the CRPD.[217] In line with the international conventions promoting equality and non-discrimination, member states of the African Charter have the duty, among other things, to eliminate all forms of discrimination.[218]

Addressing the issue of freedom of expression and opinion, Article 21 of the CRPD provides that contracting parties are obliged to take necessary measures in ensuring that individuals with different forms of disabilities enjoy their right to freedom of expression and opinion.[219] It is therefore the duty of the states to ensure that persons with disabilities are not left behind as the world progresses towards improving life for human beings,

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211 See the CRPD, Art 4(1)(f).
212 For further information, see the CRPD, Art 4(1)(g).
213 See the CRPD, Art 4(1)(h).
214 See the CRPD, Art 4(1)(i).
215 See the CRPD, Art 5(2). It should be noted that the grounds are not exhaustive, meaning that it is always possible to add further grounds when needed.
216 See the provisions of Art 3 of the CRPD.
217 The objectives of the CRPD have been complemented by the various international human rights instruments that aim at protecting and promoting the fundamental human rights, human dignity, and freedom.
218 See the African Charter, preamble.
219 State parties should ensure that persons with disabilities can freely 'seek, receive and impart information and ideas on an equal basis' as persons without disabilities. See the CRPD, Art 21.

especially in this digital era. This duty consists of ensuring that persons with disabilities enjoy the freedom to receive and disseminate information in accessible formats 'through the application of technologies appropriate to different kinds of disabilities'[220] to enable them to participate actively in their communities.

2.5 Constitutional dispensation in South Africa – an inclusive human rights framework

After several amendments by the Constitutional Assembly, the South African Constitution was signed into law on 10 December 1996 and came into effect on 4 February 1997. The adoption of the Constitution is based on the constitutional principles as 'a framework for the creation of a democratic state with a supreme constitution in which the fundamental rights and freedoms of all citizens are protected.'[221] The adoption and certification[222] of the 1996 Constitution brought a new dawn in South Africa. The basic principles underlying the new constitutional dispensation include the principle of constitutionalism[223] and the

220 See the CRPD, Art 21(a).

221 Iain Currie and Johan de Waal, *The Bill of Rights Handbook* (6 edn Juta 2013) 6–7.

222 See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC).

223 Note that the principle of constitutionalism is not expressly entrenched in the Constitution: instead, this principle is implicit. This falls outside the scope of this research and may be referred to only in passing.

rule of law,[224] democracy,[225] and accountability,[226] which are either expressly entrenched or implicit in the text of the Constitution.[227]

At the beginning, the Constitution declares that the Republic of South Africa is founded on, among other things, the principle of human dignity, which aims to achieve equality and advance human rights and freedom.[228] This statement about the value of human dignity is consistent with some of the values that underpin the Charter of the Organisation of African Unity ('COAU')[229] as mentioned in the African Charter.[230] One of the values and principles underpinning the South African Constitution is the set of provisions in the Bill of Rights. Under section 7 of the Constitution, the state must respect, promote, and assist in realising the rights in the Bill of Rights.[231] The fundamental question is how far South

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224 The rule of law is entrenched in s 1 of the Constitution, and it is based on the principle of legality and the prohibition of arbitrariness. As for the principle of legality, the rule of law has specific implications for the content of law and government conduct. Furthermore, the prohibition of arbitrariness has particular consequences for government conduct. For example, the principle of non-arbitrariness is expressed in s 9 of the South African Constitution, which requires differentiation to be rationally connected to a legitimate government purpose. The rule of law also requires that the exercise of public power by the executive and other functionaries should not be arbitrary. See *Pharmaceutical Manufacturers Association of South Africa & Another: In re Ex parte President of the Republic of South Africa & Others* (CCT31/99) [2000] ZACC 1 (25 February 2000); 2000 (2) SA 674 (CC) [85].

225 The Constitution requires the government to respect the principle of democracy. Section 1 of the Constitution provides that the Republic of South Africa is a sovereign, democratic state. Note that the principle of democracy is mentioned in various places in the Constitution. See, for example, the preamble and the provisions of sections 1, 7, 9, 61, 70, 116, 152, 195, and 234, among others. Section 2 of the Constitution provides that any law or conduct inconsistent with the principle of democracy is invalid from the outset. See also *President of the Republic of South Africa & Others v United Democratic Movement (African Christian Democratic Party & Others Intervening; Institute for Democracy in South Africa & Another as Amici Curiae)* (CCT23/02) [2002] ZACC 34 (4 October 2002), 2003 (1) SA 472 (CC) [26].

226 See the right of access to information as provided in s 32 of the Constitution and the right to just administrative action in s 33. See also *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd* 2001 (4) SA 661 (W) [37].00

227 Currie and De Waal, *The Bill of Rights Handbook* 7. It is stated that the basic principles underpinning the Constitution influence the interpretation of other provisions of the Constitution, including the provisions of the Bill of Rights.

228 Constitution of the Republic of South Africa Act, 1996, s 1(1)(a).

229 The Charter of the Organization of African Unity was adopted on 25 May 1963 in Addis Ababa, Ethiopia. See United Nations Treaty Series, 'Charter of the Organization of African Unity' <https://treaties.un.org/doc/Publication/UNTS/Volume%20479/volume-479-I-6947-English.pdf> accessed 15 April 2025.

230 See the preamble to the African Charter, which refers to freedom, equality, justice, and dignity as essential objectives towards realising the legitimate aspirations of African peoples.

231 Constitution of the Republic of South Africa Act, 1996, s 7. See also Julian David Jonker, 'Access to Learning Materials in South Africa: The Convergence of Developmental and Rights-Based Arguments for Access to Knowledge' 1–26, 2 (*Social Science Research Network*, 16 August 2009) <https://papers.ssrn.com/abstract=1455943> accessed 6 March 2025. It is stated that 'the active

Africa has performed these obligations to realise the rights of persons with disabilities in accessing copies of copyrighted works.

2.5.1 Achieving an inclusive human rights framework through the Constitution

The development of the Constitution was based on inclusive human rights. It is considered progressive legislation about human rights. It enshrines and champions not only the civil and political rights[232] but also the socio-economic ones[233] as well as the environmental right, among others. The human rights in the Bill of Rights divide into first-generation rights and second-generation rights. First-generation rights are 'traditional liberal rights to equality, personal liberty, property, free speech, assembly and association.'[234] Second-generation rights are socio-economic rights[235] and are split into three kinds: qualified rights,[236] basic socio-economic rights,[237] and negative guaranteed rights[238] against the invasion of individuals' socio-economic standing.

This chapter explores only a few of the human rights entrenched in the Constitution that pertain to this research. These are the rights to equality, culture, language, and

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obligation on all governmental institutions ensures that arguments premised on human rights and social justice have a unique efficacy in South African political dialogue.'

232 These are considered first-generation rights, which include the rights to life and freedom of expression. First-generation rights were the first rights to receive legal recognition and protection. These rights are based on the idea that the government should not interfere with the rights of individuals, especially relating to what they do in their personal lives and concerning their personal and political association with others.

233 These are second-generation rights, including the rights to housing, health care, education, and social security.

234 Currie and De Waal, *The Bill of Rights Handbook* 564. First-generation human rights are often called 'negative' rights, and they take power away from the government by imposing a duty not to act in certain ways.

235 These rights are often qualified as 'positive' rights that impose obligations on the government. See Currie and De Waal, *The Bill of Rights Handbook* 564.

236 These rights are qualified since they guarantee only access to the socio-economic goals specified in the Constitution, and the state is only required to do what is reasonable and realisable, given its limited resources. See Sandra Liebenberg, 'The Interpretation of Socio-economic Rights' in Matthew Chaskalson and Stu Woolman and others, *Constitutional Law of South Africa* (Juta 2008) 33-5. Qualified rights include the right to housing in terms of s 26 of the Constitution and the right to healthcare, food, water, and social security in terms of s 27.

237 This category includes those rights that are not qualified, through which everyone is guaranteed a minimum standard of socio-economic provisions.

238 For example, s 28(3) of the Constitution provides that '[no] one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances.'

education.[239] However, the principles of human dignity and freedom receive attention, considering the level of importance the Constitution placed on them by specifically mentioning them together with equality.[240] In fact, O'Regan J in *S v Makwanyane & Another*[241] referred to the 'recognition and protection of human dignity' in the new constitutional dispensation as 'the touchstone of the new political order' in the South African setting. This chapter of the thesis considers these rights, in no particular order of importance, in the context of the South African Constitution, bearing in mind that most of them are interrelated, interconnected, and underpinned by a common objective.[242]

2.5.2 Right to equality in the context of the Constitution and relevant case law

The concept of equality in the context of section 9 of the South African Constitution forms the basis for most human rights entrenched in the Bill of Rights. The inference could be drawn from the stated objective of the Constitution: achieving equality for everyone who lives in the Republic.[243] The constitutional interpretation of the right to equality relies on the substantive notion of equality, which requires a 'careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned'[244] which may vary from case to case.

The Constitution states its objective as creating a society that is based on equality, dignity, and freedom[245] which must be enjoyed by all human beings who live in the Republic. The right to equality under section 9 of the Constitution guarantees that the law must protect and benefit all individuals equally and also assures everyone that unfair discrimination is prohibited.[246] Explaining the concept of equality, section 9(2) refers to the full and equal

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239 It should be noted that only rights to education and culture fall within the scope of this research. The right to language is therefore not discussed, as it falls outside the scope of the study.

240 See the Constitution of the Republic of South Africa Act, 1996, s 1.

241 (CCT3/94) [1995] ZACC 3 (6 June 1995), 1995 (3) SA 391 (CC) [329].

242 It is recognised that human rights are interconnected, resulting in an embedded inclusiveness in how human rights are interrogated. For more information, see Currie and De Waal, *The Bill of Rights Handbook* 564–565.

243 See the Constitution of the Republic of South Africa, 1996, s 1(a). The SA Constitution commits the state to achieving equality in the Republic of South Africa.

244 *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others* (CCT11/98) [1998] ZACC 15 (9 October 1998), 1999 (1) SA 6 (CC) [62].

245 See the Constitution of the Republic of South Africa, 1996, s 1.

246 See the Constitution of the Republic of South Africa, 1996, s 9(1).

enjoyment of rights and freedom[247] and considers the right to equality a cornerstone of other human rights entrenched in the Constitution.

Section 9 of the Constitution demonstrates a clear intention to enhance legal and social equality. Just like the provisions of section 9 of the Constitution, the international human rights treaties, such as the CRPD and the UDHR, identify the need to treat everyone as equal before the law and confirm that everyone should receive equal protection and benefit of the law without discrimination.[248] Section 9 of the Constitution concerning equality for all is thus consistent with those human rights treaties, but expounds the right in greater detail.

Since section 9(1) of the Constitution begins from the position that everybody, without exception, is equal before the law, one may correctly argue that all persons with disabilities should receive total inclusion because their interests are paramount for them to enjoy such equality. Disabled persons should be treated equally with able persons in every respect, though also subject, like everyone, to section 36 of the Constitution on the limitation of rights.[249] The second leg of the section 9(1) provisions is that everyone, including disabled persons, has the right to equal protection and benefit of the law.

Section 9(1) is both explicit and inclusive. Section 9(2) supplements it by adding that '[e]quality includes the full and equal enjoyment of all human rights and freedoms.'[250] And to achieve the objective of equality for everyone, section 9(2) adds that 'legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.'[251]

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247 See the Constitution of the Republic of South Africa, 1996, s 9(2).

248 See the CRPD, Art 5(1). See also the UDHR, Art 7.

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

250 See the Constitution of the Republic of South Africa, 1996, s 9(2).

251 This is the second leg of s 9(2) of the Constitution.

As the Constitution and the Bill of Rights are comprehensive, section 9(3) specifies the grounds on which no one may be discriminated against unfairly, directly or indirectly. The first observation to make is that the grounds mentioned include disability. The second observation is that there is no limitation to the nature or extent of disability, so it incorporates disabilities of different kinds. The last inference to draw from the inclusive nature of section 9(3) of the Constitution is that the grounds are not limited to those provided in the section and therefore may include those to be determined in future and that may qualify after proper consideration of circumstances.

It is noted that the first part of section 9(3) specifically requires the state 'not to unfairly discriminate directly or indirectly against anyone' on the grounds listed in section 9(3). Yet section 9(4) goes so far as to provide that '[n]ational legislation must be enacted to prevent or prohibit unfair discrimination.'[252] The provisions of section 9 thus demonstrate the importance of the right to equality and its role in contributing to the realisation of other rights entrenched in the Bill of Rights.

The principle of non-discrimination is embedded in the right to equality. Therefore, it is necessary to consider briefly, in the context of the Constitution, the relation between discrimination and differentiation as well as the distinction between fair discrimination and unfair discrimination.

(a) Discrimination versus differentiation

The principle of equality does not necessarily entail that all human beings may be treated in the same manner. The equality principle means that individuals who fall within the same setting should be treated in the same manner. So, for example, South African law makes it compulsory for children to attend school, but not for adults to do so. In some circumstances, people may even be classified and treated differently for justifiable reasons. This treatment may be referred to as 'mere differentiation,' as indicated by the Constitutional Court.[253] Differentiation is allowed on the condition that it does not result in

252 See the Constitution of the Republic of South Africa, 1996, s 9(4).

253 For more information on the notion of differentiation, see *Prinsloo v Van der Linde & Another* (CCT4/96) [1997] ZACC 5 (18 April 1997), 1997 (3) SA 1012 (CC) [25].

unfair discrimination. However, in some instances, everyone must be treated equally, without exception. For example, no one should be discriminated against in relation to access to information or participation in cultural life.

(b) Unfair discrimination within the context of the Constitution

Not every form of discrimination is unfair. This principle means that some form of discrimination may be legally permissible as fair. One must, therefore, acknowledge the distinction between unfair and fair discrimination. The Constitutional Court clearly explained this distinction in *City Council of Pretoria v Walker*.[254] There, the majority of the court held that the actions of the City Council of Pretoria qualified as indirect discrimination on the ground of race.[255] The majority also held that the actions of the Council relating to the flat rate and cross-subsidisation did not entail unfair discrimination.[256] By contrast, the actions of the Council that dealt with the selective recovery of debts were considered unfair discrimination.[257]

A typical example of fair discrimination appears in the Constitutional Court's judgment in *President of the Republic of South Africa & Another v Hugo*.[258] And in *Union of Refugee Women & Others v Director: Private Security Industry Regulatory Authority & Others*,[259] the majority of the Constitutional Court held that the discrimination that took place regarding the registration of companies as security service providers was not unfair discrimination.[260]

As the Constitutional Court held in *Harksen v Lane NO & Others*,[261] it is necessary to determine the impact of discrimination on a person or group of persons to confirm whether the impact is fair or unfair. The following factors must be considered in determining whether the impact is unfair: determining the position of the affected persons in the society

254 (CCT8/97) [1998] ZACC 1 (17 February 1998), 1998 (2) SA 363 (CC).
255 See *City Council of Pretoria v Walker* [31]
256 See *City Council of Pretoria v Walker* [31].
257 See *City Council of Pretoria v Walker* [43].
258 (CCT11/96) [1997] ZACC 4 (18 April 1997), 1997 (4) SA 1 (CC) [37], [39].
259 (CCT 39/06) [2006] ZACC 23 (12 December 2006), 2007 (4) SA 395 (CC).
260 *Union of Refugee Women & Others v Director: Private Security Industry Regulatory Authority & Others* [67].
261 (CCT9/97) [1997] ZACC 12 (7 October 1997), 1998 (1) SA 300 (CC).

and the extent to which they have been victims of such discrimination in the past; determining the nature and the primary purpose of the discriminating law or action under consideration; and determining the extent to which the rights of the affected persons have been impaired and how such law or action affects their fundamental dignity.[262] A typical example is *Blind SA*,[263] where the decision of the court complied with the three factors specified in *Harksen v Lane NO & Others*.[264]

Disability is one of the grounds[265] on which differentiation is presumed to be an unfair discrimination until the contrary is proved by the party whose conduct (whether an act or an omission) is the subject of the constitutional challenge. In *Singh v Minister of Justice and Constitutional Development & Others*,[266] the Equality Court ruled that the government is obliged to protect and promote the interests of persons with disabilities.[267] This requirement then means that persons with disabilities should receive equal treatment like all other persons in relation to enjoying rights entrenched in the Bill of Rights.

2.5.3 Right to culture and participation in cultural life within the context of the Constitution

The use of culture within the context of sections 30 and 31 of the Constitution refers to a way of life that characterises a particular group of people.[268] Here, the word 'culture' is not used in its general sense: instead, its use in the Constitution is linked to the realisation of the self-worth of persons who practise the culture. In this context, culture is a source of identity for individuals who take part in the particular cultural affairs, and it also plays an essential role in promoting the dignity of these persons as human beings.[269]

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262 *Harksen v Lane NO & Others* [52].

263 *Blind SA v Minister of Trade, Industry and Competition & Others* (CCT 320/21) [2022] ZACC 33 (21 September 2022), 2023 (2) BCLR 117 (CC), 2022 BIP 518 (CC).

264 (CCT9/97) [1997] ZACC 12 (7 October 1997), 1998 (1) SA 300 (CC).

265 The grounds include 'race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.' See the Constitution of the Republic of South Africa, 1996, s 9(3).

266 (57331/2011) [2013] ZAEQC 1 (23 January 2013), 2013 (3) SA 66 (EqC).

267 *Singh v Minister of Justice and Constitutional Development & Others* [34].

268 See *MEC for Education, KwaZulu-Natal, & Others v Pillay* (CCT 51/06) [2007] ZACC 21 (5 October 2007), 2008 (1) SA 474 (CC) [49]. Section 30 of the Constitution concerns language and culture. Section 31 of the Constitution concerns cultural, religious, and linguistic communities.

269 See *MEC for Education, KwaZulu-Natal, & Others v Pillay* [53].

The right of individuals to take part in cultural life is subject to the Bill of Rights. According to section 30 of the Constitution, everyone has the right to participate in the cultural life of his or her choice, but this must be done in a manner that is consistent with any provision of the Bill of Rights.[270]

Section 31 of the Constitution is based on Article 27 of the ICCPR.[271] Section 31 of the Constitution reaffirms that everyone is entitled to enjoy their culture, practise their religion, and use their language; and to form, join, and maintain cultural, religious, and linguistic associations and other organs of civil society. Individuals belonging to a cultural group may not be denied these rights.[272] However, the right to culture and the right to cultural participation in terms of section 31(1) must not be exercised inconsistently with any provision of the Bill of Rights.[273] To achieve the right to participate in the cultural life, it is expected that persons with disabilities should have access to copyright-protected works in accessible formats without any form of restrictions.

2.5.4 Promoting the right to education within the context of the Constitution

When considering the right to education, it is necessary to keep in mind the history of South Africa and the level of inequality and discriminatory tendencies experienced in the Republic. In this context, the right to education remains one of the most important and fundamental human rights entrenched in the Bill of Rights, and the cornerstone for the realisation and subsistence of most of the other human rights.

Section 29 of the Constitution enshrines the right to education. The first leg of the provisions of section 29 is that everyone, without exception, has the right to a basic education.[274] This means that persons with disabilities are entitled to a basic education

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270 Constitution of the Republic of South Africa, 1996, s 30.

271 According to the ICCPR, Art 27, persons belonging to a minority group 'shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.' Article 27 showcases hybrid characteristics by protecting both individual and group interests in cultural affairs.

272 Constitution of the Republic of South Africa, 1996, s 31(1).

273 See the provisions of s 31(2) of the Constitution.

274 Constitution of the Republic of South Africa, 1996, s 29(1).

and cannot be denied that right. These persons are also entitled to all means and techniques that will make enjoying the right to education realisable.

The second leg of section 29 indicates that the right to education is inclusive and extends to adult basic education.[275] This means that disabled persons who are already adults should also enjoy the right to education. Again, adults with disabilities should also receive assistance that makes the enjoyment of their right to education attainable.

The third leg of section 29 is that everyone, including persons with disabilities, has the right to further education and that the state should take all reasonable measures to make it progressively available and accessible. When applied to persons with disabilities, this leg of section 29 obliges the state to take progressive steps to provide all kinds of processes to make the enjoyment of further education also achievable.

2.5.5 Dignity of the human person as the foundational value in South African constitutional democracy

Section 1 of the Constitution recognises human dignity as a foundational value[276] for South African constitutional democracy. Furthermore, section 10 of the Constitution, in line with the provisions of most international human rights instruments,[277] advocates for respecting and protecting the inherent dignity of every human person, without exception.[278]

The Constitutional Court has not clearly defined or explained human dignity. However, the court has indicated that the meaning attached to human dignity covers several different values.[279] In *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others*[280] and *Nyathi v MEC for Department of Health, Gauteng & Another*,[281]

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275 Constitution of the Republic of South Africa, 1996, s 29(1).
276 Constitution of the Republic of South Africa, 1996, s 1.
277 See, for example, the preambles to the ICCPR, the ICCESCR, and the CRPD. See also the CRPD, Art 3(a).
278 Constitution of the Republic of South Africa, 1996, s 10.
279 See *Le Roux & Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* 2011 (3) SA 274 (CC) [138].
280 (CCT11/98) [1998] ZACC 15 (9 October 1998), 1999 (1) SA 6 (CC) [29].
281 (CCT 19/07) [2008] ZACC 8 (2 June 2008), 2008 (5) SA 94 (CC) [45].

the court acknowledged that the constitutional protection of human dignity, including the human dignity of disabled persons, as contained in the Constitution,[282] makes it compulsory to appreciate and safeguard the value and inherent worth of every human person, without exception.

Furthermore, in *S v Dodo*, Ackermann J referred to human beings as creatures with inherent and infinite worth, to be treated as ends in themselves.[283] The self-worth and dignity of every human being, including those of persons with disabilities, should therefore be held in high esteem. This finding supports the principle underpinning the moral philosophy that considers human dignity the basis of the intrinsic worth that characterises every human being.[284]

Through recognising the right to human dignity in the Constitution[285] as the most important[286] of all human rights and the backbone[287] of other human rights, the need to safeguard and protect the dignity of every human being, including those with disabilities, has become an important exercise. The full recognition of every human being's right to human dignity connects to the idea of equal respect for all individuals in the Republic, as

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282 See the Constitution of the Republic of South Africa, 1996, s 10, which specifies the need to respect and protect the dignity of every human person in the Republic.

283 See *S v Dodo* (CCT 1/01) [2001] ZACC 16 (5 April 2001), 2001 (3) SA 382 (CC) [38].

284 See Arthur Chaskalson, 'Human Dignity as a Foundational Value of Our Constitutional Order' (2000) 16(2) South African Journal on Human Rights 193–205, 198.

285 Constitution of the Republic of South Africa, 1996, ss 1 and 10.

286 Chaskalson P maintained that the right to dignity and the right to life remained the most important of all human rights. See *S v Makwanyane & Another* [144].

287 Ackermann J stated that the right to dignity remains the cornerstone of the Constitution of South Africa. See *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others* [28]. Furthermore, in *Dawood & Another v Minister of Home Affairs & Others; Shalabi & Another v Minister of Home Affairs & Others; Thomas & Another v Minister of Home Affairs & Others* (CCT35/99) [2000] ZACC 8 (7 June 2000), 2000 (3) SA 936 (CC) [35], the Constitutional Court held that human dignity 'is also a value that informs the interpretation of possibly all other fundamental rights and it is further of central significance in the limitations enquiry.' And in *Christian Education South Africa v Minister of Education* (CCT4/00) [2000] ZACC 11 (18 August 2000), 2000 (4) SA 757 CC) [15], the Constitutional Court held that when balancing the various rights during the application of the limitation clause, it is essential to consider the extent to which the constitutional value of human dignity is affected, which demonstrates once more the significance of the dignity of every human being.

clearly demonstrated in *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others.*[288]

2.5.6 Right to human freedom within the context of the South African constitutional dispensation

The Constitution specifies that the advancement of freedom[289] is one of the values on which the Republic of South Africa is founded as a constitutional state. An aspect of freedom concerns the physical element of a human person, which can affect his or her psychological well-being. Another aspect of freedom concerns the protection and promotion of the right to freedom of expression. As for the first aspect, section 12(1) of the Constitution provides that everyone has the right to freedom.[290] The second aspect of freedom, particularly the provisions of section 16(1)(b),[291] merits brief consideration here, as it falls within the scope of this study.

Every human being, including disabled ones, has 'the freedom to receive or impart information or ideas'[292] without restriction, except under the law of general application in terms of section 36 of the Constitution.[293] In *Case & Another v Minister of Safety and Security & Others; Curtis v Minister of Safety and Security & Others*,[294] Mokgoro J reasoned that everyone, without exception, is entitled to enjoy the right to freedom of expression, which includes the right to 'receive, hold and consume expressions transmitted by others.'[295]

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288 (CCT11/98) [1998] ZACC 15 (9 October 1998), 1999 (1) SA 6 (CC) [28]. Ackermann J held that 'it is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society,' which propels the need to promote the right to equality.

289 Constitution of the Republic of South Africa, 1996, s 1.

290 In addition, s 12 protects the right to security of the person. In general, however, the provisions of s 12 fall outside the scope of this study. The relevant aspect of freedom is the right to freedom of expression, which falls under s 16 of the Constitution.

291 This section deals with the freedom for everyone to receive or impart information or ideas.

292 Constitution of the Republic of South Africa, 1996, s 16(1)(b).

293 See the provisions of s 36 of the Constitution regarding the limitation of human rights as contained in the limitation clause.

294 (CCT20/95, CCT21/95) [1996] ZACC 7 (9 May 1996), 1996 (3) SA 617 (CC).

295 *Case & Another v Minister of Safety and Security & Others; Curtis v Minister of Safety and Security & Others* [25].

Drawing from the provisions of section 16(1)(b) of the Constitution, therefore, one infers that all human beings who experience various forms of disabilities should also enjoy the freedom to receive information in adaptive formats that are easily accessible, on the one hand, and to express their views and opinions, on the other hand. This inference accords with CRPD Article 21, which requires member states to take the necessary steps to ensure that persons with disabilities enjoy their right to freedom of expression and opinion.[296]

2.5.7 Important features of human rights in the Bill of Rights

Several features have emerged from the jurisprudence of human rights entrenched in the South African Constitution. Two of these features pertain to the purpose of this study. One is the interdependence and holistic nature of human rights. The other is the courts' involvement in enforcing human rights.

Human rights entrenched in the Bill of Rights are interdependent and interrelated.[297] For example, implementing the right to equality remains essential for actualising many other human rights. The right to equality forms the basis of most human rights enshrined in the Constitution. Correspondingly, realising the right to education opens doors to enjoying many socio-economic rights and to realising the human rights of persons with disabilities.

Human rights should be treated holistically to achieve and advance human welfare and protection.[298] By parity of reasoning, human rights are interconnected and should not be considered in isolation but in relation to each other. Human rights such as rights to equality and education enable the enjoyment of other rights.

The second jurisprudential feature of human rights that continues to emerge is the role of the courts in enforcing these rights. In its *First Certification* judgment, the Constitutional Court stated that it would, at the very minimum, enforce human rights, especially socio-

296 See the CRPD, Art 21.
297 See *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) & Others* [55]; and *Centre for Child Law & Others v Media 24 Limited & Others* [50].
298 Liebenberg, 'The Interpretation of Socio-economic Rights' 33-5.

economic ones, against invasion.[299] The competent courts with relevant jurisdiction cannot shirk this responsibility. Significantly, section 7(2) of the Constitution requires the state to respect, protect, promote, and fulfil the rights in the Bill of Rights.[300] This declaration reaffirms the state's obligation that matches the provisions of international instruments such as the ICESCR and the CRPD.

This chapter of the thesis has considered the various international and regional legal documents and treaties and the provisions of the Constitution that champion the promotion and advancement of human rights. Now it is critical to examine various factors, particularly copyright-related ones, which have affected human rights and continue to do so, with reference to the rights of persons with disabilities.

2.6 The impact of copyright on human rights: A jurisprudential framework

2.6.1 Jurisprudential separation of human rights and copyright

The various rights considered in this chapter come from the provisions of legal documents consisting of various international human rights instruments, the South African Constitution, and regional human rights instruments.[301]

Historically, lawyers separated the jurisprudence of copyright as an aspect of intellectual property law ('IP law')[302] from the jurisprudence of human rights. During this isolation, the

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299 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [78].

300 See the Constitution of the Republic of South Africa, 1996, s 7(2). It places positive duties on the state to advance the enforcement of the rights, especially the socio-economic rights entrenched in the Bill of Rights.

301 This chapter refers to the various regional human rights instruments such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (1954); the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (2005); European Social Charter (1965); the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (1998); the American Convention on Human Rights 'Pact of San José, Costa Rica' (1978); the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights 'Protocol of San Salvador' (1999); and the African Charter on Human and Peoples' Rights (1986). Of all these regional instruments, only the provisions of the African Charter on Human and Peoples' Rights are discussed in detail.

302 It should be noted that copyright is an essential aspect of IP law. In this part of the research, the expression 'IP law' can be used instead of the word 'copyright,' accommodating the concept of copyright. Thus, the phrases 'IP law' and 'copyright law' are used interchangeably to address the same issue.

adherents of each regime failed to appreciate the impact of that regime on the other regime. Though the two areas of law developed separately from each other for many years,[303] the Committee responsible for ensuring that member states comply with the provisions of ICESCR, in its General Comment, formulated an interpretative guidance that promotes and protects authors' rights alongside with the human rights.[304] While the provisions of many international legal documents and treaties on IP law increased the tension between copyright and human rights, some scholars hold a strong view that IP, particularly copyright and patent, is a human right and must coexist with other human rights amidst technological and socio-cultural progressions.[305]

Most of the founding IP treaties did not mention human rights. Examples of this lack of reference to human rights are to be found in the Paris Convention for the Protection of Industrial Property (Paris Convention)[306] and the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention).[307] On the contrary, though the provisions of Articles 15 and 27 of ICESCR and UDHR respectively solidified the framework of human rights protection among the member states, they recognised the need to protect the right to earn a reward or rent from works created or invented by individuals.[308]

References to human rights do feature in the more recent Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), but only a few times.[309] And

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303 Laurence R Helfer, 'Human Rights and Intellectual Property: Conflict or Coexistence?' (2003) 5(1) Minnesota Intellectual Property Review 47–61, 47.

304 See Economic & Social Council, Committee on Economic, Social and Cultural Rights, General Comment No. 17: 'The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She Is the Author' (Article 15, Paragraph 1(c), of the Covenant), U.N. Doc E/C.12/GC/17 (Jan. 2006).

305 Aigul Shakhmova, 'Intellectual Property and Scientific-Technological Development: In the Prospect of Human Rights Protection' (2014) 3 Eastern Eur. Sci. Journal 135, 135. Also see Okediji, Ruth L. 'Does intellectual property need human rights?' (2018): 51 (1) *NYUJ Int'l L. & Pol.* 1, 18-20.

306 March 20, 1883, as revised in Brussels on 14 December 1900, in Washington on 2 June 1911, and in Stockholm in 1967, 305.

307 September 9, 1886, completed in Paris on 4 May 1896, and revised in Berlin on 13 November 1971. See also Helfer, 'Human Rights and Intellectual Property: Conflict or Coexistence?' 50.

308 Okediji, 'Does intellectual property need human rights?' 18. Also see Saleh Al-Sharieh, 'Toward a Human Rights Method of Measuring International Copyright Law's Compliance with International Human Rights Law' (2016) 32(82) Utrecht Journal of International and European Law 5, 5-6.

309 Though the TRIPS Agreement does not clearly and literally make use of the term "human rights", the provisions of some of the articles are written in the context of human rights. See the Agreement on Trade-Related Aspects of Intellectual Property Rights 1994, Marrakesh Agreement Establishing the

the TRIPS Agreement did not recognise the deontological[310] claims about fundamental human rights and the inalienable liberties that flow from them. Instead, this Agreement intensely justified the economic and instrumental benefits that flow from protecting the products of IP across national borders. It did not recognise the impact of IP rights on human rights and the need to balance the frameworks of IP law and human rights law.[311] There is a strong view that the international IP law is, generally, in conflict with human rights such as freedom of expression and right to education,[312] while others acknowledge some level of compatibility and coexistence between the regime of international human rights and that of international property law.[313]

Jurisprudential separation of IP law and human rights has generated debates and commentaries among proponents of the two bodies of law. One of the points of reference could be to examine the primary cause of this separation. The proponents of both aspects of law were preoccupied with underlying issues that might either threaten or advance their respective objectives.[314] For example, the most pressing issue confronting human rights proponents in the decades after World War II was how to protect, promote, and advance different kinds of human rights by codifying legal principles and enhancing enforcement mechanisms.[315]

World Trade Organization, Annex IC, Legal Instruments – Results of the Uruguay Round, Vol. 31, 33 ILM 1197 (1994). Refer particularly to the provisions of articles 8, 8, 27.2, 27.3(b) and 30.

310 Deontology is the 'science of duty; that branch of knowledge which deals with moral obligations; ethics' (see Oxford English Dictionary, 'Deontology' (2025) <https://www.oed.com/search/dictionary/?scope=Entries&q=deontology> accessed 27 April 2025).

311 See Helfer, 'Human Rights and Intellectual Property: Conflict or Coexistence?' 50. Also see UNCHR (Sub-Commission), 'Intellectual Property Rights and Human Rights: Sub-Commission on Human Rights Resolution 2000/7' (17 August 2000) UN Doc E/CN.4/Sub.2/RES/2000/7 (Resolution 2000/7). There is a submission that international IP law particularly TRIPS 'does not adequately reflect the fundamental nature and indivisibility of all human rights, including the right of everyone to enjoy the benefits of scientific progress and its application, the right to health, the right to food and the right to self-determination'. See para 2 of the Resolution 2000/7.

312 For more information see UNCHR (Sub-Commission), 'Intellectual Property Rights and Human Rights: Sub-Commission on Human Rights Resolution 2000/7' (17 August 2000) UN Doc E/CN.4/Sub.2/RES/2000/7 (Resolution 2000/7) para 2.

313 See UN Commission on Human Rights (UNCHR) (Sub-Commission), 'The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights: Report of the High Commissioner' (27June 2001) UN Doc E/CN.4/Sub.2/2001/13 (Report of the High Commissioner), para 12.

314 See Helfer, 'Human Rights and Intellectual Property: Conflict or Coexistence?' 51.

315 See Laurence R Helfer, 'Forum Shopping for Human Rights' (1999) 148(2) University of Pennsylvania Law Review 285–400, 296–301. The evolutionary process in copyright following World

When attention turns to protecting IP, international lawmakers and IP proponents focused on how to expand the subject matter of IP and the corresponding rights. To achieve this objective, they periodically revised the founding conventions such as the Berne Convention, the Paris Convention, and other subsequent conventions. They also emphasised the need to create a link between IP and trade among member states.[316]

2.6.2 Creating an intersection of human rights and copyright – A shift in paradigm

Acknowledging the conflict between IP law and human rights law took the discussion in the right direction. In 2000, the human rights system of the United Nations concentrated on the TRIPS Agreement. At this point, the transitional periods for developing countries in that Agreement were expiring.[317] The United Nations Sub-Commission on the Promotion and Protection of Human Rights formulated a Resolution on IP rights and human rights, which was adopted in August 2000.[318] The Resolution confirmed the existence of an actual or at least a potential conflict between the application of the TRIPS Agreement and the actualisation of human rights, particularly economic, social, and cultural rights.[319]

There is now a newly discovered relationship between IP law and human rights law which requires the proponents of both areas of law to pay equal attention to their subsistence and develop policies and legal principles that would promote their coexistence. Helfer maintains: 'Human rights and intellectual property, two bodies of law that were once strangers, are now becoming increasingly intimate bedfellows.'[320] This is consistent with

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War II separated human rights into categories. For further information, see Helfer, 'Human Rights and Intellectual Property: Conflict or Coexistence?' 51.

316 See the Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 (the TRIPS Agreement).

317 Helfer, 'Human Rights and Intellectual Property: Conflict or Coexistence?' 55.

318 United Nations Sub-Commission on the Promotion and Protection of Human Rights, Intellectual Property Rights and Human Rights, Resolution 2000, preamble. See Sub-Commission on the Promotion and Protection of Human Rights, 'Intellectual Property Rights and Human Rights: Resolution 2000/7' <https://www.aaas.org/sites/default/files/SRHRL/PDF/IHRDArticle15/E-CN_4-SUB_2-RES-2000-7_Eng.pdf> accessed 7 March 2025.

319 United Nations Sub-Commission on the Promotion and Protection of Human Rights, Intellectual Property Rights and Human Rights, Resolution 2000, preamble.

320 Helfer, 'Human Rights and Intellectual Property: Conflict or Coexistence?' 47. It is further stated that recently, 'international standard setting activities have begun to map previously uncharted intersections between intellectual property law on the one hand and human rights law on the other' (Helfer, 47).

an official publication issued by WIPO and the Office of UN Commission for Human Rights which states that 'Intellectual Property rights are enshrined as human rights',[321] on the one hand and '[h]uman rights and equitable treatment of authors and inventors' are considered as 'the underpinnings of IP systems',[322] on the other hand.

The interface between these two areas of law has produced two schools of thought with differing approaches. The first school of thought recognises the persistent conflict between these two areas of law. To address the challenge, some proponents of this view advocate recognising 'the normative primacy of human rights law over intellectual property law in areas where specific treaty obligations conflict',[323] on the one hand. While other proponents of this view, which includes a 'coalition of developed countries, international organizations, multinational firms, and trade associations', insist that the solution to the tension between the two regimes is to uphold the longstanding practice that international IP rules promote economic growth and development[324] and as such play dominant and beneficial roles over the international human rights rules. This is a more radical approach to resolving the conflict between the two areas of law.

The second school of thought bases its view on a moderate approach, which is similar to the approach taken in this study. In terms of this approach, when addressing the intersection of human rights and IP, it must be recognised that both areas of law face the same fundamental challenge, which is how to accommodate the interests of copyright holders and the users of copyright materials.[325] This school of thought considers human rights law and IP law essentially compatible. It aims at maintaining a balance between the

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321 For more information, see Mary Robison and Kamil Idris, 'Foreword to World Intellectual Property Organization (WIPO) and Office of the High Commissioner for Human Rights [OHCHR], Intellectual Property and Human Rights, WIPO Doc. 762(E) (1999).

322 For more information, see United Nations Secretary-General, 'Intellectual Property Rights and Human Rights', UN Doc E/CN.4/Sub.2/2001/12 (June 14 2001) 7.

323 Helfer, 'Human Rights and Intellectual Property: Conflict or Coexistence?' 48.

324 Okediji, 'Does Intellectual Property Need Human Rights?' 3.

325 For more information see Saleh Al-Sharieh, 'Toward a Human Rights Method of Measuring International Copyright Law's Compliance with International Human Rights Law' (2016) 32(82) Utrecht Journal of International and European Law 5, 5-6. Also see Helfer, 'Human Rights and Intellectual Property: Conflict or Coexistence?' 48.

two, however, the challenge is often where to strike the balance between incentives and access to copyrighted materials.[326]

For example, in order to strike the balance between the rights of copyright owners and the rights of users of copyright works, member states to the relevant international legal instruments are required to carry out their obligations to both international copyright law on the one hand and international human rights law on the other.[327] This approach accords with the Constitutional Court's decision in *Laugh It Off Promotion CC*. There, the court ruled in favour of balancing the right of the trade-mark owner against the right to freedom of expression on the premise that neither of these rights is absolute.[328]

In line with the moderate approach, Mupangavanhu argues that the proponents of IP should always aspire towards the protection and promotion of human rights such as the right to access to information.[329] In fact, 'IP instruments should include provisions that recognise, promote and protect human rights.'[330] Oriakhogba supports the view that rebalancing the intellectual property rights with other human rights such as right to education, rights to access to information, right to freedom of expression and right to participation in cultural activities is paramount in strengthening the public interest.[331] However, it requires challenging the dominant position held by holders of intellectual property rights in the international law for decades.

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326 For more information, see World Health Organization, 'Globalization, TRIPS and Access to Pharmaceuticals' WHO Policy Perspectives on Medicine No. 3 March 2001 1–6, 5 https://iris.who.int/bitstream/handle/10665/66723/WHO_EDM_2001.2_eng.pdf?sequence=1&isAllowed=y accessed 7 March 2025 (hereinafter referred to as 'WHO Policy Perspectives'); International Publishers Association (2001) *Intellectual Property Rights and Human Rights: Report of the Secretary-General,* ESCOR Sub-Comm'n. on the Promotion and Protection of Human Rights, 52nd Session, Provisional Agenda Item 4 at 8, U.N. Document E/CN.4/Sub.2/2001/12.

327 Al-Sharieh, 'Toward a Human Rights Method of Measuring International Copyright Law's Compliance with International Human Rights Law' 5.

328 See *Laugh It Off Promotions CC v SA Breweries International (Finance) BV t/a Sabmark International & Another* (CCT42/04) [2005] ZACC 7 (27 May 2005), 2006 (1) SA 144 (CC) [43], [50].

329 Mupangavanhu 'Copyright law and human rights: *Blind SA v Minister of Trade, Industry and* Competition and its Potentially far-reaching implications' 322.

330 Mupangavanhu 'Copyright law and human rights: *Blind SA v Minister of Trade, Industry and* Competition and its Potentially far-reaching implications' 322.

331 Oriakhogba, Desmond. 'The Right to Research in Africa' (2023) Exploring the Copyright and Human Rights Interface. Recuperado de: <https://link. springer.com/book/9783031332838> 30-31.

Although the Marrakesh Treaty also followed the moderate approach, it is clear and specific about its intention to protect and promote the rights of blind people and VIPs to access copyright-protected works in accessible formats. The adoption of the Marrakesh Treaty[332] led to a paradigm shift in the copyright perspective. This shift aims at reconciling the principles underpinning copyright law with the principles underpinning fundamental human rights.[333] As for advancing human rights, the preamble to the Marrakesh Treaty[334] clearly states its aim to build on the existing international legal frameworks that advocate human rights for all, while focusing on how to address those social and legal challenges that prohibit VIPs and other individuals with print disabilities from enjoying the inclusive right to access.[335] The Marrakesh Treaty reinforces the underlying role of human rights as a catalyst and justification for implementing exceptions to and limitations on copyright holders' rights for the benefit of persons with print disabilities.[336]

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332 Twenty member states ratified the Marrakesh Treaty in September 2016, and it then entered into force.

333 See Jingyi Li and Nilofer Selvadurai, 'Amending Chinese Copyright Law to Fulfil Obligations under the Marrakesh Treaty to Facilitate Access to Published Works for the Print Disabled' (2019) 240 The China Quarterly 1066–1086, 1068. The Treaty introduced a mechanism that requires member states to incorporate exceptions and limitations into their national copyright laws that aim to facilitate access to copyrighted works for VIPs and persons with other print disabilities. See also the Marrakesh Treaty, preamble; and Lida Ayoubi, 'The Marrakesh Treaty: Fixing International Copyright Law for the Benefit of the Visually Impaired Persons' (2015) 13 New Zealand Journal of Public and International Law 255–276, 255. The Marrakesh Treaty requires contracting parties to adopt exceptions to the rights of copyright holders to facilitate the production and distribution of copyrighted works in formats that are easily accessible to people with visual impairments.

334 See the Marrakesh Treaty, preamble, providing that the Treaty promotes 'the principle of non-discrimination, equal opportunity, accessibility and full and effective participation and inclusion in society, proclaimed in the Universal Declaration of Human Rights and the United Nations Convention on the Rights of Persons with Disabilities.'

335 Hope Lewis, 'Introductory Note to Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled' (2013) 52(6) International Legal Materials 1309–1320, 1309: 'Parties to the Marrakesh Treaty agree to take legal and other measures to reduce or eliminate certain legal barriers to the creation, use, and sharing of copyrighted accessible books and other publications by blind persons and other persons with print disabilities.' The central objective of the Treaty is to address the issue of 'book famine' around the globe, where individuals who experienced print disabilities were denied access to copyright materials in an accessible format.

336 Jingyi Li and Niloufer Selvadurai, 'Reconciling the Enforcement of Copyright with the Upholding of Human Rights: A Consideration of the Marrakesh Treaty to Facilitate Access to Published Works for the Blind, Visually Impaired and Print Disabled' (2014) 36(10) European Intellectual Property Review 653–664, 653; and Graeme W Austin, 'Authors' Human Rights and Copyright Policy' (2017) 40(4) Columbia Journal of Law & the Arts 405–430, 411.

2.6.3 Placing copyright owners' property rights within the framework of this thesis

Within the context of South Africa, the thesis aims at striking a balance between the right of copyright owners to their works and human rights of users of such works. South African legislation promotes the rights of everyone[337] who lives in the Republic as enshrined in the Constitution including their rights to equal education[338] and the right to be treated with respect and dignity.[339] In South Africa, some fundamental human rights such as the right to freedom of expression and the right to equality are considered primary rights,[340] however there is a need, in dealing with the issue of copyright infringements and the corresponding exceptions, to weigh these rights against other conflicting rights such as the rights of copyright owners.[341] This thesis does not explore the right to property as part of fundamental human rights. Yet this thesis must discuss the property rights of copyright owners because this topic has attracted significant attention since the President of South Africa referred the proposed Copyright Amendment Bill (CAB), B13F-2017 to the Constitutional Court.[342] This part of the present chapter thus provides an overview of the constitutionality of property rights, with particular reference to the rights of copyright owners. The issue is how to strike a balance between the property rights of copyright owners and the fundamental rights of persons with disabilities in adopting appropriate copyright exceptions and limitations in the Copyright Act in South Africa.

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337 This includes persons with all forms of disabilities such as the persons with hearing impairments, the blind as well as persons with visual impairments.

338 *Gauteng Provincial Legislature In re: Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC) [9]. Also see *Governing Body of the Juma Musjid Primary School ND OTHER V Essay N.O and others* 2011 (8) BCLR 761 (CC) [37].

339 Neli Kaunda and Sabelo Chizwina, 'Providing Access to Students with Print Disabilities: The Case of the North-West University in South Africa' (2019) 16(1) Journal of Access Services 6–20, 6.

340 Holland Jacob, 'Copyright Law and freedom of expression in South Africa' (2017) 8.2 (1) Nnamdi Azikiwe University Journal of International Law and Jurisprudence 1-2. Also see Jade Kouletakis, 'A Critical Examination of Copyright Limitations and Exceptions for the Visually Impaired Pertaining to Literally Works in South Africa in the Local and Global Context' (2014) 2 *South African Intellectual Property Law Journal* 43, 45.

341 For more information see Ncube, 'Harassing Intellectual Property for Development: Some Thoughts on an Appropriate Theoretical Framework' (2013) 16(4) *PER* 369, 380-381.

342 See Ramaphosa MC, 'NOTICE OF REFERRAL IN TERMS OF SECTIONS 79(4)(b) AND 84(2)(c) OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996: COPYRIGHT AMENDMENT BILL [B13F - 2017] AND PERFORMERS' PROTECTION AMENDMENT BILL [B24F - 2016]' <https://static.pmg.org.za/Copyright_Bill_Notice_of_Referral.pdf>

Both the Interim Constitution[343] and the Final Constitution[344] enshrined the property clause, which protects the right to property. Section 28 of the Interim Constitution provided that '[e]very person shall have the right to acquire and hold rights in property' and that 'deprivation of any rights in property' is not allowed except in terms of an appropriate law.[345] Furthermore, the relevant provisions of the Final Constitution[346] accord with those of the Interim Constitution. However, the Final Constitution went further and provided that 'no law may permit arbitrary deprivation of property.'[347]

It is necessary to determine the purpose of the constitutional property clause enshrined in section 25 of the Constitution. In an attempt to determine the constitutionality of protecting the right under section 25 of the property clause and how to deprive a person of this right, the Constitutional Court in *First National Bank*,[348] besides striking the right balance between the rights in property and the interests of the public, focused on the arbitrariness test.[349] Without neglecting the other five stages for determining the issue of the deprivation of property rights,[350] one cannot overemphasise the role of the test of arbitrariness in balancing the property rights of individuals and the interests of the public.

The question that arises is whether copyright, as an extension of IP, enjoys the protection accorded to property rights under section 25 of the Constitution. Views vary on whether the right to copyright should be considered a constitutional right; whether the

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343 See the Interim Constitution; in strict terms, the Constitution of the Republic of South Africa Act 200 of 1993.

344 See the Constitution of the Republic of South Africa, 1996.

345 See the Interim Constitution, s 28(1) and s 28(2).

346 See the Constitution of the Republic of South Africa, 1996, s 25(1).

347 See the Constitution of the Republic of South Africa, 1996, s 25(1).

348 *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Services; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC).

349 See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Services; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* [50].

350 In dealing with the issue of the deprivation of property rights as contained in s 25 of the Constitution, the following stages are considered: (1) establish whether the property should enjoy constitutional protection; (2) determine whether the law concerned provides for the deprivation of property; (3) examine whether arbitrariness occurs; (4) determine whether the law in question provides for the expropriation of property; (5) consider whether there is a need for compensation; and (6) determine whether there is a justification under the law of general limitation.

constitutional property clause protection should be extended to the right to copyright.[351] In determining whether copyright is protected as a form of constitutional property, it is necessary to consider copyright in the context of sections 25(1) and 25(2) of the Constitution. Although the Constitutional Court's decision in *First National Bank* concentrates on moveable corporal property,[352] nothing in the judgment suggests that the constitutional protection of property under the property clause cannot be extended to incorporeal property. While it is necessary to determine the legal form and nature of this right, this inquiry should be objective. Therefore, it does not really matter whether the right at stake is ownership, a limited real right, or even a personal right in respect of corporeal or incorporeal property.[353]

However, before deciding *First National Bank*, the Constitutional Court ruled in the *First Certification* case that the fact that the provision of the 1996 Constitution does not expressly extend constitutional protection to rights in incorporeal property does not contradict the underlying principles of Schedule 4 as enshrined in the Interim Constitution.[354] Although the primary aim of the certification exercise was to test the provisions of the 1996 Constitution against recognised constitutional principles, which include the principle that all 'universally accepted fundamental rights' should enjoy protection under the Constitution, this aim should not be construed to mean that incorporeal property does not enjoy protection under section 25 of the Constitution. In line with the decision in *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic*

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351 While some scholars and commentators like Du Bois, Louw, Van der Walt and Kellerman support the view that certain intellectual property rights have received a reasonable recognition in South African law, scholars like Dean have different view. For more information, also see Mikhalien Du Bois, 'Intellectual Property as a Constitutional Property Right: The South African Approach' (2012) 24 SA Merc LJ 181; Louw AM, *Ambush Marketing and the Mega-Event Monopoly: How Laws are Abused to Protect Commercial Rights to Major Sporting Events* (TMC Asser Press The Hague 2012); Van der Walt AJ *Constitutional Property Law* 3rd ed (Juta Cape Town 2011); Kellerman M, *The Constitutional Property Clause and Immaterial Property Interests* (LLD-thesis Stellenbosch University 2010); and Dean OH, 'The case of the recognition of intellectual property in the Bill of Rights' (1997) *THRHR* 105-119.

352 *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Services; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* [51].

353 *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Services; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* [54].

354 See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) [74] ('the *First Certification* case').

of South Africa,[355] a ruling in the *First Certification* case[356] that a specific right in an incorporeal property is not universally accepted and not expressly recognised in the Constitution does not mean automatic non-recognition under section 25 of the Constitution.

The Court affirmed that the term 'property' extends to rights and interests that enjoy protection under the international human rights laws.[357] Based on the Court decision, adopting a separate clause for intellectual property might not be necessary.[358] However, this is contrary to Dean's view that intellectual property is a universally accepted fundamental human right and must be treated separately.[359] This view is founded on the principle of natural law which informed the recognition of the intellectual property rights in the United Nations Bill of Rights.[360] Despite the different views held by the various schools of thought, whether intellectual property right should be considered a separate right within the South African legal system, there is a clear indication that intellectual property receives constitutional recognition in South Africa.[361]

Turning to other jurisdictions, Van der Walt maintains that most authorities in foreign law recognise the need to extend constitutional protection to rights in incorporeal properties.[362] And Roux opines that in line with recognition under foreign law, some 'category of incorporeal property, personal rights to performances, including a range of

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355 2002 (1) BCLR 23 (T) 28E–G.

356 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) [74].

357 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) [75].

358 See Du Bois, 'Intellectual Property as a Constitutional Property Right: The South African Approach' 178.

359 See OH Dean, 'The Case for the Recognition of Intellectual Property in the Bill of Rights' (1997) 60 Tydskrif vir Hedendaagse Romeins-Hollandse Reg 106 and 110.

360 See Du Bois, 'Intellectual Property as a Constitutional Property Right: The South African Approach' 181.

361 AJ Van der Walt and RM. Shay, 'Constitutional analysis of intellectual property' (2014) 17(1) *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 52-86, 55.

362 AJ van der Walt, *The Constitutional Property Clause: A Comparative Analysis of Section 25 of the South African Constitution of 1996* (Juta 1997) 30–71.

commercial rights'[363] should enjoy constitutional protection as contained in the property clause in section 25 of the Constitution.

However, the President's referring the Copyright Amendment Bill (CAB), B13F-217 to the Constitutional Court suggests that he supports the school of thought that copyright, as an extension of IP, should enjoy maximum protection within the context of section 25 of the Constitution. That referral will be discussed in Chapter Four of this thesis.

It is necessary at this point to discuss briefly the schools of thought that relate to the implementation of international law in the national legal framework which lays the basis for the discussions that will take place in the rest of the chapters, particularly chapter four. This deals with the implementation of international agreements in the national law. Though the legal theories of monism and dualism fall outside the scope of this thesis, it is crucial to indicate that South Africa adopts the dualistic approach. This inference is drawn based on the process followed by South Africa before an international treaty becomes binding in the Country. The common practice is that, for the purpose of accession or ratification, an international treaty must be approved by resolution in the National Assembly and the National Council of Provinces for it to become binding. However, an exception may occur where an international agreement is of technical or administrative nature.[364]

2.7 Conclusion

Based on the discussions of the legal instruments that deal with the various human rights in this chapter, the reasoning has shown that the South African Copyright Act exhibits a serious shortfall in not containing provisions that protect the rights of persons with disabilities. Even worse, through incorporating prohibitions,[365] the Copyright Act prevents the advancement of these rights, particularly the right to access copyright works in

363 Theunis Roux, 'Chapter 46: Property' 1–36, 16 in Stu Woolman and others, *Constitutional Law of South Africa* (2 edn Juta 2012) <https://constitutionallawofsouthafrica.co.za/wp-content/uploads/2018/10/Chap46.pdf> accessed 17 April 2025.

364 The Constitution of the Republic of South Africa, 1996, s 231(3).

365 The statutory prohibitions grant authors and copyright holders absolute control over their works to the extent that converting copyrighted works into accessible formats is almost impossible. See the provisions of ss 6 and 7 as well as s 23 of the South African Copyright Act.

accessible formats. So the Copyright Act in its present form does not comply with the provisions of international human rights instruments such as the ICESCR, the CRPD, and the UDHR, nor with the objective of the Marrakesh Treaty that centres on the achievement of equality for all.

This chapter of the thesis identified one of the measures for addressing the challenges that affect persons with disabilities. This measure consisted of making sure that the provisions of copyright laws, such as the Copyright Act in South Africa, comply with the objectives of the Constitution and other international legal instruments that champion the advancement and protection of the relevant human rights, such as the right to education and the right of access to information for all.

This chapter considered the perspectives of human rights against the backdrop of the Constitution as well as the international legal instruments and jurisprudential framework. It has also been indicated that South Africa follows the dualistic approach with regards to the implementation of international agreements. These discussions lay the basis for the entire study, with the emphasis on promoting and advancing the rights of persons with disabilities in relation to access to knowledge, though not at the expense of the rights of copyright owners.

The chapter thoroughly discussed the specific human rights that play a critical role in realising the objective of this study. Besides considering the various rights individually by examining their unique characteristics and circumstances, the discussion showed that the relevant human rights are also interrelated and interdependent. Some human rights contribute to the realisation and subsistence of other rights. So, for example, the right to education within the international jurisprudential framework provides a cornerstone for realising other rights. At the same time, within the context of the Constitution, the right to equality remains the foundation of other human rights.

Furthermore, this chapter considered various international and regional documents, such as treaties and declarations that addressed the issue of human rights, especially among persons with disabilities. As the study has specific relevance to the South African situation, the chapter also considered the pertinent provisions of the Constitution. The

discussion examined the Bill of Rights as entrenched in the Constitution, to determine its relevance to realising the goals of the study. The promotion of the rights of persons with disabilities, such as the rights to education, culture, equality, and access to information, through the adoption and implementation of the appropriate legal measures, is therefore relevant in addressing the level of discrimination, either directly or indirectly, directed against persons with disabilities. Some of the legal measures, such as copyright exceptions and limitations, will receive further attention in subsequent chapters of this thesis.

The discussion now moves to consider the relevant international laws, with particular reference to the provisions of the three-step test,[366] the function of technological protection measures (TPMs), and the Marrakesh Treaty.

[366] This is considered in relation to copyright exceptions and limitations as well as the doctrine of fair use and the implications of these aspects of copyright law on access to information.

CHAPTER 3: AN ANALYSIS OF THE RELEVANT ASPECTS OF THE THREE-STEP TEST,[1] THE PROVISIONS OF THE MARRAKESH TREATY, AND TECHNOLOGICAL PROTECTION MEASURES

3.1 Introduction

Chapter Two of this thesis extensively discussed the provisions of international laws, such as the CRPD and that ICESCR, that deal with the rights of persons with disabilities. Now this chapter considers the remaining international laws, such as the Berne Convention, the TRIPS Agreement, and the Marrakesh Treaty. The chapter discusses the three-step test in the Berne Convention and the TRIPS Agreement.[2]

In *Blind SA CC*, the Constitutional Court emphasised the need to align the South African Copyright Act with the Marrakesh Treaty and other international agreements.[3] The court read in section 13A of that Act,[4] and it now forms part of the South African Copyright Act. Section 13A is pertinent to determining how far the Copyright Act meets the underlying obligations in the Marrakesh Treaty and other applicable international agreements.[5] Section 13A is discussed in Chapter 4 of this thesis, considering the South African Copyright Act with particular reference to copyright exceptions.

Here, it is crucial to explore the principle of the three-step test, the provisions of the Marrakesh Treaty, and the technological protection measures (TPMs),[6] given the thesis

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1 Discussions on the relevant aspects of the three-step test consider the provisions of the Berne Convention and the TRIPS Agreement to the extent that they deal with the elements of the three-step test.

2 The provisions of treaties that deal with the three-step tests are Arts 9(2) and Arts 13 of the Berne Convention and the TRIPS Agreement, respectively. In addition, reference will be made to Art 10 of the WIPO Copyright Treaty and Art 16 of the WIPO Performances and Phonograms Treaty concerning the three-step test.

3 *Blind SA v Minister of Trade, Industry and Competition & Others* (CCT 320/21) [2022] ZACC 33 (21 September 2022), 2023 (2) BCLR 117 (CC), 2022 BIP 518 (CC) [14]. With regard to other international agreements, reference was made to the Berne Convention, the TRIPS Agreement, the Convention on the Rights of Persons with Disabilities (CRPD), and the International Convention on Economic, Social and Cultural Rights (ICESCR).

4 See *Blind SA v Minister of Trade, Industry and Competition & Others* [6].

5 The international agreements discussed in this chapter deal with the principle of the three-step test and technological protection measures (TPMs).

6 The thesis examines the impact of implementing TPMs on access to knowledge, particularly among persons with disabilities.

statement as clearly stated in chapter one. In addition, bearing in mind certain issues[7] that arose from the Constitutional Court decision in *Blind SA*, one must thoroughly consider the relevant international legal documents, particularly those of the Marrakesh Treaty, and the principle three-step test.

Professor Owen Dean argued in *Blind SA CC*[8] that the proposed section 19D of the Copyright Amendment Bill [B 13B-2017] needs to comply with the three-step test as contained in the Berne Convention[9] and the TRIPS Agreement.[10] He added that reproducing copyrighted works 'must not conflict with the normal exploitation of the work; and must not unreasonably prejudice the legitimate interests of the owner of copyright'[11] in terms of the provisions of the three-step test.

This thesis also considers technological protection measures (TPMs) to determine the appropriate approach to be adopted by the Parliament of South Africa for expanding the nature of works in accessible format copies to include materials that need to be converted into other forms other than those specified in the Marrakesh Treaty.[12] Since technology continuously evolves, failing to regulate the application of TPMs properly may harm the conversion of electronic materials into other accessible formats for persons with disabilities. So the thesis must consider how far the proposed Copyright Amendment Bill (CAB), particularly Bill 13F-2017 should expand the scope of copyright exceptions to accommodate continuous technological evolution and the possible challenges that TPMs may pose.

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7 The decision in *Blind SA CC* raised important questions: What copyright exceptions should the Parliament implement to promote easy access to copyrighted works for disabled students? What is the effect of the Constitutional Court order on the readiness of South Africa to ratify the Marrakesh Treaty? The elements of the three-step test play a crucial role in addressing the first question.

8 *Blind SA v Minister of Trade, Industry and Competition & Others* [35].

9 See Art 9(2) of the Berne Convention.

10 See Art 13 of the TRIPS Agreement.

11 *Blind SA v Minister of Trade, Industry and Competition & Others* [35].

12 Note that the applicable works, as provided in the Marrakesh Treaty, are limited to literary and artistic works as considered in the Berne Convention for the Protection of Literary and Artistic Works. The works may be in the form of texts, notations, or illustrations.

At the centre of this chapter is the role of copyright exceptions and limitations,[13] with particular reference to the Marrakesh Treaty, designed to promote access to copyrighted materials in accessible format copies and the influence of the three-step test in achieving this purpose. This chapter is split into three segments: the three-step test, the provisions of the Marrakesh Treaty, and the TPMs. Appreciating all the essential principles that support both the three-step test and the provisions of the Marrakesh Treaty is crucial, as these two aspects form part of the basis of this study. The principle of the three-step test will be discussed in the context of copyright exceptions in general and later considered within the context of the Marrakesh Treaty in particular.

3.2 Analysing the three-step test in the context of copyright exceptions

The three-step test supports two aspects of copyright law. One is the harmonisation of copyright exceptions at the international level. The other is the adequate regulation of the implementation of copyright exceptions in various domestic copyright statutes. The interpretations of the three-step test and its constituents significantly affect copyright applications.

Achieving the issue of harmonisation becomes possible once individual countries satisfy the three-step test by aligning their copyright exceptions to its basic requirements. Countries may make exceptions to copyright protection to suit their national interests. The condition for these exceptions is that they satisfy the three-step test requirements.[14]

This test is thus an essential yardstick for assessing copyright exceptions. Interpreting the test is crucial for achieving inclusive access to copyright-protected works. This thesis contends that appropriately interpreting and adopting the test is necessary for promoting suitable copyright exceptions to accommodate disabled people's interests fully.

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13 For the sake of precision, the term 'exception' will be used to accommodate 'limitation,' even where both terms are supposed to be used conjunctively in any part of this thesis.

14 Ratnaria Wahid and Khadijah Mohamed, 'A Cobweb of Exception to Copyright Law for Research Purposes' (2014) 9(4) Journal of International Commercial Law and Technology 258–268, 260.

Thoroughly understanding the principles underpinning the three-step test is vital. The further chapters of this thesis concern this test. Here, this part of the present chapter considers three subtopics: (1) the need to adopt the three-step test; (2) analysing the three steps; and (3) various perspectives on interpreting the test and their possible implications. The discussion concentrates on how the test promotes the interests of the public, particularly disabled persons, in relation to access to information, as contrasted with the interests of authors and other copyright holders.

3.2.1 The critical aspects of the three-step test

The discussion ranges through (1) the origin, nature and scope of the three-step test; (2) its role and objective; and (3) treaties since the Berne Convention, and the shift in the paradigm of exceptions.

3.2.1.1 The origin, nature, and scope of the three-step test

The three-step test originated in the Berne Convention from the 1967 revision in Stockholm, Sweden. The origin of the test is tied to copyright law, which was later adapted to other aspects of IP law.[15]

From the mid-nineteenth century until about the end of that century, several authors and copyright owners continuously expressed concern over the level of protection which they received for their copyrighted works in several countries other than their countries of domicile.[16] The impetus to increase copyright owners' protection in foreign countries propelled the philosophy of cross-border protectionism. It thus became necessary to consider harmonising this protection.

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15 Although the three-step test originated in copyright law, the formulation of this test is unique not only to copyright but also to other aspects of intellectual property (IP) law, such as trade-marks, designs, and patents. For more information, see GUIDE TO THE COPYRIGHT AND RELATED RIGHTS (WIPO 2003) <https://www.wipo.int/edocs/pubdocs/en/copyright/891/wipo_pub_891.pdf> accessed 30 October 2025.

16 David Carson, 'Session IV: Fair Use and Other Exceptions' (2017) 40(3) Columbia Journal of Law & the Arts 389–394, 389.

Preparations, negotiations, proposals, and counterproposals ensued. They yielded the three-step test, burdened with expectations. The emergence of this test and its application at the international level led to the formal recognition of exception principles.[17] The 1967 Stockholm revision entrenched the three-step test in the Berne Convention.

Its nature shows it as the most essential and comprehensive approach for introducing national use privileges into the copyright paradigm. It remains a crucial and flexible measure in international law. It enables national copyright lawmakers to satisfy domestic needs[18] by protecting both the interests of copyright owners and those of the public in relation to the copyrighted works.

This humble test led to a recognition-based approach as a reference point. The Berne Convention recognised that its member states already had reproduction rights and related rights and exceptions to them in their domestic statutes.[19] The three-step test acknowledged that the Berne Union countries may allow the reproduction of copyrighted works as long as the conditions in the test are met.[20] Yet this reproduction of these works should occur only in 'certain special cases.'[21] This phrase limited the instances when reproduction might happen. And this restriction is added to the consideration of the three conditions that must occur within the test itself.

The three-step test approach created an opening for the Berne Union member states to continue allowing the existing exceptions in their domestic legislation. The members could even adopt new exceptions as long as the requirements in the test are kept.[22] This

17 Christophe Geiger, Daniel Gervais and Martin Senftleben, 'The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law' (2014) 29(3) American University International Law Review 581–626, 583, stating that the 'first three-step test in international copyright law emerged as Article 9(2) of the Berne Convention. It served as a counterweight to the formal recognition of a general right of reproduction at the 1967 Stockholm Revision Conference.'

18 Martin Senftleben, 'The International Three-Step Test: A Model Provision for EC Fair Use Legislation' (2010) 1(2) JIPITEC – Journal of Intellectual Property, Information Technology and E-Commerce Law 67–82, 67.

19 See the beginning of the test as contained in Art 9(2) of the Berne Convention.

20 See also the beginning of the test as contained in Art 9(2) of the Berne Convention.

21 See the Berne Convention, Art 9(2).

22 Carson, 'Session IV: Fair Use and Other Exceptions' 390.

position gives the member states the leeway to maximise various options in maintaining the appropriate copyright exceptions in the context of their individual experiences, without exceeding the limits that the test contains.

3.2.1.2 The role and objective of the three-step test

For the organisers and coordinators of the Stockholm session, the main objectives of the meeting were as follows. On the one hand, it was intended to formally recognise and standardise the aspect of copyright law that deals with the author's right to control reproductions of protected works in the Berne Convention. On the other hand, it was intended to formulate a standard to regulate the existing exceptions in various domestic jurisdictions[23] by guiding the national legislators.[24] Member states, therefore, may make new exceptions or retain the existing exceptions in their individual statutes that may suit their national interests as long as they meet the requirements of the three-step test.[25]

The three-step test remains pivotal to regulating copyright exceptions internationally.[26] It is considered the cornerstone for most exceptions to all IP rights globally: it determines the nature of and extent to which member states may enact copyright exceptions.[27] The three-step test not only regulates how member states may restrict the authors' rights of reproduction, but also restricts how states may limit any other rights of authors, such as the distribution, adaptation, performance, or display of their works.[28]

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23 Note that many countries had already developed and adopted such rights and corresponding exceptions in their domestic laws. However, prior to the revision session held in Stockholm, the Treaty contained neither the author's right to control reproduction of protected works nor exceptions to the rights entrenched in it. See Pamela Samuelson and Kathryn Hashimoto, 'Is the U.S. Fair Use Doctrine Compatible with Berne and TRIPS Obligations?' 1–22, 3 (*Social Science Research Network*, 7 August 2018) <https://papers.ssrn.com/abstract=3228052> accessed 11 March 2025.

24 Geiger, Gervais and Senftleben, 'The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law' 586.

25 The three-step test has become the controlling mechanism at the international level. See Wahid and Mohamed, 'A Cobweb of Exception to Copyright Law for Research Purposes' 260.

26 See the provisions of Art 9(2) of the Berne Convention, Art 13 of the TRIPS Agreement, and Art 10 of the WCT.

27 Patrick R Goold, 'The Interpretive Argument for a Balanced Three-Step Test?' (2017) 33(1) American University International Law Review 187–230, 194. Note that the Berne Convention on Literary and Artistic Works, signed in 1886, provides that all member states must grant authors an exclusive legal right to reproduce their expressive works. See the Berne Convention, Art 9. The revision of the Convention in 1967 included a provision to determine the nature and extent of exceptions to the authors' reproduction right that would be allowed. See the Berne Convention, Art 9.

28 Goold, 'The Interpretive Argument for a Balanced Three-Step Test?' 195.

However, international treaties, through incorporating the three-step test, acknowledge the diversity existing in various jurisdictions about exceptions to copyright and related rights. The treaties allow national legislators to determine how far such exceptions may apply in their cases.[29] The three-step test also constitutes the yardstick for exceptions concerning the provisions of Article 13 of the TRIPS Agreement, Article 10 of the WIPO Copyright Treaty, and Article 16 of the WIPO Performances and Phonograms Treaty.[30]

From a different perspective, the three-step test is intended to fulfil at least two further functions. It demonstrates when rights holders do not require rights to maximise their income.[31] And it provides for the means of compensation for exceptions which are deemed appropriate[32] from the perspective of that public interest, but which could harm the material benefits of rights holders.[33]

The objective of the three-step test can also be explained with reference to its purpose based on the traditional interpretation. Here, the purpose is causally linked to the reasoning behind the revision of the Berne Convention. From the perspective of the traditional interpretation, the revision of the Berne Convention aimed to increase the standard of copyright globally and to raise the level of legal protection accorded to authors and copyright owners.[34] The preparatory documents compiled by the United International Bureaux for the Protection of Intellectual Property ('BIRPI') clearly indicate that the purpose of the Stockholm Revision was to improve the level of protection enjoyed by authors by creating 'new rights or by the extension of rights which are already recognized.'[35] Similarly, the subsequent international copyright instruments promote the

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29 Carson, 'Session IV: Fair Use and Other Exceptions' 391.

30 The three-step test is also the yardstick for exceptions as provided in the TRIPS Agreement, Art 26(2) on industrial design protection and Art 30 on patent rights.

31 See the second step in the three-step test.

32 An example of such an exception is where copyrighted work is copied for private use, regarded as 'private copying.'

33 See the content of the third step as contained in the three-step test.

34 Goold, 'The Interpretive Argument for a Balanced Three-Step Test?' 199.

35 See WIPO, *Records of the Intellectual Property Conference of Stockholm* June 11 to July 14, 1967 (WIPO 1967) vol I p 80, para 1 <https://www.wipo.int/export/sites/www/treaties/en/docs/prep-docs/1967_july_Stockholm_311-vol1-en.pdf> accessed 13 March 2025. The conveners of the

underlying purpose of the three-step test.[36] Article 9(2) of the Berne Convention, which contains the provisions of the three-step test, remains 'probably the most interesting part and the most quoted part of Article 9.'[37]

3.2.1.3 Treaties since the Berne Convention, and the shift in paradigm

Apart from the revisions of the Berne Convention itself,[38] several treaties[39] providing for the three-step test were signed after the adoption of the Berne Convention. These treaties are referred to in this study as the 'post-Berne treaties,' and their adoption brought a shift in paradigm concerning the nature and perspective of the three-step test. The different treaties incorporated the general basis of the test with minor differences in relation to some aspects of the test. In line with the provisions of the Berne Convention, the international treaties – the TRIPS Agreement, the WCT, and the WPPT – took an approach similar to that of the Berne Convention, Article 9(2), though with minor differences.[40] Apart from the 'certain special cases' aspect of the test, which is unique to all the international treaties,[41] there is also an element of similarity in the core content of

Stockholm Session to revise the Berne Convention set a goal to enlarge the protection accorded to authors through the introduction of the provisions of Art 9.

36 For more information on this aspect, see Goold, 'The Interpretive Argument for a Balanced Three-Step Test?' 194–195.

37 Carson, 'Session IV: Fair Use and Other Exceptions' 390.

38 It should be noted that the Berne Convention has been revised five times since its adoption in 1886 in the following order: 1908 (Berlin); 1928 (Rome); 1948 (Brussels); 1967 (Stockholm); and 1971 (Paris). However, the three-step test was only adopted during the session held in 1967 in Stockholm.

39 Andrew F Christie and Robin Wright, 'A Comparative Analysis of the Three-Step Tests in International Treaties' (2014) 45 IIC-International Review of Intellectual Property and Competition Law 409–433, 410–411. It was stated that in 2014, four international legal instruments in force contained the three-step test: the Berne Convention ('Berne'); the WIPO Copyright Treaty ('WCT'); the WIPO Performances and Phonograms Treaty ('WPPT'); and the TRIPS Agreement ('TRIPS'). In fact, two further international treaties also refer to the three-step test: the Beijing Treaty on Audiovisual Performances (24 June 2012); and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (27 June 2013). For the Beijing Treaty, see WIPO, 'Beijing Treaty on Audiovisual Performances' <https://www.wipo.int/treaties/en/ip/beijing/> accessed 12 March 2025.

40 Eric Schwartz, 'An Overview of the International Treatment of Exceptions' 1–25, 12 (2014) PIJIP Research Paper no. 2014-02 American University Washington College of Law, Washington, D.C. <https://digitalcommons.wcl.american.edu/research/41/> accessed 11 March 2025.

41 However, it should be noted that the clause 'certain special cases' does not appear in Arts 17, 26(2), and 30 of the TRIPS Agreement that deal with trademark, design, and patent, respectively.

the test as contained in Articles 9(2) of the Berne Convention,[42] 10(1) of the WCT,[43] 10(2) of the WCT,[44] 16(2) of the WPPT,[45] and 13 of the TRIPS Agreement[46] that deal with exceptions to the right of reproduction and related rights.[47] However, it is evident that the language of the test changes each time it is incorporated into different treaties.[48] However, any exceptions to the rights appearing in the Berne Convention must be governed by the three-step test as contained in Article 9(2).[49] In dealing with neighbouring rights (the rights of performers and producers of phonograms),[50] Article 16(1) of the WCT allows leeway not to provide an exception, but contains some language that shows the

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42 Article 9(2) of the Berne Convention: 'It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interest of the author.'

43 Article 10(1) of the WCT: 'Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.'

44 Article 10(2) of the WCT: 'Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.'

45 Article 16(2) of the WPPT: 'Contracting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with a normal exploitation of the performance or phonogram and do not unreasonably prejudice the legitimate interests of the performer or of the producer of the phonogram.'

46 Article 13 of the TRIPS Agreement: 'Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.'

47 Exceptions in Art 10 of the WCT and Art 13 of the TRIPS Agreement are consistent with the provisions of Art 9(2) of the Berne Convention since the test must be applied to the reproduction right and all other exclusive rights contained therein. For example, in 'nearly identical language to Article 9(2) of Berne – and identical in all of the critical three steps – the WTO TRIPS Agreement applies the same exceptions to all of the exclusive right of WTO TRIPs Agreement' (Schwartz, 'An Overview of the International Treatment of Exceptions' 16). Similarly, the provisions of the two WIPO Treaties are consistent with Art 9(2) of the Berne Convention. However, the provisions of Arts 17, 26(2), and 30 of the TRIPS Agreement, in relation to the three-step test, concern trademark, design, and patent, respectively. These provisions fall outside the scope of this work. For more information on how the rest of the international treaties are in keeping with the provisions of Art 9(2) of the Berne Convention, see Geiger, Gervais and Senftleben, 'The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law' 586.

48 See Geiger, Gervais and Senftleben, 'The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law' 587–588.

49 See Art 10(2) of the WCT: 'Contracting Parties *shall* [emphasis is mine], when applying the Berne Convention, confine any limitation of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.'

50 See Art 16(1) of the WPPT.

difference in their point of reference.[51] Similarly, the provisions of Article 16(2) of the WPPT,[52] with differences in their point of reference, are similar to those of Article 10(2) of the WCT. Under the WPPT, member states do not need to provide an exception to the rights contained in the Treaty.[53]

Article 9(2) of the Berne Convention differs from the provisions of other international treaties concerning the scope of the rights covered. Notably, Article 9(2)[54] concentrated only on exceptions to the reproduction rights, while the subsequent treaties must deal with the remainder of the rights and adopt the same assessment as contained in the three-step test in relation to each of those rights. Although the revision to the Berne Convention of 1971 was envisaged in the 1980s, it was the international trade agreement – the General Agreement on Tariffs and Trade (1947) ('GATT') – that executed these changes through its intellectual property right agreement (TRIPs), which was first adopted in 1994 after the GATT Uruguay negotiations and entered into force on 1 January 1996.[55] On the one hand, it is evident that the TRIPS Agreement has a provision[56] that appears remarkably similar to Article 9(2) of the Berne Convention.[57] On the other hand, though, the TRIPS Agreement[58] broadens its provision to incorporate further exclusive rights[59] other than the reproduction right. The same model is also followed in the WIPO Copyright Treaty, which applies to the reproduction rights in the copyright.[60] Thus, the three-step test provided in the TRIPS Agreement is similar, in key respects, to the one contained in

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51 See Art 16(1) of the WPPT: 'Contracting Parties *may* [emphasis is mine], in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of performers and producers of phonograms as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works.'

52 Article 16(2) of the WPPT: 'Contracting Parties *shall* [emphasis is mine] confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases that do not conflict with a normal exploitation of the performance or phonogram and do not unreasonably prejudice the legitimate interests of the performance or of the producer of phonograms.'

53 See the WPPT, Art 16.

54 Berne Convention for the Protection of Literary and Artistic Works.

55 See Schwartz, 'An Overview of the International Treatment of Exceptions' 12.

56 See the TRIPS Agreement, Art 13.

57 See the Berne Convention, Art 9(2).

58 See the TRIPS Agreement, Art 13. See also the provisions of Arts 17, 26(2), and 30 of the TRIPS Agreement.

59 See Art 13 of the TRIPS Agreement, which provides that members must confine limitations or exceptions to exclusive rights to certain special cases.

60 Carson, 'Session IV: Fair Use and Other Exceptions' 391.

the Berne Convention. However, there are also notable differences between the two.[61] It is therefore evident that the three-step test was expanded in the TRIPS Agreement and subsequent WIPO treaties to apply to most rights in relation to copyright.[62] The discussion now moves to analyse the various steps and conditions contained in the three-step test.

3.2.2 Analysing the steps in the three-step test

Whereas Article 9(2) refers to exceptions to the reproduction right, Articles 10 of the WCT, 16 of the WPPT, and 13 of the TRIPS Agreement refer to exceptions to rights other than the reproduction right. However, the common principle that underpins the various Articles is the application of the three-step test. For exceptions to any right within the context of copyright to take place, they must meet the requirements of the three-step test. Therefore, this part of this thesis chapter analyses the three steps in relation to their underlying principles.[63] In analysing the three-step test, reference is made to the WTO Panel Report which circulated in 2012.[64] The Report is significant because it gave a clear interpretation of the three-step test[65] in Article 13 of the TRIPS Agreement, which gave rise to subsequent discussions and debates on the underlying principles of the three step. The Report is considered an important step in developing international copyright law that guides member states in adopting appropriate copyright exceptions. This Report therefore forms the basis for the discussion on the three-step test in this chapter.

3.2.2.1 The element of 'certain special cases'[66]

In the first step of the three-step test, the key phrase to be considered is 'certain special cases.' The nature of 'cases' is considered in relation to two concepts: 'certain' and 'special.' The requirement of 'certain special cases' points to clarity as an underlying

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61 Whereas Art 9(2) of the Berne Convention concerns only exceptions to the reproduction right, Art 13 of the TRIPS Agreement extends its tests to all exceptions to all other rights.

62 Ruth L Okediji, 'Introduction' 1–11, 9 in Ruth L Okediji (ed), *Copyright Law in an Age of Limitations and Exceptions* (Cambridge University Press 2017).

63 Although the three steps are considered in relation to the various applicable international treaties, the provisions of Art 9(2) of the Berne Convention remain the central point of reference.

64 This refers to the WTO Panel report on the "three-step test" regarding the TRIPS Agreement and the US law exemption for certain imports.

65 The three-step test sets conditions for intellectual property exceptions in general.

66 This requirement is contained in Art 9(2) of the Berne Convention.

principle. It refers to activities that manifest exceptional circumstances and an element of public policy such as the needs of persons with disabilities in relation to their rights to education, access to information, science, and culture as well as other socio-economic rights, provided that such actions do not arbitrarily affect the rights of authors or copyright holders.[67]

The phrase 'certain special cases' in relation to the test for copyright exceptions features in Articles 9(2),[68] 10(1),[69] 10(2),[70] 16(2),[71] and 13[72] of the international treaties.[73] The two adjectives – 'certain' and 'special' – qualify the nature of the cases that need to be considered. Both adjectives indicate that there must be limits to how far the exception applies in relation to the specific rights.[74] The two adjectives indicate that the first part of the requirements demonstrates that there must be limits to any exception to the reproduction right[75] or exclusive rights[76] as contained in other treaties. As a result of the two adjectives, there is an expectation that any specific 'case' concerning a proposed exception should be clearly defined and narrow in scope,[77] which in turn has specific implications for the scope and nature of copyright exceptions applicable to persons with disabilities.

Various copyright commentators and experts, including the WTO Panel, have considered the reference to the term 'certain' in the three-step test. Several interpretations have been

67 Wahid and Mohamed, 'A Cobweb of Exception to Copyright Law for Research Purposes' 261.
68 See the Berne Convention, Art 9(2).
69 See the WCT, Art 10(1).
70 See the WCT, Art 10(2).
71 See the WPPT, Art 16(2).
72 See the TRIPS, Art 13.
73 Note that the phrase 'certain special cases' is not stated in Arts 17, 26(2), and 30 of the TRIPS Agreement.
74 It should be noted that Art 9(2) refers only to the reproduction right. Article 10(1) of the WCT and Article 16(2) of the WPPT refer to those rights contained in the respective treaties, and Art 13 of the TRIPS Agreement refers to exclusive rights.
75 See the Berne Convention, Art 9(2).
76 See Arts 10(1) and Art 10(2) of the WCT, Art 16(2) of the WPPT, and Art 13 of the TRIPS Agreement.
77 Sam Ricketson and Jane C Ginsburg, 'Restrictions on the Exercise of Rights: Limitations and Exceptions (Articles 2bis (2), 9(2), 10, 10bis, 11bis (2), 13, 17; Later Agreements)' 737–860 in Sam Ricketson and Jane Ginsburg (eds), *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (Oxford University Press 2022).

ascribed to the term, which are not too remote from its general meaning.[78] According to the WTO Panel's interpretation, using the term 'certain' in the first step indicates that the related exceptions in national laws should be clearly defined. However, the Panel considers that 'there is no need to explicitly identify each and every possible situation to which the exception could apply, provided that the scope of the exception is known and particularised.'[79] The term 'certain' is accordingly considered to epitomise *some degree of legal certainty*.[80]

Turning to the term 'special,' one notes several interpretations ascribed to it within the context of the three-step test. However, the general understanding of the term is a point of reference for the WTO Panel in its effort to interpret the term.[81] The Panel maintains that more than just a clear definition is needed to realise the standard stated in the first step. Therefore, 'an exception or limitation must be limited in its field of application or exceptional in its scope.'[82] By implication, this statement means that 'an exception or limitation should be narrow in quantitative as well as a qualitative sense,'[83] which then 'suggests a narrow scope as well as an exceptional or distinctive objective.'[84] The Panel

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78 Apart from the interpretations and meanings attached to the term 'concept' in the context of the underlying characteristics of the three-step test, the term has some general meaning attached to it. The dictionary definitions of the term 'concept' referred to a meaning such as 'known and particularized, but not explicitly identified, determined, fixed, not variable; definitive, precise, exact.' See Lesley Brown (ed), *New Shorter Oxford English Dictionary* (Oxford University Press 1993) 364.

79 See World Trade Organization (ed), 'United States - Section 110(5) of the US Copyright Act (WT/DS160): Report of the Panel,' *Dispute Settlement Reports 2000: Volume 8: Pages 3539-4090*, vol 8 (Cambridge University Press 2003) <https://www.cambridge.org/core/books/dispute-settlement-reports-2000/united-states-section-1105-of-the-us-copyright-act-wtds160-report-of-the-panel/B23CF7139719BEE73904E067661BA1F3> accessed 11 March 2025 para 6.62.

80 World Trade Organization (ed), 'United States - Section 110(5) of the US Copyright Act (WT/DS160): Report of the Panel' para 6.145 (emphasis is mine).

81 For example, the WTO Panel referred to the dictionary meaning of the term 'special' in order to give an appropriate interpretation of the term. It is indicated that the meaning of the term 'special' includes: 'having an individual or limited application or purpose,' 'containing details; precise, specific,' 'exceptional in quality or degree; unusual; out of the ordinary' or 'distinctive in some way.' See John A Simpson (ed), *New Oxford English Dictionary* (Oxford University Press 1989) sv 'special.'

82 See World Trade Organization (ed), 'United States - Section 110(5) of the US Copyright Act (WT/DS160): Report of the Panel' <https://policy.trade.ec.europa.eu/enforcement-and-protection/dispute-settlement/wto-dispute-settlement/wto-disputes-cases-involving-eu/wtds160-united-states-section-1105-us-copyright-act_en> accessed 13 March 2025.

83 World Trade Organization (ed), 'United States - Section 110(5) of the US Copyright Act (WT/DS160): Report of the Panel' para 6.109.

84 See World Trade Organization (ed), 'United States - Section 110(5) of the US Copyright Act (WT/DS160): Report of the Panel' para 6.110.

summarised the twofold requirements – 'quantitative' and 'qualitative' – as exemplifying narrowness in both scope and reach.[85] Such narrow, strict interpretations may still prejudice disabled persons' access to information in some jurisdictions, such as South Africa, where there is a need to expand the scope and objective of copyright exceptions to accommodate people with various forms of disability who experience little or no access to works in the appropriate formats.

The Panel also considered the relevance of the normative value of an exception in relation to the first leg of the three-step test. Establishing the normative basis of an exception is relevant where it aims at identifying the scope and clarity of the exception. The aim, however, is not to make a value judgment in establishing the normative basis of an exception.[86]

3.2.2.2 The absence of a 'conflict with normal exploitation of the work'[87]

This part of the discussion considers the second step in the three-step test. To appreciate the nature and role of the second step in the context of the entire test, it is necessary to outline the concepts 'normal' and 'exploitation' in relation to the 'work.'[88]

Reference is made to the ordinary meaning attached to the word 'normal' as a qualifying adjective.[89] The challenging part of explaining the term 'normal' is whether to do so within the context of an empirical standard[90] or a normative standard.[91] When revising the Berne Convention at Stockholm in 1967, the participants did not foresee any challenge with the concept 'normal.' They understood this concept to connote every form of exploitation that

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85 World Trade Organization (ed), 'United States - Section 110(5) of the US Copyright Act (WT/DS160): Report of the Panel' para 6.112.

86 See World Trade Organization (ed), 'United States - Section 110(5) of the US Copyright Act (WT/DS160): Report of the Panel' para 6.112.

87 This clause is derived from the second condition in the three-step test.

88 The term 'work' in this context refers to the activity or output that gives rise to the exclusive rights that copyright holders enjoy.

89 As a qualifying adjective, the term 'normal' refers to the ordinary meaning – 'constituting or conforming to a type or standard; regular, usual, typical, conventional,' among others. See Ricketson and Ginsburg, 'Restrictions on the Exercise of Rights' 768.

90 This may be viewed as what is 'common,' 'usual,' or 'ordinary,' based on human experience.

91 The concept 'normal' may as well be considered within the context of an established rule or standard that governs each case.

had ‘considerable economic or practical importance,’ on the one hand, or exploitations that ‘were likely to acquire considerable economic or practical importance,’ on the other hand.[92]

Based on the second step, an exception cannot be allowed if it exhibits any form of exploitation that at the time of the incident has acquired significant importance or is likely to acquire substantial importance in future. Such a strict interpretation may hinder the scope of works available for adaptation to accessible formats without the copyright owners’ prior permission. This point may pose a challenge when considered in relation to the Constitutional Court decision on the nature of accessible formats in *Blind SA CC*.[93] The court maintained that the copyrighted works must be converted into various formats to suit the needs of persons with various disabilities.

In comparison with the concept ‘normal,’ the term ‘exploitation,’ within the context of the second step, appears less complicated. The word ‘normal’ connotes ‘making use of’ or ‘utilizing for one’s own ends.’[94] The general connotation of the word ‘exploitation’ is to gain or benefit, which may or may not be to another person’s disadvantage. This aspect of the second leg of the three-step test may not create any challenge when applying the copyright exceptions for persons with disabilities.

There are two possibilities when applying the phrase ‘normal exploitation.’ The first interpretation refers to an instance where exploitation has already generated a tangible or substantial revenue. The second aspect is where, though it may not have a tangible revenue, exploitation could in future attain significant economic or practical relevance ‘with a certain degree of likelihood and plausibility.’[95] However, the second aspect is a matter of degree and may be difficult to prove.

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92 See WIPO, *Berne Convention Centenary: 1886-1986* (WIPO 1987).

93 *Blind SA v Minister of Trade, Industry and Competition & Others* [107].

94 See World Trade Organization (ed), ‘United States - Section 110(5) of the US Copyright Act (WT/DS160): Report of the Panel’ para 44.

95 Ricketson and Ginsburg, ‘Restrictions on the Exercise of Rights’ 769.

The Panel referred to the normative value of an exception in analysing the second leg of the test. Referring to the empirical and normative aspects of 'normal exploitation,' the Panel drew inferences. First, the empirical element relates to a business or market sector in which 'the copyright owner would ordinarily expect to exploit the work, but which [is] not available for exploitation because of this exemption.'[96] Secondly, the normative element accommodates technological and market developments, by focusing on the forms of exploitation that may gain significant 'economic or practical importance.'[97] Therefore, in the second leg of the test, the normative basis of an exception or limitation is strictly considered.[98]

The second step emphasises the importance of promoting the interests of copyright owners concerning their copyrighted works. Most importantly, these owners should continue enjoying the economic benefits of their works. So, all forms of exploiting a work, which have, or are likely to acquire, significant economic or practical value must be reserved for the benefit of the copyright owners.[99]

Compared with the third step, the second step of the test offers more restrictions to the national legislature to develop new exceptions.[100] Those exceptions under the domestic law that do not enter, and have no potential of entering, into economic competition with non-exempted uses are considered to accord with the second step as provided in Article

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96 See World Trade Organization (ed), 'United States - Section 110(5) of the US Copyright Act (WT/DS160): Report of the Panel' para 6.178.

97 See World Trade Organization (ed), 'United States - Section 110(5) of the US Copyright Act (WT/DS160): Report of the Panel' para 6.180.

98 The Panel stressed that not every use of copyrighted work which falls under the scope of exclusive rights and enjoys commercial gain is in conflict 'with a normal exploitation of that work' (World Trade Organization (ed), 'United States - Section 110(5) of the US Copyright Act (WT/DS160): Report of the Panel' para 6.182).

99 Wahid and Mohamed, 'A Cobweb of Exception to Copyright Law for Research Purposes' 261.

100 See Geiger, Gervais and Senftleben, 'The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law' 594. See also the Panel Report, stating that the criterion for normal exploitation involves the determination of the nature of exploitations that currently generate income for the right holder, on the one hand, and those that are likely to be of considerable importance in future (World Trade Organization (ed), 'United States - Section 110(5) of the US Copyright Act (WT/DS160): Report of the Panel' para 6.180).

However, possible challenges may arise from the interpretation that the Panel accorded the second step. This interpretation may restrict any potential extension of existing exceptions to accommodate unforeseen situations that may develop in future. See Geiger, Gervais and Senftleben, 'The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law' 594.

9(2) of the Berne Convention.[101] Therefore, if copyrighted works are converted to accessible formats for the benefit of VIPs, the copyright exceptions for VIPs will ordinarily pass the second step of the three-step test.

3.2.2.3 Unreasonable prejudice to legitimate interests of the author[102]

The third step depends on the second step. Generally, in the context of Article 9(2), the proposed use of a work should not threaten the normal exploitation of that work. Without this requirement, the next stage is to consider the third step of the three-step test. It is argued that the existence of the second step 'is the end of the matter and no exception is authorised by the terms of Article 9(2),'[103] even if the requirement of the third step is met. The purpose of the third step is to balance the interests of copyright owners and the interests of users of copyrighted works. This step allows significant flexibility for countries[104] and opens doors for balancing various interests. In the context of the third step, not every interest of the copyright owner is considered relevant. Only 'legitimate' interests are considered.[105] Nor does every prejudice to a legitimate interest apply. Any reasonable prejudice may be acceptable: this allows flexibility.[106] Some degree of prejudice is therefore justified.[107] The critical question is whether the specific exceptions

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101 Sam Ricketson, *Restrictions on the Exercise of Rights: Limitations and Exceptions* (Oxford University Press 2008) 773. It is also indicated that the provision of Art 9(2) of the Berne Convention was intended to accommodate instances in which exceptions already existed under domestic laws, bearing in mind that some of them are considered capable of creating economic benefits to users.

102 The term 'author' in this context may also refer to 'copyright holder' or 'copyright owner.'

103 Ricketson and Ginsburg, 'Restrictions on the Exercise of Rights' 773.

104 Wahid and Mohamed, 'A Cobweb of Exception to Copyright Law for Research Purposes' 261. It is therefore argued that unreasonable prejudice to the legitimate interests of authors and copyright holders may be addressed through the payment of remuneration as required by a compulsory licence. See WIPO, *Records of the Intellectual Property Conference of Stockholm* June 11 to July 14, 1967 (WIPO 1967) vol II 1144 <https://www.wipo.int/export/sites/www/treaties/en/docs/prep-docs/1967_july_Stockholm_311-vol2-en.pdf> accessed 23 April 2025.

105 Geiger, Gervais and Senftleben, 'The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law' 595.

106 Geiger, Gervais and Senftleben, 'The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law' 595. It is indicated that the third step allows flexibility. On the one hand, the legitimacy of interest invoked by the copyright holder is factored in. On the other hand, the interests of users and 'the reasons justifying the use privilege' are considered.

107 For instance, a country might entirely exempt the making of a small number of private copies and, in return, may impose some compensation.

'unreasonably prejudice the legitimate interests of the author'[108] or 'right holders.'[109] Ordinarily, converting copyrighted works into accessible format copies for the benefit of persons with disabilities does not unreasonably prejudice the legitimate interests of copyright holders.

3.2.3 Various perspectives on the interpretation of the three-step test and their possible implications

Interpreting the three-step test is still uncertain. Various schools of thought advance different views on approaching the test's interpretive elements. Four perspectives apply to interpreting the test: (1) the restrictive interpretation approach; (2) the balanced interpretation approach; (3) the legal interpretivist model; and (4) the fair use doctrine interpretation. Each interpretation carries specific implications for access to copyrighted works in adapted formats for persons with disabilities.

3.2.3.1 The restrictive interpretation approach

Arguably, the drafters of the original three-step test, as contained in the Berne Convention, intended to develop restrictive provisions.[110] The underlying principle of the restrictive approach relates to the traditional interpretation of the test. This interpretation holds that international copyright law aims to raise and maintain the copyright standards by affording copyright owners extensive legal protection. The proponents of the traditional interpretation take a conservative stance to the permissible exceptions under international copyright law. The proponents of the restrictive approach maintained that an appropriate interpretation of the three-step test should follow the traditional paradigm.[111] The

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108 This is considered in the Berne Convention and the WIPO Copyright Treaty context. See the Berne Convention, Art 9(2); the WIPO Copyright Treaty, Art 10(1).

109 See the provisions of the TRIPS Agreement, Art 13.

110 Goold, 'The Interpretive Argument for a Balanced Three-Step Test?' 191.

111 International copyright law permits various member states to adopt and enact copyright exceptions on condition that the elements of the three-step test are strictly complied with. In this context, it could be argued that the fair use doctrine may not pass the test because the scope is too broad and inflexible.

provisions of the three-step test must therefore be interpreted restrictively,[112] and each element[113] of the test should be considered within its own analytic step.[114]

The three elements of the test may be considered as distinct from one another. They are divisible entities, independent of each other, for understanding their meaning. The Stockholm Records show that the three elements contained in Article 9(2) are cumulatively interpreted to realise the most appropriate result that matches the strong level of protection underpinning the Berne Convention.[115]

According to the WTO Panel, the scope of exceptions must be clearly defined and 'narrow in scope and reach.'[116] The Panel also indicates that the scope of exceptions must be 'known and particularised.'[117] As for the scope of the three-step test, the Panel states that every exception must be narrow, quantitatively and qualitatively. This statement means that the scope of an exception must be narrow, and the objective distinctive.[118] The Panel maintains that member states should interpret the three steps cumulatively as independent entities, and that each step must be construed as narrow and restrictive in form.[119] The traditional paradigm, which promotes the restrictive approach, gained considerable recognition after its adoption and formulation in the WTO Panel report 2000.

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112 Goold, 'The Interpretive Argument for a Balanced Three-Step Test?' 189.

113 The elements, in terms of the Berne Convention, Art 9(2), comprise (1) certain special cases; (2) no conflict with normal exploitation; and (3) no unreasonable prejudice of legitimate interests.

114 Okediji, 'Introduction' 10. It should be noted that treating each element as subject to its own analytic step matches the standard principles of treaty interpretation. This is the view taken by the WTO Panel that reviewed the elements of the three-step test. See World Trade Organization (ed), 'United States - Section 110(5) of the US Copyright Act (WT/DS160): Report of the Panel' para 6.74.

115 See WIPO Stockholm Records 111–113. It supports the view that there is a cumulative interpretative approach to interpreting the three requirements of Art 9(2) of the Berne Convention.

116 See World Trade Organization (ed), 'United States - Section 110(5) of the US Copyright Act (WT/DS160): Report of the Panel' para 6.112. In analysing the case before it, the Panel concluded that the business exception was too broad, though defined with certainty. For more information, see World Trade Organization (ed), 'United States - Section 110(5) of the US Copyright Act (WT/DS160): Report of the Panel' para 6.131.

117 See World Trade Organization (ed), 'United States - Section 110(5) of the US Copyright Act (WT/DS160): Report of the Panel' para 6.108.

118 See World Trade Organization (ed), 'United States - Section 110(5) of the US Copyright Act (WT/DS160): Report of the Panel' para 6.109.

119 See World Trade Organization (ed), 'United States - Section 110(5) of the US Copyright Act (WT/DS160): Report of the Panel' para 6.27.

This thesis argues that the specific implication of strict adherence to the WTO Panel's restrictive approach is that it leaves limited scope for member states to strike a balance between protecting the economic interests of copyright owners and the interests of users and the public at large. This outcome could have specific implications for achieving inclusive access to information that may benefit persons with disabilities.

The Panel's decision heavily emphasises the interests of copyright owners.[120] Geiger et al[121] identified three challenges in the Panel resolution: (1) Any exception that fails to meet the requirements of the three elements in the three-step test is automatically considered illegitimate – even where such an exception positively promotes the interest of the public. (2) In its interpretation of the 'certain special cases' requirement, the Panel concluded that exceptions should be narrowly considered, quantitatively and qualitatively. Such an interpretation leaves little or no room for flexibility by the lawmakers of various member states. (3) It is problematic for the Panel to conclude that exceptions are deemed to conflict with the normal exploitation of a copyrighted work where the use of the work competes economically with how the copyright owner extracts economic value from the work. It is even more concerning for the Panel to hold the view that copying would, among other things, be considered to conflict with a normal exploitation of the copyrighted work if there is a certain degree of likelihood that the work has economic value that could be extracted from the work in future. The possible inference that could be drawn from the Panel's decision points to the view that exceptions, regardless of their purpose, could be considered inconsistent with the three-step test if they deprive copyright owners of their economic benefits, whether currently subsisting or potentially for future realisation. The danger of such an approach is that the second step of the test automatically pushes the legislatures of member states to uphold and defend the private economic interests of copyright owners rather than the interests of users of copyrighted works. This outcome

120 For more information on the criticism of the restrictive approach, see Kamiel J Koelman, 'Fixing the Three-Step Test' (2006) 28 European Intellectual Property Review 407–412, 410. See also Christophe Geiger, '"Constitutionalising" Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union' (2006) 37(4) IIC-International Review of Intellectual Property and Competition Law 371–406.

121 Christophe Geiger, Jonathan Griffiths and Reto M Hilty, 'Towards a Balanced Interpretation of the "Three-Step Test" in Copyright Law' [2008] 4 European Intellectual Property Review 489–496, 490.

may also have implications for achieving inclusive access to information that accommodates the interests of persons with disabilities.

In addition, strict adherence to the restrictive interpretation of the three elements of the test is considered problematic for various reasons. Two of them are these: (1) Such a view may establish a legal framework that may prevent lawmakers and courts from responding flexibly and appropriately to social, cultural, or commercial changes or technological developments.[122] (2) Such a view may prevent legislatures, while developing copyright legislation, from considering other vital interests[123] that are seen to conflict with the economic interests of copyright owners.[124]

There are additional challenges that confront copyright law in advancing a balanced policy choice due to strict adherence to the three-step test. For example, the development and adoption of exceptions into some member states' copyright laws are often halted because such exceptions are deemed to conflict with the underlying requirements of the three-step test.

3.2.3.2 The balanced interpretation approach

As opposed to the more traditional paradigm adopted by the proponents of the restrictive interpretation method, another school of thought takes a balanced interpretation approach. Responding to the WTO Panel report, some legal commentators and scholars proposed a 'balanced interpretation' method as an alternative to the restrictive approach in interpreting the three-step test.[125] For supporters of a balanced interpretation approach,

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122 Geiger, Griffiths and Hilty, 'Towards a Balanced Interpretation of the "Three-Step Test" in Copyright Law' 490.

123 The various possible interests that lawmakers may consider include persons' using copyrighted materials for study, promoting access to information among visually impaired students, accessing information among the general public, and promoting competition.

124 Geiger, Griffiths and Hilty, 'Towards a Balanced Interpretation of the "Three-Step Test" in Copyright Law' 490.

125 See the two primary sources of the balanced interpretation module: Martin Senftleben's monograph (Martin Senftleben, *Copyright, Limitations, and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law* (Kluwer Law International 2004)), and the 'Three-Step Test in Copyright Law' (the Munich Declaration) prepared by the Max Planck Institute for Intellectual Property and Queen Mary's School of Law. For more information, see Geiger, Griffiths and Hilty, 'Towards a Balanced Interpretation of the "Three-Step Test" in Copyright Law' 489. Both primary

striking a reasonable balance between the interests of copyright owners and the public is crucial. This view is echoed in the South African Constitutional Court decision in *Laugh It Off Promotion CC*. There, the court considered it necessary to balance the right of the trade-mark owner against the right of the public to enjoy their freedom of expression, maintaining that neither of these rights is absolute.[126] In determining the acceptability of exceptions in the context of the three-step test, equal consideration must be given to both the interests of the copyright owners and those of the users of copyrighted works.[127] This outcome results in a drastic paradigm shift compared to the approach adopted by the supporters of restrictive interpretation.

Although copyright owners and creators of works require some protection over their rights to ensure that they receive a fair reward for their works, their interests must be balanced against the interests of the public in accessing the copyrighted works. This approach accords with the goal of international copyright law that requires member states to provide a minimum level of copyright protection to copyright owners while allowing individual countries to enact exceptions that serve the broader social interests.[128]

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sources maintain that the purpose of the Berne Convention and other international copyright treaties, such as the TRIPS Agreement, is to promote an appropriate balance of interests between copyright holders and society at large. However, in determining the normative values to be implemented in measuring the appropriateness of the proposed balance, Senftleben refers to 'intergenerational equality,' while the Munich Declaration uses public interest as a point of reference. In Senftleben's view, authors of copyrighted works are naturally the rightful owners of their works and will remain owners if they leave enough for the common good. See Senftleben, *Copyright, Limitations, and the Three-Step Test* 34ff. By contrast, the Munich Declaration maintains that a correct balance is struck when preference is given to the interests of members of society, though not at the expense of copyright holders' interests. For more information, see Geiger, Griffiths and Hilty, 'Towards a Balanced Interpretation of the "Three-Step Test" in Copyright Law' 493.

126 See *Laugh It Off Promotions CC v SA Breweries International (Finance) BV t/a Sabmark International & Another* (CCT42/04) [2005] ZACC 7 (27 May 2005), 2006 (1) SA 144 (CC) [43], [50].

127 Geiger, Griffiths and Hilty, 'Towards a Balanced Interpretation of the "Three-Step Test" in Copyright Law' 493.

128 Goold, 'The Interpretive Argument for a Balanced Three-Step Test?' 189. It is highlighted that the three-step test is the 'fulcrum' of the balancing act adopted in the balanced interpretation approach. This approach serves as a point of reference when any country intends to adopt the fair use doctrine within its own jurisdiction.

Adherents of this approach formulated the Munich Declaration[129] to promote a balanced interpretation of the three-step test. The objective of the Declaration was to revisit the underlying normative values of the three-step test and to facilitate the protection of authors' rights without interfering unduly with the duties of legislators and courts in addressing the challenges of exceptions to exclusive rights.[130] The Declaration acknowledges the indivisibility of the three-step test, which points to the view that the three steps must be considered as a whole.[131]

The Declaration also indicates that the requirement of 'certain special cases' does not stop lawmakers from adopting open-ended exceptions as long as their scope is reasonably foreseeable. The Declaration adopted a normative approach to the concept of 'normal exploitation' in step two of the test.[132] Although the Declaration made some meaningful contributions, a few criticisms were also levelled against it.[133]

Unlike the restrictive interpretation approach, the balanced interpretation paradigm contends that the three steps are not separated from each other and should be considered as integrated entities by applying a 'comprehensive overall assessment' rather than cumulatively as isolated elements.[134] To determine whether exceptions are consistent with the three-step test's provisions, it is necessary to consider the exceptions in relation to all three factors and make the final analysis based on the inferences drawn

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129 The Munich Declaration was developed through the joint project entered into between the Max Planck Institute for Intellectual Property, Competition and Tax Law and Queen Mary, University of London that brought together a group of experts in intellectual property law.

130 Geiger, Griffiths and Hilty, 'Towards a Balanced Interpretation of the "Three-Step Test" in Copyright Law' 490.

131 Christophe Geiger and others, 'Declaration a Balanced Interpretation of the "Three-Step Test" in Copyright Law' (2025) 1 JIPITEC – Journal of Intellectual Property, Information Technology and E-Commerce Law 119–122, 120–121.

132 Christophe Geiger and others, 'Declaration a Balanced Interpretation of the "Three-Step Test" in Copyright Law' 121.

133 One of the criticisms against the Declaration is that the proposed interpretation placed too much emphasis on the public interest while paying little attention to the interests of copyright holders, which is far removed from the original objectives of the test. Another criticism directed at the Declaration is that the assessment mechanism it proposes is not in keeping with the test's wording and the intention of the drafters of the test.

134 Geiger, Gervais and Senftleben, 'The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law' 585. See also Goold, 'The Interpretive Argument for a Balanced Three-Step Test?' 205.

from this analysis. In this context, an exception should generally be accepted to accord with the provisions of the three-step test even if it passes only two of the steps and fails one.[135]

Where an exception has passed two of the three steps but falls short of one, it can still be considered as having passed the three-step test, 'bearing in mind that, analytically, there is some degree of overlap between the steps.'[136] Such a failure to pass through one of the steps may be compensated by validating the exception under the remaining two steps.

To achieve a balance of interests, the purpose of the provisions contained in the three-step test is preferred over the ordinary meaning of the text and the intention of the drafters. Notably, the drafters of the three-step test intended to promote the ordinary meaning of the expression of the test that favours a restrictive interpretation. This means that when the three-step test for the balancing of interests is interpreted, any interpretation that is based on the text itself or the intention of the drafters cannot be sustained. Goold, therefore, proposes that a legal interpretivism model be adopted to achieve a balanced interpretation of the three-step test.[137]

3.2.3.3 The legal interpretivism model

A balanced interpretation of the three-step test may not be achieved through the lens of textualism or by probing the underlying intention for drafting the original test. Some commentators have thus proposed a legal interpretivism model. In line with Professor Ronald Dworkin's view,[138] legal interpretivism seeks legal interpretation that advances the realisation of the underlying normative principles of a given content of the law. Since law is essentially a social construct, it is argued that when interpreting any provision of

135 Goold, 'The Interpretive Argument for a Balanced Three-Step Test?' 206.

136 Geiger, Gervais and Senftleben, 'The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law' 611.

137 Goold, 'The Interpretive Argument for a Balanced Three-Step Test?' 189.

138 For more information on legal interpretivism, see Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 44ff <https://oasis.unisa.ac.za/search~S1?/tlaw%27s+empire/tlaws+empire/1%2C4%2C7%2CB/frameset&FF=tlaws+empire&2%2C%2C4> accessed 16 March 2025.

law, one must consider the underlying normative purpose that justifies the development and adoption of that law.[139] Through legal interpretation, law experts and professionals can produce a constructive form of interpretation that demonstrates the normative principles that underpin the specific provision of the law.[140]

Taking the legal interpretivism view, it is argued that the 'most normatively defensible purpose' underlying international copyright law is to harmonise national copyright standards in a manner that strikes a balance between the interests of copyright owners and those of society at large.[141] The same principle should apply when interpreting the provisions of the three-step test.

Having analysed the underlying principles of the three-step test, the discussion moves to the second part of this chapter, which deals with the role of the Marrakesh Treaty in achieving inclusive access to information.

3.3 The role of the Marrakesh Treaty in achieving inclusive access to information

The Marrakesh Treaty provides for specific forms of exceptions by focusing on a particular group of individuals – 'Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled' – to facilitate their access to copies of published works in appropriate formats. Promoting and maintaining an inclusive access to information that advances the interests of persons with disabilities through the adoption of appropriate copyright exceptions is essential for persons with print disabilities to enjoy a right of access that is equal to the rights of those people who do not experience visual impairment.[142] The adoption of the Marrakesh Treaty[143] is considered a new dawn that transformed the copyright paradigm, which aims to reconcile the underlying objectives of copyright law with the principles

139 See Dworkin, *Law's Empire* 85–87.
140 See Dworkin, *Law's Empire* 87, 90.
141 See Goold, 'The Interpretive Argument for a Balanced Three-Step Test?' 192. He points out that the legal interpretivism model could be a guiding tool when interpreting the three-step test.
142 Ti-Li Chen, 'Copyright Exceptions for Visually Impaired Persons: The WIPO Treaty to Facilitate Access to Published Works by Visually Impaired Persons' (MPhil thesis, Queen Mary University of London 2019) 9.
143 Twenty member states ratified the Marrakesh Treaty in September 2016, and it then entered into force.

underpinning the fundamental human rights narrative.[144] The Treaty introduced a mechanism that requires member states to incorporate specific exceptions into their national copyright laws that would facilitate access to copyrighted works for VIPs.[145]

While copyright holders' interests are recognised, VIPs' access rights need to be promoted.[146] In fact, all signatories to the Treaty are required to 'introduce a minimum baseline exception'[147] that would permit persons with print disabilities to receive and use accessible copies of copyrighted works.

The preamble to the Marrakesh Treaty[148] declares its objective to build on the existing international legal frameworks[149] that advocate the right to equality while focusing on how to address the challenges that VIPs confront in obtaining copyrighted works in an accessible format.[150] This preamble accords with the objectives of some international human rights legal instruments discussed in Chapter Two of this thesis, including the UDHR, the CRPD, and the ICESCR.

144 Jingyi Li and Niloufer Selvadurai, 'Amending Chinese Copyright Law to Fulfil Obligations under the Marrakesh Treaty to Facilitate Access to Published Works for the Print Disabled' (2019) 240 The China Quarterly 1066–1086, 1068.

145 Sullivan, *WIPO Study on Copyright Limitations and Exceptions for the Visually Impaired* 1.

146 It is paramount to extend the nature and scope of copyright exceptions and limitations that apply to VIPs and persons with other print disabilities to afford them the same level of access rights as persons with no print disabilities.

147 Paul Harpur and Nicolas Suzor, 'Copyright Protections and Disability Rights: Turning the Page to a New International Paradigm' (2013) 36(3) University of New South Wales Law Journal 745–778, 778.

148 See the World Intellectual Property Organization, Marrakesh Treaty to Facilitate Access to Published Works by Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, June 27, 2013.

149 The relevant provisions of the international treaties and conventions were extensively considered in Chapter Two of this thesis.

150 Hope Lewis, 'Introductory Note to Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled' (2013) 52(6) International Legal Materials 1309–1320, 1309.

The humanitarian and social development dimensions,[151] prominent core principles of the Treaty, significantly influence its objectives.[152] The Marrakesh Treaty advocates the value of non-discrimination by affording equal opportunity to persons with disabilities. It also promotes the accessibility of information for all and full and effective participation in educational, social, and cultural activities to achieve an inclusive society as proclaimed in the UDHR and the CRPD.[153] The Marrakesh Treaty reinforces the underlying role of human rights as a catalyst and justification for implementing exceptions to the rights of copyright holders for the benefit of VIPs.[154]

The contracting parties to the Marrakesh Treaty agree to take legal and other measures to minimise barriers to creating, using, and sharing copyrighted works in accessible versions among persons with blindness and other forms of print disabilities.[155] The Marrakesh Treaty requires contracting parties to adopt exceptions to the rights of copyright holders to facilitate the production and distribution of copyrighted works in formats that are easily accessible to VIPs.[156] The central objective of the Treaty is to address the issue of 'book famine' around the globe, where individuals experiencing print disabilities are denied access to copyright materials in accessible format.

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151 The Marrakesh Treaty is characterised by humanitarian and social development principles, which make it unique and underpin its objectives. See also Desmond Oriakhogba, 'Bringing the WIPO Internet, Audiovisual Performances and Marrakesh VIP Treaties in Tune with the Access to Knowledge and Development Demands in Nigeria' (*Social Science Research Network*, 18 October 2018) <https://papers.ssrn.com/abstract=3303435> accessed 12 March 2025.

152 See the Marrakesh Treaty, preamble, para 11. See also Zemer and Gaon, 'Copyright, Disability and Social Inclusion: The Marrakesh Treaty and the Role of Non-Signatories' 838. As a humanitarian treaty, the Marrakesh Treaty constitutes a segment of the WIPO's Development Agenda, which was officially adopted in 2007.

153 See the Marrakesh Treaty, preamble.

154 Jingyi Li and Niloufer Selvadurai, 'Reconciling the Enforcement of Copyright with the Upholding of Human Rights: A Consideration of the Marrakesh Treaty to Facilitate Access to Published Works for the Blind, Visually Impaired and Print Disabled' (2014) 36(10) European Intellectual Property Review 653–664, 653; and Graeme W Austin, 'Authors' Human Rights and Copyright Policy' (2017) 40(4) Columbia Journal of Law & the Arts 405–430, 411.

155 Lewis, 'Introductory Note to Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled' 1309–1310.

156 See the Marrakesh Treaty, preamble; Lida Ayoubi, 'The Marrakesh Treaty: Fixing International Copyright Law for the Benefit of the Visually Impaired Persons' (2015) 13(2) New Zealand Journal of Public and International Law 255–276, 255.

This part of Chapter Three of the thesis discusses the following aspects: the interplay between the three-step test and the provisions of the Marrakesh Treaty; establishing the objectives and uniqueness of the Treaty; analysing the core elements that underpin the Treaty; perspectives on providing cross-border exchange; the obligations of the contracting parties towards implementing the Treaty; and the possible shortcomings of the Treaty.

3.4 The interplay between the three-step test and the Marrakesh Treaty provisions

One of the issues canvased during the negotiations leading up to the conclusion of the Marrakesh Treaty was how to factor the requirements of the three-step test into the proposed treaty. For example, there was a debate on whether the test should be incorporated into the Treaty 'as a stand-alone provision' or whether the test should be assimilated into the various provisions of the Treaty.[157]

Since the Treaty seeks to promote the interests of VIPs within the framework of the WIPO international copyright regime, it became paramount that the provisions of the Treaty should still comply with the three-step test.[158] In so doing, the Marrakesh Treaty provides recommendations that may guide member states in developing copyright exceptions which would satisfy the three-step test, on the one hand, and advance the objectives of the Treaty, on the other.[159]

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157 Simonetta Vezzoso, 'The Marrakesh Spirit – A Ghost in Three Steps?' (2014) 45(7) IIC-International Review of Intellectual Property and Competition Law 796–820, 801. It is indicated that the EU's Draft Recommendation regarding improved access to copyrighted works for persons with a print disability strongly supports the view that the three-step test should be incorporated into the Marrakesh Treaty as a stand-alone provision. See Standing Committee on Copyright and Related Rights, 'Draft Joint Recommendation Concerning the Improved Access to Works Protected by Copyright for Persons with a Print Disability' (*WIPO International*, 17 June 2010) <www.wipo.int/edocs/mdocs/copyright/en/sccr_20/sccr_20_12.pdf> accessed 12 March 2025.

158 Vezzoso, 'The Marrakesh Spirit – A Ghost in Three Steps?' 799.

159 Marketa Trimble, 'The Marrakesh Puzzle' (2014) 45(7) IIC-International Review of Intellectual Property and Competition Law 768–795, 775. See also Catherine Saez, 'Miracle In Marrakesh: "Historic" Treaty For Visually Impaired Agreed' 1–4, 4 (*Intellectual Property Watch*, 26 June 2013) <https://www.ip-watch.org/2013/06/26/miracle-in-marrakesh-historic-treaty-for-visually-impaired-agreed/> accessed 12 March 2025.

Since the three-step test is considered the international legal framework for measuring the copyright exceptions, reference to the test in developing and implementing the Marrakesh Treaty is crucial.[160] At the same time, overemphasising the three-step test created serious worries and suspicions in the minds of some negotiators. Although some of the concerns raised are genuine, it may be argued that the three-step test produced a useful platform that ushers in an element of harmonisation for the Marrakesh Treaty to emerge.[161] To demonstrate the relevance of the three-step test in achieving its objectives, the Marrakesh Treaty made various references to the obligations of the contracting parties to comply with the test.[162]

The three-step test remains a fundamental legal tool underpinning the provisions of the Marrakesh Treaty. It may be argued that the manner in which the three-step test was incorporated into the Treaty brought some element of adaptation which, on the one hand, allows the protection of a minimum of exclusive rights and, on the other hand, accommodates a few exceptions as contained in multiple versions of the test.[163] Article 11(a) of the Marrakesh Treaty incorporated the three-step test as contained in the Berne Convention,[164] the TRIPS Agreement,[165] and the WIPO Copyright Treaty.[166] When adopting measures necessary for implementing the Marrakesh Treaty, it is essential for member states to comply with the requirements of the three-step test.[167]

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160 It should be noted that the issue of copyright exceptions was considered as part of the agenda of the WIPO's Standing Committee for Copyright and Related Rights (SCCR) in March 2008, and it was expected that the three-step test framework would receive significant attention to make sure that the negotiation process was flexible.

161 Vezzoso, 'The Marrakesh Spirit – A Ghost in Three Steps?' 796.

162 The preamble to the Marrakesh Treaty referred to the three-step test, which clearly reminded the contracting parties of their existing international obligations under the WIPO conventions and treaties. Article 11 of the Marrakesh Treaty provides that contracting parties, in adopting measures to accelerate the application of the Treaty, should comply with their obligations to apply the various provisions of the three-step test as contained in the Berne Convention, the TRIPS Agreement, and the WCT. Similarly, Art 1 of the Marrakesh Treaty referred to the three-step test. It reaffirmed the need to adhere to the obligations in the existing WIPO Convention and Treaty, and other related treaties.

163 Vezzoso, 'The Marrakesh Spirit – A Ghost in Three Steps?' 802.

164 See the Berne Convention, Art 9(2).

165 See the TRIPS Agreement, Art 13.

166 See the WCT, Arts 10(1) and 10(2).

167 See the Marrakesh Treaty, Art 11. It clearly provides that the exceptions and limitations adopted within the context of the Treaty must be confined to certain special cases and should not conflict with

The provisions of the Marrakesh Treaty thus require member states to comply with the obligations contained in the Berne Convention,[168] the TRIPS Agreement,[169] and the WIPO Copyright Treaty[170] regarding the rights of authors and other copyright holders.[171] By incorporating the three-step test, the Marrakesh Treaty aimed at striking a balance between the interests of copyright holders and beneficiaries of copyrighted works in accessible format. Although it is paramount to provide exceptions for achieving free access to copyrighted works among VIPs, the Marrakesh Treaty appreciates the need to accommodate the three-step test and avoid encroaching on the established rights of authors and other copyright holders.[172] Generally, this solution accords with the proposed method adopted by the proponents of the 'balanced interpretative approach.'

While the member states are granted reasonable flexibility in implementing the Marrakesh Treaty, they are also required to ensure that the implementation meets the requirements of the three-step test. For example, the exceptions that the member states incorporate into their national copyright laws must apply to certain special cases and neither conflict with ordinary exploitation of the work nor prejudice the interest of authors and other copyright holders.

To strike a balance between the various interests, the Marrakesh Treaty provides for specific restrictions framed to guide the contracting parties in adopting only those exceptions that ensure the successful implementation of the Treaty, on the one hand, and

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a normal exploitation of the works and, further, that they should not unreasonably prejudice the legitimate interests of authors and other copyright holders.

168 See the Berne Convention, Art 9(2).

169 See the TRIPS Agreement, Art 13.

170 See the WCT, Arts 10(1) and 10(2).

171 See the Marrakesh Treaty, Arts 1 and 11. The aim is to ensure that the rights conferred under the Berne Convention, the TRIPS Agreement, and the WCT are not prejudiced.

172 Gunjan Chawla Arora, 'The Marrakesh Miracle: Affirming the Right to Read for the Blind and Visually Impaired Persons' (2016) 1(1) Amity Law School Gwalior Journal on IPR 1–14, 9 (ISSN No. 9789384312572) <https://ssrn.com/abstract=3254860> accessed 1 March 2025.

to guarantee the realisation of the underlying principles of the three-step test, on the other hand.[173]

Since examining the exceptions for VIPs in the context of the three-step test is essential, the three-step test allows member states to develop exceptions for VIPs.[174] To become acceptable, exceptions must cumulatively satisfy the three conditions outlined in the three-step test.[175] As already observed, this approach may have specific implications for implementing copyright exceptions in the legal system of the member states, particularly those that may need some flexibility in addressing the problem of accessibility of copyrighted works among persons with disabilities.[176]

The first requirement in the context of the cumulative approach is that exceptions in national laws must be known, specific, and narrow in scope to meet the requirement that accessible works may be produced 'in certain special cases.' Secondly, the production and use of the accessible work should not conflict with a normal exploitation of the work by the right holder entitled to enjoy the economic benefits that flow from the holder's work. Thirdly, exceptions in national laws should not unreasonably violate the legitimate interests of copyright holders in their works. This violation may happen where adopting or implementing these exceptions results in or may potentially result in unreasonable loss of income for the copyright holders.

Referring to Article 9(2) of the Berne Convention, Article 11(a) of the Marrakesh Treaty states that a reproduction of copyrighted work may only take place if the reproduction 'does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.'[177] Similarly, Articles 11(b), 11(c) and 11(d) of the Marrakesh Treaty, with reference to Article 13 of the TRIPS Agreement as well as

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173 Lior Zemer and Aviv Gaon, 'Copyright, Disability and Social Inclusion: The Marrakesh Treaty and the Role of Non-Signatories' (2015) 10(11) Journal of Intellectual Property Law & Practice 836–849, 840.

174 The exceptions and limitations must fall within the scope outlined in the three-step test.

175 Jerry Jie Hua, 'Implementation of the Marrakesh Treaty for Visually Impaired Persons into the Chinese Copyright Law' (2017) 3(1) China and WTO Review 7–34, 11.

176 In these circumstances, the principle of fair use may become useful but may not apply because of the cumulative approach to applying the three-step test.

177 See the Marrakesh Treaty, Art 11(a).

Articles 10(1) and 10(2) of the WIPO Copyright Treaty, provide that the reproduction of a copyrighted work that conflicts with a normal exploitation of the work and unreasonably prejudices the legitimate interest of the copyright holder is not permitted.

The three-step test is thus dynamically connected to the objectives of the Marrakesh Treaty. One of those objectives is to achieve a workable provision for the cross-border exchange of copyrighted works in accessible formats among member states to benefit VIPs. The Marrakesh Treaty stipulates that the cross-border exchange, which is underpinned by the principle of copyright exceptions, must be consistent with the three-step test.[178] The test arguably sets a threshold for implementing copyright exceptions as provided in the Marrakesh Treaty.

Although member states are permitted to develop acceptable exceptions in any manner that suits their circumstances, the chosen approach must accord with the three-step test.[179] Under the Marrakesh Treaty, member states that have not ratified the WCT are required to apply the three-step test in the Berne Convention to their national implementations employing exceptions that affect the reproduction right.[180]

3.5 Analysing the core elements underpinning the Marrakesh Treaty

The core elements of the Marrakesh Treaty consist of two segments that form part of its essential features. While they are not wholly interrelated, some aspects of the first segment must be considered in relation to the second segment. The first segment refers to the basic requirements of the Marrakesh Treaty for achieving its objectives. The second segment deals with applying the requirements in the context of the three-step test.[181]

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178 See the Marrakesh Treaty, Art 11. The cross-border sharing of copyrighted works in accessible format must be limited to certain special cases that, on the one hand, do not conflict with the normal exploitation of the copyrighted work and, on the other hand, do not unreasonably prejudice the legitimate interests of the copyright holder.

179 See Laurence R Helfer and others, *The World Blind Union Guide to the Marrakesh Treaty: Facilitating Access to Books for Print-Disabled Individuals* (Oxford University Press 2017) 46.

180 See the Marrakesh Treaty, Art 11.

181 Note that the second segment does not deal with the requirements of the three-step test. Instead, it relates to the essential characteristics of the Marrakesh Treaty.

These elements will also be discussed in relation to South African law particularly the *Blind SA CC*[182] and the provisions of Bill 13F-2017.[183]

3.5.1 The first segment of the core elements applicable to the Marrakesh Treaty

The first segment deals with the following: beneficiaries as provided in the Treaty; the nature and scope of authorised entities; and the nature and scope of works applicable in the context of the Treaty.

There is a link between beneficiaries and the authorised entities, on the one hand, and between beneficiaries and the works that fall within the scope of an accessible format in terms of the Marrakesh Treaty, on the other hand. Accordingly, both the authorised entities and the issue of works in accessible formats as provided in the Treaty are considered in relation to the interests of beneficiaries.

3.5.1.1 The nature and scope of beneficiaries

The issue of beneficiaries is one of the core elements of the Marrakesh Treaty. The Treaty creates specific exceptions for persons who are blind, visually impaired, or print disabled[184] who should gain access to copyrighted works using the specific exceptions. Under Article 3 of the Marrakesh Treaty,[185] beneficiary persons (hereinafter referred to as 'beneficiaries') include blind people, persons who are visually impaired, and persons with specific conditions, such as people with perceptual or reading disabilities or physical

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182 The Constitutional Court dealt with the provisions of Bill 13B-2017. Also, it should be noted that s 13A proposed by the Court contains the term 'permitted entity', instead of 'authorized entity'. The incorporation of s 13A into the Copyright Act is temporary, which allows the Parliament to amend the provisions of s 19D of the Bill.

183 This bill, which contains few changes, has replaced Bill 13B-2017. For example, Bill 13F-2017 introduced the term 'authorized entity', which was missing in the previous bill.

184 For more information, see Brook K Baker, 'Challenges Facing a Proposed WIPO Treaty for Persons Who Are Blind or Print Disabled' (*Social Science Research Network*, 21 May 2013) <https://papers.ssrn.com/abstract=2267915> accessed 12 March 2025.

185 See the Marrakesh Treaty, Art 3. According to Art 3, there are different categories of beneficiaries that include the following: a person who is blind; a person who experiences visual impairment or perceptual or reading disability and cannot read printed materials at the same level as a person who has no impairment or disability; or a person who, due to physical disability, will not be able 'to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading; regardless of any other disabilities.'

disabilities who cannot read print works.[186] Article 3 thus makes it clear who qualifies as a beneficiary. Its definition of a beneficiary is broad[187] and includes people with perceptual or reading disabilities affecting visual function.[188]

More inclusively, the definition of a beneficiary even connotes persons who are not able 'to hold or manipulate a book' or who are unable to 'focus or move the eyes to the extent that would be normally acceptable for reading'[189] as a result of health challenges. The Marrakesh Treaty broadens the scope of beneficiaries. Even so, this thesis argues that the Treaty's definition of beneficiary is still too narrow in not considering other forms of disability beyond the scope of print disability based on the inability of a person to read works in print format.

A proper definition of the beneficiaries in the context of the Marrakesh Treaty becomes necessary to determine who has the right to receive and disseminate copyrighted works in accessible formats. Also, a proper definition of "persons with disabilities", based on their medical conditions, is necessary and this include those who suffer from physical, mental, intellectual or sensory impairments. This is to create certainty on who are the main focus in the proposals set out in the thesis. In its *Blind SA CC* judgment, the Constitutional Court restricted itself to the definition of beneficiaries exactly as contained in the Marrakesh Treaty. However, the court acknowledged that the term 'beneficiary' in the context of the South African copyright exception should extend to persons with other forms of disability, such as those whose impairments affect their hearing ability.[190] This

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186 See M Hilty and others, 'Position Paper of the Max Planck Institute for Innovation and Competition: Concerning the Implementation of the WIPO Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled' (2015) 46 IIC-International Review of Intellectual Property and Competition Law 707–716, 710.

187 The term 'beneficiary person' is broadly defined, within the context of the objective of the Treaty, to include both blind people and other persons who cannot access literary and artistic works to the same degree as able persons. See the Marrakesh Treaty, Art 3.

188 An example of 'perceptual or reading disability' is dyslexia, since, like blindness, it can have a similarly prohibitive effect on reading print works. See Vezzoso, 'The Marrakesh Spirit – A Ghost in Three Steps?' 811.

189 See the Marrakesh Treaty, Art 3.

190 *Blind SA v Minister of Trade, Industry and Competition & Others* [112].

thesis proposes that Parliament incorporate a broader definition of beneficiaries in the proposed Bill amending the Copyright Act as prescribed by the Constitutional Court.[191]

3.5.1.2 The nature and function of authorised entities

The authorised entities are intended to serve the interest of the beneficiaries in terms of the Marrakesh Treaty. In clarifying the nature of an 'authorised entity' in terms of the Treaty, the first question is: Who qualifies as an authorised entity? Under the Treaty, an authorised entity refers to 'an entity that is authorized or recognized by the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis.'[192] 'Authorised entity' also refers to government institutions or non-profit organisations that primarily render services to VIPs to enhance their access to works in adaptive formats.[193]

The term 'authorised entity' has a broad connotation, which includes 'educational institutions, libraries, healthcare organizations, civil society groups, and other governmental or nonprofit organizations,'[194] as long as one of the main obligations of these entities is to serve the beneficiaries as provided in the Marrakesh Treaty.

The authorised entities are required, among other things, to produce, distribute, and make available works in accessible formats for the benefit of VIPs. Similarly, Article 4(2) of the Marrakesh Treaty provides that contracting parties should allow authorised entities to 'make an accessible format copy of a work, obtain from another authorized entity an

191 The Constitutional Court has allowed Parliament to find a solution to domesticate the Marrakesh Treaty. See *Blind SA v Minister of Trade, Industry and Competition & Others* [102].

192 See the Marrakesh Treaty, Art 2(c).

193 See the Marrakesh Treaty, Art 2(c). One of the primary obligations of an authorised entity in terms of the Treaty is to provide services to VIPs. An authorised entity shows commitment to following its own practices to serve the interests of the beneficiaries and, further, to ensure that copies of accessible formats are available only to the beneficiaries. Such an entity is instrumental in providing access to copies of copyrighted works in accessible formats. See also Trimble, 'The Marrakesh Puzzle' 776.

194 Helfer and others, *The World Blind Union Guide to the Marrakesh Treaty: Facilitating Access to Books for Print-Disabled Individuals* 28.

accessible format copy, and supply those copies to beneficiary persons by any means,'[195] as long as the basic requirements are met.[196]

In addressing the issue of an 'authorised entity,' the Constitutional Court states that the application of the concept 'authorised entity' should include institutions that provide, among other things, instructional training, adaptive reading, or information access to VIPs.[197] This means that authorised entities include those institutions that train the beneficiaries on how to access the adaptive formats. The question is whether this possibility accommodates instances in which the authorised entity trains the guardians[198] of a beneficiary who is a minor or who is incapacitated due to the person's impairment in how to access the adaptive formats of copyrighted works.

3.5.1.3 The nature and scope of the applicable works in the context of the Treaty

The Marrakesh Treaty considers it necessary to provide for the nature and scope of works that are permitted to be made available for the interests of the beneficiaries. The Treaty provisions in relation to applicable works are consistent with Article 2(1) of the Berne Convention. The applicable works are restricted to literary and artistic works as considered in the Berne Convention for Protection of Literary and Artistic Works.[199] Thus, the exceptions contained in the Marrakesh Treaty should relate only to the published literary and artistic works in so far as they are available to the print disabled in specific formats that are accessible to them.[200] The works may take the form of texts, notations,

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195 See the Marrakesh Treaty, Art 4(1).

196 For the activities of an authorised entity to become justifiable, the Treaty maintains that the following conditions must be met: (1) The authorised entity must have lawful access to the work or a copy of the work in question; (2) The conversion of the work in accessible format should introduce only the changes necessary to make it accessible to VIPs and persons with other visual impairment; (3) The work in accessible format is distributed and made available to the beneficiaries for their own personally use only; and (4) The authorised entity is required to perform such activities with no intention to make a profit. See the Marrakesh Treaty, Art 4(2)(a).

197 *Blind SA v Minister of Trade, Industry and Competition & Others* [109].

198 An example of a guardian or guardians is one of the parents or both parents of the beneficiary in question.

199 See the Marrakesh Treaty, Art 2(a). The beneficiary is permitted to have access to copies of accessible formats 'as feasibly and comfortably as a person without visual impairment or other print disability.'

200 See Trimble, 'The Marrakesh Puzzle' 775. It is noted that the exceptions provided in the Treaty are expected to affect the rights of copyright holders in relation to the reproduction, distribution, and making their works in available formats available to the public.

or illustrations, among others, which are made available to the public[201] and could be converted to accessible format copies for the benefit of VIPs.

An accessible format copy refers to 'a copy of a work in an alternative manner or form which gives a beneficiary person access to the work'[202] to the extent to which the beneficiary could enjoy print materials like persons without visual impairment. Copies of accessible formats must be developed specifically for the benefit of VIPs.[203] Although authorised entities make the accessible format copies, they can also be made by beneficiaries or other people acting on their behalf for their personal use.[204]

Accessible format copies are made available to the beneficiaries on the condition that the integrity of the original work is respected.[205] The Treaty only allows the necessary changes to make the copyrighted works accessible in an alternative version for VIPs.[206] Copies of works in an accessible format enjoy legal protection if they are legally obtained, transformed to accessible format copies, and made exclusively for the benefit of VIPs.[207] Copyrighted works in accessible formats may comprise large print materials, audio recordings transcribed, and photographic enlargements, as well as other formats that have emerged as the result of technological development, such as electronic Braille and other digital copies. It is assumed that the Accessible Information System (DAISY)

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201 The works in question can be published or made available to the public in any other form. See the Marrakesh Treaty, Art 2(a).

202 Marrakesh Treaty, Art 2(b).

203 Thus, there is a nexus between the nature of the beneficiaries and the nature of the accessible formats to be developed.

204 Marrakesh Treaty, Art 4(2).

205 Marrakesh Treaty, Art 2(b). The accessible format copies may be 'used exclusively by beneficiary persons' on condition that the integrity of the copyrighted works in their original forms must be respected.

206 Marrakesh Treaty, Art 2(b).

207 See WIPO, *Standing Committee on Copyright and Related Rights, Nineteenth Session Background Paper by Brazil, Ecuador and Paraguay on a WIPO Treaty for Improved Access for Blind, Visually Impaired and Other Reading Disabled Persons* SCCR/19/13 Corr (2009) <https://www.wipo.int/edocs/mdocs/copyright/en/sccr_19/sccr_19_13.pdf> accessed 12 March 2025.

remains one of the leading accessible formats for VIPs and persons with other print disabilities.[208]

The Constitutional Court's decision in *Blind SA CC*[209] about the nature of works to be converted to an accessible format is consistent with the Marrakesh Treaty. The Court deemed it important and urgent to address the disproportionate infringement on the right of persons with disabilities especially their right to receive and disseminate copyrighted works in accessible format copies in line with the provisions of the Marrakesh Treaty.[210] Though the Court considered the provisions of the international law particularly the Marrakesh Treaty,[211] it is not under any duty or compulsion to follow the whims and dispositions of the Treaty. The Court tilted more to the theory of dualism than the theory of monism in making its decision. These two theories strictly fall outside the scope of this thesis and could not discussed further. According to the court, the subject of the exception is directed to the published literary works and artistic works that form part of the literary works.[212] Considering the South African position, the Constitutional Court states that the provisions of sections 6[213] and 7[214] of the South African Copyright Act hinder VIPs from obtaining 'accessible format copies of published literary works and such artistic works as may be included in these literary works.'[215]

As for the nature and extent to which conversion may take place to produce an accessible format copy, the Constitutional Court deviated from the Marrakesh Treaty. The court maintains that the people who serve the interests of VIPs and persons with other forms

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208 Judith Sullivan, *WIPO Study on Copyright Limitations and Exceptions for the Visually Impaired* (20 February 2007) 12 <https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=75696> accessed 12 March 2025.

209 *Blind SA v Minister of Trade, Industry and Competition & Others* (CCT 320/21) [2022] ZACC 33 (21 September 2022), 2023 (2) BCLR 117 (CC), 2022 BIP 518 (CC).

210 *Blind SA v Minister of Trade, Industry and Competition & Others* [69].

211 *Blind SA v Minister of Trade, Industry and Competition & Others* [93].

212 *Blind SA v Minister of Trade, Industry and Competition & Others* [106].

213 Section 6 of the Copyright Act lists actions exclusively vested in the copyright owner regarding literary and musical works, which the owner has the exclusive right to perform or authorise another person to perform.

214 Section 7 of the Copyright Act lists actions exclusively vested in the copyright owner regarding artistic works, which the owner has the exclusive right to perform or authorise another person to perform.

215 *Blind SA v Minister of Trade, Industry and Competition & Others* [96].

of print disabilities should be given maximum freedom to produce literary works in accessible format copies and to develop appropriate technological devices that may be required to convert 'the original work in the best possible way, tailored to the varied incidents of the impairments such persons suffer.'[216] In developing appropriate amendments to the Copyright Act to increase access to copyrighted works in accessible formats for VIPs, South African legislators ought to consider a framework that gives a deeper meaning to the nature and extent to which the conversion of copyrighted works may be necessary to accommodate the interests of persons with various forms of disability.

3.5.2 The second segment of the core elements of the Marrakesh Treaty in the context of the three-step test

This part of the present chapter considers the core elements of the Marrakesh Treaty in relation to the principles underpinning the three-step test in the Berne Convention. The Marrakesh Treaty remains the first treaty requiring member states to adopt copyright exceptions within the framework of the three-step test.[217] The Marrakesh Treaty considers it essential to use the three-step test as a benchmark to prevent misuse of exceptions.[218] So this thesis analyses the core elements of the Marrakesh Treaty in the context of all three legs of the three-step test. The thesis therefore applies the three-step test to the provisions of the Marrakesh Treaty to determine their compliance.

(a) The core elements in the context of the requirement of 'certain special cases'

According to the first leg of the test, with particular reference to the term 'certain,' the core elements of the Marrakesh Treaty must be defined with certainty. First, the individuals to whom the exceptions apply must be clearly defined by separating the beneficiaries within

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216 *Blind SA v Minister of Trade, Industry and Competition & Others* [89].

217 It is no longer optional for countries to decide whether to adopt exceptions for the benefit of VIPs. On the contrary, the Marrakesh Treaty has made it compulsory for its member states to adopt and implement specific copyright exceptions to achieve the objectives of the Treaty.

218 The three-step test limits how contracting parties, considering the need to strike a balance between various interests, legislate for specific exceptions. The principle of the three-step test has proved to be an efficient mechanism to balance the interests of users and copyright holders.

the context of the Marrakesh Treaty from the other users of copyrighted works.[219] Similarly, the exclusive rights subject to exceptions under the Marrakesh Treaty are clearly identified.[220] Some copyright commentators argue that the concept of 'works' for the purpose of the beneficiaries within the context of the Marrakesh Treaty is defined with less certainty, bearing in mind the level of novelty in the categories of works employed.[221] The second aspect of the first leg of the test requires that the case should be 'special;' the core elements of the treaty are measured against this requirement. Generally, all exemptions for the benefit of the beneficiaries as contained in the Marrakesh Treaty are likely to meet the requirement of 'special' in the second leg.[222] To meet the requirement of 'special' in a qualitative sense, the WIPO Panel argues that the number of potential beneficiaries of any exemption must be sufficiently limited.[223] The class of individuals considered potential users under the Marrakesh Treaty provision is qualified and must fall within the specified cases.[224]

Ultimately, the individuals who qualify as the beneficiaries under the Marrakesh Treaty are clearly defined. The requirement of 'certain special cases' is largely met. Any exemption for the interests of VIPs is likely to qualify as a special case in the normative sense.[225]

(b) Understanding the core elements in the context of the second requirement

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219 Mihály J Ficsor, 'Commentary to the Marrakesh Treaty on Accessible Format Copies for the Visually Impaired' 1–79, 16 (*Copyright See-Saw*, 11 October 2013) <http://www.copyrightseesaw.net/uploads/fajlok/M_Ficsor_Commentary%20to%20the%20Marrakesh%20Treaty%20on%20accessible%20format%20copies%20for%20the%20visually%20impaired.doc> accessed 12 March 2025. See also Vezzoso, 'The Marrakesh Spirit – A Ghost in Three Steps?' 814. The Marrakesh Treaty clearly identified the category of beneficiaries who are allowed to access copies of works as provided in the exceptions.

220 However, there is some ambiguity in the definition of the exclusive rights for the beneficiaries in the context of the Marrakesh Treaty.

221 Vezzoso, 'The Marrakesh Spirit – A Ghost in Three Steps?' 814. However, it is noted that the reference to 'related illustrations' is sufficiently clear to show a 'certain' case.

222 This inference is drawn from the qualitative facet in the diluted interpretation of the concept 'special' by the WTO Panel. It is noted that the Panel employed a normative approach in its interpretation and thus did not equate the term 'special case' with 'special purpose.'

223 The WIPO Panel maintains that the qualitative reference to the 'special case' does not enjoy any regulatory substance. So the Panel relied heavily on the qualitative aspect of specialness in interpreting the term 'special case.'

224 See the Marrakesh Treaty, Art 3.

225 Vezzoso, 'The Marrakesh Spirit – A Ghost in Three Steps?' 814.

The second requirement of the three-step test refers to the fact that exceptions to the exclusive rights in the copyrighted work should not conflict with the normal exploitation of the work.[226] However, this requirement does not extend to instances in which the copyright holders do not intend to exploit the works and in which the use of copyright works is permitted: for example, where the doctrine of fair use applies.

One of the underlying principles attached to the second requirement is the perspective of the 'commercial availability' of the accessible format copies, which may hamper VIPs' chances of enjoying the appropriate exceptions. On the one hand, it is crucial to consider the need for people with print disabilities to enjoy the exceptions in the Treaty. On the other hand, it is necessary to appreciate that the perspective of 'commercial availability' may have specific implications for people with print disabilities who need the copies in an accessible format.

The question arises: how far does the principle of commercial availability hinder the realisation of the copyright exceptions as provided in the Marrakesh Treaty? Strict adherence to the principle of commercial availability means that authorised entities and other representatives of VIPs are expected to check whether the accessible format copies are available on the market before reproducing the works and distributing them to the beneficiaries.[227]

However, there is an underlying exception to the second requirement in the three-step test because of how the 'commercial availability' principle is applied in the Marrakesh Treaty. The provisions of the Marrakesh Treaty do not contain a compulsory reference to the principle of 'commercial availability.' So it may not be sustainable for copyright holders to argue that, based on the second leg of the three-step test, the member states should

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226 Although producing a substantial number of copies through photocopying for commercial gain may conflict with the normal exploitation of the work and thus not be permitted, not all instances in which photocopying in large numbers and for commercial gain may conflict with the normal exploitation of those works.

227 Vezzoso, 'The Marrakesh Spirit – A Ghost in Three Steps?' 815.

observe the requirement of 'commercial availability' while applying the Marrakesh exemption.[228] Insisting on the 'commercial availability' rule could create a severe burden for the beneficiaries and their authorised agents while engaging in the cross-border distribution of copies of works in accessible versions.[229]

To realise the specific core element of the Marrakesh Treaty – to satisfy the interests of the beneficiaries who need copies of works in accessible format – the interpretation of the second leg of the three-step test should be less restrictive.[230] It is paramount to consider the interests of the public at large rather than concentrating on private interests. The exemption in the Marrakesh Treaty should be based on a non-economic consideration underpinned by the principle of public policy.[231] How far the copyright holders may receive compensation for the use of their works is based on the third leg of the three-step test.

(c) Evaluating the core elements in the context of the third test

In terms of the third leg of the three-step test, copyright exceptions should not result in an unreasonable prejudice to the legitimate interests of the copyright holders. Generally, the third leg is construed to mean 'that consideration should be given to the payment of equitable remuneration if the economic impact of the exemption exceeds a certain level.'[232] The question is: what could be the implication of strictly adhering to the remuneration regime for the realisation of the core element of the Marrakesh Treaty, which is promoting access to copyrighted works among VIPs?

The provision of the Marrakesh Treaty offers a flexible approach to the remuneration regime. The Treaty gives member states the option to adopt national legislation that may

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228 Marrakesh Treaty, Art 4(4): 'A Contracting Party may confine limitations or exceptions under this Article to works which, in the particular accessible format, cannot be obtained commercially under reasonable terms for beneficiary persons in that market.'

229 This supports the view of the World Blind Union that the requirement for the authorised entities to check for commercial availability in another country for cross-border transfer to take place may seriously hinder fulfilling the objectives of the Marrakesh Treaty.

230 Vezzoso, 'The Marrakesh Spirit – A Ghost in Three Steps?' 818.

231 However, there is a need to balance the interests of the beneficiaries against those of authors and other copyright holders in the context of the tradition of the Berne Convention.

232 Vezzoso, 'The Marrakesh Spirit – A Ghost in Three Steps?' 818.

incorporate the necessary laws about how to remunerate authors and other copyright holders where their legitimate interests are unreasonably prejudiced.[233] For example, countries such as Australia promulgated relevant copyright exceptions for the benefit of VIPs and, in return, provide for the possibility of remuneration being paid to copyright holders through the National Copyright Agency.[234]

Following the adoption and ratification of the Marrakesh Treaty in several countries, the cross-border exchange of copies in accessible formats between member states has become possible and achievable, subject to payment to copyright holders for the production and distribution of the copies. Countries that participate in the cross-border exchange must incorporate in their national laws the specific provisions that address the issue of remuneration.[235]

3.6 The objectives and uniqueness of the Marrakesh Treaty

This part of the chapter considers two essential aspects of the Marrakesh Treaty: its objectives and its unique nature. These two aspects are interrelated and mutually complementary, but they are considered separately for easier reading.

3.6.1 The objectives of the Marrakesh Treaty

The Marrakesh Treaty means different things to different people. For many, it is a 'miracle treaty.'[236] Most copyright commentators agree that its adoption remains a significant achievement in advancing the interests of VIPs by affording them an equal opportunity to access copyrighted materials.[237]

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233 Marrakesh Treaty, Art 4(5).

234 See Copyright Agency Limited (CAL), '2013 Statutory Licence for Institution Assisting People with the Print Disability' <https://www.adcet.edu.au/resource/2664/copyright-and-print-disability-institutions-assisting-people-with-disabilities> accessed 15 March 2025.

235 Vezzoso, 'The Marrakesh Spirit – A Ghost in Three Steps?' 819.

236 Some copyright commentators and researchers view the Marrakesh Treaty as a miracle treaty. See, for example, Danielle Conway, *The Miracle at Marrakesh: Doing Justice for the Blind and Visually Impaired While Changing the Culture of Norm Setting at WIPO* 35–57 in Irene Calboli and Srividhya Ragavan (eds), *Diversity in Intellectual Property: Identities, Interests, and Intersections* (Cambridge University Press 2015).

237 Neil Yap, 'Fitting Marrakesh into a Consequentialist Copyright Framework' (2017) 6(2) New York University Journal of Intellectual Property & Entertainment Law 351–384, 352.

The Marrakesh Treaty, which is also referred to as a humanitarian treaty,[238] has specific goals, and its obligations are benchmarked on international minimum standards.[239] The primary goal of the Treaty is to address the issue of 'book famine'[240] among VIPs by making copyrighted works easily accessible to them.

One of the ways to achieve this goal includes lowering the ancillary costs[241] of making the accessible works available to the beneficiaries. Reducing the ancillary costs, such as the transaction costs associated with producing and distributing copyrighted works in accessible formats, could increase the number of copies of such works to be made available to persons with print disabilities.[242]

Although it may be difficult for the Marrakesh Treaty to lower the initial cost of producing copies of works in accessible formats, it may succeed in either eliminating or reducing other ancillary costs such as transaction costs that may be incurred because of the nature of copyright protection attached to the works. By lowering the transaction cost, for example, the authorised entities will be able to produce and distribute the accessible format copies more easily and less expensively than when these works are subject to normal costs 'attributable to the copyright protection of the works.'[243]

As its name clarifies, the Marrakesh Treaty through its provisions for copyright exceptions is intended to benefit VIPs and persons with other print disabilities. The adoption of the

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238 The Marrakesh Treaty exhibits a clear humanitarian and social development dimension, promoting users' interest in copyrighted materials.

239 Conway, *The Miracle at Marrakesh: Doing Justice for the Blind and Visually Impaired While Changing the Culture of Norm Setting at WIPO* 35.

240 See WIPO, *The Marrakesh Treaty in Action* as found in Anandashankar Mazumdar, 'The Marrakesh Treaty in Action: Exciting Progress in Access to Published Works for the Blind and Print-Disabled Communities' (*The Library of Congress*, 22 February 2021) <https://blogs.loc.gov/copyright/2021/02/the-marrakesh-treaty-in-action-exciting-progress-in-access-to-published-works-for-the-blind-and-print-disabled-communities/> accessed 12 March 2025.

241 Trimble, 'The Marrakesh Puzzle' 773–774. Indeed, the goal of the Marrakesh Treaty is to minimise the costs of the transactions required for making and distributing the copyrighted works for the benefit of VIPs and other print-disabled people.

242 Trimble, 'The Marrakesh Puzzle' 774.

243 Trimble, 'The Marrakesh Puzzle' 774.

Marrakesh Treaty brought great hope[244] for VIPs to access copyrighted works to realise their educational, social, and cultural needs, among others.

To achieve this goal, the Treaty requires all member states to incorporate into their national copyright laws the exceptions clauses that would allow reproducing, distributing, and providing the copyrighted works in an accessible version for the benefit of VIPs.[245] While copyright holders' interests are recognised, VIPs' access rights need to be promoted. In fact, all signatories to the Treaty are required to 'introduce a minimum baseline exception'[246] that would permit persons with print disabilities to receive and use accessible copies of copyrighted works.

The humanitarian and social development dimensions,[247] prominent core principles of the Treaty, significantly influence its objectives.[248] The Treaty's preamble emphasises the importance of achieving non-discrimination and equal opportunities for everyone, as well as an inclusive society that accommodates the interests of people with print disabilities.[249] This aligns with the values and principles that underpin the objective of many international

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244 Sue Swenson, Manel Mhiri and Ailis Hardy, 'The Right to Read, the Marrakesh Treaty, and People with Intellectual Disabilities' (IFLA WLIC Athens 2019, Satellite Meeting: 'Equitable library services for everybody including persons with print disabilities,' Bibliotheca Alexandrina, Alexandria, Egypt, 20 August 2019) <https://library.ifla.org/id/eprint/2736/1/S22-2019-swenson-en.pdf> accessed 12 March 2025.

245 Sullivan, *WIPO Study on Copyright Limitations and Exceptions for the Visually Impaired* 1.

246 Paul Harpur and Nicolas Suzor, 'Copyright Protections and Disability Rights: Turning the Page to a New International Paradigm' (2013) 36(3) University of New South Wales Law Journal 745–778, 778.

247 The Marrakesh Treaty is characterised by humanitarian and social development principles, which make it unique and underpin its objectives. See also Desmond Oriakhogba, 'Bringing the WIPO Internet, Audiovisual Performances and Marrakesh VIP Treaties in Tune with the Access to Knowledge and Development Demands in Nigeria' (*Social Science Research Network*, 18 October 2018) <https://papers.ssrn.com/abstract=3303435> accessed 12 March 2025.

248 See the Marrakesh Treaty, preamble, para 11. See also Zemer and Gaon, 'Copyright, Disability and Social Inclusion: The Marrakesh Treaty and the Role of Non-Signatories' 838. As a humanitarian treaty, the Marrakesh Treaty constitutes a segment of the WIPO's Development Agenda, which was officially adopted in 2007.

249 The preamble to the Marrakesh Treaty explicitly reiterates the provisions of Art 1 of the Universal Declaration of Human Rights 1948, which states that, 'All human beings are born free and equal in dignity and rights.' The Marrakesh Treaty also recalled the provisions of Art 19 of the Universal Declaration of Human Rights, which states that, 'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.' Further, the Marrakesh Treaty refers to the provisions of Art 27 of the Universal Declaration of Human Rights, which forms a strong threshold for promoting the rights of VIPs to copyrighted works in accessible formats.

documents such as the UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities,[250] the CRPD,[251] the ICESCR[252] as well as the Constitution of the Republic of South Africa, 1996.[253] The recent decision of the Constitutional Court in *Blind SA CC*[254] also matches the view promoting non-discrimination, equal opportunity, and an inclusive society for all.[255] This thesis argues that the South African Copyright Act should be amended to accord with the provisions of the Constitution, the Marrakesh Treaty, and all the relevant international copyright laws and international human rights instruments. Some of these objectives have been achieved by the Constitutional Court's reading section 13A into the South African Copyright Act in *Blind SA CC*[256] as a temporary remedy.

Specifically, the Marrakesh Treaty seeks to establish a legal framework allowing VIPs to access copyrighted works on an equal basis with people who are not visually impaired.

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250 It should be noted that this international instrument, the Standard Rules on the Equalization of Opportunities for Persons with Disabilities, is not legally binding on the states. However, it is essential to point out that the Standard Rules symbolise a firm commitment from governments of various nation states to achieve an inclusive society by affording equal opportunity to persons with disabilities. The UN General Assembly's adopting the Standard Rules on 20 December 1993 was a remarkable achievement for persons with disabilities. The Standard Rules comprise twenty-two rules through which frameworks are developed for policy-making. The Standard Rules comprise four chapters: (1) Preconditions for equal participation; (2) Target areas for equal participation; (3) Implementation measures; and (4) Monitoring mechanism. For more information, see OHCHR, 'Standard Rules on the Equalization of Opportunities for Persons with Disabilities' <https://www.ohchr.org/en/instruments-mechanisms/instruments/standard-rules-equalization-opportunities-persons-disabilities> accessed 6 March 2025.

251 This Convention and its Optional Protocol were adopted at the UN Headquarters in New York on 13 December 2006. It was opened for signature on 30 March 2007, and there were eighty-two signatories to the Convention, forty-four signatories to the Optional Protocol, and one ratification of the Convention. On its opening day, the Convention enjoyed the highest number of signatories in the history of UN Conventions. The rapid and widespread ratification of the CRPD intensified the effort to develop and adopt the Marrakesh Treaty. See Lewis, 'Introductory Note to Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled' 1310.

252 Article 13 of the ICESCR states that the states parties 'to the present Covenant recognize the right of everyone to education.'

253 The Constitution of the Republic of South Africa, 1996, s 1(1)(a) provides that the Republic of South Africa is founded on values including human dignity, which aims to achieve equality and advance human rights and freedom.

254 See *Blind SA v Minister of Trade, Industry and Competition & Others* [102].

255 There is a specific reference to the interests of VIPs and persons with other forms of print disabilities who have been seriously disadvantaged in the past, with a view to incorporating the element of inclusiveness in society.

256 See *Blind SA v Minister of Trade, Industry and Competition & Others* [6].

To achieve this goal, the Treaty requires member states to incorporate specific exceptions into their copyright laws. So the Treaty has contributed uniquely to improving access for persons with print disabilities throughout the world by harmonising the relevant copyright exceptions.[257]

Acceding to or ratification of the Marrakesh Treaty is a prerequisite for it to become binding on Member States like South Africa. However, parliamentary enactment is a requirement for the Treaty to be enforced by South African courts, ensuring that the Treaty obligations are confined. Through this process the international obligations are interpreted as part of the enforceable rights and duties in the national legislation, balancing international obligations with constitutional supremacy. Failure to domesticate the Marrakesh Treaty, therefore means that it cannot produce international obligation for a dualist State like South Africa. However, if the Constitutional Court rules in favour of the Applicant in the second hearing in the matter of *Blind SA CC*, by ordering that the provisions of section 19D of CAB [B13F-2017] be incorporated into the Copyright Act, it would mean that the Act has complied to the provisions of the Treaty pending the ratification by the Parliament.

In summary, the Marrakesh Treaty requires contracting parties to carry out four basic obligations for achieving its objectives of producing and distributing copyrighted works in accessible versions to VIPs.[258] Those obligations are: adopting specific copyright exceptions in national copyright laws;[259] providing for the export of copyrighted works in accessible formats;[260] allowing the importation of copyrighted works in accessible

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257 Harpur and Suzor, 'Copyright Protections and Disability Rights: Turning the Page to a New International Paradigm' 769. Note that the Marrakesh Treaty requires the national laws of developing countries to adopt the relevant limited exceptions already provided in developed countries' copyright laws.

258 Conway, *The Miracle at Marrakesh: Doing Justice for the Blind and Visually Impaired While Changing the Culture of Norm Setting at WIPO* 35–36.

259 See the Marrakesh Treaty, Art 4(1). By adopting the relevant exceptions and limitations in their domestic copyright laws, the contracting parties protect the right to reproduce and distribute the copyrighted works in accessible versions for the benefit of VIPs.

260 The Marrakesh Treaty has expressly provided that signatories to the Treaty should allow the exportation of copyrighted works in accessible formats to meet the needs of the Treaty beneficiaries. See the Marrakesh Treaty, Art 5(1).

formats;[261] and ensuring that VIPs' right to access copyrighted works in accessible formats is not hampered by legal remedies against the circumvention of TPMs.[262] With reference to the Constitutional Court decision in *Blind SA CC*,[263] this thesis examines how far South Africa has fulfilled the four obligations. The thesis makes recommendations that will help Parliament formulate the Bill to amend the Copyright Act to deal with the specific areas not addressed in the B13F-2017. Indeed, the recommendations in this thesis go beyond the obligations as well as the underlying principles and values of the Marrakesh Treaty. At the same time, the thesis interacts with and transcends the read-in provisions.

In general, the Marrakesh Treaty addresses some basic functions that it sets out to achieve. These functions are interrelated and mutually supplementary. Although considered individually, they contribute collectively towards realising the main objective of the Marrakesh Treaty.

The first function of the Marrakesh Treaty deals with the mandatory adoption of copyright exceptions for the benefit of all persons with different forms of print disabilities.[264] The Treaty requires the contracting parties to introduce a standard set of exceptions to the copyright legal rules that would make it possible to reproduce, distribute, and make available the accessible formats of copyrighted works.[265] The Treaty requires member states to adopt copyright exceptions that allow creation and distribution of copyrighted works in accessible formats for VIPs to use.[266] In terms of this provision, all member states should ensure that their respective copyright laws align with the harmonised standard by

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261 Similarly, the Marrakesh Treaty requires member states to permit the importation of works in accessible versions to benefit VIPs. See the Marrakesh Treaty, Art 6.

262 See the Marrakesh Treaty, Art 7.

263 See *Blind SA v Minister of Trade, Industry and Competition & Others* [112].

264 See the Marrakesh Treaty, Art 2(b). See also Trimble, 'The Marrakesh Puzzle' 778. By adopting the Marrakesh Treaty, contracting parties must adopt the exceptions for the benefit of VIPs, an objective which could have been challenging to achieve through mere recommendation.

265 Marrakesh Treaty, Art 2(b).

266 See the Marrakesh Treaty, Art 4.

incorporating an exception clause in their national copyright legislation. The Treaty has made harmonising[267] copyright exceptions for the benefit of VIPs a reality.[268]

The Marrakesh Treaty does not just permit exceptions. Instead, it requires exceptions to copyright's exclusive rights,[269] thus 'imposing a ceiling on the strength of copyright interests.'[270] It obliges the contracting parties to uphold principles of equality and non-discrimination, ensuring that VIPs have access to reading materials. The Treaty particularly encourages governments to promote the right of access to copyrighted works for even more marginalised groups, including children, women, and poor people, who experience visual impairments, especially in developing countries.[271]

The second function of the Marrakesh Treaty concerns the cross-border distribution of lawfully made accessible copies of the copyright materials for the benefit of persons who have various kinds of print disabilities.[272] The Treaty's concept of cross-border exchange is seen as an extension of its objective to reduce the costs associated with creating and distributing copyrighted works in accessible formats. Now these costs are often duplicated when copies are produced separately in different countries. Allowing copies of works in accessible formats to be legally shared across national borders can help prevent the duplication of efforts and resources. In these cases, copies can be made in one country and then distributed to beneficiaries in other countries, especially where these countries share the same or similar languages that the beneficiaries can understand. [273]

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267 The Marrakesh Treaty is considered 'the first multilateral instrument that establishes harmonised standards for limitations and exceptions' (Chen, *Copyright Exceptions for Visually Impaired Persons: The WIPO Treaty to Facilitate Access to Published Works by Visually Impaired Persons* 38).

268 Jeremy de Beer, 'Applying Best Practice Principles to International Intellectual Property Lawmaking' (2013) 44(8) IIC-International Review of Intellectual Property and Competition Law 884–901, 898.

269 Henning Grosse Ruse-Khan, 'Time for a Paradigm Shift? Exploring Maximum Standards in International Intellectual Property Protection' (2009) 1(1) Trade, Law and Development 56–102, 70.

270 Harpur and Suzor, 'Copyright Protections and Disability Rights: Turning the Page to a New International Paradigm' 768.

271 Lewis, 'Introductory Note to Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled' 1310.

272 The Marrakesh Treaty permits the cross-border transfer and exchange of accessible copyrighted works, resulting in 'a globally-coordinated approach to pooling accessible books digitised around the world' (Harpur and Suzor, 'Copyright Protections and Disability Rights: Turning the Page to a New International Paradigm' 778).

273 Trimble, 'The Marrakesh Puzzle' 778.

Reducing barriers for the dissemination of published works in accessible formats by encouraging cross-border exchange is essential for making copyrighted works accessible to blind people and VIPs. This thesis argues that the Marrakesh Treaty facilitates a more coordinated and streamlined cross-border dissemination of literary works in accessible versions. Allowing the cross-border exchange of accessible formats of copyrighted works without needing copyright holders' permission significantly eases the financial burden on countries with large populations of people with print disabilities, who lack the financial resources to reproduce these works on their own.[274] Given the prevalence of visual impairments in South Africa,[275] this thesis champions adopting a cross-border model that makes works readily available in accessible formats for VIPs and those with other disabilities.

The Marrakesh Treaty requires member states to permit organizations and institutions that assist VIPs to distribute accessible copies of copyrighted works either directly to VIPs in other member states or to the organizations and institutions that assist them.[276] Consequently, these organisations and institutions can work across borders solely in the interest of VIPs.[277] Similarly, the Treaty establishes a mechanism that enables information sharing among member states by creating a voluntary register of institutions that help people with print disabilities.[278] Ideally, transferring and sharing copyrighted works in accessible formats between member states should increase the global availability of

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274 See Lewis, 'Introductory Note to Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled' 1310.

275 The systematic review and meta-analysis in 2021 showed that 'almost one in ten of the South African population experience vision loss' (Emmanuel Kofi Addo and others, 'Prevalence and Associated Factors of Vision Loss in the South African National Health and Nutrition Examination Survey (SANHANES-1)' (2021) 21 BMC Ophthalmology 1–15, 13 <https://doi.org/10.1186/s12886-020-01714-4> accessed 12 March 2025). It is reported that 32% of persons with disabilities in South Africa have different forms of visual impairment. It is also estimated that up to 5% of the South African population has impaired vision. See also Neli Kaunda and Sabelo Chizwina, 'Providing Access to Students with Print Disabilities: The Case of the North-West University in South Africa' (2019) 16(1) Journal of Access Services 6–20, 6.

276 See the Marrakesh Treaty, Arts 5 and 6.

277 The organisations and institutions involved in the cross-border distribution of accessible copies are required 'to serve the treaty's target beneficiaries and [help] to avoid the misdistribution of published works' (Chen, *Copyright Exceptions for Visually Impaired Persons: The WIPO Treaty to Facilitate Access to Published Works by Visually Impaired Persons* 38).

278 See the Marrakesh Treaty, Art 9.

these works for VIPs, without duplicating the same or similar works in different countries.[279]

As its third function, the Marrakesh Treaty reforms anti-circumvention measures for promoting greater accessibility of digital accessible copies of copyrighted materials. The Treaty requires member states to include exceptions into their anti-circumvention laws: these ensure that VIPs can benefit from the exceptions contained in the Treaty.[280] Article 7 of the Treaty is vital since it allows VIPs and their authorised representatives to use adaptive technologies to access copyrighted materials by bypassing digital locks (DRM) on e-books and other related copyrighted works.[281] Even so, the Marrakesh Treaty's provisions about the challenges created by technological measures for accessing digital copyrighted works are limited.

Ultimately, the Marrakesh Treaty is based on human rights objectives, as it 'embodies institutional strategies for activating human rights constituencies'[282] on copyright-related matters. Although the Treaty primarily seeks to ensure that VIPs have access to information[283] by making copies available in accessible formats for them, the adequate and effective implementation of its provisions may also support other fundamental human rights, including freedom of expression, the right to science and culture[284] as well as other minority cultural rights.[285] By locating the implementation of its provisions in VIPs

279 For instance, instead of five countries using the same language to make accessible formats of the same work, these countries will each be able to produce an accessible format of a different copyrighted work. In this way, the various works could be shared with other countries. See Sullivan, *WIPO Study on Copyright Limitations and Exceptions for the Visually Impaired* 1.

280 See the Marrakesh Treaty, Art 9.

281 Harpur and Suzor, 'Copyright Protections and Disability Rights: Turning the Page to a New International Paradigm' 769.

282 Molly K Land, 'The Marrakesh Treaty as "Bottom Up" Lawmaking: Supporting Local Human Rights Action on IP Policies' (2018) 8(3) UC Irvine Law Review 513–554, 550.

283 This refers to the right to education, which becomes realisable through the availability of educational materials and the ability to read those materials.

284 This includes the right to participate in cultural activities, which can be achieved as a result of the availability of educational materials in accessible formats for the use of VIPs and people with other print disabilities.

285 Lea Shaver, 'The Right to Read' (2015) 54(1) Columbia Journal of Transnational Law 1–58, 1.

themselves, the Marrakesh Treaty has introduced human rights and disability rights constituencies into the mainstream of the copyright regime.[286]

This study will recommend how South African lawmakers can amend the Copyright Act[287] to incorporate all aspects of the Marrakesh Treaty's objectives, considering the need to accommodate the influence of technological developments in the digital era by incorporating those areas related to technological protection measures (TPMs) that the Treaty does not cover. The study builds on the read-in provisions while going beyond them.

3.6.2 The uniqueness of the Marrakesh Treaty

For several distinct reasons, the Marrakesh Treaty is unique among many other international instruments in the field of intellectual property law, particularly copyright law. It clearly states its objectives and explains how to achieve them. It takes a major step forward in advancing international cooperation among communities and organisations in seeking to create uniform standards for copyright exceptions to help VIPs access information.[288] Its adoption is vital for the international community, as it marks the first international agreement where diverse representatives with differing views met to negotiate and sign a treaty dedicated to copyright exceptions for VIPs.[289] Its emergence shows the strength of international communities to transform the copyright regime and other aspects of the international IP system to achieve the common good.[290] This aligns with one of the thesis's recommendations, which suggests incorporating the principle of 'ubuntu' when implementing copyright exceptions, as one of the underlying values that adds meaning to the moderate approach, which aims at striking a balance between the interests of copyright holders and those of persons with disabilities. However, the principle

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286 Land, 'The Marrakesh Treaty as "Bottom Up" Lawmaking: Supporting Local Human Rights Action on IP Policies' 550.

287 See the Copyright Act 98 of 1978 in South Africa.

288 Rami Olwan, 'The Ratification and Implementation of the Marrakesh Treaty for Visually Impaired Persons in the Arab Gulf States' (2017) 20(5-6) Journal of World Intellectual Property 178–205, 182. See also Zemer and Gaon, 'Copyright, Disability and Social Inclusion: The Marrakesh Treaty and the Role of Non-Signatories' 847.

289 Olwan, 'The Ratification and Implementation of the Marrakesh Treaty for Visually Impaired Persons in the Arab Gulf States' 182–183.

290 Trimble, 'The Marrakesh Puzzle' 268.

of ‘ubuntu’ as considered in this thesis carries a more profound philosophical meaning than the concept of the ‘common good’ that underlies the Treaty.

The Marrakesh Treaty is the first and only document in copyright law that contains mandatory exceptions to copyright.[291] It identifies specific exceptions necessary to achieve its objectives, as stated in its preamble. Although adopting exceptions remained a feature of copyright law, the Treaty’s significance and uniqueness lie in its requirement that contracting parties must adopt these specific exceptions to benefit VIPs.[292]

The Treaty thus went beyond the normative approach underpinning traditional international IP law. Instead, the Treaty adopted a new paradigm that considers the need to consolidate a sound relationship between the human rights regime and the intellectual property system.[293] The Treaty also ‘provides a model for increasing collaboration between human rights advocates and other social movements working to make IP policies more just.’[294] It concentrates on proposing specific limits on copyright protection[295] to challenge the continuous increase in protecting the rights of authors and other copyright holders. This expansion has specific implications for VIPs’ right to access copyrighted works in adapted formats.

The Marrakesh Treaty is also unique as the first international copyright document to focus on users’ rights rather than those of authors or copyright holders.[296] It strengthens human

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291 Laurence R Helfer, ‘Intellectual Property and Human Rights: Mapping an Evolving and Contested Relationship’ 117–143, 135 in Rochelle Dreyfuss and Justine Pila (eds), *The Oxford Handbook of Intellectual Property Law* (Oxford University Press 2018). See also Lida Ayoubi, ‘Deciphering the Right to Read under International Human Rights Law: A Normative Framework for Equal Access’ (2019) 36(3) Wisconsin International Law Journal 425–473, 429; Land, ‘The Marrakesh Treaty as “Bottom Up” Lawmaking: Supporting Local Human Rights Action on IP Policies’ 548.

292 Ayoubi, ‘Deciphering the Right to Read under International Human Rights Law: A Normative Framework for Equal Access’ 429.

293 Land, ‘The Marrakesh Treaty as “Bottom Up” Lawmaking: Supporting Local Human Rights Action on IP Policies’ 548.

294 Land, ‘The Marrakesh Treaty as “Bottom Up” Lawmaking: Supporting Local Human Rights Action on IP Policies’ 549.

295 Helfer, ‘Intellectual Property and Human Rights: Mapping an Evolving and Contested Relationship’ 134.

296 Before the adoption of the Marrakesh Treaty, international instruments in copyright law focused on promoting the rights of authors and other copyright holders, with little or no emphasis on the rights of the users of copyrighted works. By contrast, the Treaty focuses on alleviating the serious problem

rights protection by advancing increased access to printed materials[297] among VIPs. By setting a minimum standard for copyright exceptions, its adoption marks a paradigm shift[298] in the international approach to copyright law.[299]

Another feature of the Treaty's uniqueness concerns its adoption and implementation. It obliges the contracting parties to adopt specific copyright exceptions.[300] It also gives clear examples of measures suitable for implementing it at the national level. These measures are flexible and appropriate for the circumstances of the member states.[301] Leeway is provided for necessary changes to make sure that works are available in accessible formats.[302] The model used by the Treaty provides clarity on the contracting parties' obligations and the steps required for implementation.

A further feature of its uniqueness is that the Treaty seeks to establish maximum legal clarity through its implementation. The international agreement among contracting parties supports implementing specific copyright exceptions at the national level, in alignment with Article 4(2) of the Treaty. This provides essential tools for contracting parties,

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of the book famine that print-disabled people confront and identifies the necessary mechanisms to address those challenges.

297 Land, 'The Marrakesh Treaty as "Bottom Up" Lawmaking: Supporting Local Human Rights Action on IP Policies' 549.

298 The adoption of the Marrakesh Treaty indicates that it is still possible for international communities to agree on specific international copyright rules that serve the public interest.

299 Yap, 'Fitting Marrakesh into a Consequentialist Copyright Framework' 353. See also Harpur and Suzor, 'Copyright Protections and Disability Rights: Turning the Page to a New International Paradigm' 746.

300 See the Marrakesh Treaty, Art 4(1).

301 See the Marrakesh Treaty, Art 4(2). For example, the adoption of the Marrakesh Treaty remains relevant to developing countries for various reasons. First, the copyright law of many developing countries did not incorporate exceptions in the interests of VIPs. Adopting the Marrakesh Treaty has made a significant difference to national copyright systems. Secondly, most of the print-disabled people in developing countries could have struggled to obtain copyrighted works in accessible formats if not for the adoption of the Marrakesh Treaty, which makes it possible for them to receive copies from developed countries. Thirdly, VIPs in developing countries and the domestic organisations representing them have little or no influence on how to reform domestic copyright laws, while copyright holders continue to use their dominant position to maintain the current state of affairs, which protects their interests. See Corinne Hui Yun Tan, 'Moving towards a More Inclusive Copyright Regime for the Visually Impaired' (2012) 24(2) Singapore Academy of Law Journal 433–469, 440; Aaron Scheinwald, 'Who Could Possibly Be against a Treaty for the Blind?' (2012) 22(2) Fordham Intellectual Property, Media & Entertainment Law Journal 445–512, 475; Margot E Kaminski and Shlomit Yanisky-Ravid, 'The Marrakesh Treaty for Visually Impaired Persons: Why a Treaty Was Preferable to Soft Law' (2014) 75(3) University of Pittsburgh Law Review 255–300, 290.

302 See the Marrakesh Treaty, Art 4(2).

particularly developing countries, to resist external pressures from more powerful bargainers.

To achieve maximum legal certainty in domestic implementation options, the Treaty provides some exemplary models that copyright legislators could adopt at national level.[303] Implementing the Marrakesh Treaty is particularly important for VIPs in developing countries.[304] In this context, South Africa, as a constitutional democracy, should adopt the copyright exceptions that align with its Constitution's fundamental values as well as the principles highlighted in many decisions by the Constitutional Court, [305] the country's apex court.

3.7 Perspectives on contracting parties' obligations to implement the Treaty

The contracting parties and their governments play a crucial role in advancing the rights of VIPs and those with other print disabilities.[306] They can fulfil this role by appropriately implementing the Marrakesh Treaty. The national statutes must address the exclusion of VIPs from accessing printed books,[307] with the aim of advancing the public interest. The copyright exceptions adopted should aim at promoting the public interest by effectively implementing the Treaty's provisions.[308]

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303 See the Marrakesh Treaty, Art 5(2). However, the inclusive confinement to the provisions of the three-step test may erode the legal certainty that may flow from the model provisions laid down in Arts 4(2) and 5(2) of the Marrakesh Treaty. See the Marrakesh Treaty, Art 11.

304 See Bram van Wiele, 'Comments on the Marrakesh Treaty Considering South African Copyright Law and Policy' [2014] South African Intellectual Property Law Journal 66–73, 66.

305 Most of the relevant Constitutional Court decisions were considered in Chapter Four of this thesis. The pre-eminent one is *Blind SA v Minister of Trade, Industry and Competition & Others.*

306 Kholis Rroisah and Wendy Budiati Rakhmi, 'The Marrakesh Treaty and Facilitating Access to Literary Works in the Field of Knowledge for Blind People' (2019) 4(3) Hasanuddin Law Review 315–324, 318. The governments of the various contracting parties play a significant role in promoting VIPs' rights to access information in published works. Those governments are obliged to protect the human rights of VIPs and persons with other print disabilities. This obligation to protect the rights of the print disabled extends to taking legislative, juridical, and other practical steps. To fulfil these roles, the governments of the member states must limit the rights of authors and other copyright holders over their works.

307 Rroisah and Rakhmi, 'The Marrakesh Treaty and Facilitating Access to Literary Works in the Field of Knowledge for Blind People' 316.

308 Marrakesh Treaty, Art 10(2) and Art 10(3).

Although the Treaty sets out clear obligations[309] for the contracting parties, it does not dictate how they must meet them. Sometimes, it only provides recommendations in this regard. While some of the obligations are mandatory,[310] member states still have the flexibility to choose the most suitable approach for implementing the Treaty's provisions.[311] If a contracting party decides not to use the specific implementation methods provided in the Treaty, it may tailor relevant exceptions to its circumstances.[312] Article 4(1)[313] states the first obligation for the contracting parties required to provide copies of copyrighted works in accessible formats to the beneficiaries or their authorised entities.[314] To ensure that works in accessible formats are available, contracting parties are required to include specific exceptions in their national legislation, limiting the rights of authors and other copyright holders in relation to their works.[315]

To meet its obligations, the Treaty recommends that contracting parties include specific exceptions in their national copyright laws. These exceptions should permit beneficiaries with lawful access to accessible formats of copyright works to make copies for their personal use.[316] This thesis recommends that national laws also allow exceptions that accommodate the unique circumstances of each country, particularly developing ones. These exceptions should allow for the adaptation of copyright works to meet the needs of people with various disabilities, not just print disabilities.

Alternatively, the Treaty recommends that contracting parties can adopt exceptions that allow authorised entities representing beneficiaries to perform several essential activities. These are producing copies of works in accessible formats, obtaining these copies from

309 The obligations of the contracting parties are provided for in Arts 4(1), 5(1), and 6 of the Marrakesh Treaty.

310 An example is the obligation of the member states (the contracting parties) to allow the free flow of accessible format copies across the border, an obligation that is compulsory. However, the contracting parties are allowed to adopt the appropriate methods to implement the obligation.

311 Marrakesh Treaty, Arts 4(3), 10(2), and 10(3).

312 Helfer and others, *The World Blind Union Guide to the Marrakesh Treaty: Facilitating Access to Books for Print-Disabled Individuals* 46.

313 Marrakesh Treaty, Art 4(1).

314 Marrakesh Treaty, Art 4(1)(a).

315 The exceptions and limitations affect the rights to reproduce the copyrighted works, distribute them, and make them available to the public. See the Marrakesh Treaty, Art 4(1)(a).

316 Marrakesh Treaty, Art 4(2)(b).

other authorised entities, and distributing them to beneficiaries.[317] Although Article 4(2) provides guidelines for regulating exceptions in national law, the Treaty permits contracting parties to provide alternative exceptions that produce similar results.[318]

The second obligation for member states is dealt with in Article 5(1). It requires contracting parties to ease the free cross-border transfer of copies of works in accessible format.[319] For example, the contracting parties must permit authorised entities representing the beneficiaries to export those copies to beneficiaries or other authorised entities representing the interests of the beneficiaries in different countries.[320] To meet this obligation, the Treaty recommends that member states adopt specific exception clauses in their national copyright laws. These exceptions would permit authorised entities to distribute copies in accessible format to other authorised entities representing the beneficiaries or directly to the beneficiaries in other member states.[321]

This cross-border exchange is a crucial element of the Marrakesh Treaty. It is critical to achieving the Treaty's objectives. In reality, the Treaty's practical success depends on the effective implementation of this cross-border exchange.

Both Articles 5 and 6 of the Marrakesh Treaty deal with the global exchange of accessible copies of print materials. To address the challenges of international sharing, Article 5 requires the member states to permit cross-border exchange of accessible works legally produced under exception rules. As a result, contracting parties must permit this cross-border exchange. In accordance with the production and use of works in accessible format as provided in Article 4, these copies can only be shared with beneficiaries or their authorised entities in other member states.[322]

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317 Marrakesh Treaty, Art 4(2)(a).
318 Marrakesh Treaty, Arts 4(3) and 11.
319 Marrakesh Treaty, Art 5(1).
320 Marrakesh Treaty, Art 5(1).
321 Marrakesh Treaty, Art 5(1)(a) and Art 5(1)(b). It should be noted that the copies in the accessible format should be for the exclusive use of the beneficiaries. In addition, the authorised entity that intends to carry out the cross-border transfer of the accessible format copies should not, before the distribution or making the copies available, have actual or constructive knowledge that the copies of the works in accessible formats would be used for any purpose other than for the beneficiaries' use.
322 Marrakesh Treaty, Art 5(2)(a)–(b).

Article 5 takes a more flexible approach to dealing with authorised entities in countries not bound by the Berne Convention's three-step test.[323] These entities may receive the accessible format copies as long as the reproduction and distribution of those copies are made for the benefit of VIPs.[324]

Three essential requirements are inferred from Article 5(1). The exporting country[325] and the importing country[326] must both be parties to the Marrakesh Treaty. Producing copies of the work in accessible formats must align with the specific exception law or the operation of the law. And the copies must be distributed by an authorised entity to a beneficiary or another authorised entity.[327]

Article 5(2) explains how the contracting parties may regulate the sharing of accessible format copies. And Article 5(3) gives various countries the choice to adopt other exceptions to achieve the successful exchange of those copies.[328] The Treaty also requires contracting parties to take all appropriate measure to facilitate the cross-border exchange of works in accessible format.[329]

Article 6 accords with Article 5 of the Treaty, as it also requires contracting parties to permit a beneficiary or an authorised entity in a member state to receive accessible format copies from a beneficiary or an authorised entity located in another member state.

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323 Through the provisions of Art 5(4)(b), the Marrakesh Treaty closes the 'Berne Gap' by allowing those countries whose national laws are not subject to the three-step test to incorporate into their copyright laws the Berne Convention version of the three-step test that would address the cross-border reception of copies of works in accessible format. See also Vezzoso, 'The Marrakesh Spirit – A Ghost in Three Steps?' 809.

324 Marrakesh Treaty, Art 5(4)(b). This means that the 'non-Berne countries' are not obliged to apply the three-step test on condition that the accessible format copies are reproduced, distributed, or made available for the benefit of persons with print disabilities within the jurisdiction of the contracting parties.

325 The exporting country is often referred to as the source country.

326 The importing country is often referred to as the destination country.

327 Marrakesh Treaty, Art 5.

328 Marrakesh Treaty, Art 5(3).

329 Marrakesh Treaty, Art 9. For the successful exchange of accessible format copies, the Marrakesh Treaty recommends measures such as encouraging the voluntary sharing of information among authorised entities to identify themselves and to communicate information about the functioning of the Treaty to the general public.

It is not sufficient that contracting parties' national laws permit making copies of works in accessible formats. Those national laws must also advance the movement of those copies through importation from one country to another. Here, Article 6 of the Marrakesh Treaty addresses the third obligation by providing that contracting parties must allow beneficiaries or their authorised entities to import the accessible format copies from other contracting parties to benefit the beneficiaries. Such import permission should align with the member state's legislation allowing the creation of copies of copyrighted works in accessible formats.[330]

Consequently, implementing the Marrakesh Treaty provisions on cross-border exchange by the contracting parties, especially in developing countries, could reduce the challenges that VIPs and their authorised entities confront in reproducing and distributing the accessible format copies. Some difficulties thus reduced or eliminated include high production costs; delays in gaining permission from copyright holders before reducing and distributing the copies; and legal and market-based constraints.

Implementing such a cross-border exchange could facilitate the flow of limited copies of works in accessible formats worldwide, helping VIPs in developing countries to enjoy equal opportunities with those in developed countries. Countries, especially those within a particular geographical region that use similar or the same language as their official language, are thus able to exchange existing accessible format copies and avoid unnecessary duplications, particularly of popular collections. Even more important, by implementing this cross-border exchange, developed countries can share existing collections of accessible format copies with developing and less developed countries.[331]

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330 Conway, *The Miracle at Marrakesh: Doing Justice for the Blind and Visually Impaired While Changing the Culture of Norm Setting at WIPO* 37.

331 Ayoubi, 'The Marrakesh Treaty: Fixing International Copyright Law for the Benefit of the Visually Impaired Persons' 432.

At the same time, though, the Treaty sets conditions for sharing accessible format copies across the contracting parties' borders.[332] Member states have specific obligations to fulfil while allowing cross-border sharing of the accessible format copies for VIPs' benefit.

In *Blind SA CC*, the Constitutional Court emphasised the need to consider the nature of the domestic legal paradigm required to ensure reciprocity and facilitate cross-border exchange and distributions of copyrighted works in accessible format copies.[333] The court also indicated the need to consider how the distribution of copies of works in accessible format 'should best be permitted for persons with print and visual disabilities' in the South African context.[334]

Next, Article 7 of the Marrakesh Treaty addresses the fourth obligation by balancing the interests of the beneficiaries against those of the copyright holders. Article 7 stipulates that contracting parties are obliged to protect beneficiaries' enjoyment of exceptions contained in the Treaty as against the legal protection from circumvention and other TPMs enjoyed by copyright holders.[335] The contracting parties must therefore adopt appropriate measures that will make it easy for the beneficiaries or their representative authorised entities to obtain copies of works in an accessible format.[336] Sharing a similar view, the Constitutional Court[337] declared the identified sections[338] of the Copyright Act[339] unconstitutional, invalid, and inconsistent with the rights of VIPs as contained in the provisions of sections 9(3), 10, 16(1)(b), 29(1) and 30 of the Constitution of the Republic of South Africa, 1996.[340] However, adopting the read-in provision has addressed most of the constitutional challenges of the South African Copyright Act and has brought the Act into line with the Marrakesh Treaty. That read-in provision has addressed the requirement that contracting parties adopt an explicit provision in their national law that deals with

332 See various aspects of the Marrakesh Treaty, such as Arts 5 and 6.
333 *Blind SA v Minister of Trade, Industry and Competition & Others* [104].
334 *Blind SA v Minister of Trade, Industry and Competition & Others* [104].
335 Marrakesh Treaty, Art 7.
336 Marrakesh Treaty, Art 7.
337 *Blind SA v Minister of Trade, Industry and Competition & Others* [112].
338 See ss 6, 7, and 23 of the Copyright Act.
339 Copyright Act 98 of 1978.
340 Constitution of the Republic of South Africa, 1996.

distributing and making available copies of works in accessible formats to the beneficiaries.[341]

In the context of the Act's provisions, the national copyright law must limit the specific rights of authors and other copyright holders. These rights include the right to reproduce copies of their works in accessible formats, distribute them, and make them available to the beneficiaries.[342] Again, this expectation has been achieved through the adoption of the read-in provision. The Constitutional Court[343] thus held that the requirement of authorisation, in relation to reproducing copyrighted works, as contained in the Copyright Act, infringes the constitutional rights of VIPs, which prompted the court to adopt temporary relief through incorporating the read-in provisions. At the same time, the recommendations in this thesis go beyond both the Marrakesh Treaty and the read-in provision, but do not detract from them.

It is important to note that Article 10 of the Marrakesh Treaty allows the contracting parties to exercise some discretion in choosing the appropriate method of implementing the Treaty's obligations. So, for example, to fulfil those obligations, contracting parties are permitted to adopt the appropriate exceptions necessary to advance VIPs' interests in their national copyright legislation.[344]

Article 10 thus introduced flexibility into implementing the Treaty's obligations. However, the exceptions thus adopted must still accord with the contracting parties' rights and obligations as laid down in the Berne Convention and other international treaties.[345]

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341 Vezzoso, 'The Marrakesh Spirit – A Ghost in Three Steps?' 807.

342 Marrakesh Treaty, Art 4(1)(a).

343 *Blind SA v Minister of Trade, Industry and Competition & Others* [74].

344 Marrakesh Treaty, Art 10(3). The exceptions and limitations adopted by member states may be general or specific, or comprise a possible combination to suit their individual needs and circumstances.

345 Marrakesh Treaty, Art 10(3).

3.8 Shortcomings of the Marrakesh Treaty

Although adopting and implementing the Marrakesh Treaty provisions have brought about a significant paradigm shift in copyright exceptions, the Treaty still has limitations. It focuses on blind people, people with visual impairments, and people with other print disabilities. It does not accommodate people with other forms of disability. Accordingly, some of the recommendations in this thesis go beyond the Treaty provisions.

In addition, the influence of the three-step test in interpreting the Treaty provisions has specific implications for various jurisdictions as they deal with the particular challenges unique to the beneficiaries in those jurisdictions. When dealing with the implementation of copyright exceptions adopted by the contracting parties, this thesis recommends applying some flexibility in interpreting the three-step test requirements to eliminate unforeseen constraints.

Moreover, the Marrakesh Treaty made no detailed provisions for addressing the impact of evolving digital technologies with reference to TPMs and the challenges that people with disabilities confront in accessing ICT-based copyrighted works and transforming those works through various digitised platforms. This thesis recommends paying more attention to the implications of applying the TPMs for implementing copyright exceptions for people with disabilities amid the continuous evolution in digital technologies.

3.9 Regulating the application of TPMs: implications for access to works in adaptive formats

This thesis discusses TPMs briefly in relation to access to information for persons with disabilities. It does not explore the various aspects of digital technologies[346] developed to protect copyrighted works in digitised forms,[347] the technological circumvention

[346] For more information about what constitutes digital technology, see Paul Conway, '6.3 Digital Technology Made Simpler' 1–11, 2–3 (*Northeast Document Conservation Center*, 2025) <https://www.nedcc.org/free-resources/preservation-leaflets/6.-reformatting/6.3-digital-technology-made-simpler> accessed 12 March 2025.

[347] Conversion and adaptation of works in a digital form can now be carried out with little or no effort. See VS Chowbe, 'Intellectual Property and its Protection in Cyberspace' (2010) 9(1&2) IUP Journal of Intellectual Property Rights 7–41, 8. With the help of digital technology, various works can easily

measures[348] developed to counter TPMs, and the corresponding anti-circumvention measures[349] that later emerged. The thesis considers the underlying principles of TPMs only in so far as it helps readers to appreciate the need to regulate TPMs within the context of copyright exceptions for persons with disabilities in accessing digital copyrighted works.

It is vital to give a brief overview of the issues relating to persons with disabilities' access to digital copyrighted works. This emanates from inaccessible formats caused by Digital Rights Management (DRM) hindering the dissemination[350] of assistive technologies and the failure of copyright laws to promote accessibility of copyrighted works in digital forms for the benefit of persons with disabilities. The lack of affordable assistive technologies also remains a serious challenge confronting persons with disabilities in particular. Further, there is systemic gaps caused by the unwillingness of publishers and holders of

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be created, stored, or reproduced digitally. See also Conway, '6.3 Digital Technology Made Simpler' 2.

347 Andrea Wechsler, 'The Quest for Balance in Intellectual Property Law: An Emerging Paradigm or a Fad?' 1–15, 1–3 ATRIP Essay Competition 2009, Max Planck Institute for Innovation and Competition, 2009 <https://atrip.org/wp-content/uploads/2016/12/2009-2Andrea-Wechsler.pdf> accessed 12 March 2025. See also Thomas Vinje, 'Copyright Imperilled?' (1999) 21 European Intellectual Property Review 192.

347 Vinje, 'Copyright Imperilled?' 192–193.

348 In response to TPMs, some technological keys that could overcome such control measures were developed. These unauthorised keys, which gave easy access to private copying, were relatively cheap and readily available. See Stephen Odirachukwu Mwim, 'The Impact of Digital Technology on Intellectual Property Law: Possible Implications for Developing Countries with Particular Reference to Those in Africa' (LLM dissertation, University of South Africa 2017) 104. See also Joseph P Liu, 'Paracopyright – A Peculiar Right to Control Access' 227–252, 228 in Rochelle Cooper Dreyfuss and Jane C Ginsburg (eds), *Intellectual Property at the Edge: The Contested Contours of IP* (Cambridge University Press 2014).

349 Furthermore, in response to those circumvention technologies, software producers responded with more complicated encryption mechanisms in the form of anti-circumvention measures to benefit authors and other copyright holders. In turn, third parties 'developed more advanced decryption keys and other means for overcoming such controls' (Mwim, *The Impact of Digital Technology on Intellectual Property Law: Possible Implications for Developing Countries with Particular Reference to Those in Africa* 104). See also Ryan Iwahashi, 'How to Circumvent Technological Protection Measures without Violating the DMCA: An Examination of Technological Protection Measures under Current Legal Standards' (2011) 26(1) Berkeley Technology Law Journal 491–526, 492–493. The abbreviation DMCA denotes the Digital Millennium Copyright Act 1998, Pub. L. 105-304, 112 Stat. 2860 in the United States of America.

350 See also Stefik, 'Shifting the Possible: How Trusted Systems and Digital Property Rights Challenge Us to Rethink Digital Publishing' 147. See also Mwim, *The Impact of Digital Technology on Intellectual Property Law: Possible Implications for Developing Countries with Particular Reference to Those in Africa* 147.

copyrighted works to provide accessible versions of their works in the digital environment for the benefit of persons with disabilities. This creates a "digital divide" resulting in an unequal access to information and culture, which necessitates a legal reform as reiterated in the case of *Blind SA CC.*[351]

The continuous evolution in the development of digital technologies has revolutionised the copyright paradigm. Rapid development and deployment of revolutionary new technologies have specific implications for copyright protection. There is an increase in technologies facilitating the reproduction of creative works in digital forms and promoting the instantaneous transmission of digitised work through the internet.[352] Through the help of computer networks such as the internet, copyright-protected works can now be digitised, manipulated, uploaded, downloaded, copied, or distributed effortlessly or cost-free.[353]

This chapter of the thesis now considers the following aspects: legislative choices to deal with digital copyright infringement; the implementation of TPMs as an appropriate option; and the possible implications of the extreme protection of TPMs for persons with disabilities in receiving and disseminating copyrighted works in accessible formats.

3.9.1 Legislative choices to address digital copyright infringement

Legislative choices for addressing digital copyright infringement could determine whether the balance of values and interests underpinning the copyright system 'will survive or be replaced by a new, privately formulated, system embodying a very different balance.'[354] In particular, choices about technical protection measures (TPMs) and the enforceability of 'electronic-contracts' may affect the viability of copyright.[355]

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351 *Blind SA v Minister of Trade, Industry and Competition & Others* [65-72].

352 Sharon Appel, 'Copyright, Digitization of Images, and Art Museums: Cyberspace and Other New Frontiers' (1999) 6(2) UCLA Entertainment Law Review 149–234,151.

353 For more information, see Séverine Dusollier, 'Electrifying the Fence: The Legal Protection of Technological Measures for Protecting Copyright' (1999) 6 European Intellectual Property Review 285–297.

354 Wechsler, 'The Quest for Balance in Intellectual Property Law: An Emerging Paradigm or a Fad?' 1–3. See also Vinje, 'Copyright Imperilled?' 192.

355 Vinje, 'Copyright Imperilled?' 192–193.

Most international treaties, such as the Paris Convention, the Berne Convention, and the TRIPS Agreement,[356] that came into effect before the recent technological developments did not consider the impact of digital technology on copyright. Later, some international conventions began to initiate processes and measures to address the effects of technological developments on the copyright paradigm. For example, the WIPO Copyright Treaty contains provisions to address the complex legal problems associated with emerging digital technologies. The WCT preamble recognises the profound impact of the development and convergence of information and communication technologies (ICT) on the creation and use of literary and artistic works. The WCT preamble declares that the purpose of the WCT is to clarify the existing rights and to introduce new international rules for protecting works, especially digital copyrighted works, against infringements.[357]

To address 'the impact of digital technology on IP in general, and the problem of circumvention in relation to copyright in particular, the WCT embodies three provisions that reflect the so-called digital agenda.'[358] The digital agenda depicts responses to some of the concerns raised by copyright owners about the impact of digital communication technologies.[359]

The 'digital agenda' consists of the following aspects. First, the WCT provides that, as part of the 'communication right,' contracting parties must provide copyright owners with exclusive rights to make their works available to the public. This right includes making

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356 The underlying objective for adopting the TRIPS Agreement is to develop an enforceable 'minimum international standard for the protection of IP,' which could not be realised through the earlier international treaties (Mwim, *The Impact of Digital Technology on Intellectual Property Law: Possible Implications for Developing Countries with Particular Reference to Those in Africa* 97). Under the TRIPS Agreement, contracting parties are expected to meet certain minimum requirements for IP protection. See Arts 12 and 27(1) of the TRIPS Agreement.

357 The WIPO Copyright Treaty set out international standards for protecting digital works. See the WCT, preamble.

358 See Mwim, *The Impact of Digital Technology on Intellectual Property Law: Possible Implications for Developing Countries with Particular Reference to Those in Africa* 105. See also Lionel Bently and Brad Sherman, *Intellectual Property Law* (4 edn Oxford University Press 2014) 38–39.

359 WCT, preamble.

those works available so that members of the public can access these works from a place and at a time of their choice.[360]

Secondly, the WCT specifies that contracting parties may adopt appropriate legal processes to protect the copyrighted works against infringements through digital technologies.[361] Contracting parties must also implement effective legal remedies against the circumvention of technological controls used by authors and other copyright holders while exercising their rights in the WCT.[362]

Thirdly, the WCT requires contracting parties to adopt appropriate remedies against persons who interfere with the 'electronic rights management information.' This phrase means the specific information that identifies the copyrighted works in the digital environment.[363]

By adopting these provisions, the WIPO Copyright Treaty has demonstrated the need to widen the scope of technological control measures. It also reassured authors and other copyright holders that their works are receiving sufficient protection. The WCT, therefore, recognises that the circumvention of technological measures should be considered unlawful. 'The provisions of the WCT in general and Article 11[364] in particular are of great importance.'[365] They considerably influence the legal frameworks adopted by many jurisdictions that set out to deal with digital copyright infringements. Most subsequent national laws and directives developed to address the issue of digital copyright infringements thus accord with the Treaty provisions.[366]

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360 WCT, Art 8. See also the 'Agreed Statement' annexed to the WCT, which states that the mere provision of physical facilities for enabling or making a communication does not in itself amount to a communication.

361 For more information, see the WCT, Art 11.

362 WCT, Art 11. The WIPO Copyright Treaty requires countries to provide adequate protection against the circumvention of technological protections employed by copyright owners for their works.

363 WCT, Art 12.

364 It imposes a specific mandate that all contracting parties must carry out.

365 Mwim, *The Impact of Digital Technology on Intellectual Property Law: Possible Implications for Developing Countries with Particular Reference to Those in Africa* 106.

366 Mwim, *The Impact of Digital Technology on Intellectual Property Law: Possible Implications for Developing Countries with Particular Reference to Those in Africa* 106.

Various directives and sets of legislation deal with TPMs which took place against the backdrop of the provisions of the WCT. These provisions include: (1) the EU Directive and legislation;[367] (2) the United States Digital Millennium Copyright Act 1998;[368] (3) the Australian Copyright Amendment (Digital Agenda) Act 2000; and (4) the Japanese Copyright Law.[369] However, these directives and legislation, except for the Australian legislation,[370] are not discussed in this study, as they fall outside its scope.

3.9.2 Implementing TPMs as an appropriate option

In the context of this thesis, technological measures connote 'devices, tools and technologies'[371] intended to protect and manage IP rights[372] in general and copyright in particular.[373] They are technical tools to control and manage access to prevent the exploitation of copyrights and other forms of IP rights. So they deal with copy-control systems, which regulate and manage access to copyrighted works 'through devices, such as smart cards, other copy management systems, based on hardware or software.'[374] They risk preventing persons with disabilities and their representatives from enjoying the legitimate right to receive and disseminate copyrighted works in accessible format.

Although they may take different forms, technological measures seek to enable content owners to dictate permissible access to and uses of their works. Technological protection

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367 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, European Union (EU) <https://www.wipo.int/wipolex/en/legislation/details/1453> accessed 12 April 2025.

368 Digital Millennium Copyright Act 1998, Pub. L. 105-304, 112 Stat. 2860.

369 Copyright Law No. 48 of 1970. See Copyright Research and Information Center (CRIC), 'Copyright Law of Japan' <https://www.cric.or.jp/english/clj/doc/20210624_law.pdf> accessed 23 April 2025.

370 Australia is one of the countries selected for legal comparison in this thesis. Therefore, Chapter Five of this thesis will discuss the relevant aspects of the Australian copyright statutes. That chapter will discuss, for example, the Copyright Amendment (Digital Agenda) Act 2000.

371 Mwim, *The Impact of Digital Technology on Intellectual Property Law: Possible Implications for Developing Countries with Particular Reference to Those in Africa* 102.

372 Intellectual property (IP) rights concern the rights enjoyed by the owners of the various types of IP, such as trade marks, patents, designs, and copyright. This thesis addresses only copyright; other forms of IP fall outside the scope of this thesis.

373 Dusollier, 'Electrifying the Fence: The Legal Protection of Technological Measures for Protecting Copyright' 285.

374 Jörg Reinbothe, 'A Review of the Last Ten Years and A Look at What Lies Ahead: Copyright and Related Rights in the European Union' 1. A paper given at the Tenth Annual Conference on International IP Law & Policy, Fordham University School of Law (New York, April 2002).

can be as simple as requiring a password before accessing a work or a collection of works. Technological measures can also involve much more complicated rights management systems capable of monitoring and metering all conceivable uses of a work.[375]

These measures include any of the following devices and tools: anti-copy devices used in preventing the copying of works without permission; devices that can be used in controlling access to protected works; a 'proprietary viewer,' which can be used in placing digital content under constant monitoring by the copyright owners and only allowing uses permitted by the owners; 'watermarking or fingerprinting technique' that enables inserting an invisible digital mark into the digital code of a work; 'metering systems,' which record all uses carried out in relation to a particular work; and an 'Electronic Copyright Management System' (ECMS), which is used for identifying copyrighted materials, monitoring how they are used, and rewarding copyright owners with the proper remuneration.[376]

As a form of technological control measures, TPMs are often programmed, among other things, to deny access without a password, prevent simultaneous logging on from two terminals, or even prohibit alteration of a file designated 'read-only.'[377] Strict implementation of these measures will always affect the rights of persons with disabilities to receive and disseminate copyrighted works in accessible formats.

Unlike the alternative solutions,[378] technological controls, such as encryption, can effectively control private copying without legal action.[379] TPMs allow authors and other

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375 Lydia Pallas Loren, 'Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems' (1997) 5(1) Journal of Intellectual Property Law 1–58, 9.

376 For comprehensive information on the various technological measures, see Dusollier, 'Electrifying the Fence: The Legal Protection of Technological Measures for Protecting Copyright' 285–286.

377 Dan L Burk and Julie E Cohen, 'Fair Use Infrastructure for Rights Management Systems' (2001) 15(1) Harvard Journal of Law & Technology 41–84, 50.

378 An example of such alternative solutions is a contractual use restriction.

379 Glynn S Lunney, 'The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act' (2001) 87(5) Virginia Law Review 813–920, 827.

copyright holders 'to control the use of, and access to, their protected works.'[380] Applying TPMs, to the detriment of persons with disabilities and other users, benefits copyright holders by safeguarding their works against unauthorised use and allowing them to enforce their rights more effectively.[381] So, for example, copyright holders may use encryption 'to incorporate a technological lock on distributed copies of their copyrighted works, and possibly prevent any private copying.'[382] The goal is to use TPMs to limit the spread of copying technology by preventing that technology from reproducing digital copyrighted works without proper permission.[383]

3.9.3 The possible implications of the extreme protection of TPMs

A leading principle of copyright is that the public interest should take precedence over the interests of copyright holders.[384] At the same time, it is essential to balance granting certain rights to copyright holders and allowing individuals, particularly persons with disabilities, to use copyrighted materials in certain ways.[385] In some cases, the public's interest in promoting knowledge and learning may prevail over or even override the interests of copyright holders.[386].

Manufacturers of technological measures may determine how the applicable technologies work according to the copyright holders' specifications. Applying those measures automatically puts a system in place to their advantage. This position leads some copyright researchers to argue that once constraints on behaviour are built into the

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380 Mwim, *The Impact of Digital Technology on Intellectual Property Law: Possible Implications for Developing Countries with Particular Reference to Those in Africa* 103.

381 Reinbothe, 'A Review of the Last Ten Years and A Look at What Lies Ahead: Copyright and Related Rights in the European Union' 1.

382 Mwim, *The Impact of Digital Technology on Intellectual Property Law: Possible Implications for Developing Countries with Particular Reference to Those in Africa* 104. See also Liu, *Paracopyright – A Peculiar Right to Control Access* 228–229.

383 Iwahashi, 'How to Circumvent Technological Protection Measures without Violating the DMCA: An Examination of Technological Protection Measures under Current Legal Standards' 491–492.

384 Lydia Pallas Loren, 'Digitization, Commodification, Criminalization: The Evolution of Criminal Copyright Infringement and the Importance of the Willfulness Requirement' (1999) 77(3) Washington University Law Quarterly 835–900, 857.

385 Andrea Wechsler, 'The Quest for Balance in Intellectual Property Law: An Emerging Paradigm or a Fad?' 3–4.

386 Loren, 'Digitization, Commodification, Criminalization: The Evolution of Criminal Copyright Infringement and the Importance of the Willfulness Requirement' 857.

technical standards governing technology, these technical standards effectively become a new method of governing the use of the technology. In essence, the technical standards become a kind of law in themselves,[387] aimed at constraining access to information, to the detriment of persons with disabilities.

One potential consequence of providing extreme protection for TPMs is that technological limitations might replace legislation to manage and control copyright issues in the digital sphere. This development could lead to control over copyright management and information rights being moved to private entities, which may or may not uphold public policies supporting access doctrines such as fair use and fair dealing.[388] This trend becomes even more challenging when it is supported by digital copyright laws such as the United States Digital Millennium Copyright Act 1998 ('DMCA')[389] which defend 'technological control over copyrighted works, without much regard for their effect on public policy.'[390]

As copyright holders control their technological measures, they can openly or covertly undermine public policies that promote the interests of persons with disabilities. By imposing 'technical constraints on access to and use of digital information,'[391] they may displace the legal foundations of the copyright system.[392] For instance, a copyright holder might design technological controls to prevent any copying of a protected work, 'regardless of whether or not the copying would be fair use'[393] by persons with disabilities.

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387 Burk and Cohen, 'Fair Use Infrastructure for Rights Management Systems' 50.

388 The risk is that copyright holders, 'by implication, can effectively formulate their own rules through the implementation of computer codes' (Mwim, *The Impact of Digital Technology on Intellectual Property Law: Possible Implications for Developing Countries with Particular Reference to Those in Africa* 145). See also Burk and Cohen, 'Fair Use Infrastructure for Rights Management Systems' 51.

389 Digital Millennium Copyright Act 1998, Pub. L. 105-304, 112 Stat. 2860.

390 Mwim, *The Impact of Digital Technology on Intellectual Property Law: Possible Implications for Developing Countries with Particular Reference to Those in Africa* 145.

391 Mwim, *The Impact of Digital Technology on Intellectual Property Law: Possible Implications for Developing Countries with Particular Reference to Those in Africa* 147.

392 Mark Stefik, 'Shifting the Possible: How Trusted Systems and Digital Property Rights Challenge Us to Rethink Digital Publishing' (1997) 12(1) Berkeley Technology Law Journal 137–160, 147.

393 Mwim, *The Impact of Digital Technology on Intellectual Property Law: Possible Implications for Developing Countries with Particular Reference to Those in Africa* 148. See also Stefik, 'Shifting the Possible: How Trusted Systems and Digital Property Rights Challenge Us to Rethink Digital Publishing' 147.

Overemphasising the protection of TPMs may prevent persons with disabilities from receiving and disseminating accessible format copies for legitimate purposes. Uncontrolled application of TPMs might affect 'format shifting and librarying' to the detriment of persons with disabilities.[394]

With the backing of the digital copyright law and policies, some copyright owners have overlooked the difference between 'fair use' and 'harmful use' by consumers in applying TPMs.[395] If not adequately monitored, the digital copyright system may allow 'copyright owners to restrict the usage of content by persons with disabilities before it reaches the harmful stage of Internet transfer, while such use is still legitimate and legal.'[396]

In addition, overemphasising TPMs can prevent users of copyrighted works from relying on specific copyright exceptions. This thesis identifies the primary concern that users with lawful access to copyright-protected works may be unable to rely on these copyright exceptions to reuse parts of the works without interruption. This constraint 'may occur either because TPM makes reproduction or use impossible or because it is unlawful for the user to decipher the encryption.'[397] Although TPMs provide undeniable benefits,[398] this thesis argues that strict adherence to these measures has profound implications for applying copyright exceptions, potentially altering some fundamental principles of the copyright system. Directly or indirectly, this could also have implications for implementing copyright exceptions for people with disabilities in the digital environment.

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394 Eric Fleischmann, 'The Impact of Digital Technology on Copyright Law' (1988) 23(1) New England Law Review 45–66, 45.

395 Martin F Halstead, 'The Regulated Become the Regulators – Problems and Pitfalls in the New World of Digital Copyright Legislation' (2002) 38(1) Tulsa Law Review 195–234, 231.

396 Mwim, *The Impact of Digital Technology on Intellectual Property Law: Possible Implications for Developing Countries with Particular Reference to Those in Africa* 148. See also Halstead, 'The Regulated Become the Regulators – Problems and Pitfalls in the New World of Digital Copyright Legislation' 231.

397 Mwim, *The Impact of Digital Technology on Intellectual Property Law: Possible Implications for Developing Countries with Particular Reference to Those in Africa* 149. See also Robert Burrell and Allison Coleman, *Copyright Exceptions: The Digital Impact* (Cambridge University Press 2009) 71.

398 Julie E Cohen, 'Copyright and the Jurisprudence of Self-Help' (1998) 13(3) Berkeley Technology Law Journal 1089–1144, 1089.

3.10 Conclusion

This chapter is the threshold for considering the remaining chapters of this thesis. It opens doors for discussions in subsequent chapters that focus on copyright exceptions for persons with disabilities[399] as adopted by the three jurisdictions[400] considered in this study. Copyright exceptions,[401] which form essential underlying principles of copyright law, constitute the cornerstone of the thesis.

Given the crucial role of the three-step test in determining the legitimacy of copyright exceptions, its interpretation is of great significance. This thesis argues that a balanced, integrated approach is preferable when interpreting the three-step test. A 'comprehensive overall assessment' of the three-step test is preferable to 'the step-by-step application,' which can be ambiguous.[402] This approach helps balance various interests, including those of people with disabilities.

When applying the three-step test, it is essential to prioritise the values and principles underlying fundamental rights. To strike a balance between the interests of copyright holders and users of copyrighted works, 'the three-step test should be interpreted so as to ensure a proper and balanced application of limitations and exceptions.'[403] The preferred approach accommodates both existing and potential future exceptions, considering the continuous evolution of copyright law and policies because of factors driven by advances in digital technology. In addition, the preferred approach should prevent unnecessary restrictions on current exceptions in domestic laws and allow for introducing and adopting new exceptions as needed.

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399 Although the Marrakesh Treaty concentrates on the challenges that VIPs and people with other forms of print disability confront, this thesis extends its focus to people with different kinds of disabilities who experience limitations in accessing works as a result of those disabilities.

400 The three jurisdictions are South Africa, Australia, and India.

401 The copyright exceptions that benefit persons with disabilities by promoting their access to copyrighted works are emphasised.

402 Geiger, Griffiths and Hilty, 'Towards a Balanced Interpretation of the "Three-Step Test" in Copyright Law' 493.

403 Geiger, Griffiths and Hilty, 'Towards a Balanced Interpretation of the "Three-Step Test" in Copyright Law' 492.

This chapter of the thesis has considered all the relevant aspects of the Marrakesh Treaty and the fundamental principles that guided its adoption. Its adoption and implementation opened a new era in the copyright system, aiming to reconcile traditional copyright objectives[404] with the principles of fundamental human rights.

This chapter has shown that the Marrakesh Treaty seeks to promote the interests of VIPs within the WIPO international copyright framework. The Treaty addresses the social and legal barriers preventing VIPs and people with other print disabilities from enjoying the inclusive right of access to information.

The Marrakesh Treaty provides guidelines that could help the contracting parties adopt copyright exceptions consistent with the three-step test and other international legal instruments, while promoting the interests of individuals with print disabilities. This chapter of the thesis has shown the relevance of the three-step test in achieving the Marrakesh Treaty's objectives. Endorsing the three-step test, the Treaty often mentions that the contracting parties must comply with the test.

The chapter examined the objectives supporting the adoption and implementation of the Treaty. The chapter analysed some core elements of the Treaty in relation to the three-step test. These included the meaning of beneficiaries as outlined in the Treaty, the nature and scope of authorised entities, and the nature and scope of works covered by the Treaty.

The discussion moved to another crucial aspect of the Marrakesh Treaty, the cross-border transfer of copies of works in accessible format. This cross-border exchange forms a vital element of the Treaty and is critical to achieving its objectives. Effective implementation of cross-border exchanges of accessible format copies is essential for the Treaty to meet its objectives.

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404 Traditionally, copyright law has considered the restrictive approach adopted in most international copyright treaties and conventions, and it has focused on protecting the interests of authors of works and copyright holders in relation to those works.

Attention then turned to the responsibilities of the contracting parties in achieving the Treaty's objectives. These parties are crucial in promoting access to information for VIPs and people with other print disabilities. And these contracting parties must incorporate relevant exceptions into their national laws to advance the interests of people with print disabilities.

The introduction of the WIPO Copyright Treaty with particular reference to the 'digital agenda' that paved the way for the development of legislation such as the Digital Millennium Copyright Act 1998 (DMCA) in the United States of America and the Copyright Amendment (Digital Agenda) Act 2000 in Australia further promoted the protection of the interests of the copyright holders within the digital environment.

As article 11 of the WCT requires contracting parties to implement effective legal remedies against the circumvention of technological controls used by authors and other copyright holders to exercise their rights, the question is whether the CAB [13F-2017] contains provisions that adequately address the circumvention of TPMs and other technological controls employed by authors and copyright holders. In the same vein, both the WCT and the WPPT allow member states some flexibility in addressing the prohibition of circumvention of technological measures by excluding acts permitted by law.[405] The provision CAB [13F-2017] is in line with the provision of flexibility as contained in the WCT and the WPPT.[406]

The thesis advocates for a moderate approach to implementing the TPMs and adopting legal remedies against their circumvention. Overprotection of TPMs may carry specific implications for access to information particularly among persons with disabilities and should be avoided. One of the implications of granting TPMs extreme protection is that

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405 See WCT, Art 11 and WPPT, Art, 18.

406 See the CAB, s 1(i)(b), which provides that the definition of 'technological protection measure' 'does not include a process, treatment, mechanism, technology, device, system or component, to the extent that in the normal course of its operation, it controls any access to a work for non-infringing purposes.'

technological constraints may supplant the use of legislation to manage and control copyright issues in the digital environment. Control over copyright management and the design of information rights may then fall into the hands of private parties, to the disadvantage of public use, particularly among persons with disabilities.

It can be concluded that strict adherence to technological control mechanisms might create an imbalance between promoting knowledge and learning and protecting copyright holders' interests. When copyright holders strictly enforce TPMs, they can set rules embedded in those measures, effectively overriding public policies. More concerningly, by imposing technological restrictions on accessing and using digital information, copyright holders can, in effect, replace copyright rules. Above all, this move could lead to the limitation of knowledge, including the non-availability of copies of works in accessible formats among people with disabilities. Many experts in copyright law argue that this digital lock-up poses a substantial threat to users' freedom of expression, as well as the promotion of knowledge and learning.[407]

This chapter lays the basis for Chapters Four to Six that discuss the copyright exceptions and other relevant legal provisions in the three jurisdictions (South Africa, Australia and India, respectively) to determine how far they map to the Marrakesh Treaty and the requirements of the three-step test. The discussion now moves to the analysis of the South African jurisprudence on copyright exceptions, and the implications for persons with disabilities.

[407] Burrell and Coleman, *Copyright Exceptions: The Digital Impact* 67–69.

CHAPTER 4: AN ANALYSIS OF SOUTH AFRICAN JURISPRUDENCE ON COPYRIGHT EXCEPTIONS – IMPLICATIONS FOR PERSONS WITH DISABILITIES

4.1 Introduction

Chapter Four of the thesis considers South African copyright law, particularly on copyright exceptions regarding the rights of persons with disabilities.[1] To orient readers with a recap, Chapter Two of this thesis showed that the provisions of the Constitution of the Republic of South Africa, 1996,[2] the various international human rights treaties,[3] and the African Charter all recognised the need to protect and advocate the promotion of the rights and freedom of all human persons, including those with disabilities. After that, Chapter Three considered the implications of the three-step test on the implementation of the copyright exceptions and analysed the various provisions of the Marrakesh Treaty[4] that protect and advance the rights of blind people and persons with various forms of visual impairment to access copies of copyrighted works in adapted formats.

This chapter now examines the copyright law in South Africa to determine how far it maps to the Constitution, the various international human rights treaties, and the regional legal instruments such as the African Charter as well as international copyright law, notably the Marrakesh Treaty, in protecting and advancing the rights of persons with disabilities. The Constitutional Court's reading section 13A into the South African Copyright Act 98 of 1978 in *Blind SA v Minister of Trade, Industry and Competition & Others*[5] (*Blind SA CC*) has a

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1 Although the study focuses on protecting and promoting the rights of persons with disabilities, it should be noted that there has been much emphasis on the rights of VIPs, which include those of blind people, on the premise that the provisions of the Marrakesh Treaty (the prominent treaty on copyright exceptions so far) strictly advocates for the rights of persons who are blind, visually impaired, or otherwise print disabled. In addition, the milestone judgment in *Blind SA CC* focused on 'the rights of persons with visual and print disabilities,' with little emphasis on persons with other forms of disabilities.

2 Constitution of the Republic of South Africa, 1996. The Bill of Rights, enshrined in ch 2 of the Constitution, consists of various human rights, such as the rights to equality, freedom of expression, education, access to information, and participation in the cultural life of one's choice.

3 Some of the international treaties that advocate for promoting the rights of human beings include the ICESCR, the CRPD, and the UDHR, extensively discussed in Chapter Two of this thesis.

4 Unlike the Constitution, the international human rights treaties, and the African Charter, the Marrakesh Treaty limited itself to persons with different visual impairments, cited as 'persons who are blind, visually impaired, or otherwise print disabled.'

5 (CCT 320/21) [2022] ZACC 33 (21 September 2022), 2023 (2) BCLR 117 (CC), 2022 BIP 518 (CC) [6] (*Blind SA CC*).

temporary effect. It forms part of the Copyright Act and became effective immediately, while the Parliament is allowed the opportunity to rectify the defects dictated in Bill 13B-2017.[6] The provisions of section 13A, as incorporated by the Constitutional Court, differ in some aspects from the provisions of section 19D as contained in Bill 13B-2017. In the same vein, the provisions of Bill 13F-2017, which was introduced after the Court's decision in *Blind SA* CC, differ from those of Bill 13B-2017 in some aspects.[7] This thesis mainly focuses on the provisions of Bill 13F-2017 to see how far the Copyright Act complies with international copyright law with particular reference to the Marrakesh Treaty as well as international conventions.[8]

In the next stage of this litigation, on 13 December 2024, in *Blind SA v President of the Republic of South Africa & Others*,[9] the Constitutional Court

> considered the application for a supplementary, just and equitable relief to remedy the *lacuna* that resulted from the expiry of the suspension of the declaration of constitutional invalidity[10] and the reading in remedy[11] in *Blind SA v Minister of Trade, Industry and Competition & Others* [2022] ZACC 33.[12] The Court … decided to make an interim order pending final determination of the matter…

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6 Reference should be made to section 19D of CAB 13B-2017.

7 B13B-2017 does not contain the 'authorized entity'. Rather it refers to a "person as may be prescribed and that serves persons with disabilities", which in itself lacks clarity. On the contrary, B13F-2017 makes reference to "authorized entity" and contains a detailed definition of an "authorized entity".

8 See the United Nations General Assembly, The Universal Declaration of Human Rights (New York: United Nations General Assembly, 1948); the United Nations Convention on the Rights of Persons with Disabilities (United Nations (2006), Treaty Series, 2515, 3); and the United Nations General Assembly, International Covenant on Economic, Social and Cultural Rights (United Nations, Treaty Series, vol. 993, 16 December 1966).

9 Case number CCT 300/24, Constitutional Court of South Africa, 13 December 2024 (original emphasis); see <https://powerlaw.africa/wp-content/uploads/2025/01/doc03468520241213154349.pdf> accessed 16 March 2025.

10 The Copyright Act 98 of 1978, ss 6 and 7, read with s 23, had previously been declared unconstitutional by the Constitutional Court to the extent that these sections limit the access of VIPs to copyrighted works in accessible format copies.

11 The Constitutional Court had previously read in Copyright Amendment Bill [B 13B—2017], s 13A on exceptions available to beneficiary persons.

12 (CCT 320/21) [2022] ZACC 33 (21 September 2022), 2023 (2) BCLR 117 (CC), 2022 BIP 518 (CC) (*Blind SA CC*).

This interim order then reincorporated section 13A, as crafted by the Constitutional Court, into the South African Copyright Act.[13]

South Africa is bound by the treaties and charters to which it consents,[14] so is required 'to fulfil those international obligations that map onto the Bill of Rights'[15] as enshrined in the Constitution. It is therefore necessary to align South African copyright law with all the legal instruments[16] that advocate for protecting the rights of persons with disabilities.

The provisions of the South African Copyright Act[17] determining how copyright is regulated affect, directly or indirectly, how far persons with disabilities enjoy several human rights.[18] Implementing copyright in South Africa influences the actualisation of the rights of persons with disabilities, including their right to access copies of works in adapted formats. Adopting the appropriate copyright exceptions is critical to changing the lives of persons with disabilities by allowing them to access copyrighted works in adapted formats. At the same time, all copyright exceptions must comply with the three-step test,[19] which must therefore be considered.

The *Blind SA CC* case emphasised the importance of copyright law in realising the rights of persons with disabilities. The Constitutional Court ruled that VIPs' rights are affected by the provisions of sections 6 and 7, as read with section 23 of the Copyright Act, which hinder VIPs' access to copyright-protected works in adapted format copies. The court in

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13 *Blind SA v President of the Republic of South Africa & Others*, Case number CCT 300/24, Constitutional Court of South Africa, 13 December 2024; see <https://powerlaw.africa/wp-content/uploads/2025/01/doc03468520241213154349.pdf> accessed 16 March 2025.

14 Sanya Samtani, 'The Domestic Effect of South Africa's Treaty Obligations: The Right to Education and the Copyright Amendment Bill' 1–53, 4 [2020] Joint PIJIP/TLS Research Paper Series <https://digitalcommons.wcl.american.edu/research/61> accessed 16 March 2025.

15 Samtani, 'The Domestic Effect of South Africa's Treaty Obligations' 17.

16 South Africa is a party to the international copyright instruments and the international human rights instruments; therefore, it is necessary to amend the provisions of the Copyright Act 98 of 1978 in South Africa to accord with these international legal instruments. See Samtani, 'The Domestic Effect of South Africa's Treaty Obligations' 4.

17 Copyright Act 98 of 1978.

18 See human rights such as the rights to equality, freedom of expression, education, access to information, and participation in the cultural life of one's choice.

19 Some international law treaties, particularly the Berne Convention and the TRIPS Agreement, specify the requirements that the national copyright legislation should meet in adopting copyright exceptions, which require the relevant countries to align their domestic legislation with the three-step test.

Blind SA CC[20] held that the authorisation requirement in the Copyright Act[21] infringes the constitutional rights of VIPs in terms of sections 9(2),[22] 10,[23] 16(1)(b),[24] 29(1)(a) and (b),[25] and 30.[26] The court thus ruled that the provisions of sections 6 and 7, read with section 23 of the Copyright Act, are unconstitutional to the extent that they limit VIPs' access to copyrighted works in accessible format copies.[27]

However, several months after the Constitutional Court's ruling in *Blind SA CC*, the President of the Republic of South Africa, Mr Cyril Ramaphosa, referred the Copyright Amendment Bill[28] to the Constitutional Court to determine its constitutionality. While the court's determination on the President's referral is awaited, the court has extended the expiration period for incorporating the reading-in provisions into the South African Copyright Act.[29]

Chapter Four of this thesis discusses the following aspects: the impacts of copyright implementations on persons with disabilities before the Constitutional Court's decision in *Blind SA CC*; South Africa's obligations under the international copyright treaties and human rights treaties; a review of the introduction of the proposed Copyright Amendment Bill (CAB), Bill 13F-2017 and the possible challenges identified within the process; an analysis of *Blind SA CC* and the potential implications of the court's decision; and further developments after the *Blind SA CC* decision.

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20 *Blind SA CC* [74].

21 Copyright Act 98 of 1978, ss 6, 7, and 23.

22 The Constitution of the Republic of South Africa, 1996, s 9(2) deals with the right to equality, which includes the right to full and equal enjoyment of all rights and freedoms for everyone, including persons with disabilities.

23 The Constitution of the Republic of South Africa, 1996, s 10 provides that everyone has the right to human dignity.

24 The Constitution of the Republic of South Africa, 1996, s 16(1)(b) provides that everyone has the right to enjoy freedom of expression, which includes the freedom to receive information or ideas.

25 The Constitution of the Republic of South Africa, 1996, ss 29(1)(a) and 29(1)(b) refer to the right to both basic education and further education.

26 The Constitution of the Republic of South Africa, 1996, s 30 deals with the right of everyone to use the language of their choice and participate in the cultural life of their choice.

27 *Blind SA CC* [112].

28 This refers to the Copyright Amendment Bill (CAB) under Bill 13F-2017.

29 *Blind SA v President of the Republic of South Africa & Others*, Case number CCT 300/24, Constitutional Court of South Africa, 13 December 2024; see <https://powerlaw.africa/wp-content/uploads/2025/01/doc03468520241213154349.pdf> accessed 16 March 2025.

4.2 The impact of copyright implementations on persons with disabilities before *Blind SA CC*

In the South African legal system, copyright is regulated by the Copyright Act,[30] together with regulations promulgated from time to time under the Act. Although the language of the Act was derived mainly from the Berne Convention,[31] its provisions were influenced primarily by the United Kingdom's legislation on copyright.[32] The Copyright Act has been amended nine times, most recently in 2002.

Sections 6 to 11B of the Copyright Act 1978 provide for the various types of work where authors or copyright holders enjoy exclusive rights. The Act also contains exceptions to the rights. Generally, it is unnecessary to obtain permission to copy an insubstantial portion of the work.[33] Section 12 of the Act also states the general exceptions to copyright concerning literary and musical works.[34] For example, under section 12(1),[35] copyright is not infringed by fair dealing with literary or musical works if it falls within one of the recognised categories.[36] Thus, section 12(1)(a)[37] deals with instances where a work is used for private study without a prior permission from the copyright holder.[38] Section 12(1)(b)[39] permits copying works for criticism, including critical review of works for

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30 The South African Copyright Act 98 of 1978 is based mainly on the Copyright Act 1956 in the United Kingdom, which derived from the Copyright Act 1911, a statute developed and passed in the United Kingdom to protect the interests of British authors in the colonies.

31 The South African Copyright Act maps so closely to the Berne Convention that it mostly copies the exact wording of the Convention.

32 Most importantly, the UK Copyright Act 1956 substantially shaped the current South African Copyright Act.

33 Copyright Act 98 of 1978, s 1(2A). Copyright infringement is limited to instances where a substantial part of the copyrighted work is copied. Authorisation may thus not be needed where a small portion of the work is copied or used.

34 Copyright Act 98 of 1978, s 12.

35 Copyright Act 98 of 1978, s 12(1).

36 See the Copyright Act 98 of 1978, s 12(a)–(c) for the various categories in which fair dealing may apply. To qualify under one of the exceptions, copying the copyrighted work must be considered fair dealing.

37 Copyright Act 98 of 1978, s 12(1)(a).

38 For more information, see the Copyright Act 98 of 1978, s 12(1)(a).

39 Copyright Act 98 of 1978, s 12(1)(a).

teaching or learning.[40] Section 12(2)[41] concerns the issue of judicial proceedings,[42] and section 12(3)[43] the quotation from a copyrighted work.[44] Then section 12(4)[45] deals with the use of literary or musical works as illustrations for teaching.

In discussing the provision of section 12[46], it is necessary to consider some of the important aspects of the court's decision in the case of *Moneyweb (Pty) Limited v Media 24 Limited & Another*[47]. In this case, the business of both the Applicant[48] and the First Respondent[49] is mainly to publish works on the Internet.[50] In its application, Moneyweb asked the court to declare the seven articles[51] published by Media24 unlawful, alleging that they infringed its copyright or in the alternative, that the action of Media24 be declared an unlawful competition.[52]

The court placed the onus on the Respondents[53] to prove that the reproduction of 'a substantial part of Moneyweb 5' should be considered "fair dealing" as construed in

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40 See also William Baude and others, 'Model Language for Exceptions and Limitations to Copyright Concerning Access to Learning Materials in South Africa' [2006] 7 The Southern African Journal of Information and Communication 82–106, 85.

41 Copyright Act 98 of 1978, s 12(2).

42 This aspect of fair dealing falls entirely outside the scope of this thesis.

43 Copyright Act 98 of 1978, s 12(3).

44 For the exception to apply in the context of quotation, it is necessary to consider the extent of quotation in relation to the purpose of the exception. The source and author of the work from which the quotation is taken must also be acknowledged. See Baude and others, 'Model Language for Exceptions and Limitations to Copyright Concerning Access to Learning Materials in South Africa' 86.

45 Copyright Act 98 of 1978, s 12(4).

46 Copyright Act 98 of 1978, s 12.

47 *Moneyweb (Pty) Limited v Media 24 Limited & Another* (31575/2013) [2016] ZAGPJHC 81 (5 May 2016), 2016 (4) SA 591 (GJ).

48 The Applicant in this case refers to Moneyweb.

49 The First Respondent in this case refers to Media24.

50 On the one hand, 'Moneyweb publishes business, financial and investment news primarily on the Internet, but also on other digital platforms.' On the other, 'Media24 publishes online magazines and newspapers, including Fin24, an online financial publication.' See *Moneyweb (Pty) Limited v Media 24 Limited & Another* (31575/2013) [2016] ZAGPJHC 81 (5 May 2016), 2016 (4) SA 591 (GJ) [2].

51 Publication of the seven articles appeared on Moneyweb's website first. The articles were later published by Media24 in Fin24, though not 'word-for-word copies of the articles published by Moneyweb'. See *Moneyweb (Pty) Limited v Media 24 Limited & Another* (31575/2013) [2016] ZAGPJHC 81 (5 May 2016), 2016 (4) SA 591 (GJ) [5].

52 *Moneyweb (Pty) Limited v Media 24 Limited & Another* (31575/2013) [2016] ZAGPJHC 81 (5 May 2016), 2016 (4) SA 591 (GJ) [3].

53 The Respondents in this case refer to Media24 and Fin24.

section 12(1)(c)(i) of the Copyright Act.[54] In line with the provisions of section 12(1)(c)(i)[55], the Court states that the Respondents must show the following: that the dealing is "fair"; that the purpose of the dealing is to report "current events"; and that the source is mentioned.[56] The court conceded that there was no South African decision yet on the issue of fair dealing.[57]

A group of researchers[58] identified two problems with the section 12(1) language about fair dealing. First, the Copyright Act does not define the expression 'fair dealing,' and, except in *Moneyweb (Pty) Limited v Media 24 Limited & Another*,[59] no competent court in South Africa has referred to the meaning of 'fair dealing.'[60] Secondly, it is not clearly indicated 'whether a teacher or an institution can make and distribute the copies for the individual.'[61] The exceptions under section 12 do not address the challenges that disabled persons face in obtaining copyright works in accessible format copies.

The unconstitutionality of the Copyright Act and its effects on the rights of VIPs, prior to the incorporation of Bill 13F-2017, were dealt with in the case of *Blind SA CC*.[62] It violates VIPs'

- right to equality under section 9 of the Constitution by unfairly discriminating against persons with disabilities, as the provisions of the Act[63] do not allow VIPs to obtain copyrighted works in accessible formats;

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54 See *Moneyweb (Pty) Limited v Media 24 Limited & Another* (31575/2013) [2016] ZAGPJHC 81 (5 May 2016), 2016 (4) SA 591 (GJ) [100].

55 Copyright Act 98 of 1978, 12(1)(c)(i).

56 *Moneyweb (Pty) Limited v Media 24 Limited & Another* (31575/2013) [2016] ZAGPJHC 81 (5 May 2016), 2016 (4) SA 591 (GJ) [102].

57 *Moneyweb (Pty) Limited v Media 24 Limited & Another* (31575/2013) [2016] ZAGPJHC 81 (5 May 2016), 2016 (4) SA 591 (GJ) [103].

58 These researchers include William Baude, Julien Hofman, Eddan Katz, Katherine McDaniel, Andrew Rens, and Chris Riley. Their article was on 'Model Language for Exceptions and Limitations to Copyright Concerning Access to Learning Materials in South Africa.'

59 *Moneyweb (Pty) Limited v Media 24 Limited & Another* (31575/2013) [2016] ZAGPJHC 81 (5 May 2016), 2016 (4) SA 591 (GJ).

60 Baude and others, 'Model Language for Exceptions and Limitations to Copyright Concerning Access to Learning Materials in South Africa' 85.

61 Baude and others, 'Model Language for Exceptions and Limitations to Copyright Concerning Access to Learning Materials in South Africa' 85.

62 *Blind SA CC* [74] and [112].

63 Copyright Act 98 of 1978, ss 6, 7, and 23.

- right to receive and impart information under section 16 of the Constitution, thus directly affecting VIPs' right to freedom of expression;
- right to education under section 29 of the Constitution, as it curtails VIPs' access to educational materials in accessible formats; and
- rights to participate in the cultural life of their choice under sections 30 and 31 of the Constitution, since it limits VIPs' access to cultural materials in accessible formats.

Regrettably, more than twenty-nine years into the democratic dispensation in South Africa, VIPs still struggle to obtain literary works in accessible formats, as the Copyright Act still forces them to obtain copyright holders' permission to access their protected works.[64] Even with that permission, it is still costly and time-consuming to convert those works into accessible formats, so there is a need to allow the exchange of works that already exist in accessible formats in line with the provision of the Marrakesh Treaty.[65] Unfortunately, the Copyright Act[66] in its current form restricts the distribution of copies of print materials in accessible formats from neighbouring countries through cross-border exchange.[67]

Section 23 deals with indirect copyright infringement, with particular reference to the importation and distribution of infringing articles. It states that 'it is an infringement to import, sell, or distribute infringing articles for trade purposes, if the importer knew the articles were infringing or would have been infringing if made in South Africa'.[68] The

64 Copyright Act 98 of 1978, ss 6, 7, and 23

65 For more information see Marrakesh Treaty, Art 9.

66 The Copyright Act 98 of 1978, s 23 restricts the distribution of copyrighted works without the copyright owners' permission.

67 South African copyright legislation hinders the cross-border exchange of print materials in an accessible format. The Copyright Act 98 of 1978 prohibits the cross-border exchange of accessible format copies of copyright works from other countries that have already developed Braille master copies for published works.

68 Copyright Act 98 of 1978, s 23. This section is implemented where the issue of parallel importation is applicable. For example, where goods are legally manufactured in another country but imported into South Africa without the permission of the local copyright owner.

implementation of section 23 has specific implications[69] for people with disability in obtaining and sharing copyright works in accessible formats.

It became constitutionally necessary to amend the Copyright Act[70] to deal with the discrimination against persons with disabilities who struggle to access copies of works in adapted formats. None of the numerous amendments addresses the challenges that persons with disabilities confront in accessing copies of the copyrighted works. Any further delay in passing the CAB would damage disabled persons' enjoyment of their constitutional rights.[71]

4.3 South Africa's obligations under the international copyright treaties and human rights treaties

As the arm of the state in South Africa responsible for ensuring that legislative provisions accord with the relevant international legal instruments,[72] Parliament[73] is obliged to carry out its legislative mandate within the bounds of the Constitution.[74] And as a party to

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69 Based on the "hypothetical test" in section 23 a court, in dealing with any matters that concerns the provisions of section 23, is expected to determine whether or not the article would have been an infringement if it had been made in South Africa.

70 See the Copyright Act 98 of 1978.

71 Some of the individual rights affected include the rights to equality, dignity, freedom of expression, education, and participation in the cultural life of one's choice.

72 These legal instruments are considered in the context of this thesis and refer to international copyright laws and international human rights law.

73 This word refers to the National Assembly (NA) with its seat in Cape Town and the National Council of Provinces (NCOP) with its seat in Cape Town. For more information, see the Constitution of the Republic of South Africa, 1996, ss 42(1), 42(6), and 63(3). Parliament is responsible for enacting new legislation and amending existing legislation in South Africa.

74 The power of Parliament to enact legislation must be exercised within the Constitution's framework, particularly the Bill of Rights provisions. Parliament, among other things, is expected to consider the following: ensuring that legislation is drafted to give effect to the Bill of Rights; ensuring, while enacting legislation, that the international human rights obligations that map to the Bill of Rights are considered in interpreting the Bill of Rights provisions; avoiding the limitation of any rights in the Bill of Rights, except where the requirements of the limitation clause as contained in s 36 are met; and ensuring that Parliament's constitutional mandate of enacting legislation that gives effect to international law obligations is performed within the context of the constitutional framework, particularly the Bill of Rights. See Samtani, 'The Domestic Effect of South Africa's Treaty Obligations' 30.

several international copyright treaties[75] and human rights treaties,[76] South Africa, through Parliament, is expected to fulfil the obligations deriving from the relevant international treaties on copyright and on human rights. Some obligations are interrelated because some legal instruments map to each other, sharing similar legal principles and objectives.[77]

4.3.1 Obligations linked to the international copyright treaties and limitations found in those treaties

First, South Africa is a party to the Berne Convention. To align the Copyright Act[78] with that Convention, the Act[79] was passed in 1978 after the Convention's 1971 revision.[80] The language of the Act thus maps to that of the Convention in many respects.[81] The Convention requires that all exceptions adopted in the domestic copyright legislation for countries that are parties to the Convention must follow the three-step test.[82] Although the Convention's adoption opened the door for subsequent international laws in IP law, the Convention's application to improving access to copyright materials is questionable.[83]

Secondly, the Republic of South Africa is a party to the TRIPS Agreement, which maps to the provisions of the Berne Convention.[84] The TRIPS Agreement provisions are binding on the Republic, so it must implement the appropriate enforcement proceedings for copyright and the necessary remedies for infringement. The TRIPS Agreement refers to

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75 Examples of these treaties are the Berne Convention, the TRIPS Agreement, the WCT, the WPPT, and the Marrakesh Treaty.

76 The international human rights treaties applicable here include the ICESCR, the CRC, the CRPD, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the ICCPR.

77 For example, the Berne Convention, the TRIPS Agreement, the WCT, and the WPPT map to one another in many aspects, while the ICESCR, the CRC, the CRPD, the CEDAW, and the ICCPR map to one another in various ways.

78 See the Copyright Act 98 of 1978, passed to give domestic effect to the Berne Convention revised in 1971.

79 Copyright Act 98 of 1978.

80 The Berne Convention was revised several times. The 1971 revision occurred in Paris, preceding the adoption of the South African Copyright Act 98 of 1978.

81 Samtani, 'The Domestic Effect of South Africa's Treaty Obligations' 6.

82 The three-step test was discussed extensively in Chapter Three of this thesis.

83 Samtani, 'The Domestic Effect of South Africa's Treaty Obligations' 7.

84 The TRIPS Agreement incorporates the provisions of the Berne Convention, Arts 1–21.

the three-step test as the basis for implementing the copyright exceptions[85] which the Republic is required to follow.

Thirdly, the position of South African copyright law concerning the WCT and the WPPT is briefly mentioned. In 1974, the Republic ratified the WIPO Convention, automatically making the Republic a WIPO member. Eventually, in 1997, the Republic signed both the WCT and the WPPT but could not ratify them until recently, when Parliament approved them both after they were tabled.[86]

Finally, the Republic, though actively participating in the negotiation and adoption of the Marrakesh Treaty, has not yet ratified it and is therefore not a party to it. The Republic's representatives expressed their approval of the Treaty's positive impact on blind people and VIPs and, therefore, pledged that the Republic would remain committed to enforcing the Treaty.[87]

4.3.2 Obligations linked to the international human rights treaties as mapped to the South African Constitution

The debates over the CAB's validity have neglected the rightful place of international human rights law. Human rights treaties[88] show considerable consistency with the South African Constitution's Bill of Rights[89] and require the CAB drafters' proper consideration. The Republic is also a party to the major international human rights law treaties and has

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85 Samtani, 'The Domestic Effect of South Africa's Treaty Obligations' 8.

86 Both the WCT and the WPPT were tabled and approved by Parliament in March 2019, as was the Beijing Treaty on Audiovisual Performances (2012). For the Beijing Treaty, see WIPO, 'Beijing Treaty on Audiovisual Performances' <https://www.wipo.int/treaties/en/ip/beijing/> accessed 12 March 2025.
South Africa signed the WCT in 1997 but due to constitutional challenge it could not be ratified. The government then decided to pursue accession rather than ratification. With regards to WPPT, South Africa has neither acceded to nor ratified it.

87 See UCT IP Unit, 'Marrakesh Treaty Implementation Guide South Africa' Briefing Paper Version 2 – May 2015 1–14 <https://ip-unit.org/wp-content/uploads/2015/05/IPUnit_MarrakeshGuideSA1.pdf> accessed 16 March 2025.

88 The international human rights treaties in question include the ICESCR, the CRC, the CRPD, the CEDAW, and the ICCPR.

89 See the Constitution of the Republic of South Africa, 1996, ch 2, Bill of Rights, providing for the various human rights it contains.

obligations to enforce their provisions. Non-compliance with the obligations in international laws such as international human rights treaties carries specific implications for the Republic.[90]

For example, the Republic is a party to the International Covenant on Economic, Social and Cultural Rights (ICESCR), which fully guarantees various human rights such as those to education, access to information, and participation in the cultural life of one's choice. The Republic ratified the ICESCR in 2015 after approval from Parliament[91] and is thus obliged to protect and promote the individual rights in line with the ICESCR.[92] The Republic is also a party to the Convention on the Rights of the Child (CRC),[93] which promotes and advances various human rights, including education and access to information.[94] When Parliament approved the CRC, the Republic ratified it in 1995. Further, the Republic is a party to the United Nations Convention on the Rights of Persons with Disabilities (CRPD), which it ratified in 2007. In 2000, the Republic ratified the UNESCO Convention against Discrimination in Education (CDE).[95] As a party to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),[96] the Republic ratified the Convention against Discrimination in Education (CDE) in 1998. The Republic also signed the International Covenant on Civil and Political Rights (ICCPR) in 1994 and ratified it in 1998.[97]

Upon ratification or accession of international agreements like those considered above, their provisions become binding on South Africa. However, through the implementation

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90 Other countries may seek relief against South Africa in a competent international forum where South Africa fails to comply with or breaches its treaty obligations. See Samtani, 'The Domestic Effect of South Africa's Treaty Obligations' 17.

91 Samtani, 'The Domestic Effect of South Africa's Treaty Obligations' 11.

92 The ICESCR protects and promotes all persons' rights to participate in cultural life, and no one should be prevented from enjoying the benefits of developments in science and technology. See the ICESCR, Art 15(1)(a) and Art 15(1)(b).

93 United Nations Convention on the Rights of the Child (1989) (CRC).

94 See the CRC, Arts 28 and 29.

95 UNESCO's Convention against Discrimination in Education (1960) (CDE) is an international legal document detailing the right to education.

96 United Nations, International Convention on the Elimination of All Forms of Racial Discrimination (1966) Treaty Series, 660, 195.

97 The ICCPR protects and promotes freedom of expression, including the right to access and communicate all kinds of information and ideas. See the ICCPR, Art 19.

of a dualistic approach, they must be incorporated into the national law by the Parliament for them to become part of the domestic law, which makes them to be directly enforceable in the Republic through the court. There are instances where "self-executing" clauses or specific constitutional interpretations may allow some direct application, without going through the above process. In terms of section 231 of the Constitution, the following process needs to be followed: Firstly, the executive signs; Secondly, the Parliament approves in most instances; Finally, the Parliament enacts it into law for domestic effect.

Parliament is constitutionally obliged[98] to align sections of the Copyright Act with the Constitution's Bill of Rights that map to the international legal instruments protecting and advancing the rights of persons with disabilities.[99] Generally, Parliament must follow procedural and substantive requirements in performing its legislative function.[100] At the same time, the Bill of Rights is considered one of the main constraints on the legislative power of Parliament.[101] Samtani identified three ways in which the Bill of Rights limits Parliament's legislative power: Parliament has the general obligation to amend 'apartheid-era legislation,' such as the Copyright Act, to render it consistent with the Constitution's Bill of Rights;[102] for any law of general application that infringes any right in the Bill of Rights to be considered constitutionally valid, that law must pass the test in section 36 of

98 Constitution of the Republic of South Africa, 1996, s 44(4). The Constitution places some checks on Parliament in performing its legislative duty.

99 Samtani, 'The Domestic Effect of South Africa's Treaty Obligations' 26.

100 For more information on the procedural and substantive constraints, see Michael Bishop and Ngwako Raboshakga, 'National Legislative Authority' 38–92 in Stu Woolman and Michael Bishop (eds), *Constitutional Law of South Africa* <https://constitutionallawofsouthafrica.co.za/wp-content/uploads/2018/10/Chap17.pdf> accessed on 17 September 2023.

101 Bishop and Raboshakga, 'National Legislative Authority' 36–37.

102 The courts have recognised this general obligation on Parliament. See *Holomisa v Holomisa & Another* (CCT146/17) [2018] ZACC 40 (23 October 2018), 2019 (2) BCLR 247 (CC); *Zondi v MEC for Traditional and Local Government Affairs* (CCT 73/03) [2004] ZACC 19 (15 October 2004, 2005 (3) SA 589 (CC). And in *Herbert NO & Others v Senqu Municipality & Others* (CCT 308/18) [2019] ZACC 31 (22 August 2019), 2019 (6) SA 231 (CC), the Constitutional Court applied a two-step test to determine whether apartheid-era legislation accords with the provisions of the Bill of Rights as enshrined in the Constitution. First, the legislation, such as the provisions of the Copyright Act 98 of 1978, must be interpreted with reference to its historical context to determine its purpose. Secondly, the legislation, such as the provisions of the Copyright Act 98 of 1978, must be tested against the particular provisions of the Constitution that are allegedly being violated. Where the legislation in question does infringe the rights in the Bill of Rights, the s 36 limitations must be applied to determine whether the legislation is a justifiable limitation on the specific rights.

the Constitution;[103] and all organs of state, including Parliament, are obliged to respect, protect, and advance the rights in the Bill of Rights.[104]

The failure of the Parliament to align sections of legislation with the Bill of Rights as enshrined in the Constitution has specific implications in South Africa. The relevant case laws that deal with Parliament's obligation to align sections of legislation with the South African Bill of Rights include the case of *Minister of Home Affairs v Fourie*[105] and the *National Coalition for Gay and Lesbian Equality v Minister of Justice*[106]. The decisions of these courts are in line with subsequent judgments in *Mahlangu v Minister of Labour*[107]; and *Mogale and Others v Speaker of the National Assembly and Others*[108].

Turning to the first requirement, one sees that Parliament has made a concerted effort to align the Copyright Act[109] with the Bill of Rights by incorporating some provisions in the CAB [13F-2017], that would enhance the realisation of rights entrenched in the Bill of Rights. So, for example, the CAB [13F-2017] proposes amendments that would enable the state to perform its obligation to perform its obligation to respect, protect, promote, and fulfil the rights of persons with disabilities as entrenched in the Bill of Rights.[110]

The second requirement concerns the law of general application in terms of section 36 of the Constitution. Parliament is obliged to determine whether the provisions of section 36 are complied with in relation to the provisions of the Copyright Act that limit some rights

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103 The Constitution of the Republic of South Africa, 1996, s 36 deals with the law of general application. To pass the test, specific requirements must be met within the context of the law of general application.

104 Constitution of the Republic of South Africa, ss 7(2) and 8(1).

105 *Minister of Home Affairs and Another v Fourie and Another; Lesbian and Gay Equality Project and Others v Minister of Home Affairs* (CCT60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC).

106 *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998).

107 *Mahlangu and Another v Minister of Labour and Others* (CCT306/19) [2020] ZACC 24; 2021 (2) SA 54 (CC); 2021 (1) BCLR 1 (CC); 2021 (2) BLLR 123 (CC); (2021) 42 ILJ 269 (CC).

108 *Mogale and Others v Speaker of the National Assembly and Others* (CCT 73/22) [2023] ZACC 14; 2023 (9) BCLR 1099 (CC); 2023 (6) SA 58 (CC).

109 Copyright Act 98 of 1978.

110 The organs of state must fulfil these obligations. See the Constitution of the Republic of South Africa, ss 7(2) and 8(1).

of persons with disabilities entrenched in the Bill of Rights.[111] Parliament must examine all the factors under section 36 to determine whether the Copyright Act would still be deemed justifiable and considered constitutionally valid despite the actual infringements of the established rights of persons with disabilities.

Finally, the third requirement that Parliament must consider is the provisions of sections 7(2) and 8(1) of the Constitution. These provisions stipulate that all organs of state are obliged to respect, protect, and advance the rights contained in the Bill of Rights and that the Bill of Rights, as enshrined in the Constitution, applies to every law and binds the different organs of state: the legislature, the executive, and the judiciary.

This means that the Bill of Rights in the Constitution specifically influences Parliament in performing its legislative mandate and that international laws are relevant to interpreting the rights in the Bill of Rights.[112] Similarly, the Bill of Rights is considered when the court interprets all legislation, and this interpretation often considers the provisions of international laws.[113] As an organ of state, Parliament must pass only the legislative texts that promote the spirit, object, and purport of the Bill of Rights and accord with sections 7(2) and 8(1) of the Constitution.[114]

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111 The Constitution of the Republic of South Africa, 1996, s 36 provides that the rights entrenched in the Bill of Rights may be limited after applying the law of general application to show that the limitation of such rights 'is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom,' taking into consideration all the critical factors that include: (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.

112 The Constitution of the Republic of South Africa, 1996, s 39(1) states: 'When interpreting the Bill of Rights, a court, tribunal or forum- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law.'

113 It should be noted that the Constitution of the Republic of South Africa, 1996, s 39(2) requires the courts to interpret all legislation with the aim of promoting the spirit, purport, and objects of the Bill of Rights.

114 Parliament is required to pass legislation whose provisions respect, protect, promote, and fulfil the rights in the Bill of Rights except where those rights are limited by the Constitution of the Republic of South Africa, 1996, s 36.

4.4 A review of the Copyright Amendment Bill and the possible challenges identified within the process[115]

The failure[116] of the Copyright Act to include adequate exemptions for people with disabilities directly contradicts the standards set in the Bill of Rights. For example, attention must be drawn to the standard in section 29(1)(a) of the Constitution as acknowledged by the Constitutional Court.[117] If the Constitutional Court's ruling in *Government of the Republic of South Africa & Others v Grootboom & Others* is applied to the situation under discussion, the Copyright Act, among other things, fails to meet the minimum standard of reasonableness contemplated in section 29(1)(b) of the Constitution by failing to provide for the needs of the most desperate.[118]

It is argued that the Copyright Act has lagged behind legislation in other jurisdictions, such as Australia and Canada, and thus requires either total replacement or substantial amendment.[119] The South African Government ignored the series of calls from various interested parties to amend the South African Copyright Act until July 2015.[120]

Copyright law in jurisdictions such as South Africa, which have not incorporated the appropriate exceptions into their copyright legislation, has substantially hindered the realisation of access rights, especially among VIPs.[121] Therefore, the absence of relevant exceptions in the copyright laws of many countries, including South Africa, continues to hamper the accessibility of copyrighted materials among VIPs.[122]

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115 This will be considered in relation to Bill 13B-2017 and Bill 13F-2017.

116 See the Copyright Act 98 of 1978.

117 See *Government of the Republic of South Africa & Others v Grootboom & Others* (CCT11/00) [2000] ZACC 19 (4 October 2000), 2001 (1) SA 46 (CC).

118 *Government of the Republic of South Africa & Others v Grootboom & Others* [44].

119 Dean, 'Copyright Blind Spot' 16.

120 This is when draft amendments were published for public comment, and the CAB was introduced in the National Assembly.

121 Margot E Kaminski and Shlomit Yanisky-Ravid, 'The Marrakesh Treaty for Visually Impaired Persons: Why a Treaty Was Preferable to Soft Law' (2014) 75(3) University of Pittsburgh Law Review 255–300, 259. Although making accessible formats is permitted in some countries, the cross-border exchange of accessible format copies is considered an infringement of copyright holders' rights.

122 Jerry Jie Hua, 'Implementation of the Marrakesh Treaty for Visually Impaired Persons into the Chinese Copyright Law' (2017) 3(1) China and WTO Review 7–34, 9. It is argued that copyrighted information and works are not accessible to many VIPs at a nominal or no cost due to, among other things, the absence of relevant exception clauses in national copyright laws. For example, the South

South Africa is one of the countries that have failed to adopt the appropriate exceptions in their copyright laws for the promotion of accessibility of copyrighted works among persons with disabilities.[123] In the absence of the appropriate copyright exceptions, users have challenge in adapting and transforming works into accessible formats. They are also not permitted to disseminate the transformed works across national borders.'[124]

To comply with the Marrakesh Treaty and align South African copyright law with international human rights treaties[125] and the underlying values of the Constitution,[126] the Copyright Act must be adequately amended.[127] There is a need, therefore, for Parliament to align the Copyright Act with the provisions of the Constitution, the international human rights treaties, and the international copyright treaties, notably the Marrakesh Treaty.[128] In analysing the legislative process of reforming the Copyright Act through the introduction of the Copyright Amendment Bill (CAB), particularly Bill 13F-2017, in South Africa, this thesis considers the views of several researchers, including the Joint Academic

African Copyright Act 98 of 1978 contains a few limitations and exceptions, but no specific exceptions and limitations for persons with disabilities.

123 Some other countries have neglected to harmonise the existing provisions of those copyright exceptions within regions or across their borders. See Lewis Hope, 'Introductory Note to Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled' (2013) 52(6) International Legal Materials 1309–1320, 1309.

124 See Hua, 'Implementation of the Marrakesh Treaty for Visually Impaired Persons into the Chinese Copyright Law' 9.

125 See the various international human rights instruments such as the UDHR, the ICESCR, the SREOPD, the CRC, and the CRPD.

126 The Constitution of the Republic of South Africa, 1996 is the supreme law of the land. It explicitly states at the beginning that the Republic is founded on, among other things, the principle of human dignity to achieve equality and advance human rights and freedom. See the Constitution of the Republic of South Africa, 1996, s 1(1)(a).

127 It has become urgent that the South African Copyright Act 98 of 1978 be amended to be consistent with the provisions of the Marrakesh Treaty and the Bill of Rights enshrined in the South African Constitution. The change in the Copyright Act paradigm aims to improve the rights of persons with disabilities, such as VIPs and persons with other forms of visual impairment. Examples of the rights to be advanced through the paradigm change include the rights to education, freedom of expression, access to information, and participation in the cultural life of one's choice.

128 Sanya Samtani, 'Developing a Human Right to Research in International Law' [2023] Joint PIJIP/TLS Research Paper Series 1–33, 2–3 <https://digitalcommons.wcl.american.edu/research/107>. See also Beiter and others, 'Copyright Reform in South Africa: Two Joint Academic Opinions on the Copyright Amendment Bill [B13B-2017]' 3.

Opinions[129] by the CAB Academic Team (CAT).[130] The opinions of these researchers are considered critically where necessary as part of my analysis, indicating where there are disagreements or agreement with their views.

4.4.1 Recounting the process of legislative reform to align South African copyright law to the Constitution and international laws

Some legislative reform processes have taken place under the control of Parliament in an attempt to align South African copyright law with the Constitution, particularly the Bill of Rights, as well as international copyright treaties and international human rights documents. The legislative reform processes considered in this chapter of the thesis include the initial movement of the CAB through Parliament, its referral to the President and its return to Parliament, and comments on the concerns raised in the President's referral letter.[131] This series of events is now considered.

4.4.1.1 The origin of the Copyright Amendment Bill and the initial movement through Parliament

To begin amending the Copyright Act, the Department of Trade, Industry and Competition ('DITC'), previously known as the Department of Trade and Industry ('DTI'), proposed a draft amending the Act, which underwent several revisions amid heavy criticism.[132] The Parliamentary Committee on Trade and Industry, having received the draft for its consideration, decided to redraft the entire Bill because the initial draft was

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129 There are three different academic opinions formulated by the team of researchers. The three Joint Academic Opinions developed as responses to changes in the provisions of the CAB should not be considered independently, as they complement one another. The first Joint Academic Opinion was submitted in May 2021 as part of the public participation process after the initial release of the CAB for public comments and submissions. The second Joint Academic Opinion, which served as an opinion on the proposed changes to the CAB from November to December 2021, was submitted in about January 2022. Then the third Joint Academic Opinion submitted in 2023 focused on the developments in the CAB legislative process, especially after the court decision in *Blind SA v Minister of Trade, Industry and Competition & Others*.

130 The team of academic researchers includes Sanya Samtani, Klaus D Beiter, Sean Flynn, Jonathan Klaaren, Caroline B Ncube, Chijioke Okorie, Desmond Oriakhogba, Andrew Rens, and Tobias Schonwetter. They are experts in copyright and constitutional law and are referred to in this thesis as the CAB (Copyright Amendment Bill) Academic Team – 'CAT,' for short.

131 The president's referral letter will be considered in relation to various discussions on the adoption of the CAB and its compliance with the provisions of the Constitution and the applicable international legal documents.

132 Despite several revisions of the Bill by the DTIC, its standard as a legal instrument was inferior and it could not be accepted by the Parliamentary Committee after due consideration.

substandard.[133] When the draft amending the Act was published in July 2015 for public comment, it was time to introduce the CAB in the National Assembly[134] as a Section 75 Bill.[135] After several amendments following public comments in consultations and workshops, the Bill was reintroduced in the National Assembly in May 2017.[136] The revision of the Bill continued until December 2018, when the National Assembly passed it. After that, the Bill was presented to the National Council of Provinces (NCOP) and passed in March 2019.[137] The Bill was eventually sent to the President under section 79[138] to complete the legislative process.

4.4.1.2 The referral of the Copyright Amendment Bill to the President and its return to Parliament

Under section 79(1) of the Constitution, the President was expected to attend to the CAB promptly after receiving it.[139] Months passed without progress. So Blind SA filed a lawsuit against the President in May 2020[140] that was later withdrawn. The President's delay in signing the Bill was caused by influence from the South African creative industry and from international trade partners, particularly the United States of America and the European Union.[141]

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133 However, the draft by the Parliamentary Committee still attracted criticism, as it did not meet the standard of a legal document. See Dean, 'Copyright Blind Spot' 16.

134 The National Assembly is the elected lower house of the Parliament of South Africa. See Parliament of South Africa, 'National Assembly' <https://www.parliament.gov.za/national-assembly> accessed 15 March 2025.

135 For more information, see Government of South Africa, 'Trade and Industry Hosts Consultative Conference on Copyright Amendment Bill, 27 Aug' (Www.gov.za, 20 August 2015) <https://www.gov.za/speeches/dti-hosts-conference-copyright-law-changes-2015-08-20-20-aug-2015-0000> accessed 16 March 2025.

136 See Parliamentary Monitoring Group (PMG) <https://pmg.org.za/bill/705/> accessed 16 March 2025.

137 For more information see Parliamentary Monitoring Group (PMG) <https://pmg.org.za/bill/705/> accessed 16 March 2025.

138 Constitution of the Republic of South Africa, s 79.

139 The Constitution bound the President to sign the CAB to become law or refer it back to the National Assembly if he had any reservations about its constitutionality.

140 The lawsuit by Blind SA was based on the fact that the President's unreasonable delay in signing the Copyright Amendment Bill continued to violate the rights of access to copyrighted works in accessible formats for VIPs and people with other forms of print disabilities.

141 For more information, see Laura Kayali, 'How the U.S. and European Union Pressured South Africa to Delay Copyright Reform' (*POLITICO*, 28 June 2020) <https://www.politico.com/news/2020/06/28/copyright-reform-south-africa-344101> accessed 16 March 2025. It was reported that the pressure on the President not to sign the Bill came mainly from the European Commission and the United States of America. The US trade authority and the EU's delegation to South Africa pressured the President not to sign the Bill.

Before the lawsuit against the President could be set down for hearing, he decided to act on the Bill in terms of section 79 by referring it back to Parliament rather than assenting to it. In their Joint Academic Opinion, the members of the CAT[142] mentioned six reservations in the President's referral letter: the incorrect tagging of the Bill under section 75; the possible impact of the royalty provisions in the Bill; questions about the power of the Minister of Trade and Industry to promulgate regulations as contained in the CAB; the public participation on 'fair use' as inadequate; copyright exceptions targeting libraries and education as possibly leading to the arbitrary deprivation of constitutional property; and the provisions of the CAB in question as being inconsistent with South Africa's international copyright obligations.[143]

4.4.1.3 Comments on the concerns raised in the President's referral letter

The president's referral letter, which has a direct impact on the interests of persons with disabilities, is very significant in the discussion on the CAB [B13F-2017]. It is the view of this thesis that the letter should focus, *inter alia*, on outlining specific constitutional reservations or procedural concerns that Parliament should deal with. It becomes necessary to consider how the letter has influenced the outcome of adopting Bill 13F-2017 and the challenges this may pose on the interests of persons with disabilities. This chapter cannot be complete in absence of a proper discussion on the referral letter.

Several months after receiving the President's referral letter,[144] the Portfolio Committee[145] published a call for a public hearing and consultation[146] to address some of the

142 This group of academic researchers, the CAB Academic Team, compiled various academic opinions submitted to Parliament in the public participation process.

143 Beiter and others, 'Copyright Reform in South Africa: Two Joint Academic Opinions on the Copyright Amendment Bill [B13B-2017]' 5–6.

144 After receiving the President's referral letter, the Parliamentary Portfolio Committee took almost a year to decide.

145 This refers to the Parliamentary Portfolio Committee on Trade and Industry, which is responsible for the legislative processes related to the CAB.

146 This took the form of written and oral submissions. The Portfolio Committee received over ninety written submissions. For more information, see Portfolio Committee on Trade and Industry, 11th August 2021 (Directed by Parliament of the Republic of South Africa, 2021) <https://www.youtube.com/watch?v=76wB4BIP2Ss> accessed 16 March 2025.

concerns[147] raised in the President's letter. In response to the President's reservations, the CAT's joint opinion maintains that most of the CAB provisions contested in the President's letter are constitutionally compliant, as 'they fulfilled the rights to education, equality, dignity, freedom of expression and information, and access to and participation in cultural life.'[148]

Upon receiving the President's reservations on the CAB provisions, the Parliamentary Committee[149] considered those reservations and decided to make recommendations.[150] Parliament called for written and oral submissions to address the President's reservations about educational and library exceptions, fair use, and international law.[151] Later, the Portfolio Committee invited comments on further amendments to the CAB.[152]

I now turn to the specific comments and reservations raised by the President in the referral letter.[153] The first three comments and recommendations discussed in this part of the thesis deal with the three concerns in the President's referral letter that were published

147 Not all the concerns raised in the President's referral letter were open for public consultation and comments. For example, the issue of tagging was handled by the Joint Tagging Mechanism, which decided to retag the Bill as a Section 76 Bill. This issue is discussed in the following subparagraph of this thesis chapter.

148 Beiter and others, 'Copyright Reform in South Africa: Two Joint Academic Opinions on the Copyright Amendment Bill [B13B-2017]' 6.

149 This refers to the Parliamentary Portfolio Committee on Trade and Industry.

150 It took the Parliamentary Committee almost a year to move from mere debating and act on the President's reservations. One clear recommendation by the Parliamentary Committee was for the Joint Tagging Mechanism to retag the CAB as a Section 76 Bill, which was carried out by the Joint Tagging Mechanism. For more information, see Parliamentary Monitoring Group (PMG), 'Copyright Amendment Bill (B13-2017)' (PMG.org.za, 2024) <https://pmg.org.za/bill/705> accessed 16 March 2025.

151 For more information on the written submissions received by the Committee as well as the public hearing that took place, see Portfolio Committee on Trade and Industry, 11th August 2021 (Directed by Parliament of the Republic of South Africa, 2021) <https://www.youtube.com/watch?v=76wB4BIP2Ss> accessed 16 March 2025.

152 For more information on the published amendments by the Portfolio Committee, see Parliamentary Monitoring Group (PMG), 'Copyright & Performers' Protection Amendment Bills: Proposed Amendments' (24 November 2021) <https://pmg.org.za/committee-meeting/33911/> accessed 23 April 2025.

153 Six reservations have been identified by members of CAT in the President's referral letter: the incorrect tagging of the Bill under section 75; the possible impact of the royalty provisions in the Bill; questions about the power of the Minister of Trade and Industry to promulgate regulations as contained in the CAB; the public participation on 'fair use' as inadequate; copyright exceptions targeting libraries and education as possibly leading to the arbitrary deprivation of constitutional property; and the provisions of the CAB in question as being inconsistent with South Africa's international copyright obligations. See Beiter and others, 'Copyright Reform in South Africa: Two Joint Academic Opinions on the Copyright Amendment Bill [B13B-2017]' 5–6.

for public consultations and comments: the issue of international law compliance, the issue of 'fair use,' and the concern that copyright exceptions targeting libraries and education might lead to the arbitrary deprivation of constitutional property. The remaining three concerns raised by the President are also considered in this chapter, though not in detail.

(a) Compliance with international law

The President's referral letter raised concerns about CAB's compliance with international law. The first concern relates to those treaties that South Africa has signed as a member but has not ratified to become enforceable in the Republic, however, it is safe to say that the status of treaty like the WCT is unique.[154] The first constitutional precondition for ratifying these treaties is that Parliament must give its approval for the Republic to be bound by the legal instrument and determine how to implement the binding legal instrument in the country.[155] However, the substantive issues raised in the President's referral letter about the WCT, the WPPT, and the Marrakesh Treaty are overbroad.[156] The President's letter maintains that some of the exceptions in relation to sections 12A to 12D, 19D, and 19C[157] seem to conflict with the provisions of the WCT and the WPPT.[158]

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154 Though South Africa signed the WCT in 1997 but could not ratify it due to constitutional challenge. The government, instead of ratification of the Treaty, opted for accession. On the contrary, South Africa has neither acceded to nor ratified the WPPT Treaty. It is right to say that South Africa has not ratified the WCT, the WPPT, and the Marrakesh Treaty, however, the position of the WCT in South Africa is different from the other two.

155 Parliament must ensure that the decision is based on the principle of separation of powers. See *Glenister v President of the Republic of South Africa & Others* (CCT 48/10) [2011] ZACC 6 (17 March 2011), 2011 (3) SA 347 (CC) [89].

156 It is the view of this thesis that the content of the referral letter is overbroad because some of the issues raised up in the letter fall outside the scope of the treaties. It is unnecessary to focus on issues such as royalty provisions and the delegation of power to the Minister. Also, the letter is considered to be too wide, instead of focusing on the specific exceptions required for the implementation of the Marrakesh Treaty, it concentrates on dealing with the broad 'three-step test'. See the President's referral letter, para 21; it is available in The President, 'Notice of Referral in terms of Sections 79(4)(b) and 84(2)(c) of the Constitution of the Republic of South Africa, 1996: Copyright Amendment Bill [B13F - 2017] and Performers' Protection Amendment Bill [B 24F- 2016]' 10 October 2024 <https://pmg.org.za/files/Copyright_Bill_Notice_of_Referral.pdf> accessed 16 March 2025.

157 The President's referral letter refers to the specific sections in the CAB that were inconsistent with the provisions of the WCT and the WPPT.

158 See the President's referral letter, para 18.

Similarly, the President's letter highlights that the exceptions[159] are inconsistent with the Marrakesh Treaty's three-step test.[160]

The second query raised in the President's letter about compliance with international law concerns treaties that have been ratified and are thus binding on South Africa.[161] The President believes that some CAB provisions do not comply with the version of the three-step test contained in the Berne Convention, to which South Africa has already acceded.[162] It should be noted that the Berne Convention's three-step test is the same as the Marrakesh Treaty's test.

In both instances,[163] the critical question is whether the issue of compliance with international law, as contained in the President's referral letter, is a sufficient reason for referring the Bill back to Parliament in terms of section 79(1) of the Constitution.[164] The next question is to what extent the issue of compliance with international law qualifies as an independent ground to institute an inquiry into the constitutionality of the CAB under section 79 of the Constitution. Under section 79(1), the President has the right to refer a Bill back to the National Assembly if the President has reservations regarding the constitutionality of the Bill.[165] The principle of constitutional supremacy justifies the need to institute an inquiry into the constitutionality of a Bill under section 79 of the Constitution. Every law in South Africa, including amending Bills, must accord with the Constitution, the supreme law of the land.[166]

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159 These exceptions are considered in relation to ss 12A to 12D, 19B, and 19C of the CAB under Bill 13F-2017.

160 See the President's referral letter, para 15.

161 Constitution of the Republic of South Africa, 1996, s 231(2). For example, South Africa acceded to the three-step test as contained in the Berne Convention.

162 See the President's referral letter, para 15.1.

163 Both instances refer to where South Africa has signed the treaties but not ratified them, and where South Africa has ratified or acceded to the treaties after signature.

164 See the Constitution of the Republic of South Africa, 1996, s 79(1). See also Samtani, 'The Domestic Effect of South Africa's Treaty Obligations' 32.

165 Constitution of the Republic of South Africa, 1996, s 79(1).

166 See *Ex parte: President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* (CCT12/99) [1999] ZACC 15 (11 November 1999), 2000 (1) SA 732 (CC) [6].

To determine whether the issue of compliance with international law qualifies as an independent ground for the President to return the Bill to Parliament under section 79,[167] one needs to consider the provisions of the Constitution on the issue of international law.[168] For international treaties to bind South Africa, certain constitutional conditions must be fulfilled under section 231.[169] That section of the Constitution laid down the constitutional requirements for South Africa to accede to or ratify international agreements.

Although international law compliance connects to the issue of an inquiry into the constitutionality of a Bill, it is merely an auxiliary point in that inquiry. In *Earthlife Africa & Another v Minister of Energy & Others*,[170] the court decided that the agreement in question never fulfilled the constitutional requirements in section 231(3) and that a delay in bringing it before Parliament was unreasonable.[171] The thesis is in agreement with the CAT's view that compliance with international law, in its strict sense, does not justify referring the Bill back to Parliament.[172]

The issue of constitutional compliance is not the main problem raised in the President's referral letter. Instead, the letter focused mainly on whether the CAB is compatible with international treaties. In these circumstances, the question remains: can the international legal incompatibility of a Bill be considered an independent ground for constitutional invalidity?[173] Even where the discussion under consideration relates to international human rights law, Parliament must aim at 'respecting, protecting, promoting and fulfilling the Bill of Rights.'[174] As for the President's letter, the fact remains that the CAB's inconsistency with international law cannot be considered an independent ground for

167 Constitution of the Republic of South Africa, 1996, s 79.
168 The Constitution of the Republic of South Africa, 1996, s 231 deals with international laws.
169 For more information, see the Constitution of the Republic of South Africa, 1996, s 231.
170 (19529/2015) [2017] ZAWCHC 50 (26 April 2017), 2017 (5) SA 227 (WCC).
171 *Earthlife Africa & Another v Minister of Energy & Others* [127]. The court held further that the relevant agreement should be classified not under s 231(3) but under s 231(2), which would result in following a different procedure.
172 Beiter and others, 'Copyright Reform in South Africa: Two Joint Academic Opinions on the Copyright Amendment Bill [B13B-2017]' 22.
173 Samtani, 'The Domestic Effect of South Africa's Treaty Obligations' 34.
174 Samtani, 'The Domestic Effect of South Africa's Treaty Obligations' 34.

referring the Bill back to Parliament. According to section 44(4) of the Constitution, Parliament is bound only by the provisions of the Constitution when it is carrying out its legislative mandate, meaning that Parliament's action must be consistent with the provisions of the Constitution.[175]

Unlike the circumstances of *Law Society of South Africa & Others v President of the Republic of South Africa & Others*,[176] the President's letter does not invoke the principle of legality as a ground for the referral. Bearing in mind that this letter focused only on the issue of the CAB's[177] compliance with international law, it could be argued that such a referral is not constitutionally justifiable.[178] Parliament 'interpreted and applied international law correctly,'[179] so it considered the appropriate provisions of international law. It could also be argued that the specific exceptions[180] highlighted in the President's letter are compatible with international law obligations binding on South Africa.[181]

Parliament began incorporating the provisions of the WCT, the WPPT, the Beijing Treaty, and the Marrakesh Treaty into the Copyright Act. The CAB refers to several definitions contained in these treaties and incorporates the provisions of specific international treaties to meet the requirements of these legal documents.[182] Based on Parliament's

175 Constitution of the Republic of South Africa, 1996, s 44(4).

176 (CCT67/18) [2018] ZACC 51 (11 December 2018), 2019 (3) SA 30 (CC). The ruling of the Constitutional Court extended to the principle of legality while dealing with the international obligations of Parliament.

177 There is a specific emphasis on the provisions of ss 12A to 12D, 19B, and 19C of the CAB.

178 The issue of compliance with international law does not in itself qualify as a ground for the President's referral.

179 Samtani, 'The Domestic Effect of South Africa's Treaty Obligations' 36.

180 Attention is drawn to the provisions of ss 12A to 12D, 19B, and 19C.

181 The international law obligations are considered in relation to those obligations that derive from human rights treaties and copyright treaties.

182 See the CAB, cl 1, containing the examples of definitions incorporated in the CAB [13F-2017], namely, 'accessible format copy,' 'technological protection measure,' and 'technological protection measure circumvention device.' See also CAB, cll 26 and 27, which, among other things, promote further protection of moral rights and economic rights of authors and copyright holders by stating that tampering with technological protection measures (TPMs) will become an offence. See further CAB, cll 28 and 29, which provide for the enforcement of anti-circumvention and restrictions of conduct linked to offences contained in the CAB [13F-2017]. This aligns with the provisions of the WCT, Arts 11–14. Similarly, the provisions of the Performers' Protection Amendment Bill [B 24—2016] ('PPAB') have addressed the obligations placed on the contracting parties under the WPPT and the Beijing Audiovisual Treaty. See the PPAB, cll 3, 4, 7, and 8.

extensive work, the President's referral letter did not need, among other things, to raise the issue of the economic rights of creators.[183] Moreover, the allegation in the President's letter that the CAB's provisions about exceptions do not accord with the three-step test in the WCT, the WPPT, and the Marrakesh Treaty is unsustainable. For the three treaties[184] have the same test as the Berne Convention and the TRIPS Agreement.[185]

(b) The concern over public participation regarding fair use and its compliance with the Constitution

The President's letter expresses concern over public participation in drafting section 12A, which deals with the principle of fair use and the extent to which it complies with the Constitution.

The CAB drafters acknowledged the existence of the principle of 'fair dealing' in the current Copyright Act; this was considered in several public processes.[186] Dean argues that the term 'fair dealing,' as it is entrenched in the current Copyright Act, could be used interchangeably with 'fair use.'[187] Yet a major difference between the two expressions concerns the inclusion of the words 'such as,' indicating the permitted-use categories.[188] The nature and scope of use that may be allowed to form part of the exceptions under the 'fair use' principle were canvased extensively, allowing members of the public to participate through written and oral submissions during public hearings. For this reason, the term 'such as' was included in the initial draft of the Copyright Amendment Bill

183 See the CAB, cll 23 and 27. See also the PPAB, cll 3, 4, 7, and 8.

184 The three treaties are the WCT, the WPPT, and the Marrakesh Treaty.

185 It should be noted that South Africa is a party to the Berne Convention and the TRIPS Agreement. South Africa acceded to the three-step test as contained in the Berne Convention.

186 Public processes took place at different dates when the Bill was presented for public participations which include 1st August 2017, 3rd August 2017, 4th August 2017, 15th August 2017, 11th August 2021, 12th August 2021, 21st February 2023, 7th March 2023 and 14th March 2023. For more information see Parliamentary Monitoring Group (PMG) <https://pmg.org.za/bill/705/> accessed 16 March 2025.

187 OH Dean, *Handbook of South African Copyright Law* (Juta 2015 electronic version) 1-52.

188 Beiter and others, 'Copyright Reform in South Africa: Two Joint Academic Opinions on the Copyright Amendment Bill [B13B-2017]' 14.

submitted in 2015.[189] The term 'such as' was removed in the later draft but reinserted following comments from the public.[190]

(c) Concern over copyright exceptions that target libraries and education

A further concern raised by the President in his referral letter, which was published for public consultations and comments, centres on the possible implications that copyright exceptions may have on the rights of copyright owners. This view maintains that copyright exceptions targeting libraries and education may result in arbitrary deprivation of the constitutional property of copyright owners. In his referral letter, the President indicates that the exception for educational use in section 12D of the CAB is inconsistent with the Constitution.[191]

However, by incorporating the provisions of section 12D into the copyright law, South Africa moves towards resolving its international obligations regarding human rights and copyright, a step which makes 'section 12D defensible as a legitimate policy choice'[192] for South Africa. In particular, incorporating section 12D[193] into the South African Copyright Act will align the copyright law with the Constitution's Bill of Rights. Through the provisions of sections 12D(3) and 12D(4) of the CAB, copyrighted works in the form of educational materials are made available for the common good,[194] on condition that

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189 The term 'such as' was placed before the lists of use that may be allowed to form part of the fair use exception as contained in the CAB [13F-2017].

190 Beiter and others, 'Copyright Reform in South Africa: Two Joint Academic Opinions on the Copyright Amendment Bill [B13B-2017]' 14.

191 The President considers that the provisions of s 12D of the CAB violate the Constitution and international law. However, his view is not supported by a proper explanation. Similarly, some commentators criticise s 12D, particularly s 12(3), which, under specific conditions, permits educational institutions to make a copy of a whole book to form a course pack for students and s 12(4), which, under specific conditions, allows an entire textbook to be reproduced for conducting educational or academic activities.

192 Beiter and others, 'Copyright Reform in South Africa: Two Joint Academic Opinions on the Copyright Amendment Bill [B13B-2017]' 19.

193 See the CAB, s 12D, containing important exceptions to the right of copyright owners that promote the educational use of copyrighted works to advance the Bill of Rights and realise constitutional obligations.

194 Making educational materials available for the common good, particularly to people who are vulnerable and have been discriminated against in the past, such as VIPs, prevents the tendency to abuse monopoly power in support of an underlying objective of international law, such as the Berne

the requirements set out in those provisions are met.[195] For example, in terms of section 12D(3), educational institutions are permitted to make a copy of a whole book into a study pack on condition that 'a licence to do so is not available from the copyright owner, collecting society or an indigenous community on reasonable terms and conditions.'[196] Similarly, section 12D(4) authorises educational institutions to reproduce an entire copyrighted work in the form of a textbook to achieve specific educational or academic functions. This reproduction is only permitted on the condition, among other things, that the 'textbook is out of print' or 'the owner of the right cannot be found.'[197]

The provisions of section 19C of the CAB under Bill 13F-2017 are directed at libraries' use of copyrighted works. They are in line with the constitutional mandate being promoted by the Bill of Rights and do not suggest any unjustified limitation of the rights of copyright holders over their works. Although some commentators direct their concerns specifically at the provisions of sections 19C(4) and 19C(9) of the CAB under Bill 13F-2017, they failed to advance reasonable grounds to justify their criticisms of these provisions, bearing in mind the developments in the medium of learning since the arrival of COVID-19.[198]

The effect of the COVID-19 pandemic has justified the need to constantly adopt other alternative media that do not require physical access to libraries, which is in line with the provisions of sections 19C(4) and 19C(9) of the CAB, Bill 13F-2017. Many libraries across countries such as the United States of America, the United Kingdom, Canada, and the European Union have begun to provide ways of accessing some works remotely through secure computer systems. In line with the latest developments in other countries, the introduction of section 19C, particularly in subsections (4) and (9), creates the opportunity for everyone in the Republic to have access to educational materials, even when those

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Convention as well as the TRIPS Agreement that aims at controlling the abuses of copyright and other IP-related rights.

195 According to ss 12D(3) and 12D(4) of the CAB, certain conditions must be met before copyrighted works in the form of educational materials can be used for the common good in the manner set out in the sections.

196 See the CAB, s 12D(3).

197 See the CAB, s 12D(4). Another condition determines whether authorised copies can be found at a reasonable price based on the market-related price in South Africa.

198 The COVID-19 pandemic has made it unrealistic to depend only on physical access to libraries.

materials cannot be accessed physically as a result of circumstances like those experienced during the COVID-19 pandemic.

(d) Further concerns raised by the President in his referral letter

The President's further concerns in his referral letter, which were not published by the Portfolio Committee for public consultations and comments, are the following: the issue of incorrect tagging of the Bill under section 75; the possible impact of the royalty provisions in the Bill; and the concern over the power of the Minister of Trade and Industry to promulgate regulations as contained in the CAB.[199]

(1) The implication of tagging the Bill

In agreement with the President's reservation about the issue of tagging,[200] the Portfolio Committee proposed that the Joint Tagging Mechanism retag the Bill.[201] The CAB is covered by section 75 of the Constitution, which governs Bills that do not affect the provinces of the Republic.[202] However, the President chose section 76 instead of section 75, which led to the retagging of the CAB after it was referred back to Parliament.[203]

Many researchers reject the view that the section 76 process governs the CAB,[204] as the regulation of the CAB falls outside the functional areas listed in Schedule 4. The thesis shares the view of Beiter and others stating that retagging the CAB is in itself

199 Parliament published only three of the six concerns raised by the President in his referral letter for public comments and further submissions. The remaining three concerns (namely, incorrect tagging, the royalty issue, and the power of the Minister to promulgate regulations in the CAB) were not published by Parliament for public consultation.

200 The Portfolio Committee recommended retagging the CAB as a Section 76 Bill in line with the view of the President in his referral letter.

201 This refers to the retagging of the CAB in terms of s 76 of the Constitution.

202 The procedure contained in the Constitution of the Republic of South Africa, 1996, s 75 that is used for 'Ordinary Bills not affecting provinces' is the same process applicable where the amendments of copyright and other IP-related Acts are concerned.

203 According to the President, s 76 should apply because the Copyright Act amendment may affect areas such as trade and culture, which fall under the control of both national and provincial spheres.

204 For more information on the s 76 process, see *Democratic Alliance v President of South Africa & Others* (18392/13) [2014] ZAWCHC 31 (13 March 2014), 2014 (4) SA 402 (WCC) [94]–[96].

unconstitutional and may expose its legislative process to future constitutional challenges.[205]

(2) The possible implications of allowing royalty provisions in the Bill

According to the President, the royalty provision contained in the CAB may negatively affect the property intended to be protected by the Constitution.[206] For example, the President is concerned about the retrospective effect of applying the royalty provision on property. Yet the members of CAT argue that incorporating a retrospectivity provision in the CAB 'is not in itself a ground to find the provisions unconstitutional.'[207]

Besides, the royalty provisions in the CAB resemble those entrenched in other legislation, such as labour law, where the minimum provisions often apply retrospectively to govern those work relationships linked to existing contracts. Section 6A(7) of the CAB clearly states that royalty requirements only apply 'where copyright in that work was assigned before the commencement date' of the legislation on condition that the work in question 'is still exploited for profit' and only applicable to those uses that occur 'after the commencement date' of the legislation.[208]

As to the aspect of arbitrariness raised by the President, there is a need to curb any intended or implied arbitrariness in implementing the royalty provisions. However, South African constitutional law is unclear on whether the rights protected in copyright law, such as the right to remuneration, are deemed protected under the Constitution. It is unclear whether copyright is governed by the constitutional provision of section 25 of the Constitution, which prevents the arbitrary deprivation of property.[209]

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205 Beiter and others, 'Copyright Reform in South Africa: Two Joint Academic Opinions on the Copyright Amendment Bill [B13B-2017]' 11–12.

206 Applying and enforcing the royalty requirements in the CAB may result in a retrospective and arbitrary regulation of the relevant property.

207 Beiter and others, 'Copyright Reform in South Africa: Two Joint Academic Opinions on the Copyright Amendment Bill [B13B-2017]' 12.

208 See the CAB, s 6A(7)(a), (c).

209 This issue has not been settled in South African law. *See Laugh It Off Promotions CC v SA Breweries International (Finance) BV t/a Sabmark International & Another* (CCT42/04) [2005] ZACC 7 (27 May 2005), 2006 (1) SA 144 (CC), where the Constitutional Court ruled that the right to free expression

Any constitutional challenge regarding the CAB's royalty provisions will probably be cured by limiting the royalty to fair remuneration, which must be reasonable. The provisions of sections 7A and 8A of the CAB should consider the applicable royalty incorporated in existing agreements and limit the royalty to fair remuneration.[210] Similarly, there is no justifiable reason to change any fair existing remuneration arrangement.[211]

4.4.2 Compliance with the Marrakesh Treaty – within the context of section 19D

This subsection considers the extent the Copyright Act, through the aisle of section 19D of Bill 13F-2017, complies with the provisions of the Marrakesh Treaty and therefore, forms part of the bedrock of this thesis. The aim is precisely to determine the extent section 19D is consistent with the provisions of the Marrakesh Treaty. The onus is on the Parliament to ensure that the provisions of the CAB are formulated in such a way that the Copyright Act becomes consistent with the Marrakesh Treaty.[212] This step will allow the Republic to accede to the Treaty.[213]

The provisions of section 19D of the CAB, Bill 13F-2017 are critical in aligning the South African Copyright Act to the Marrakesh Treaty.[214] The object of section 19D, in general,

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applies to the use of parody in trade-marks but failed to determine whether trade-marks qualify as property protected by the Constitution of the Republic of South Africa, 1996, s 25. Other cases that could be considered here include *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) [75], where it was decided that the final Constitution may not be considered defective simply because it did not incorporate the right to IP as part of the Bill of Rights; *Ascendis Animal Health (Pty) Ltd v Merck Sharpe Dohme Corporation & Others* (CCT 212/18) [2019] ZACC 41 (24 October 2019), 2020 (1) SA 327 (CC), where the Constitutional Court refused to recognise patents as property under the provisions of s 25.

210 According to the CAB, ss 7A and 8A, authors of visual artistic works, as well as performers in audiovisual works, may share in any royalty received for using their protected rights, while the proposed s 6A may require authors of literary and artistic works to enjoy a fair, reasonable share in royalties for the use of their works.

211 Any regulation that alters fair remuneration arrangements may be deemed arbitrary and thus not acceptable as constitutional.

212 The South African Institute of Intellectual Property Law (SAIIPL) 'Submissions to the Portfolio Committee on Trade and Industry' https://www.saiipl.co.za/news-and-resources/laws/ (2021) 4.

213 Dean, 'Copyright Blind Spot' 17.

214 The Marrakesh Treaty obliges the parties to the Treaty to ensure that certain exceptions to the exclusive rights of copyright holders are incorporated into domestic copyright law that will allow VIPs to access copyrighted works in accessible formats. The inclusion of such copyright exceptions also allows the cross-border exchange of works in accessible formats for the benefit of VIPs.

is to provide exceptions to the exclusive rights of copyright holders over their works for the benefit of persons with disabilities.[215] Contrary to the view held in this thesis,[216] some commentators hold the opinion that section 19D is not in full compliance with the Marrakesh Treaty, as it contains a broad exception directed at persons with disabilities and authorised entities or persons representing them.[217]

Section 19D(1) of the CAB, Bill 13F-2017 provides that, subject to certain conditions,[218] it is lawful to make copies of works in an accessible format for the benefit of persons with disabilities without permission from copyright holders. This provision of the CAB, Bill 13F-2017 balances the rights of persons with disabilities, particularly VIPs, and the interests of copyright holders.[219] Whereas section 19D(1) of the CAB under Bill 13F-2017 regulates the making of accessible format copies of works available to persons with disabilities, section 19D(3) of the CAB under Bill 13F-2017 regulates how these copies are distributed among or made available to persons with disabilities.[220] Furthermore, section 19D(2) of

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215 The exceptions introduced by the provisions of s 19D make it possible for persons with print disabilities to make or import accessible format copies of copyrighted work without the authorisation of the copyright owner.

216 This is in line with views held by commentators like Woods and Band. It is argued that South Africa as a sovereign state has legitimate ability to incorporate into its law specific exceptions and limitations that are applicable to persons with different disabilities, not just to persons with print disability. See Jonathan Band, 'Analysis of Woods and Myburgh Comments on CAB' Joint PIJP/TLS Research Paper Series No. 55 https://digitalcommons.wcl.american.edu/research/55/ (2020) 10.

217 The South African Institute of Intellectual Property Law (SAIIPL) 'Submissions to the Portfolio Committee on Trade and Industry' https://www.saiipl.co.za/news-and-resources/laws/ (2021) 10. Also see Laetitia Cassells 'The Impact of the Marrakesh Treaty on South African Publishers' (2020) https://www.researchgate.net/publication/346536532_The_Impact_of_the_Marrakesh_Treaty_on_South_African_Publishers 4.

218 See the CAB, s 19D(1)(a), (b), and (c) for the conditions that must be met in order to provide a reasonable safeguard against the abuse of the copyright exceptions. The CAB, s 19D(1)(a) requires a person who is acting in terms of s 19D(1) to have lawful access to the copyrighted work or a copy of the work. The CAB, s 19D(1)(b) stipulates that the conversion of the copyrighted works into accessible format copies is allowed only to the extent that it does not introduce changes other than those necessary to make the works available to the beneficiary persons. The CAB, s 19D(1)(c) provides that the actions that fall under s 19D(1) shall be carried out without any profit or intention of making a profit.

219 On the one hand, the CAB, s 19D(1) allows VIPs to access more works in accessible formats easily and quickly. On the other hand, the rights of authors and copyright holders are protected by including specific conditions that must be considered in applying the exception.

220 The CAB, s 19D(4) also regulates the cross-border distribution of works in accessible format copies as required by the Marrakesh Treaty.

the CAB under Bill 13F-2017 grants a beneficiary person[221] the permission to reproduce, for personal use and without the copyright holder's prior authorisation, any work that he or she received[222] under the provisions of section 19D(1).

One aspect of section 19D that raises some concerns is the issue of cross-border trade within the context of the Marrakesh Treaty. It is necessary to determine whether the CAB under Bill 13F-2017, through the introduction of section 19D, contains an appropriate mechanism for cross-border trade of accessible format copies of the copyrighted works, in line with the provisions of the Marrakesh Treaty. A strict application[223] of the provisions of Articles 5(1)[224] and 5(2)[225] of the Treaty in the context of the CAB under Bill 13F-2017 may lead to the conclusion that section 19D does not fully comply with the Treaty because it does not clearly refer to 'authorized entities' in clarifying the application of the cross-border exchange in terms of the Treaty.[226] However, the introduction of Article 5(3)[227] has taken care of the concerns raised within the context of Articles 5(1) and 5(2) of the Treaty.

Section 19D(4) meets the requirement of the cross-border trade mechanism and, therefore, aligns the South African copyright law with the object of the Marrakesh Treaty in the context of Article 5(3). The introduction of Article 5(3) grants some flexibility to member states in implementing the cross-border provisions in their domestic legal systems. To comply with the recommendation of Article 5(3) of the Treaty, section 19D(4) of the CAB [13F-2017] provides, among other things, that 'a person who serves persons

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221 For the Marrakesh Treaty, a beneficiary person refers explicitly to blind people and persons with other forms of print disabilities. By contrast, the CAB [13F-2017] refers to persons with disabilities in general.

222 The beneficiary person must have received the work through 'wire or wireless means.' See the provisions of the CAB, s 19D(2).

223 Such strict application focuses exclusively on the provisions of Arts 5(1) and 5(2) without considering the provisions of Art 5(3) of the Marrakesh Treaty.

224 According to Art 5(1) of the Marrakesh Treaty, member states are required to indicate in their domestic copyright laws that copies of works in accessible format 'may be distributed or made available by an authorized entity to a beneficiary person or an authorized entity in another Contracting Party.'

225 Article 5(2) of the Marrakesh Treaty specifies that to comply with the cross-border trade obligation, members' domestic legislation should include a specific provision dealing with authorised entities.

226 The issue of cross-border trade, subject to the provisions of Art 5(3), must be considered with reference to a clear specification of the term 'authorized entities.'

227 Article 5(3) of the Marrakesh Treaty states: 'A Contracting Party may fulfil Article 5(1) by providing other limitations or exceptions in its national copyright law.'

with disabilities' is granted the authority to either export or import, for the benefit of persons with disabilities, lawful copies of works in accessible format without the permission of the copyright holder. Consequently, section 19(D) of the CAB under Bill 13F-2017 is appropriate for implementing cross-border trade as established in the Treaty.[228]

Section 19D(3) of the CAB under Bill 13F-2017 in its current state provides a mechanism for implementing cross-border trade as stated in the Marrakesh Treaty. The incorporation of 'authorized entity' as well as 'a person who serves persons with disabilities' into the CAB under Bill 13F-2017 is in an indication that the requirement of 'authorized entities'[229] has been met.

Section 19D(4)(b) of the CAB under Bill 13F-2017 provides that the import or export of works in accessible format copies would be allowed only if the person[230] in question 'knows, or has reason to know, that the accessible format copy will be used for purposes other than to aid persons with a disability.'[231] Contrary to Article 5(2) of the Marrakesh Treaty, the test in section 19D(4)(b) of the CAB under Bill 13F-2017, is formulated in the positive, which places an excessive burden on the person serving persons with disabilities.[232] According to the Marrakesh Treaty, the authorised entity that intends to distribute or carry out the cross-border transfer of works in accessible format copies should not, before the distribution or making the copies available, have actual or constructive knowledge that the accessible format copies would be used for any other purpose other than for the beneficiary persons.[233]

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228 See the Marrakesh Treaty, Art 5(1).

229 The requirement of 'authorized entities' is stipulated in Art 5(1) of the Marrakesh Treaty. However, this requirement must be considered subject to Art 5(3) of the Treaty.

230 This refers to either disabled person or a person who serves such a disabled person, which includes an authorized entity. See the CAB, s 19D(4)(a).

231 See the CAB, s 19(4)(b).

232 According to the CAB, s 19D(4)(b), it is not sufficient for the person serving persons with disabilities to presume that the work in accessible format copies is not used for any persons other than persons with disabilities; instead, actual knowledge or existence of a reasonable ground to believe that the accessible format copies are only intended for persons with disabilities.

233 Marrakesh Treaty, Art 5. Unlike the test in CAB, s 19D(3), the test in Marrakesh Treaty, Art 5 does not overburden the authorized entity: it does not require that the authorized entity should know or

As the test in section 19D(4)(b) of the CAB under Bill 13F-2017 overburdens the persons serving persons with disabilities, it is open to a future attack, for it may appear to promote inequality and unfair discrimination against persons with disabilities. The extreme burden arising from the test under section 19D(4)(b) applies only to persons with disabilities and those persons or entities serving them, which must be addressed in line with the recommendations in this thesis.[234] Allowing the provisions of section 19D(4)(b) in its present form may have foreseeable constitutional implications that may render the Copyright Act non-compliant with the Constitution even after the amendment of the CAB under Bill 13F-2017.[235] The thesis maintains that the test under section 19D(4) of Bill 13F-2017, should be consistent with the one contained in Article 5(2) of the Marrakesh Treaty to eliminate the unjustified burden placed on persons with disabilities or the persons responsible for distributing the accessible format copies.

4.4.3 Adopting technological protection measures complying with the WIPO Copyright Treaty

Chapter Three of this thesis thoroughly discussed the underlying principles of technological protection measures (TPMs) as contained in the WCT and with particular reference to the 'digital agenda.'[236] The WCT preamble clearly states that the WCT aims to introduce new international rules for protecting works, especially digital copyrighted works, against infringement.[237] The provisions of the WCT, particularly Article 11,[238] have

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should reasonably have known that the accessible format copies are intended for the beneficiary persons.

234 Another consequence of insisting on such an onerous burden in terms of CAB, s 19D(3), as considered in this thesis, is that it will probably discourage the cross-border distribution of accessible format copies that could have been possible under the provisions of the Marrakesh Treaty. See Beiter and others, 'Copyright Reform in South Africa: Two Joint Academic Opinions on the Copyright Amendment Bill [B13B-2017]' 28–29.

235 The specific provisions of the Constitution that may form the basis of such non-compliance relate to the principle of equality and non-discrimination as contained in Constitution of the Republic of South Africa, 1996, s 9 and ss 1(c) and 33.

236 This refers to three provisions that contain specific responses to various concerns raised by copyright holders regarding the impact of evolving digital technologies on copyright protection and management.

237 See the WCT, preamble. The Treaty sets out international standards for protecting works, particularly in digital forms.

238 It provides a specific mandate that all contracting parties must perform.

significantly influenced the nature of legal frameworks that have been adopted by many jurisdictions[239] in addressing digital copyright infringements.

Under the digital agenda, contracting parties are required to adopt appropriate legal processes to protect copyrighted works against infringement through digital technologies.[240] These parties are also required to implement effective legal remedies against the circumvention of technological controls used by authors and other copyright holders to exercise their rights as provided in the WCT.[241] The question is whether the CAB under Bill 13F-2017 contains provisions that address the circumvention of TPMs and other technological controls employed by authors and copyright holders.

In addressing this issue, the CAB under Bill 13F-2017 defines technological protection measures against circumvention as 'any process, treatment, mechanism, technology, device, system or component that in the normal course of its operation prevents or restricts infringement of copyright in a work.'[242] This definition accords with Article 11 of

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239 Various directives and legislation on TPM-related issues that were developed against the backdrop of the provisions of the WCT include the EU Directive and legislation; the Digital Millennium Copyright Act in the USA; the Copyright Amendment (Digital Agenda) Act 2000 in Australia; and the Japanese Copyright Act. Although the thesis does not deal with the situation in EU and Japan, it is necessary to provide an overview of the EU Directive and Japanese perspective on TPMs.

The EU Directive (EUD), which was adopted on 9 April 2001, sets out to harmonise aspects of digital copyright. It favours technological measures as a solution to digital copyright infringement. Article 6(1) protects technological measures by outlawing both the act of circumvention and the preparatory activities of manufacturing and distributing circumvention devices or services. It stipulates that member states will provide adequate legal protection against any activities, including the manufacture or distribution of devices, or the performance of services which only have limited commercial significance other than circumvention, and which the person concerned carries out in the knowledge, or with reasonable grounds for knowing, that they will enable or facilitate, without authority, the circumvention of any effective technological measures designed to protect any copyright or any related rights, as provided by law. See the EU Directive, Arts 6(1) and 6(2).

In Japan, the Copyright Law Amendment Act 2012, which came into force on 1 October 2012, brought many changes in the area of copyright infringement, including the circumvention of TPMs. For general information on this issue, see the Copyright Law Amendment Act 2012. According to Art 119(3), unauthorised downloaders of copyright contents may receive a jail term and payable fine. However, through the implementation of its Amendment Act and following Art 2, Japan has succeeded in addressing the issue of circumvention of TPMs, which brings its copyright legislation into line with the provisions of the WCT.

240 For more information, see the WCT, Art 11.

241 See the WCT, Art 11. The Treaty requires contracting parties to provide the necessary protection against the circumvention of technological protections employed by authors and other copyright holders in securing their works.

242 See the CAB, s 1(i)(a).

the WCT.[243] This thesis partially[244] supports the view of the CAT members that the definition of a 'technological protection measure circumvention device,' as contained in the CAB, should not be expanded as proposed in November 2021.[245] Even so, the thesis maintains that broadening the definition of technological protection measure as proposed by the Portfolio Committee to include, among other things, non-commercial use that allows access by persons with disabilities has no harmful effect and thus should be allowed to form part of the Bill.[246]

Both the WCT and the WPPT allow member states some flexibility in addressing the prohibition of circumvention of technological measures by excluding acts permitted by law.[247] The second leg of section 1(i)[248] of the CAB under Bill 13F-2017 maps to the provision of flexibility as contained in the WCT and the WPPT, which aligns with the view advocated in this thesis.

The thesis advocates for a moderate approach to implementing the TPMs and adopting legal remedies against their circumvention. Overprotection of TPMs may carry specific implications for access to information particularly among persons with disabilities and should be avoided. One of the implications of granting TPMs extreme protection is that

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243 In terms of the WCT, Art 11, contracting parties are required to adopt appropriate 'legal protection and effective legal remedies against the circumvention of effective technological measures' implemented by copyright holders while exercising their rights as contained in the Treaty.

244 This thesis only supports the view of the members of CAT to the extent that such expansion of the definition of a TPM circumvention device fails to consider the fact that the circumvention of TPMs may also be allowed 'for lawful commercial purposes, such as quoting a film in a documentary or television program.' See Beiter and others, 'Copyright Reform in South Africa: Two Joint Academic Opinions on the Copyright Amendment Bill [B13B-2017]' 31.

245 One of the proposed changes circulated for comment on 24 November 2021 is that the definition of a 'technological protection measure circumvention device' should be expanded to include any device or service used mainly for non-commercial purposes, which, among other things, enable access by persons with disabilities.

246 It is conceded that the wording of the proposed expansion of the definition of TPMs may not align with the WCT wording. However, this does not render such expansion harmful. On the contrary, such additions create more awareness for protecting and promoting the interests of persons with disabilities.

247 It means that some acts that should have been considered circumvention of technological measures are excluded because they are permitted by law.

248 See the CAB, s 1(i)(b), which provides that the definition of 'technological protection measure' 'does not include a process, treatment, mechanism, technology, device, system or component, to the extent that in the normal course of its operation, it controls any access to a work for non-infringing purposes.'

technological constraints may supplant the use of legislation to manage and control copyright issues in the digital environment. Control over copyright management and the design of information rights may then fall into the hands of private parties, to the disadvantage of public use, particularly among persons with disabilities.

A further implication of granting extreme protection to TPMs is that this practice may prevent users of copyrighted works from making copies for legitimate uses. Therefore, some copyright researchers and commentators often worry that overemphasising the development of TPMs may lead to the locking up of both copyrighted and non-copyrighted works,[249] which directly affects persons with disabilities' access to copyrighted works in digital formats. By locking up their works, content owners will prevent users, particularly persons with disabilities, from exercising legitimate exceptions to the rights of content owners.[250] On the contrary, mapping to the flexibility allowed by the WCT and the WPPT will make 'the circumvention of digital lock for lawful means'[251] possible within the South African environment.[252]

The absence of proper control over TPM applications may promote the restriction of content usage before it reaches the harmful stage of internet transfer, while such use is still legitimate and legal.[253] Persons with disabilities with lawful access to copyrighted works may find it difficult to reuse aspects of the works while relying on one of the copyright exceptions. This situation may occur either because the TPM makes reproduction or use impossible, or because it is unlawful for users to decipher the encryption.[254]

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249 For more information, see Robert Burrell and Allison Coleman, *Copyright Exceptions: The Digital Impact* (Cambridge University Press 2009) 67–68.

250 Dean S Marks and Bruce H Turnbull, 'Technical Protection Measures: The Intersection of Technology, Law and Commercial Licences' 2000 European Intellectual Property Review 198, 202–203.

251 Beiter and others, 'Copyright Reform in South Africa: Two Joint Academic Opinions on the Copyright Amendment Bill [B13B-2017]' 30. An instance where the circumvention of a digital lock may be allowed is where it is done to make a copy for classroom use or to quote in a documentary film.

252 Including s 1(i)(b) in the Bill will prevent digital locks.

253 Martin F Halstead, 'The Regulated Become the Regulators – Problems and Pitfalls in the New World of Digital Copyright Legislation' (2002) 38(1) Tulsa Law Review 195–234, 231.

254 Burrell and Coleman, *Copyright Exceptions: The Digital Impact* 70–71.

4.5 An analysis of *Blind SA v Minister of Trade, Industry and Competition & Others*

The case of *Blind SA*[255] *v Minister of Trade, Industry and Competition & Others*[256] concerned an application to the Pretoria High Court by Blind SA, represented by SECTION27, which the Constitutional Court later heard in terms of section 172(2)(d) of the Constitution.

Since the formulation of the Marrakesh Treaty in 2013[257] and its coming into force on 30 September 2016,[258] it is difficult to comprehend why South Africa never ratified the Treaty by April 2021, when Blind SA approached the High Court for the necessary relief. Although the CAB was introduced in Parliament in 2015, debates on the CAB provisions continued six years later, while most VIPs continued to face challenges in accessing copies of copyrighted works in accessible formats and thus continued to be excluded from academic and cultural activities.[259]

The frustration and dissatisfaction of the representatives[260] of VIPs and other interested parties[261] intensified after the President failed to act on the Bill for several months and,

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255 Blind SA, as the applicant in this case, is a non-governmental organisation whose main objective is to improve the lives of blind people and all other visually impaired persons in South Africa. Four people deposed affidavits supporting the application: the head of Blind SA; a former Constitutional Court judge (Justice Zac Yacoob); a novelist and PhD researcher; and a schoolteacher. The four deponents described how the provisions of the Copyright Act have limited their rights and the rights of all persons with visual impairments.

256 In this case, the respondents consisted of the Minister of Trade, Industry and Competition as the first respondent, the Minister of International Relations and Cooperation as the second respondent, the Speaker of the National Assembly as the third respondent, the Chairperson of the National Council of Provinces as the fourth respondent, and the President of the Republic of South Africa as the fifth respondent.

257 Although enacted in 2013, the Marrakesh Treaty was adopted three years later. South Africa signed the Marrakesh Treaty.

258 The Marrakesh Treaty only came into force after at least twenty member states ratified it in their respective jurisdictions.

259 For more information, see Blind SA's campaign: Blind SA, 'Braille Is No Crime, Unlock the Chains and Ratify Marrakesh Treaty' (13 September 2020) <https://blindsa.org.za/2020/09/13/brailleis-no-crime-unlock-the-chains-and-ratify-marrakesh-treaty/> accessed 17 March 2025.

260 Blind SA is the primary entity that represents blind people and persons with other forms of visual impairment in South Africa.

261 Other interested parties include the Equal Education Law Centre (EELC), the International Commission of Jurists (ICJ), and Media Monitoring Africa (MMA). For example, on 6 August 2021, the ICJ and EELC made a joint submission encouraging Parliament to act quickly to ensure that the CAB was passed to enable persons with disabilities to have unrestricted access to works in accessible format copies. They called upon the South African Government to carry out its obligations

after much delay,[262] referred it back to Parliament with some concerns. Even worse, the Bill remained with Parliament for almost a year after referral from the President, being retagged and therefore required to pass through an additional legislative process at the National Council of Provinces (NCOP) based on the requirements of section 76.[263]

The provisions of section 19D of the CAB under Bill 13F-2017 contain the necessary legal framework to facilitate the ratification of the Marrakesh Treaty and make the operation of the cross-border exchange[264] of accessible format copies feasible. However, the implementation of section 19D depends on the passing of the CAB[265] that has been unnecessarily delayed.

The decisions of the High Court and the Constitutional Court in *Blind SA v Minister of Trade, Industry and Competition & Others* are now explored, bearing in mind the importance of this case.[266]

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in line with international copyright treaties and international human rights laws by ensuring that the rights of persons with disabilities to education and participation in the cultural life of their choice were protected and advanced. For more information, see Equal Education Law Centre, 'Equal Education Law Centre and International Commission of Jurists Advocate to Ensure That South Africa's Copyright Law Allows for Enhanced Accessibility of Reading Material to Persons with Disabilities' (6 August 2021) <https://eelawcentre.org.za/eicjcab/> accessed 17 March 2025.

262 The President's long delay in acting under s 79 of the Constitution resulted in the first court application initiated by Blind SA against him, which was later withdrawn after he referred the Bill back to Parliament.

263 The Portfolio Committee recommended retagging the CAB as a Section 76 Bill in line with the view of the President in his referral letter. The Joint Tagging Mechanism followed this recommendation. Section 76 of the Constitution of the Republic of South Africa, 1996 governs Bills affecting the provinces of the Republic.

264 Under the Copyright Act 98 of 1978, South Africa does not allow the cross-border exchange of copies of works in accessible formats without copyright holders' prior permission. VIPs are only allowed to convert works into accessible formats, which may come with heavy financial costs.

265 South Africa must first amend its Copyright Act 98 of 1978 to incorporate the exception for VIPs before it can lawfully implement the provisions of the Marrakesh Treaty, including the cross-border exchange of accessible format copies. See also Samtani, 'Developing a Human Right to Research in International Law' 7.

266 This case came before two courts, namely, the High Court of South Africa, Gauteng Division, Pretoria, which was the court of first instance, and the Constitutional Court of South Africa, which acted as the court of final instance to confirm the decision of the High Court in terms of s 167(5) of the Constitution of the Republic of South Africa, 1996. Section 167(5) states: 'The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status, before that order has any force.'

4.5.1 The facts of the Blind SA case

The case of *Blind SA GP* commenced in the High Court of South Africa, Gauteng Division, Pretoria (hereinafter referred to as the 'Pretoria High Court') under case number 14996/21, as a regular application.[267] The application was, therefore, brought to court by Blind SA[268] as the applicant under section 38 of the Constitution,[269] represented by SECTION27. In this application under section 172 of the Constitution, the applicant challenged the constitutionality of specific provisions of the Copyright Act, stating that they constitute 'unconstitutional marginalisation or limitation of the rights of persons with various visual and print disabilities from access to information.'[270]

The applicant argued that the Copyright Act failed to incorporate the necessary provisions designed to protect and promote the right of VIPs to access copyrighted works but bestowed on authors and copyright holders 'almost absolute control over their works, production, publication, performance, broadcast and adaptation.'[271] The applicant added that it is intrinsically discriminatory to require permission from copyright holders before converting copyrighted works into accessible format copies for VIPs,[272] and that this renders the Copyright Act unconstitutional. The level of monopoly granted by the

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267 *Blind SA v Minister of Trade, Industry and Competition & Others* (14996/21) [2021] ZAGPPHC 871 (7 December 2021), 2021 BIP 195 (GP) (*Blind SA GP*). It should be noted that this was an unopposed application.

268 This is a non-profit organisation whose principal objective is to assist blind people and persons with other forms of visual impairment in protecting their rights, such as the rights to education, access to information, and participation in the cultural life of their choice.

269 See the Constitution of the Republic of South Africa, 1996, s 38, which provides: 'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are- (a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interest; and (e) an association acting in the interest of its members.' The applicant, Blind SA, derived its *locus standi* from the provisions of s 38, as it acted in its members' interest and generally in the public interest.

270 *Blind SA GP* [2].

271 *Blind SA GP* [3]. See also *Blind SA CC* [17].

272 *Blind SA GP* [6]; such statutory prohibition, as a matter of fact, 'renders the Copyright Act inconsistent with the provisions of s 9 of the Constitution of the Republic of South Africa Act 1996, inter alia.' Therefore, the Copyright Act, in its current form, is inconsistent with the Constitution, because it discriminates against VIPs. As the High Court added, 'Section 9 espouses the eradication of all forms of discrimination in favour of the prevalence of equality, irrespective of race, gender, religion, disabilities and cultures.'

Copyright Act to copyright holders over the use of their works makes it almost impossible for VIPs to access copies of those works in a format suitable for their conditions, and this practice 'should have no place in any society.'[273]

At the centre of the litigation is the 'contention that the Copyright Act limits the availability of works under copyright in formats accessible to persons with print and visual disabilities.'[274] Despite several years of delay in passing the CAB, which intended to align the Copyright Act with the provisions of the Marrakesh Treaty through the incorporation of section 19D of the CAB,[275] the Bill remains pending.[276] Under these circumstances, the applicant approached the High Court, requesting 'an order declaring the Copyright Act unconstitutional to the extent that it unjustifiably limits the rights of persons with visual and print disabilities.'[277] Then, in summarising the applicant's case, the Constitutional Court referred to the kind of relief that the applicant sought from the court.[278]

4.5.2 Evaluating the submissions by various parties

The various parties' submissions[279] focused on, among other things, how to align the Copyright Act with the provisions of the international agreements,[280] notably the

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273 *Blind SA GP* [2].

274 *Blind SA CC* [4].

275 Through the implementation of the CAB, s 19D, people with disabilities and persons who serve them would be able to convert copyright works into accessible format copies and distribute existing copies in an accessible format without copyright holders' prior permission. See *Blind SA CC* [7].

276 *Blind SA CC* [5]–[7].

277 *Blind SA CC* [8].

278 The applicant 'seeks an order declaring the Copyright Act unconstitutional to the extent that it *(a)* limits and/or prevents persons with visual and print disabilities from accessing works under copyright that persons without such disabilities are able to access and; *(b)* does not include provisions designed to ensure that persons with visual and print disabilities are able to access works under copyright in the manner contemplated by the Marrakesh Treaty.' See *Blind SA CC* [15].

279 Although this application was not defended, various parties made submissions, particularly when the case came before the Constitutional Court. The parties who made submissions include the following: Blind SA, the applicant in this case; the Minister of Trade, Industry and Competition as the first respondent; and Prof Owen Dean, the Media Monitoring Africa Trust, and the International Commission of Jurists, who were admitted as *amici curiae*.

280 This includes the Berne Convention for the Protection of Literary and Artistic Works and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).

Marrakesh Treaty and international human rights treaties,[281] as well as issues about implementing the provision of cross-border transfer.[282]

The applicant mentioned the excessive power granted to copyright owners by the copyright law in carrying out some acts[283] in relation to their works which have specific implications for VIPs who need to access those works.[284] Contrary to submissions from Professor Owen Dean,[285] the applicant argued that some portions of the Copyright Act should be declared unconstitutional.[286] In his submission, Dean argued that section 13 renders the Copyright Act compliant with the Constitution on the basis that the Minister is permitted 'to promulgate regulations which would allow for the reproduction of works under copyright in the manner contemplated by Blind SA.'[287] However, his submission referred only to reproduction, thereby confirming that the power of the Minister in terms of section 13[288] is limited, as it does not extend to any act that falls outside the reproduction of works.[289] Therefore, the application of section 13 is insufficient to address the issue before the court. In line with this view, the applicant argued that, even if the court determined that section 13 could have received a broad interpretation to show that it was 'constitutionally-compliant,'[290] the wording of section 13 suggests that the section applies when the matter concerns reproduction only.

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281 The international human rights treaties considered included the Convention on the Rights of Persons with Disabilities (CRPD) of 13 December 2006 and the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 16 December 1996.

282 The issue of cross-border transfer concerns, among other things, the 'importation and export of copyright works for purposes of making accessible format copies available to visually and print disabled persons.' See *Blind SA CC* [14].

283 Some acts specifically and exclusively reserved for the copyright owners include 'reproduction, publication, performance, broadcast, transmission and adaptation of works' as permitted under the Copyright Act 98 of 1978.

284 See *Blind SA CC* [17]. Under the Copyright Act, VIPs must obtain prior permission from copyright holders to produce copies in an accessible format.

285 Professor Dean was one of the *amici curiae* in this case.

286 This refers only to those provisions of the Copyright Act that limit or prevent VIPs from having access to copyrighted works in the 'manner contemplated by the Marrakesh Treaty.' See *Blind SA CC* [15].

287 *Blind SA CC* [33].

288 Read with s 39(a), s 13 of the Copyright Act 98 of 1978 permits the Minister to promulgate regulations for the reproduction of works in addition to reproduction already allowed by the Act, 'but in such a manner that the reproduction is not in conflict with a normal exploitation of the work and is not unreasonably prejudicial to the legitimate interests of the owner of the copyright.'

289 *Blind SA CC* [18].

290 *Blind SA CC* [21].

The questions are whether reproduction alone is sufficient to accomplish the underlying goal of Article 4(1)(a) of the Marrakesh Treaty, and how far reproduction on its own brings the Copyright Act into line with Article 4(1)(a) of the Treaty. Views vary about interpreting the word 'reproduction' in the Copyright Act and whether this interpretation connotes the acts under the limitations and exceptions prescribed by Article 4(1)(a) of the Treaty. The Treaty refers to 'the right of reproduction, the right of distribution, and the right of making available to the public'[291] when adopting the appropriate exceptions to address the issue of the lack of works in accessible format copies for VIPs.[292] In this regard, therefore, the applicant submitted that the word 'reproduction,' in the context of the Copyright Act, does not comply with the requirement of Article 4(1)(a)[293] of the Marrakesh Treaty, even if it is interpreted broadly.[294] However, Dean argued to the contrary that 'reproduction' could be interpreted broadly 'to incorporate the making of any derivative version where the reproducer does not add any contribution of their own, or change the ideological content of the work.'[295]

On whether only reproduction is needed to convert a work into an accessible format for VIPs, Dean maintains that reproduction in itself, within the context of the South African Copyright Act, should be sufficient for the conversion of a work to take place, since it is 'a mechanical process' that does not result in a transformation of the original work.[296] He also argued that adaptation[297] is not necessary for converting works into a version

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291 For example, if making a work available to the public is considered an act of transmission, it may fall outside the scope of reproduction, even when the latter is interpreted broadly.

292 Marrakesh Treaty, Art 4(1)(a).

293 It requires member states to adopt exceptions that accommodate 'the right to reproduction, the right of distribution, and the right of making available to the public' in relation to works that should be made accessible to VIPs.

294 *Blind SA CC* [22].

295 *Blind SA CC* [37].

296 He refers to converting a work into Braille as a new format that 'entails the reproduction of an existing work into a different format while still maintaining the original content of the work.' See *Blind SA CC* [37].

297 In Dean's view, adaptation falls outside the conversion of a work into another format, such as Braille, because it 'requires the person making the adaption to embroider on, or transform, the original work by making a contribution to the content of the work.' He mentions translating a work into different languages as a form of adaptation. See *Blind SA CC* [38].

accessible to VIPs and persons with other forms of disabilities.[298] He added that format shifting does not require adaptation but reproduction, which is governed by section 13 of the Copyright Act.[299]

In response, Media Monitoring Africa (MMA)[300] argued that adaptation is required to convert copyrighted works into various accessible format copies[301] for the benefit of persons with various forms of visual and print disabilities. For persons with disabilities to enjoy their fundamental rights[302] attached to access to information,[303] some element of 'modifications and adjustments' to original works may be necessary.[304] According to the views advocated in this thesis, adaptation is needed to protect the interests of persons with disabilities other than persons who experience visual impairment. Section 19D of the CAB under Bill 13F-2017 refers to persons with disabilities,[305] in language that includes people with hearing impairment, for example. Therefore, this thesis proposes that in determining the nature of works in accessible format copies, it is necessary to consider the categories of beneficiary persons in the context of the CAB.

Dean overlooks the fact that Article 4(1)(a) of the Marrakesh Treaty also requires member states to adopt exceptions to 'the right of distribution' and 'the right of making available to the public'[306] other than 'the right to reproduction' which fall outside the provisions of section 13 of the South African Copyright Act. Therefore, concentrating only on reproduction is insufficient to argue that the Copyright Act is constitutionally compliant. In

298 See *Blind SA CC* [37].

299 *Blind SA CC* [39].

300 This was the second *amicus curiae* in the matter. It is 'a non-profit organisation that operates in the public interest to promote the development of a free, fair, ethical and critical media in South Africa.' See *Blind SA GP* [3].

301 According to MMA, the accessible format copies may include 'adding audio descriptions to films and broadcasts, as well as subtitles.' See *Blind SA CC* [40].

302 Some of those rights considered in this thesis include the rights to education, participation in the cultural life of one's choice, freedom of expression, equality, and dignity.

303 For persons with disabilities, access to information is considered with reference to access to works in accessible format copies.

304 *Blind SA CC* [40].

305 The meaning of 'beneficiary persons' in the CAB [13F-2017] goes beyond the meaning contained in the Marrakesh Treaty. The CAB meaning is wide enough to extend to persons with disabilities other than visual and print impairments.

306 The 'right of making work available to the public' may be interpreted to connote transmission that may require some technical measures.

this context, the applicant argued that 'an exception granted solely in respect of reproduction would be inadequate.'[307]

An important aspect of *Blind SA CC* that drew the attention of the various parties is whether reading in the provision of section 19D of the CAB would align the Copyright Act with the Marrakesh Treaty and how far it would render the Act constitutionally compliant. The applicant argued that section 19D accords with the Marrakesh Treaty,[308] but Dean maintained that section 19D is inconsistent with certain aspects of the Treaty.[309] For the applicant, reading in section 19D would end the issue of non-compliance of the Copyright Act with the Marrakesh Treaty and pave the way for immediate ratification of the Treaty. In reply to Dean's contention that the absence of a proper definition of a concept such as 'accessible format copy' makes section 19D inconsistent with the provision of the Marrakesh Treaty,[310] the applicant argued that such a definition is not an indispensable requirement for domestic copyright legislation to become compliant with the Marrakesh Treaty.[311] The view that the court could be committing judicial overreach[312] by incorporating in its finding definitions that are not set out by lawmakers[313] conflicts with the applicant's submission that the court could either 'read-in the new proposed statutory definitions' applicable to the two concepts[314] or, alternatively, 'us[e] its powers in terms of s 172(1)*(b)* of the Constitution' to make a ruling on how the two concepts may be used within the context of the CAB or the Marrakesh Treaty.[315] Both the second *amicus*

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307 *Blind SA CC* [23].

308 The applicant argued that there is nothing contentious in the provisions of s 19D. See *Blind SA CC* [28].

309 One aspect of s 19D that renders it inconsistent with the Marrakesh Treaty, according to Dean, is the CAB's lack of proper definitions for terms such as 'accessible format copy' and 'persons with disability.' See *Blind SA CC* [34].

310 In Dean's view, the absence of such a definition renders the provisions of the section 'not self-executing' and thus defeats its purpose. The court also lacks jurisdiction to venture into the legislative role of Parliament, so it cannot rectify the error caused by not defining the terms. See *Blind SA CC* [34].

311 In fact, the applicant submitted that in the absence of such definitions, the Constitution of the Republic of South Africa, 1996, s 233 requires that the statute be interpreted to render it compliant with the applicable international law. See *Blind SA CC* [28].

312 This may imply that the court's approach in arriving at the finding indicates that the principle of the separation of powers is ignored.

313 See Dean's submission in *Blind SA CC* [34].

314 This refers to 'accessible format copy' and 'persons with disability.'

315 *Blind SA CC* [27].

curiae[316] and the third *amicus curiae*[317] supported the applicant's proposal for reading in section 19D of the CAB.

In the absence of proper definitions of terms such as 'accessible format copy' and 'persons with disability,' Dean opines that section 19D extends its non-compliance with the three-step test with particular reference to Article 9(2) of the Berne Convention and Article 13 of the TRIPS Agreement.[318] As regards the definition and categories of 'accessible format copy' that the exception governs, this thesis maintains that Parliament must be precise in order to align the Copyright Act with the international treaties. Similarly, extending the beneficiaries to persons with different forms of disability is commendable. However, it is still appropriate for Parliament to provide a precise definition of the term 'persons with disability' by determining who qualifies as a person with disability in the context of section 19D of the CAB. In this way, section 19D would comply particularly with the first leg[319] of the three-step test.[320] In agreement, the first respondent confirmed that the Portfolio Committee responsible for the legislative process received concerns from interested parties about the lack of definitions of important terms that form part of the underlying object of section 19D.[321]

In his submission, the first respondent did not wholly reject the applicant's remedy of reading in section 19D of the CAB. The first respondent submitted that such reading-in should not be final to avoid judicial overreaching that may result in the court's disregarding the principle of the separation of powers.[322] According to the first respondent, the interim

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316 According to the second *amicus curiae*, Media Monitoring Africa, reading in the provisions of s 19D will balance the interests of copyright owners and the 'rights of all people to access and impart knowledge and ideas.' See *Blind SA CC* [41].

317 The third *amicus curiae*, the International Commission of Jurists, submitted that reading in s 19D would bring the South African Copyright Act 98 of 1978 into line 'with international human rights treaties such as the ICESCR and the CRPD.' See *Blind SA CC* [42].

318 *Blind SA CC* [35].

319 This concerns the test that the exception must be confined to certain special cases.

320 As contained in the Berne Convention, Art 9(2) and the TRIPS Agreement, Art 13.

321 However, it is indicated that no concern has been received in the form of public comment questioning the constitutionality of s 19D other than the one raised in this lawsuit by Blind SA. See *Blind SA CC* [31].

322 Interim reading-in of s 19D constitutes 'a remedy that does not intrude unduly into the domain of Parliament' but instead recognises that the legislative power belongs to Parliament. See *Blind SA* CC [30].

reading-in of section 19D should run concurrently with the suspension of an interim order declaring the affected provisions of the Copyright Act unconstitutional.[323] Regarding Dean's proposal for promulgating a regulation under section 13 to deal with works in accessible formats for persons with disabilities,[324] the first respondent disapproved of the proposed regulation, stating that the provision of section 13 is too limited.[325] Instead, the first respondent maintained that the provision of section 19D is broad and sufficient to bring the Copyright Act into line with the obligations[326] found in the various copyright treaties and international human rights treaties.[327] This goal may not be accomplished in the same manner if the Minister takes the route of promulgating a regulation in terms of section 13 of the Copyright Act.

4.5.3 Analysis of the crucial issues considered by the court

The approach taken in this thesis is to conduct an analysis of the case by going through the various segments of the case and identifying the essential aspects that support the arguments advanced in the thesis. Where necessary the thesis gives an account of the views and submissions made by the various parties in the case. This makes it easy for readers to understand why certain decisions have been reached in the thesis.

This thesis discusses the following vital issues that the Constitutional Court considered in *Blind SA CC*: how the Copyright Act restricts VIPs' constitutional rights; the processes required to convert works into accessible format copies; whether section 13 of the Copyright Act can cure the constitutional invalidity of that Act; and whether the reading-in of section 19D of the CAB is an appropriate remedy.

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323 *Blind SA CC* [30].

324 His proposed regulation should be promulgated by the Minister of Trade, Industry and Competition under the Copyright Act 98 of 1978, s 13 as amended. See *Blind SA CC* [36].

325 Acting in this way would amount to acting *ultra vires*, and 'the minister cannot be so directed.' See *Blind SA CC* [32].

326 The specific obligation to be covered is the protection and promotion of the rights of persons with disabilities within the context of the Marrakesh Treaty and various international human rights treaties such as the ICESCR, the CRC, the CRPD, the CEDAW, and the ICCPR.

327 *Blind SA CC* [32].

4.5.3.1 How does the Copyright Act restrict VIPs' constitutional rights?

The Copyright Act prohibits[328] converting a copyrighted work into accessible format copies for the benefit of persons with disabilities. It therefore renders the Act inconsistent with section 9 of the Constitution, which upholds the eradication of unfair discrimination and promotes the right of equality for all, irrespective of race, gender, religion, disabilities, and culture.[329] In its discriminatory nature, the Copyright Act also affects other fundamental rights enshrined in the Bill of Rights, such as the rights to human dignity,[330] freedom of expression,[331] basic education,[332] and participation in the culture of one's choice.[333]

The Constitutional Court confirmed[334] the discriminatory effect of the Copyright Act and its infringements on the rights of VIPs in this case. However, this finding applies not only to VIPs as limited in the case of *Blind SA* but to all persons with disabilities who are affected by the Copyright Act. By granting exclusive rights to literary and artistic works to copyright holders through the provisions of sections 6 and 7, read with section 23 of the Act,[335] the Copyright Act severely affects the rights of persons with disabilities to access copyrighted works in adapted format copies. In the absence of appropriate exceptions for persons with disabilities to obtain works in accessible formats without copyright holders' prior permission, the authorisation requirement amounts to unfair discrimination against those persons.[336]

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328 See ss 6 and 7, read with s 23 of the Copyright Act 98 of 1978, which restrict the conversion of works into accessible formats without copyright owners' prior consent, where this consent is rarely granted, leaving persons with disabilities and other interested parties with no other option.

329 *Blind SA GP* [6].

330 See the Constitution of the Republic of South Africa, 1996, s 10.

331 See the Constitution of the Republic of South Africa, 1996, s 16(1)(b).

332 See the Constitution of the Republic of South Africa, 1996, s 29.

333 The right to language and culture is protected by Constitution of the Republic of South Africa, 1996, s 30.

334 *Blind SA CC* [74].

335 The Copyright Act 98 of 1978, ss 6 and 7, read with s 23, grant copyright holders the exclusive rights to perform certain acts in relation to their copyrighted works. These rights include reproduction, adaptation, distribution, broadcasting, communication, and importation of the works, and implementation and enforcement of TPMs over their works in digital forms.

336 Paul Ochieng Juma, 'The Marrakesh Treaty and African Copyright Laws: Lessons for the African Region from *Blind SA v Minister of Trade, Industry and Competition*' (2022) 10 African Disability Rights Yearbook 231–242, 232.

The principle of authorisation is one of the factors that underpin the provisions of section 23[337] of the Copyright Act in its current form. In *Blind SA CC*, Unterhalter AJ, giving the judgment of the Constitutional Court,[338] maintained that the authorisation principle is incorporated into the Act to protect the rights of copyright owners against potential users of their works.[339] Therefore, the application of the authorisation requirement infringes the constitutional rights of persons with disabilities.[340] The Constitutional Court ruled that the right of copyright owners to authorise the reproduction or adaptation of literary works, which excludes VIPs, is a constitutional infirmity that ought to be cured.[341]

The Constitutional Court confirmed that the requirement of authorisation constitutes unfair discrimination on the ground of disability based on section 9(3) of the Constitution.[342] In protecting the interest of copyright owners through the authorisation requirement, the Copyright Act failed to consider 'the differential impacts of such protection upon different classes of persons.'[343] Applying its finding to the case before it, the court held that the authorisation requirement drastically limits VIPs' ability to access works in the most appropriate formats, as contrasted with the ability of persons without visual impairments.[344]

The Constitutional Court also confirmed that the authorisation requirement in the Copyright Act infringes VIPs' right to their dignity.[345] Denying them access to copyrighted

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337 The Copyright Act 98 of 1978, s 23 restricts access to literary works by making it unlawful to perform specific actions reserved for copyright owners without those owners' prior permission.

338 Kollapen J, Madlanga J, Majiedt J, Mathopo J, Mhlantla J, Mlambo AJ, Theron J, and Tshiqi J concurred in Unterhalter AJ's judgment.

339 *Blind SA CC* [69].

340 See the Constitution of the Republic of South Africa, 1996, s 23 regarding the authorisation requirement.

341 *Blind SA CC* [88].

342 *Blind SA CC* [70].

343 *Blind SA CC* [67].

344 Although it is necessary to protect the rights of copyright owners over their works, Parliament must also consider how far the authorisation requirement may limit the rights of different classes of persons to access copyrighted works.

345 The court agreed with the applicant that the authorisation requirement in the Copyright Act infringes VIPs' right to their dignity in terms of the Constitution of the Republic of South Africa, 1996, s 10. See *Blind SA CC* [71].

works in the manner appropriate to their physical conditions carries specific implications for the development of their personal well-being.[346] To achieve the advancement of their human persons, VIPs, like every other person, should have access 'to the vast universe of knowledge and imagination that is to be found in literary works,' which may be compromised by the authorisation requirement.[347]

Similarly, the court accepted the applicant's submission that the authorisation requirement in the Copyright Act infringes the right of VIPs to basic education[348] as well as further education,[349] since VIPs are restricted in reproducing and transmitting works in accessible format copies as required for their education.[350]

Finally, the authorisation requirement in the Copyright Act infringes other rights such as VIPs' right to participate in the cultural life of their choice[351] as well as their right to freedom of expression, especially the freedom to receive and impart information.[352] The Constitutional Court confirmed the applicant's submission that the authorisation requirement clearly infringes VIPs' right to freedom of expression and to participation in the cultural life of their choice.[353] Therefore, VIPs' freedom to receive and impart information is drastically affected by the restriction imposed by the provisions of sections 6, 7, and 23 of the Copyright Act, preventing VIPs from accessing literary works in appropriate formats. As literary works remain an essential source enabling individuals to

346 As regards the authorisation requirement, in general, it is discriminatory and undignified for disabled persons to have to ask for what others can get automatically.

347 *Blind SA CC* [71].

348 The right to basic education is considered in relation to learners in pre-tertiary institutions, particularly those in primary and secondary schools who have limited or no access to the necessary books in accessible format copies due to their visual impairments. The right to basic education also includes the right of adults to basic education. See the Constitution of the Republic of South Africa, 1996, s 29(1)(a).

349 The right to further education may be interpreted to include the right of persons to education after primary and secondary school. See the Constitution of the Republic of South Africa, 1996, s 29(1)(b).

350 *Blind SA CC* [73].

351 For more information on the right to culture, see the Constitution of the Republic of South Africa, 1996, s 30.

352 The right to freedom of expression is stated in the Constitution of the Republic of South Africa, 1996, s 16.

353 *Blind SA CC* [72].

participate in cultural life, restrictions on access to literary works in the appropriate formats severely limit VIPs' opportunities of participating in the cultural life of their choice.

Therefore, agreeing with the applicant's submission, the Constitutional Court ruled[354] that the authorisation requirement in terms of the provisions of sections 6 and 7, read with section 23 of the Copyright Act, infringes the fundamental rights[355] of VIPs as enshrined in the Bill of Rights. As the application was not opposed, no justification for restricting any of the rights was advanced in terms of section 36 of the Constitution.

4.5.3.2 What is required to convert works into accessible format copies?

The parties[356] in *Blind SA CC* thoroughly considered the issue of the conversion of works into accessible format copies and what this process entails. A proper interpretation of 'conversion of works' into accessible copies determines how far the interests of VIPs and persons with other forms of disabilities will be safeguarded amid the continuous shift in the copyright paradigm, especially in the digital environment. The question is whether to follow a restrictive-interpretation approach or an integrated-interpretation approach that is both moderate and inclusive.

Dean defends a restrictive-interpretation approach as the most appropriate approach to interpret the meaning of 'conversion of work' into accessible format copies in terms of the Copyright Act. Accordingly, he maintains that the 'meaning of reproduction under the Copyright Act permits of sufficient amplitude to allow literary works to be rendered into accessible format copies' for the benefit of VIPs. In this context, Dean recognises section 13[357] as a gateway to address the issue of limited access to literary works in accessible format copies for VIPs.

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354 *Blind SA CC* [74].

355 The constitutional rights of VIPs that are affected by the authorisation requirement include the rights to equality (s 9(2)), dignity of the human person (s 10), freedom of expression (s 16(1)), education (s 29(1)), and participation in the cultural life of their choice (s 30 of the Constitution of the Republic of South Africa, 1996).

356 The parties that thoroughly discussed this issue were the applicant, Blind SA, and the first *amicus curiae*, Prof Dean.

357 The Copyright Act 98 of 1978, s 13 authorises the Minister to promulgate the necessary regulations that may allow the literary works to be reproduced in accessible format copies for VIPs.

In an attempt to deduce the meaning of 'reproduction,' and in distinguishing it from the term 'adoption' in the context of the Copyright Act, Dean referred to sections 1 and 6 of the Copyright Act. Although 'adaptation' is defined in section 1 to mean a translation of a literary work, 'reproduction' is considered in section 6(a) to mean reproducing a work in any manner or form that may apply. The phrase 'to reproduce' was interpreted more restrictively in *Media 24 Books (Pty) Ltd v Oxford University Press Southern Africa (Pty) Ltd*, where the Supreme Court of Appeal mentioned the phrase 'to copy' in its explanation.[358] In the context of the court's definition of the phrase 'to reproduce,' there must be a close similarity[359] between the original work that is copied and the actual copy that has been reproduced.

Opposing the applicant's view in *Blind SA CC* that adaptation, other than reproduction, is also needed for works to be converted into various accessible format copies,[360] Dean emphatically submitted that 'reproducing a literary work is to take the work and make a transcription of it into another format, without changing its content.'[361] In this manner, he maintained that there is a clear distinction between 'reproduction of a work' and 'adaptation of a work.' Whereas the one does not require a transformative change in the content of the work,[362] the other does require a transformative change in the content of the original work.[363]

In its assessment of the conflicting views on adaptation and reproduction, the Constitutional Court recognised the difficulty in drawing a boundary between the two

358 (886/2015) [2016] ZASCA 119 (16 September 2016), 2017 (2) SA 1 (SCA) [12].

359 Arguably, this similarity could be absent where a work is reproduced 'in any manner or form' as contemplated in the Copyright Act 98 of 1978, s 6(a).

360 *Blind SA CC* [17], [18], and [22]. The applicant submitted that in dealing with making copies available to VIPs in an accessible format, Parliament should also consider other processes such as transmission of the copies to the beneficiaries.

361 *Blind SA CC* [82].

362 According to Dean, this occurs where a work has been reproduced in another format.

363 In Dean's view, this is considered when adaptation has taken place, which 'requires some creative or interpretative engagement with the text, the consequence of which changes the content of the work.' See *Blind SA CC* [82].

concepts.[364] Unlike Dean, who used a 'content-based' explanation to distinguish adaptation from reproduction,[365] the court maintained 'that a content-based distinction between reproduction and adaptation will not always be definitive.'[366] Although the court agreed with Dean that transcribing a literary work into another format that is merely a copy of the original work may be considered a reproduction, the court still maintained that converting a work into a copy in an accessible format may not be straightforward.[367]

The parties did not present evidence to prove the possible ways and what would be needed to convert the works into accessible format copies. Instead, the applicant and the first *amicus curiae* brought arguments to bear to convince the court of their respective views. In delivering its judgment, the court indicated that none of the parties explained with evidence the nature of accessible format copies required by VIPs, 'the technology used to create these formats, and whether these formats more closely resemble translations or transcriptions that are in effect copies.'[368]

In pointing out that none of the parties presented relevant evidence to help the court reach an appropriate decision on whether 'only reproduction' or 'both reproduction and adaptation' are required to convert works into accessible format copies, the court posed the following five fundamental questions:[369]

1. Does the transcription of a textbook into Braille amount 'to translation from one language into another'?
2. Does it require any form of textual description to render 'a two-dimensional work into three dimensions,' and to what extent is this process considered an adaptation?

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364 *Blind SA CC* [83].

365 According to Dean, the extent of transformation that has taken place in the content of an original work is a major determining factor of whether adaptation or reproduction has occurred. Through adaptation, the content of the 'original work' is transformed, unlike the case of reproduction. See *Blind SA CC* [82].

366 *Blind SA CC* [84].

367 The question remains whether the conversion of a literary work into copies in accessible formats qualifies as a mere reproduction. See *Blind SA CC* [85].

368 *Blind SA CC* [86].

369 To understand the basis of these questions, see *Blind SA CC* [87].

3. What processes are required to convert 'graphs, tables, histograms, and pie charts in textbooks and technical articles' into versions easily accessible to VIPs?
4. Will it be considered an adaptation when 'a shift of format' is realised through 'written description of a photograph or a picture in a book' as a means to make a work accessible to VIPs?
5. Is it realistic to render 'pictures, photographs, and other multi-media presentations' in formats accessible to VIPs by mere reproduction?

Most of these questions, if not all, remained unaddressed. Instead, the court posed them to demonstrate that there is still much to be done to determine the various forms that accessible format copies may take and the various processes that may be required to convert works into accessible format copies.

The Constitutional Court also referred to e-books, which may contain various forms of 'multi-media presentations' and may need some adaptation for these books to be converted into accessible format copies.[370] It does not seem realistic to achieve some of the processes necessary to convert the works into accessible format copies without any form of adaptation. To reduce some of the contents that must appear in the accessible format copies may require 'some translation and transformation' which may necessitate some element of interpretation and possibly effort to carry out the process.[371] The Constitutional Court recognised that people who experience other forms of disabilities, such as hearing impairment (though this aspect fell outside the application before the court), may also require works in accessible formats Accordingly, it is necessary to consider whether 'the conversion of a written text into an audio' constitutes a mere reproduction or an adaptation of the work.[372]

370 *Blind SA CC* [87].
371 The applicant and the first *amicus curiae* disagreed on whether, in respect of the questions posed by the court, converting works into 'accessible format copies amounted to reproducing the original work or adapting it.' See *Blind SA CC* [87].
372 *Blind SA CC* [87].

The court affirmed that there was no 'definitive resolution on evidence' on the disagreement between the parties over what constitutes conversion of works into accessible format copies.[373] However, the court maintained that despite how widely the term 'reproduction' is interpreted in the context of the Copyright Act, there are instances in which mere reproduction is insufficient to convert a work into an accessible format copy.[374] Adaptation may become applicable where reproduction cannot achieve the end product of conversion. These considerations determine whether Dean's view[375] on section 13 of the Copyright Act is acceptable or not.

4.5.3.3 Can section 13 cure the constitutional invalidity of the Copyright Act?

Contrary to Dean's submission on the constitutional validity of the Copyright Act based on the applicability of section 13 of the Copyright Act,[376] Unterhalter AJ maintained that section 13 cannot cure the constitutional invalidity found in the Act.[377] The court's decision that the affected provisions[378] of the Act are not constitutionally compliant is based on the reason that there is no justification for believing 'that accessible format copies must be restricted to reproducing original literary works so as to permit s 13 to save the Copyright Act from constitutional invalidity.'[379] On the contrary, the application of section 13 alone cannot make the Copyright Act constitutionally compliant, since adaptation may be necessary in some instances to convert works into accessible format copies, and this adaptation falls outside the scope of section 13 of the Act.

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373 *Blind SA CC* [88].

374 To realise the objective of Art 4(1)(a) of the Marrakesh Treaty, which requires the member states to adopt exceptions that should allow 'changes needed to make the work accessible in the alternative format,' it is necessary to interpret the concept 'conversion' widely to accommodate the term 'adaptation.' See *Blind SA CC* [89].

375 Dean maintains that the Minister should promulgate a regulation under s 13 because the term 'reproduction' is interpreted widely under the Copyright Act to cover all forms of the conversion of works into accessible format copies for VIPs.

376 Dean opines that the application of s 13 will render the Copyright Act constitutionally compliant, as the Minister is authorised to promulgate regulations that permit the reproduction of works in a format required by VIPs. See *Blind SA CC* [33].

377 *Blind SA CC* [90].

378 See the Copyright Act 98 of 1978, ss 6 and 7, read with s 23.

379 *Blind SA CC* [89].

Therefore, the major shortcoming of section 13 is that its provision is limited to instances in which works merely need to be reproduced into accessible format copies. The strict application of section 13 will not address the problem of the scarcity of accessible format copies for VIPs. Copyright owners enjoy the statutory right 'to authorise the reproduction and adaptation of original literary works' for these works to become available in accessible formats.[380] Incorporating an exception based on section 13 may not cover instances in which adaptation is needed to convert works into accessible format copies. This set of circumstances may require VIPs or those who serve their interest to obtain permission from copyright owners before carrying out the necessary adaptation of such works.

4.5.3.4 Is reading in section 19D an appropriate remedy, and if so, how is it appropriate?

Views differ[381] on whether reading in section 19D should be considered an appropriate remedy, and how far it can apply if allowed. Several views have been considered in detail while analysing the various submissions made by the different parties, especially the applicant and Dean. The court's considerations and rulings on the issue of reading in section 19D are now discussed.

The Constitutional Court referred to *Centre for Child Law & Others v Media 24 Limited & Others*,[382] where the Constitutional Court had to apply reading-in as a remedy to address some constitutional defectiveness in the legislation. And in *AmaBhungane Centre for Investigative Journalism NPC & Another v Minister of Justice and Correctional Services & Others; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC &*

380 *Blind SA CC* [90].

381 For the applicant, s 19D of the CAB is consistent with the Marrakesh Treaty, so reading in s 19D should be considered part of the appropriate remedy for the benefit of VIPs. In fact, there is nothing contentious in the provisions of s 19D. The applicant maintained that this reading-in would end the non-compliance of the Copyright Act with the Marrakesh Treaty and kickstart the process of ratifying the Treaty. See *Blind SA CC* [28]. However, Dean considers reading in s 19D not an option because some provisions of s 19D (such as the absence of a proper definition of concepts like 'accessible format copy') do not accord with certain aspects of the Marrakesh Treaty. See *Blind SA CC* [34]. Both the second *amicus curiae* (MMA) and the third *amicus curiae* (ICJ) supported the applicant's proposal for reading in s 19D of the CAB. The second *amicus curiae* maintained that this reading-in would balance the rights of copyright owners to their works and the rights of users of those works. See *Blind SA CC* [41]. The third *amicus curiae* opined that reading in s 19D would align the South African Copyright Act 98 of 1978 with the provisions of international human rights treaties such as the ICESCR and the CRPD. See *Blind SA CC* [42].

382 (CCT261/18) [2019] ZACC 46 (4 December 2019), 2020 (4) SA 319 (CC) [114]–[120].

Others,[383] the Constitutional Court applied reading-in, during the period of suspension, as an interim remedy for an immediate redress of the constitutional illegality found in the relevant statute.[384]

Considering the submissions, particularly from the applicant[385] and Dean as the first *amicus curiae*,[386] the Constitutional Court in *SA Blind CC* explained why it is necessary to grant an order incorporating a remedy to serve as an immediate redress of the infringement of VIPs' constitutional rights.[387] However, such a remedy should have only an interim effect[388] to allow Parliament to deliver a final legislative solution that would take care of all the lapses detected in the existing Copyright Act and the proposed section 19D.[389]

Having confirmed the need to grant an interim reading-in remedy, the Constitutional Court conceded that it should be limited to the case that the applicant had established before the court.[390] Anything more than this could mean that the court would usurp Parliament's

383 (CCT 278/19) [2021] ZACC 3 (4 February 2021), 2021 (3) SA 246 (CC) [136]–[145].

384 See the Regulation on Interception of Communications and Provision of Communication-Related Information Act 70 of 2002.

385 The applicant urged the court to order the reading-in of s 19D and for it to be incorporated into and remain part of the Copyright Act. For more information on the summary of the reasons adduced by the applicant, see *Blind SA CC* [100].

386 Dean fiercely argued against the reading-in of s 19D for various reasons. In summary, he maintained that 's 19D is at odds with the Marrakesh Treaty.' See *Blind SA CC* [101].

387 The court's decision to grant a remedy that offers an immediate redress of the constitutional defect found in the Copyright Act 98 of 1978 is based on the following reasons: VIPs 'should not have to wait further to secure a remedy;' there was an unreasonable delay by Parliament in passing the Bill; and it has become highly urgent to address the issue of constitutional rights infringement suffered by VIPs. See *Blind SA CC* [102].

388 The relief is only temporary, in line with the principle of the separation of powers, which prevents one organ of state from usurping powers belonging to another organ of state. Therefore, the Constitutional Court's decision to grant a reading-in remedy 'should not deter Parliament from its ultimate task to cure the constitutional defect' that the court detected. See *Blind SA CC* [102].

389 Only Parliament has the constitutional obligation to adopt a legislative framework that would holistically cure the constitutional defect found in the Copyright Act 98 of 1978 and align that Act with the provisions of the Marrakesh Treaty and other international legal documents.

390 The remedy ordered by the court should, in the interim, pave the way for South Africa to ratify the Marrakesh Treaty and enable VIPs to access copyrighted works in accessible format copies without copyright owners' prior authorisation. See *Blind SA CC* [105].

constitutional power to carry out its legislative function and possibly result in what might be referred to as judicial overreach.[391]

The court acknowledged that the remedial solution granted in this case 'may be somewhat imperfect,'[392] considering the complexity of the issues presented by the applicant and those defects determined by the court that fell outside the applicant's submissions.[393] However, the remedy will reasonably serve the interests of VIPs while Parliament is busy concluding the long-awaited Bill[394] amending the Copyright Act to deal holistically with specific issues preventing VIPs from exercising their constitutional rights as prescribed in the Constitution and various international treaties.[395]

4.5.4 The High Court decision compared with the Constitutional Court decision

This part of the thesis does not seek merely to distinguish between the order granted by the High Court and the one granted by the Constitutional Court. The primary aim of comparing the two decisions is to see what lessons can be drawn from each of the court's rulings that could be useful in formulating recommendations in this thesis that could help Parliament adopt a Bill to stand the test of time.

As the court of first instance, the High Court entirely concurred with the applicant in its submission by declaring the Copyright Act unconstitutional 'to the extent that it fails to make provision for exceptions that would enable, through the conversion of works, access to such works' among VIPs.[396] The High Court ruling specified that the appropriate copyright exceptions should permit the conversion of works under copyright into

391 Only Parliament has the constitutional power 'to provide an effective remedy that cures a specific defect.' See *Blind SA CC* [103].

392 *Blind SA CC* [109].

393 For example, the court detailed how the parties failed to adduce appropriate evidence explaining the processes of converting works into different versions of accessible format copies. The court also explained why adaptation, in some instances, may be necessary in converting works to accessible format copies. See *Blind SA CC* [86]–[90].

394 This refers to the CAB as it incorporates the revised s 19D, considering the concerns raised in this case.

395 Reference should be made to the provisions of international human rights treaties such as the ICESCR and the CRPD and copyright treaties, particularly the Marrakesh Treaty.

396 *Blind SA GP* [28.1].

accessible format copies. The High court failed to distinguish the various kinds of works that VIPs and persons assisting them may be allowed to convert into accessible format copies. This makes the exceptions, as contemplated by the High Court, open-ended. This order was broad and liberal, unlike the Constitutional Court's order. In its judgment, the Constitutional Court referred 'to published literary works, and artistic works as may be included in such literary works, in accessible format copies.'[397] Unlike the High Court, which referred to 'works under copyright,' the Constitutional Court specified the nature of works that may be applicable, namely, 'published literary works;' however, 'artistic works' may apply only to the extent that they form part of the literary works.[398] This ruling clarifies how far the provisions[399] of the Copyright Act were declared unconstitutional and invalid.

Whereas the High Court order declared the Copyright Act 98 of 1978 unconstitutional,[400] the Constitutional Court declared only the specific provisions[401] of that Act unconstitutional.[402] According to the High Court, constitutional invalidity applies to the whole Copyright Act 98 of 1978 without reference to the affected parts of the Act, which leaves the order open to possible attack and criticism.[403] The Constitutional Court is thus more precise than the High Court. Similarly, the High Court maintained that the 'statutory prohibition of free conversion of works under copyright is inherently discriminatory and renders the Copyright Act inconsistent with the provisions of s 9[404] of the Constitution' as it affects VIPs, one of the groups contemplated as previously disadvantaged.[405]

In agreement with the applicant, the High Court ordered the immediate reading-in of the provision of section 19D as contemplated by clause 20 of the CAB.[406] Rather than order

397 See *Blind SA CC* [112.2].
398 See *Blind SA CC* [112.2].
399 This refers to the Copyright Act 98 of 1978, ss 6 and 7, read with s 23.
400 *Blind SA GP* [28.1].
401 See the Copyright Act 98 of 1978, ss 6 and 7, read with s 23.
402 *Blind SA CC* [112.2].
403 *Blind SA GP* [28.1].
404 Section 9 of the Constitution of the Republic of South Africa, 1996 deals with the right to equality and prevention of all forms of discrimination, irrespective of race, gender, religion, disabilities, and culture.
405 *Blind SA GP* [6].
406 Based on the High Court order, the Copyright Act should be 'read as though it contains the proposed new section 19D,' which is meant to align the Copyright Act with the provisions of the Marrakesh Treaty. See *Blind SA GP* [12.3].

the reading-in of section 19D as proposed by the applicant, the Constitutional Court ordered that the Copyright Act must be deemed to incorporate the provisions of the newly introduced section 13A exceptions, which must remain in place for the period of 24 months' suspension.[407] The applicable exceptions contemplated by the Constitutional Court under the provisions of 'section 13A' are narrow compared with the scope of the exception contemplated by the High Court. The interim relief, as contemplated in the Constitutional Court order, under section 13A, deals,[408] among other things, with the following aspects: the subject of the exceptions; the definition of 'beneficiary persons;' the scope of the exception in relation to the specific acts that are permitted; and the definition of 'permitted entity,' and the various functions which that entity is allowed to perform.

The exceptions in s 13A relate to 'published literary works, and artistic works forming part of these works, that are the subject of copyright under the Copyright Act.'[409] The meaning of 'literary works' relates to 'literary work' as defined in the Copyright Act 98 of 1978 s 1 sv 'literary work.'[410]

The definition of 'beneficiary persons' in s 13A adopted by the Constitutional Court is the same as in the Marrakesh Treaty. It refers to a person who is blind; a person who has 'a visual impairment or a perceptual or reading disability' and finds it difficult to read printed works due to his or her impairment or disability; or a person who, as a result of physical disabilities, cannot 'hold or manipulate a book or [to] focus or move the eyes' as expected to enable reading to take place.[411]

The central question regarding the 'accessible format copies' is: what does it entail to allow the making of an accessible format copy? In Dean's view, converting literary works into accessible format copies only requires reproduction, which the Constitutional Court

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407 The Constitutional Court declared the affected sections of the Copyright Act unconstitutional; they were 'suspended for a period of 24 months to enable Parliament to cure the defect in the Copyright Act giving rise to its invalidity.' See *Blind SA CC* [112.5].

408 For more information on the (re)incorporated s 13A, see *Blind SA CC* [112.6].

409 See *Blind SA CC* [106].

410 See *Blind SA CC* [112.6(1)(c)].

411 See *Blind SA CC* [112.6(1)(b)].

considered very strict.[412] The meaning of 'accessible format copy' in s 13A adopted by the Constitutional Court resembles the one in the Marrakesh Treaty. The purpose of converting works into accessible format copies is to give beneficiary persons access to works in alternative versions that will most suit their conditions.[413]

Turning to the issue of 'permitted entity', the term 'permitted entity' comprises 'a government institution or non-profit organisation, that provides education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis, and has the provision of such services as one of its primary activities or institutional obligations.'[414] Subject to certain conditions, a permitted entity may perform any of the following functions without the copyright owner's prior authorisation: convert literary works into accessible format copies; obtain accessible format copies from another 'permitted entity and distribute such copies to beneficiary persons; and choose any appropriate steps to accomplish their objectives.'[415]

Although the scope of the High Court order confirming the reading-in of section 19D and its ruling on the applicable copyright exception are broader than those contained in the Constitutional Court's judgment, the decisions of the Constitutional Court are preferred in this thesis for various reasons. First, the Constitutional Court clearly analysed the reasons that informed all its decisions. Secondly, it allowed Parliament to rectify the defects found in the existing legislation. Thirdly, it implemented a workable interim remedy without usurping the legislative power of Parliament, in keeping with the principle of the separation of powers. Fourthly, the Constitutional Court considered it necessary to analyse all the critical concepts underpinning the copyright exception before the court, which were not properly presented by the various parties, to improve South African jurisprudence. Fifthly, unlike the High Court, the Constitutional Court sought to balance the interests of users of copyright works, particularly VIPs, and the interests of copyright

412 See *Blind SA CC* [106(c)].
413 See *Blind SA CC* [112.6(1)(a)].
414 See *Blind SA CC* [112.6.(1)(d)].
415 See *Blind SA* CC [112.6.(2)].

owners. Finally, the Constitutional Court was generally more objective in its judgment and in presenting reasons than the High Court.

4.5.5 The methodology of the constitutional analysis adopted in the case of Blind SA compared with the methodology adopted in the earlier case of Laugh It Off

Both *Laugh It Off Promotion CC*[416] and *Blind SA CC* concern the rights of IP owners to their respective products[417] as opposed to specific constitutional rights[418] that may be affected by the application of provisions[419] of the individual legislation[420] as applicable in both cases. Although the facts[421] of the two cases are dissimilar, both cases focused on protecting specific individual human rights enshrined in the Bill of Rights against the backdrop of the IP right[422] in relation to the trade mark and copyright.

This thesis does not aim to compare the two cases. Instead, it seeks to consider the approach adopted in each case in carrying out the constitutional analysis and what the different methodologies could mean for future related cases. It is also necessary to

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416 *Laugh It Off Promotions CC v SA Breweries International (Finance) BV t/a Sabmark International & Another* (CCT42/04) [2005] ZACC 7 (27 May 2005), 2006 (1) SA 144 (CC).

417 The case of *Laugh It Off Promotions CC* concerned trade-marks protected by the Trade Marks Act 194 of 1993; *Blind SA CC* dealt with copyright protected by the Copyright Act 98 of 1978.

418 The constitutional right considered in *Laugh It Off Promotions CC* was the right to freedom of expression in the Constitution of the Republic of South Africa, 1996, s 16. The constitutional rights considered in *Blind SA CC* include the rights to equality (s 9(2)), dignity of the human person (s 10), freedom of expression (s 16(1)), education (s 29(1)), and participation in the cultural life of one's choice (s 30).

419 The relevant provision of the Trade Marks Act is in s 34(1)(c), and the relevant provisions of the Copyright Act are in ss 6, 7, and 23.

420 See the Trade Marks Act 194 of 1993 and the Copyright Act 98 of 1978.

421 In summary, *Blind SA CC* concerned an application brought by Blind SA seeking an order of court to declare the Copyright Act 98 of 1978 unconstitutional to the extent that its provisions prohibit VIPs from accessing copyrighted works and by not incorporating exceptions that would ensure that VIPs could easily access those works in the form contemplated by the Marrakesh Treaty. See *Blind SA CC* [15].

By contrast, *Laugh It Off Promotions CC* dealt with an application by the respondent (South African Breweries International) for an interdict against the applicant (Laugh It Off) because the applicant's unauthorised use of the respondent's registered trade-marks was unlawful within the context of the anti-dilution provisions of Trade Marks Act 194 of 1993, s 34(1)(c). In response, the applicant argued, among other things, that 'it was exercising freedom of expression entrenched in s 16(1) of the Constitution.' See *Laugh It Off Promotions CC v SA Breweries International (Finance) BV t/a Sabmark International & Another* [12].

422 Although the IP right is not enshrined in the Bill of Rights, it is considered a fundamental right and should be protected as one.

determine why the court applied a specific methodology in a particular case and whether it could deviate from that approach in dealing with a similar case in future.

In *Laugh It Off Promotions CC*, the Constitutional Court described the basis of the litigation as the 'interface between the guarantee of free expression enshrined in section 16(1) of the Constitution and the protection of intellectual property rights'[423] in relation to the registered trade-marks as contemplated in section 34(1)(c) of the Trade Marks Act 194 of 1993.[424] In its submission, the applicant (Laugh It Off) argued, among other things, that the object of intellectual property laws such as copyright and trade-marks 'in an open and democratic society is not to shut out critical expression or to throttle artistic and other expressive acts in a manner that gives way to inordinate brand sway.'[425] The Constitutional Court affirmed the reasoning of the Supreme Court of Appeal that the provisions of section 34(1)(c) of the Trade Mark Act should be considered in the context of the Constitution that necessitates the recognition of other rights, such as freedom of expression.[426] However, unlike the Constitutional Court, the Supreme Court of Appeal failed to appreciate the need to weigh up the right of the owner of the trade mark against the freedom of expression of 'the unauthorised user' of the trade mark.[427]

The Constitutional Court found fault with the Supreme Court of Appeal's application of a two-stage approach[428] rather than balancing the right of the owner of the trade mark against the right to freedom of expression on the premise that neither of the rights is absolute. This weighing up requires 'an evaluation of the importance of the purpose, nature, extent and impact of the limitation of free expression invoked against claims of

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423 *Laugh It Off Promotions CC v SA Breweries International (Finance) BV t/a Sabmark International & Another* [1].

424 Trade Marks Act 194 of 1993.

425 *Laugh It Off Promotions CC v SA Breweries International (Finance) BV t/a Sabmark International & Another* [13].

426 *Laugh It Off Promotions CC v SA Breweries International (Finance) BV t/a Sabmark International & Another* [18].

427 *Laugh It Off Promotions CC v SA Breweries International (Finance) BV t/a Sabmark International & Another* [18].

428 Moseneke J indicated that the Supreme Court of Appeal's 'approach appears to be premised on the reasoning that one must first find an infringement under the section and only thereafter determine whether the infringement is excused by an assertion of freedom of expression.' See *Laugh It Off Promotions CC v SA Breweries International (Finance) BV t/a Sabmark International & Another* [43].

unfair advantage or of likelihood of material detriment to a registered mark.'[429] It means that the limitation of freedom of expression must comply with the principle of general application. In sum, to restrain any conduct that the Constitution protects, the respondent bears the onus to demonstrate a likelihood of substantial harm or detriment to the trade mark which amounts to unfairness.[430]

In *Blind SA*, the method of constitutional analysis adopted aims wholly at protecting and promoting the interests of VIPs as opposed to analysing the rights of copyright owners and those of VIPs before applying the principle of limitation in terms of section 36 of the Constitution. The *Blind SA* case centres on the infringements of VIPs' rights by the provisions of the Copyright Act, the implications of those infringements, and the adoption of the appropriate remedy. The Constitutional Court acknowledged that the case before it related to the infringement of VIPs' rights. Having confirmed the infringements, the court was required to adopt the appropriate remedies to cure them.[431] Therefore, the court's effort, rightly so, is to consider the infringing behaviour of the Copyright Act and adopt the possible remedy to address the problem. However, the court should not have stopped there.[432]

The second *amicus curiae* in *Blind SA* (Media Monitoring Africa Trust) submitted that it is necessary to strike a balance 'between the rights of copyright and intellectual property owners and the rights of all people to access and impart knowledge and ideas.'[433] However, the court did not consider this view while analysing the various submissions or in its final analysis of the various aspects of the case. Although this case was not

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429 *Laugh It Off Promotions CC v SA Breweries International (Finance) BV t/a Sabmark International & Another* [50].

430 The onus, therefore, lies on the trade-mark owner to show that the expressive action of the applicant cannot receive constitutional protection because of its economic detriment to the trade mark. There was no evidence before the court to suggest actual economic detriment or the likelihood of economic detriment to the respondent's trade mark or business.

431 *Blind SA CC* [63].

432 There should be a clear consideration of the status of copyright owners' rights. In fact, there should be a discussion about the status of the IP right as a constitutional right, as recognised by the Constitutional Court in *Laugh It Off Promotions CC*.

433 *Blind SA CC* [41].

defended, the court still did justice in analysing the status of the rights of copyright owners, deeming it necessary to examine many concepts not considered by the parties.

The court merely referred[434] to the right of owners of incorporeal properties as protected by the Copyright Act. The court failed to consider whether this right also enjoys any form of constitutional protection as a fundamental right. In determining the nature of relief to be adopted in this case,[435] the court acknowledged the need to respect the rights of copyright owners.[436] Similarly, the court recognised that, in formulating the definition of 'accessible format copy,' it is vital to consider 'the rights of the copyright owner to have the integrity of the original work respected.'[437]

The rights of copyright owners were acknowledged and commented on in passing by the court in *Blind SA CC*. This aspect of *Blind SA CC* is unlike *Laugh It Off Promotions CC*, where the court considered the interrelationship between IP rights and the right of freedom of expression as demonstrating that neither is absolute. Giving his separate judgment in *Laugh It Off Promotions CC*, Sachs J confirmed the need to balance the rights of IP owners and users.[438] In this regard, the rights of copyright owners should have been properly considered in *Blind SA* as an indication that VIPs' rights are not absolute, despite the urgent need to address their infringement.

Although the Constitutional Court in *Blind SA CC* and *Laugh It Off Promotions CC* adopted the methods that it considered suitable to grant the appropriate remedies, there is still the likelihood that the same court may adopt a different approach to similar cases in future. While every case is unique, balancing the competing rights is always necessary in cases about the limitation of a particular right by another right or the infringement of some identified rights by other rights protected in the legislation.

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434 *Blind SA CC* [66].
435 *Blind SA CC* [41].
436 The court specifically mentioned those rights 'that are not implicated in constitutional infringement' of VIPs' rights. See *Blind SA CC* [105].
437 *Blind SA CC* [106].
438 Sachs J spent a lot of time balancing the right to freedom of expression and the rights of trade-mark owners.

4.6 An update on the latest ruling

The legislative process was reopened soon after the Constitutional Court delivered its judgment in September 2022, in which, among other things, it requested Parliament to complete its work and cure the defects identified in the Copyright Amendment Bill.[439] Through its committee, the National Council of Provinces initiated calls for oral and written comments. A public hearing was conducted at different intervals in February and March 2023.[440] Public hearings and consultations on the CAB were held in all nine provinces of the Republic.[441]

Parliament must ensure that all the defects identified by the Constitutional Court are cured and that the provisions of section 19D are consistent with the court's findings in *Blind SA CC*.[442] The members of CAT, therefore, recommend that section 19D be amended to comply with the *Blind SA CC* judgment to prevent any future interpretation that may suggest that section 19D remains constitutionally non-compliant.[443]

In line with the object of this thesis, it is proposed that the provisions of section 19D should remain applicable to all persons with different forms of disabilities,[444] even though this is not the finding by the Constitutional Court in *Blind SA CC.* Indeed, section 19D(2)(a), read with section 19D(1) of the CAB, should be extended to incorporate instances in which persons with disabilities who are already in lawful possession of copyrighted works and would like to convert them into accessible format copies, or share accessible format copies with other disabled persons lawfully, could perform these activities on their own

439 Parliament is allowed to finalise the legislative process and ensure that the CAB is passed within 24 months from the date on which the Constitutional Court granted the order. See *Blind SA CC* [102], [112(5)].

440 For example, public hearings were held on 21 February, 7 March, and 14 March 2023.

441 For more information on the calls for public hearings and consultations by the various provinces, see Parliamentary Monitoring Group (PMG), 'Provincial Legislatures: Copyright Amendment Bill & Performers Protection Amendment Bill' (*Pmg.org.za*, 2022) <https://pmg.org.za/call-for-comment/1245/> accessed 17 March 2025.

442 The applicant's case in *Blind SA v Minister of Trade, Industry and Competition & Others* concerns persons with print and visual disabilities, including those who are blind. It does not include persons with other forms of disabilities.

443 Samtani, 'Developing a Human Right to Research in International Law' 12.

444 Samtani, 'Developing a Human Right to Research in International Law' 13.

without the assistance of another person as specified under section 19D(1). The application of section 19D(2)(a) in its present form may hinder the possibility of producing and distributing accessible format copies among persons with print disabilities without the help of other persons, as contemplated in section 19D(1). This possibility may open a gateway for further litigation where persons with disabilities may bring a case of unfair discrimination based on the provisions of section 19D(2)(a) read with section 19D(1) of the CAB.[445]

Whereas the Constitutional Court[446] focused on the case before it and based its judgment on that set of circumstances only,[447] Parliament should maintain its decision to extend the provisions of the CAB [13F-2017] to persons with disabilities and not just blind people and those with other forms of print disabilities.[448] This recommendation thus extends the scope of the CAB [13F-2017] beyond the provisions of the Marrakesh Treaty, which aligns with the object of this thesis. This recommendation largely matches the provisions of sections 10(1) and 52(1)(zb) of the Australian Copyright Act[449] and the Indian Copyright Act,[450] respectively.

Similarly, the provisions of section 28P(2) of the CAB, which also require the authorisation of copyright owners, may hinder the realisation of accessible format shifting. This outcome is inconsistent with the provision of the Marrakesh Treaty that requires the contracting parties that deem it necessary to adopt into their laws only the TPMs that do not prevent accessible format shifting.[451] The Constitutional Court's decision also addressed the issue of format shifting and held that the authorisation requirement may

445 These recommendations accord with the CAT members' views. See Samtani, 'Developing a Human Right to Research in International Law' 13.

446 See *Blind SA CC*.

447 The Constitutional Court limited its judgment to persons with print and visual disabilities, as the applicant's case excluded persons with other forms of disabilities.

448 The provisions of s 19D, in particular, deal with all forms of disabilities in accordance with the CRPD obligations.

449 Copyright Act 1968.

450 Copyright Act 14 of 1957.

451 For more information on how the Marrakesh Treaty addressed the issue of TPMs in relation to format shifting, see the Marrakesh Treaty, Art 7.

render accessible format shifting unattainable.[452] To ensure that the CAB under Bill 13F-2017 accords with the Marrakesh Treaty's requirements regarding the protection of the TPMs, this thesis recommends that Parliament reconsider the provisions of section 28P(2) of the CAB.[453]

In carrying out its legislative process of passing the CAB [13F-2017], Parliament should thoroughly consider all aspects of the Constitutional Court decision in *Blind SA CC* and valuable recommendations from various individuals and groups such as the CAT. In an attempt to bring the provisions of the Copyright Act, through the adoption of the CAB [13F-2017], into line with the Marrakesh Treaty and the relevant international human rights treaties such as the CRPD and the ICESCR, Parliament may, where necessary, go beyond the provisions of the Marrakesh Treaty to accommodate factors not considered by that Treaty.[454]

President Ramaphosa's decision to refer the Bill to the Constitutional Court to determine its constitutionality was a significant development.[455] The emphasis was on the critical impacts of adopting the Bill in its present form on the rights of copyright holders. It was argued that the Bill, if passed into law, would irreparably harm the South African creative industry and seriously affect employment and investment in the creative and innovation

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452 *Blind SA CC* [67].

453 This thesis thus accords with the views of researchers such as the members of the CAT (including Samtani, Beiter, Flynn, Klaaren, Ncube, Oriakhogba, and Schonwetter) as well as others such as Helfer, Land, Okediji, and Reichman. See Samtani, 'Developing a Human Right to Research in International Law' 14; and Laurence R Helfer and others, *The World Blind Union Guide to the Marrakesh Treaty: Facilitating Access to Books for Print-Disabled Individuals* (Oxford University Press 2017) 150.

454 Some of the factors to be considered include the need to accommodate persons with forms of disabilities other than print disability; the nature of the works to be converted into accessible format copies, and the various forms that these copies may take to suit the needs of persons with disabilities; the process of converting works into accessible format copies that are more inclusive; and any other factor that may be considered in order to ensure that the South African Copyright Act 98 of 1978, after the amendment, accords with the provisions of the Constitution of the Republic of South Africa, 1996.

455 The Bill in question is the Copyright Amendment Bill (CAB).

sector[456] and undermine some of the exclusive rights of copyright owners.[457] In this context, adopting the Bill would expose the Copyright Act to non-compliance with South Africa's international legal obligations, particularly the specific requirements of the three-step test, and could seriously affect the legitimate interests of copyright holders.[458]

4.7 Conclusion

Chapter Four of this thesis explored South African copyright law with particular reference to copyright exceptions for the rights of persons with disabilities, except where there was a specific emphasis on a certain group of disabled persons.[459] The chapter aimed at determining how copyright law relates to the South African Constitution, the various international human rights treaties, regional legal instruments such as the African Charter, and international copyright law, notably the Marrakesh Treaty, in protecting and advancing the rights of persons with disabilities.

Analysing the relevant provisions of the Copyright Act before the incorporation of the read-in provisions showed that the Act was not aligned with international law obligations expected of the Republic as a contracting party to most of the treaties. The incorporation of section 13A as part of the Copyright Act has rendered the Act generally compliant with the provisions of the Marrakesh Treaty.[460] However, the Copyright Act, in its present form, still does not fulfil most of the obligations underpinning some international human rights treaties. Parliament is responsible for ensuring that the Copyright Act is aligned with the

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456 See the Joint Statement issued by some organisations such as the International Publishers Association (IPA), the International Association of Scientific, Technical & Medical Publishers (STM), International Federation of Reproduction Rights Organisations (IFRRO), and International Authors Forum (IAF) in March 2024 (James Taylor, 'Interview with PASA on SDG Publishers Compact – International Publishers Association' (*International Publishers Association*, 25 February 2025) <https://internationalpublishers.org/interview-with-pasa-on-sdg-publishers-compact/> accessed 17 March 2025.

457 Joint Statement issued by IPA, STM, IFRRO and IAF in March 2024 (see James Taylor, 'Interview with PASA on SDG Publishers Compact – International Publishers Association'). The PASA is the Publishers' Association of South Africa.

458 This includes anyone who enjoys exclusive rights in relation to copyrighted works, such as authors and publishers.

459 A typical example is *Blind SA v Minister of Trade, Industry and Competition & Others*, where the court limited its decision to VIPs as dictated by Blind SA, the applicant in the case.

460 It should be noted that the Constitutional Court in *Blind SA CC* did not properly address some aspects of the obligations underpinning the Marrakesh Treaty: one example is the issue of cross-border exchange and distribution of copyright works in accessible formats.

various international human rights treaties and international copyright treaties, notably the Marrakesh Treaty, to fulfil the obligations that flow from the various treaties. Parliament and the President unreasonably delayed amending the Copyright Act to protect and promote the interests of persons with disabilities in line with international law obligations, particularly the Marrakesh Treaty. So Blind SA approached the court seeking an order, among other things, to declare the Copyright Act unconstitutional and to read in the provisions of section 19D in line with the provisions of the Marrakesh Treaty.

This chapter thoroughly analysed the decisions of the courts, particularly the Constitutional Court, within the context of this thesis. The chief aspect of the court's decision is the adoption of section 13A into the court order to bring immediate relief to VIPs' challenges in accessing copyrighted works in adapted format copies. Another critical aspect of its decision is allowing Parliament to cure the defects detected by the court. Generally, therefore, the Constitutional Court delivered a reasonable and appropriate decision, though with some reservations when the methodology adopted by the court is analysed and compared with the methodology adopted in *Laugh It Off Promotions CC*.

On closer analysis, the CAB that initiated amending the Copyright Act revealed some aspects that do not align with the provisions of the Marrakesh Treaty. So, for example, the definition of 'beneficiary person' in the CAB refers to a person with a disability as opposed to the Marrakesh Treaty, which refers to visually impaired persons and persons who are otherwise print disabled. This chapter of the thesis has explained why the CAB [13F-2017] has defined the term 'beneficiary person' as persons with disabilities. However, in a serious oversight, the CAB drafters have failed to explain the nature of the disabilities in question and who may qualify as a person with a disability, as contrasted with the corresponding provisions of the Australian Copyright Act.

In the absence of appropriate definitions of terms such as 'persons with disability' and 'accessible format copy,' this thesis agrees with Dean's submission in *Blind SA CC* that section 19D extends its non-compliance with the three-step test, particularly the

provisions of Articles 9(2) and 13 of the Berne Convention and TRIPS Agreement, respectively.[461] However, the definition of 'accessible format copy' should be inclusive and sufficient to accommodate persons with various kinds of disabilities.

In line with the provisions of the Marrakesh Treaty that referred to an 'authorized entity' in Articles 2(c) and 5(1), the CAB [13F-2017] now contains the definition of 'authorized entity' and also make reference to authorized entity in sections 1(c) and 19D. This differs from the provisions of CAB [13F-2017] where reference is only made to a person who assists a person with a disability.

Contrary to Article 5(2) of the Marrakesh Treaty,[462] section 19D(4)(b) of the CAB [13F-2017] provides that any importation or exportation of copyright-protected works in accessible format copies may be permitted only if the person assisting a disabled person knows or possibly has a reason to know that the accessible format copies will be used only to aid persons with a disability. Unlike Article 5(2) of the Marrakesh Treaty, which places little or no burden on the authorised entities,[463] the test in the proposed section 19D(4)(b) of the CAB [13F-2017] is formulated in such a way that it overburdens the person serving persons with disabilities.[464]

By overburdening the persons who serve persons with disabilities, the relevant portion of section 19D(4)(b) could appear to be promoting inequality and unfair discrimination against persons with disabilities, as it applies only to those persons and those persons or entities serving them and thus may be open to future attack. If not immediately rectified, it may also render the Copyright Act non-compliant with the Constitution because of the infringement of rights in the Bill of Rights.

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461 *Blind SA CC* [35].

462 According to Art 5(2) of the Marrakesh Treaty, any authorised entity that wants to take part in the cross-border transfer of the copyrighted works in accessible format copies should not, before the distribution or making the copies available, have actual or constructive knowledge that the accessible formats copies would be used for any purpose other than for the beneficiary persons.

463 It is sufficient for the authorised entity not to have known, and therefore to presume, that the copyrighted work in accessible format copies is not used for any persons other than persons with disabilities.

464 According to the CAB, s 19D(4)(b), the person assisting a disabled person must take steps to ensure that the accessible format copies will be used only for the benefit of persons with a disability.

Having considered the position in South African law, the thesis shifts to the comparative law aspect as the discussion considers the copyright exceptions in the first foreign jurisdiction selected – Australia.

CHAPTER 5: COPYRIGHT EXCEPTIONS IN AUSTRALIA FOR PERSONS WITH DISABILITIES

5.1 Introduction

Australia enjoys one of the most progressive copyright laws in the world and has revised its Copyright Act 1968 several times to accommodate the interests of persons with disabilities. Since the Australia-USA Free Trade Agreement (AUSFTA) was signed on 18 May 2004, Australia has continuously revised its copyright law to protect and promote the rights of VIPs and persons with other print disabilities.[1]

A significant revision of the Australian copyright law occurred under the Copyright Amendment (Digital Agenda) Act 2000 ('CADA'). This Act updated the Copyright Act 1968 to align it with the WIPO Copyright Treaty standards.[2] Subsequently, since the adoption of the Marrakesh Treaty, Australia has also constantly sought to combat book famine among blind people and others with various kinds of visual impairments. Australia has made further significant efforts under the Marrakesh Treaty to promote and protect the rights of people who are visually impaired, especially their right to education and their right of access to information.

This chapter of the thesis discusses copyright exceptions and legal frameworks, including the decision by a Commissioner in Australia that ruled on the rights of persons with disabilities, particularly their right of access to information and their right to education. This chapter is not limited to copyright exceptions as contained in Australia's Copyright Amendment (Disability Access and Other Measures) Act 2017 ('Copyright Amendment Act 2017') but considers the copyright exceptions in Australian copyright law in its totality, in so far as they affect the rights of persons with disabilities, particularly their right to

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1 Dilan Thampapillai, 'The Emergence of an Access Right in Australian Copyright Law' 1–27, 1 (2007) <https://eprints.qut.edu.au/10854/1/10854.pdf> accessed 21 March 2025.

2 In its timing and provisions, the CADA was intended to render Australia compliant with the emerging international standards. Therefore, the CADA reflected the need to afford maximum protection to copyright owners. See Thampapillai, 'The Emergence of an Access Right in Australian Copyright Law' 9. However, Wahid and Abdul Ghani Azmi argue that despite the recent developments in the Australian copyright law, 'the problem of inequitable knowledge acquisition or denial of opportunities to acquire, use and share knowledge still occurs.' See Wahid and Abdul Ghani Azmi 'Comparative Study on Copyright Exception for Teaching Purposes: Australia, Malaysia and the United Kingdom' (2012) 8 Journal of International Studies 31-45, 31.

access copyrighted works. Before the Copyright Act 1968 was amended, some aspects were inconsistent with the Marrakesh Treaty's provisions. At the same time, some provisions of the Copyright Act 1968 before the 2017 amendment are still relevant to advancing the interests of persons with disabilities.

The purpose of this chapter is not to discuss the Australian copyright system in isolation but with reference to the South African situation. Also, the aim is not to consider Australian copyright law in general. Rather the emphasis is on Australian copyright law in relation to the specific exceptions that have been developed to protect and promote the interests of persons with disabilities. Chapter five aims at analysing and comparing it with the South African position.

This chapter of the thesis deals with four aspects: relevant copyright exceptions before the amendment of the Copyright Act 1968 in 2017; evaluation of the important judicial decision; the amendment of the Copyright Act 1968, which has many subtopics attached to it; and post-amendment concerns as well as possible countermeasures that have been proposed since the amendment of the Copyright Act 1968.

5.2 Relevant copyright exceptions before the amendment of the Australian Copyright Act 1968

Australia adopted several copyright exceptions to protect and promote the interests of persons with disabilities. Unlike the South African Copyright Act 1978, which was declared unconstitutional in respect of sections 6 and 7 as read with section 23 that infringe the constitutional rights of VIPs by discriminating against them, Australian copyright law, before its amendment, contained copyright exceptions promoting access to information among persons with visual impairments. This chapter of the thesis considers some of these copyright exceptions to determine how far they promote the interests of persons with disabilities and whether they accord with the Marrakesh Treaty.

First, the principle of fair dealing in Australian copyright law promotes the right of access to information by persons with print disabilities. Under this principle, copyrighted works may be used without the copyright holder's prior permission, on condition that this use

qualifies as a fair dealing within the context of the Copyright Act 1968.[3] Although anyone, including persons with print disability, may reproduce and communicate copyrighted works[4] or adaptations[5] of those works for the purposes indicated in the Copyright Act 1968, the court decision in *De Garis v Neville Jeffress Pidler*[6] introduced some restrictions[7] to this exception. By implication, therefore, fair-dealing provisions in Australian law do not allow persons with visual impairments to access copies of print materials for their private use.[8] So this means that the fair-dealing provision in the Australian Copyright Act 1968 does not meet the standard of the exception set out in the Marrakesh Treaty because, for example, the fair-dealing provision does not allow persons with a disability to access works for private use without prior permission from copyright owners. In its 2013 Final Report, therefore, the Australian Law Reform Commission ('ALRC') identified gaps that needed urgent attention in the pre-amendment Copyright Act.[9]

Secondly, format shifting is a further exception in the Australian copyright law that promotes access to copyrighted works by persons with print disabilities and people with other forms of disabilities.[10] This format-shifting exception refers to instances in which literary works such as books, newspapers, and periodical publications are reproduced in different forms for private and domestic use.[11] To be accessible to persons with print

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3 Copyright Act 1968, ss 40–43. For fair dealing to apply here, it must be for research or study, criticism or review, parody or satire, reporting news or providing professional advice by a legal person such as a lawyer.

4 This includes literary, dramatic, musical, or artistic works.

5 Reference is made to an adaptation of a literary, dramatic, or musical work, excluding an adaptation of an artistic work.

6 [1990] FCA 352 (13 September 1990), (1990) 37 FCR 99, (1990) 18 IPR 292.

7 The use must relate to the person's fair-dealing purposes. This means that fair dealing, in this instance, does not include the supply of copyrighted materials to other persons for their fair-dealing purposes.

8 Jingyi Li and Niloufer Selvadurai, 'Facilitating Access to Published Works for Persons with a Print Disability: Amending Australian Copyright Laws to Ensure Compliance with the Marrakesh Treaty' (2017) 43(3) Monash University Law Review 619–647, 624.

9 Australian Law Reform Commission (ALRC), *Copyright and the Digital Economy* Final Report ALRC Report 122 (November 2013) 132; <https://www.alrc.gov.au/wp-content/uploads/2019/08/final_report_alrc_122_2nd_december_2013_.pdf> accessed 17 March 2025. It is pointed out that the fair-dealing exception is restrictive and does not apply to instances where copyrighted works are used for private and domestic purposes. This means that fair dealing is not available to persons with a print disability for leisure and entertainment, among other purposes.

10 Copyright Act 1968, s 43C.

11 Format shifting is an exception under s 43C of the Australian Copyright Act 1968.

disabilities, the work must be reproduced in large print, audio, digital, and other accessible versions. Under section 43C of the Australian Copyright Act 1968, the users of literary works such as books, newspapers, and periodical publications can make accessible format copies of the work for private and domestic use. Section 43C, subject to the Act's conditions contained in 43C(3),[12] extends to lending the reproduced copies of the work to family or household members who also experience different visual impairments. It may be argued that, compared with the fair-dealing exception, the Australian exception of format shifting offers more benefits to blind people and persons with other print disabilities. However, the ARLC report argues that although format shifting allows a person to change the format of a work on condition that he or she is the legal owner of the original copy of the work, the Copyright Act 1968 is unclear whether a third party could help the owner of the original work in converting it to the accessible format of that work.[13]

Thirdly, section 200AB(4) of the Copyright Act 1968 promotes access to print materials for persons with visual impairments.[14] So, copyright is not infringed if persons with print disabilities use copyrighted works as provided for in section 200AB(4) of the Copyright Act 1968.[15] However, section 200AB(4) applies only if the use is not made wholly or partly to obtain a commercial advantage or profit. By implication, such a use in terms of section 200AB(4) must meet the requirements of the three-step test.[16] The ARLC report argues that section 200AB has rarely been used as an alternative to two other exceptions, fair dealing and format shifting.[17]

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12 Copyright Act 1968, s 43C(3). The format-shifting exception is restricted to private and domestic use. It is not extended to instances where the reproduced work is sold, let for hire by trade, presented for sale or hire, or distributed for trade.

13 Australian Law Reform Commission (ALRC), *Copyright and the Digital Economy* Final Report ALRC Report 122 174.

14 Copyright Act, s 200AB(4).

15 According to the Act, any use made by a person with a disability or someone else for the disabled person to obtain a reproduction or copy of works or other subject matter in another form or with a feature that reduces the difficulty is not considered an infringement. See s 200AB of the Copyright Act 1968.

16 Sections 200AB(1)(c) and 200AB(1)(d) of the Australian Copyright Act 1968 apply where the use of the copyrighted work does not conflict with a normal exploitation of the work and where the use does not unreasonably prejudice the legitimate interests of the copyright owner. However, a strict interpretation of these provisions may lead to a different outcome because the section does not refer to 'special cases' as contained in the three-step test.

17 Australian Law Reform Commission (ALRC), *Copyright and the Digital Economy* Final Report ALRC Report 122 223.

Fourthly, Australian copyright law provides for statutory licences. These allow those institutions assisting persons with visual impairments to obtain copyrighted works in accessible formats without prior permission. These institutions[18] are granted a licence under the Copyright Act 1968 to copy and reproduce specific works[19] and communicate copies of those works in an accessible format. Therefore, the Copyright Act 1968 permits the relevant institutions to produce and communicate copies of the work in accessible formats[20] for persons with print disabilities once a literary or dramatic work has been published.[21] Similarly, section 135ZQ of the Copyright Act 1968 allows the prescribed institutions under section 135ZP to produce and communicate works to persons with disabilities. However, the collecting society must be notified.[22] In addition, the Copyright Act 1968 permits those institutions that assist persons with print disabilities to make facsimile copies of works in a published edition that may be required to reproduce works as contemplated under section 135ZP.[23] Further, the Copyright Act 1968 provides an exception for circumventing technological protection measures (TPMs) on the condition that this circumvention applies to the acts prescribed in the regulations.[24]

Unlike the provisions of section 200AB of the Copyright Act 1968, statutory licences have proved more advantageous for persons with a print disability in obtaining copies of print materials in an accessible format.[25] Despite its benefits for persons with a print disability in obtaining copies of works in accessible formats, the statutory licence, as contained in

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18 Copyright Act 1968, s 135ZP(1)–(2). This section, which deals with a statutory licence, has been repealed. The institutions allowed to perform such tasks include educational institutions and any other institutions with the main objective of providing works in an accessible format to persons with print disabilities, subject to a remuneration notice given by or on behalf of the body to the appropriate collecting society.

19 They can only reproduce literary and dramatic works, excluding others such as artistic ones.

20 This refers to a broader scope of formats, including Braille, large-print, photographic, or electronic versions of the copyrighted works.

21 Copyright Act 1968, s 135ZP(2). The provision of this section has been repealed and replaced by sch 1, s 39 of the Copyright Amendment Act.

22 Copyright Act 1968, s 135ZQ 4A and 4B, read together with s 135ZP.

23 Copyright Act 1968, s 135ZN.

24 Copyright Act 1968, s 116AN(9)(c).

25 Australian Law Reform Commission (ALRC), *Copyright and the Digital Economy* Final Report ALRC Report 122 223. See also Paul Harpur and Nicolas Suzor, 'Copyright Protections and Disability Rights: Turning the Page to a New International Paradigm' (2013) 36(3) University of New South Wales Law Journal 745–778, 752.

Australian copyright law, has its shortcomings and is thus insufficient to address the demand for reproducing and converting copyrighted works into accessible formats.[26]

5.3 Judicial decision that helped in transforming the perspectives of copyright exceptions for persons with disabilities in Australia

Generally, Australian copyright law champions promoting and advancing VIPs' right to receive information in accessible formats. This trend was demonstrated in *Maguire v Sydney Organising Committee for the Olympic Games*,[27] just as in *Blind SA CC,* the Constitutional Court of South Africa ruled on the constitutionality of some sections of the South African Copyright Act 1978.[28] The *Maguire* case concerned direct discrimination against Maguire, a visually impaired person. The Sydney Organising Committee for the Olympic Games ('SOCOG') failed, among other things, to provide the ticket in the Braille format because the cost of printing the ticket book in a Braille version would be too high.[29]

In the unreported decision *Maguire v Sydney Organising Committee for the Olympic Games* on 18 October 1999, the Human Rights and Equal Opportunity Commission ('HREOC') (per Commissioner Carter QC) ruled that Maguire[30] was directly discriminated[31] against when the Australian Government failed to provide ticketing materials in Braille[32] for the Sydney Olympic Games and thus breached section 24 of the Disability Discrimination Act 1992 ('DDA'). The Commissioner also ruled that, by not producing the tickets in Braille format, the SOCOG treated Maguire less favourably

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26 Li and Selvadurai, 'Facilitating Access to Published Works for Persons with a Print Disability' 627.

27 *Maguire v Sydney Organising Committee for the Olympic Games* 1999, HREOC Decision H99/115. See Independent Living Institute, 'Sydney Olympics 2000 Website Accessibility Decision: Bruce Lindsay Maguire vs Sydney Organising Committee for the Olympic Games: Reasons for Decision of the Hon. William Carter QC, Inquiry Commissioner' <https://www.independentliving.org/docs5/sydney-olympics-blind-accessibility-decision.html> accessed 21 March 2025.

28 *Blind SA v Minister of Trade, Industry and Competition & Others* (CCT 320/21) [2022] ZACC 33 (21 September 2022), 2023 (2) BCLR 117 (CC), 2022 BIP 518 (CC).

29 *Maguire v Sydney Organising Committee for the Olympic Games* 1999, HREOC Decision H99/115.

30 Maguire was a small business owner from Baulkham Hills, New South Wales, born totally blind and without sight or light perception.

31 The Commission ruled that in failing to provide the ticket book in Braille, SOCOG breached s 24 of the Australian Copyright Act 1968, a direct discrimination against Maguire.

32 In its ruling, the Commission maintained that it was not reasonable for SOCOG to presume that persons with visual impairments may obtain information through telephone lines or secure the services of other persons to read the materials to them.

because of his disability than persons without that disability.[33] Similarly, the Constitutional Court in *Blind SA CC* ruled that the provisions of sections 6 and 7, read with section 23 of the South African Copyright Act 1968, are unconstitutional to the extent that they limit the access of VIPs to the adapted format copies of copyrighted works.[34] As stated in its preamble, one of the objectives of the Marrakesh Treaty is that it is vital to achieve non-discrimination, equal opportunity for all, and an inclusive society that accommodates the interests of people with print disabilities.[35] This view accords with the Commissioner's decision in the *Maguire* case. The underlying issue is how to make works and other reading materials accessible to people with print disabilities.

Although the Australian copyright perspective gained global prominence as one of the jurisdictions with anti-discrimination laws promoting inclusive web accessibility, the *Maguire* case opened doors for new dimensions in dealing with access to information among blind people and persons with other forms of visual impairments. The Commissioner in the *Maguire* case stated that alongside the evolving development of technology, such as the internet, facilitating inclusive web accessibility remains an important topic requiring attention among professionals and researchers. The Commissioner also maintained that the adoption of Web Accessibility Guidelines has been inevitable. In the midst of development, the World Wide Web Consortium ('W3C') Web Content Accessibility Guidelines ('WCAG') were introduced as a significant step to achieve inclusive web accessibility and promote online information provision to persons with visual impairment and other forms of disabilities.[36]

In keeping with the objective of the Marrakesh Treaty, the *Maguire* decision supports the need to incorporate the relevant copyright exceptions into the Australian Copyright Act 1968 that would promote the rights of persons with disabilities to access copyrighted works in adapted versions that may suit their conditions.

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33 *Maguire v Sydney Organising Committee for the Olympic Games* 1999, HREOC Decision H99/115.
34 *Blind SA CC* [112].
35 Marrakesh Treaty, preamble.
36 Gerard Goggin, Scott Hollier and Wayne Hawkins, 'Internet Accessibility and Disability Policy: Lessons for Digital Inclusion and Equality from Australia' (2017) 6(1) Internet Policy Review 1–18, 3.

5.4 The amendment of the Australian Copyright Act 1968

For a holistic treatment of the topic, this thesis concentrates not only on the actual amendment of the Copyright Act 1968 but also on the need to briefly consider the various factors that influenced that amendment. The thesis considers the following aspects: the provisions of Australian copyright law that were inconsistent with the Marrakesh Treaty, the effort to address the inconsistencies between the Australian Copyright Act 1968 and the Marrakesh Treaty, and the relevant factors underlying the Copyright Amendment Act 2017. The thesis considers all three aspects to give readers a clear perspective of the Australian copyright law affecting the issue of the availability of copyrighted works in accessible formats for persons with disabilities. However, the thesis focuses more on the actual amendment of the Copyright Act 1968 and how far the amendment aligns that Act with the provisions of the Marrakesh Treaty.

5.4.1 The provisions of Australian copyright law that were inconsistent with the Marrakesh Treaty

Although some aspects of the Australian Copyright Act 1968 were incorporated to promote the interests of VIPs, the Act was found not to comply with the Marrakesh Treaty in some crucial respects. This thesis briefly discusses some aspects of the Act that were found to be inconsistent with the provisions of the Treaty.

The first aspect is the scope of works that are subject to copyright exceptions. Although the Marrakesh Treaty requires works to be either published or made available to the public,[37] the Australian Copyright Act 1968 in some instances did not require the relevant works to be published for them to be subject to copyright exceptions.[38] Under the Marrakesh Treaty, both literary and artistic works could be produced in accessible format

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37 Marrakesh Treaty, Art 2(a).

38 Copyright Act 1968, s 135ZP, which has been repealed. On the one hand, there may be no need for works to be published where sound recordings are made as accessible copies of the works for persons with print disabilities. On the other hand, works are considered published if produced, among other things, in one of the following formats: the Braille, large-print, electronic, or photographic version.

copies[39] on condition that those works had been published or made available publicly in any media.[40]

The second aspect is the scope of beneficiaries under the Copyright Act 1968 before its amendment. This has broader connotations than those of the Marrakesh Treaty. Under Australian copyright law, unlike the Marrakesh Treaty, where the categories of beneficiaries are clearly specified, various kinds of copyright exceptions apply to different types of beneficiaries. For example, section 200AB of the Copyright Act 1968 applied to persons with disabilities that cause reading difficulties and to persons with disabilities that cause difficulty in viewing and hearing copyrighted works.[41] The provisions of section 47A(11)(b) of the Copyright Act 1968 also support the principle that Australian copyright law covers a wider range of beneficiaries in comparison with the Marrakesh Treaty. Within the context of 47A(11)(b), beneficiaries of the print disability radio licences include individuals who are unable to manage texts such as books and other reading materials or to read or comprehend printed works because of factors such as old age, disability, or literacy.[42]

The third aspect is the issue of remuneration for the use of copyrighted materials and determining how far the non-profit principle applies in the context of copyright exceptions for VIPs. As regards remuneration, the Marrakesh Treaty allows member states to clearly express in their national laws whether remuneration will be collected and, where applicable, how this remuneration may be collected.[43] To maintain the existing position in Australian copyright law, Australia lodged a notification stating that the requirement of remuneration would remain part of its copyright law.[44] Unlike the Marrakesh Treaty requiring authorised entities to act as a non-profit organisation or to perform their duties

39 Marrakesh Treaty, Art 2. Producing literary and artistic works in accessible formats is considered within the context of Art 2(1) of the Berne Convention.

40 Marrakesh Treaty, Art 2(a).

41 Copyright Act 1968, s 200AB.

42 Copyright Act 1968, s 47A(11)(b). Within this context, therefore, Australian copyright law protects the interests of persons who experience various forms of optical diseases such as glaucoma, presbyopia, and cataracts because of old age and who may find it difficult to hold printed materials for a long period. See Li and Selvadurai, 'Facilitating Access to Published Works for Persons with a Print Disability' 632.

43 Marrakesh Treaty, Art 4(5).

44 Li and Selvadurai, 'Facilitating Access to Published Works for Persons with a Print Disability' 633.

to the VIPs on a non-profit basis,[45] the Australian copyright exceptions can apply where activities are performed on a profit basis as well as a non-profit basis.[46]

The fourth aspect is cross-border exchange. Through Articles 5, 6, and 9, the Marrakesh Treaty adopts the necessary mechanisms for implementing the cross-border exchange of copyrighted works in accessible format copies. Although the provisions on cross-border exchange do not contain a straightforward implementation process, the possible measures that can be adopted comprise the application of the choice of law principle, the exhaustion policy, and labelling.[47] Before its amendment, the Australian Copyright Act 1968 focused mainly on averting parallel importation by implementing the exhaustion rule. The Copyright Act 1968 also prohibits the importation of copies of literary, dramatic, musical, or artistic work without the permission of the copyright owners, where the purpose of the importation is, among other things, any purpose that would be prejudicial to the copyright owners.[48] However, some provisions of the Copyright Act 1968 contain exceptions to the restriction of the parallel importation of copyrighted works.[49]

5.4.2 Addressing the inconsistencies between the Marrakesh Treaty and the Australian Copyright Act 1968

The proposals to address the inconsistencies between the Marrakesh Treaty and the Australian Copyright Act 1968 came from various quarters, including the Australian Law Reform Commission (ALRC), the Attorney-General's Office, and the Parliamentary Joint Standing Committee. This part of the thesis briefly considers the various views in the context of the underlying objectives of the Copyright Act 1968.

One of the issues raised by the ALRC was the limitations found in the fair-dealing exception in the Copyright Act 1968. It was pointed out that fair dealing applied to VIPs only where copies of copyrighted works are used for research, study, criticism, parody,

45 Marrakesh Treaty, Arts 2(c) and 4(2).
46 Li and Selvadurai, 'Facilitating Access to Published Works for Persons with a Print Disability' 632.
47 Marketa Trimble, 'The Marrakesh Puzzle' (2014) 45(7) IIC - International Review of Intellectual Property and Competition Law 768–795, 768.
48 Copyright Act 1968, s 37.
49 For more information, see ss 44A and 112A of the Australian Copyright Act 1968.

and reporting news.[50] The fair-dealing exception did not apply in other instances where copies are intended for other purposes such as leisure and entertainment and other private or domestic use.[51] Format shifting is a further area that the ARLC detected as challenging. An individual is allowed to shift the format of a copyrighted work through the application of the format-shifting exception on condition that the individual lawfully owns the original work.[52]

In its final report,[53] the ALRC identified some problems with the print disability licence contained in the Copyright Act 1968. The first challenge is the scope of the authorised institutions in the context of section 135ZP of the Copyright Act 1968, which does not apply to institutions such as libraries or archives.[54] These institutions help VIPs access copies of copyrighted works in accessible formats but do not consider this to be their primary function. These institutions are permitted, without prior authorisation, to make copies of copyrighted materials and to distribute these copies to VIPs and other private users for the purpose of research or study. However, these institutions are required to destroy these copies at the end of each use,[55] an outcome with serious financial implications for libraries and archives.[56]

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50 For more information, see Australian Law Reform Commission, *Copyright and the Digital Economy* Discussion Paper Report No DP 79 (DP 79) (May 2013) 132 <https://www.alrc.gov.au/wp-content/uploads/2019/08/dp79_whole_pdf_.pdf> accessed 21 March 2025.

51 Australian Law Reform Commission, *Copyright and the Digital Economy* (DP 79) 174–193. Also, Patricia Aufderheide *et al* indicate that the fair dealing exceptions, as contained in the Australian copyright law, 'are supplemented by a narrow set of personal use exceptions…, specific exceptions for' other uses such as 'a flexible dealing exception for libraries, educational institutions, and the disabled, and a set of statutory licences for educational copying', among others. See Patricia Aufderheide and others, 'Calculating the consequences of narrow Australian copyright exceptions: Measurable, hidden and incalculable costs to creators' 1–7, 3 (2018) <https://doi.org/10.1016/j.poetic.2018.05.005> accessed 21 October 2025.

52 Australian Law Reform Commission, *Copyright and the Digital Economy* (DP 79) 174. However, there is no certainty that 'another person could assist the original copy owner to convert the format of such a work' (Li and Selvadurai, 'Facilitating Access to Published Works for Persons with a Print Disability' 634).

53 This is contained in Australian Law Reform Commission, *Copyright and the Digital Economy* Final Report ALRC Report 122 357–358.

54 Australian Law Reform Commission, *Copyright and the Digital Economy* Final Report ALRC Report 122 357–359.

55 Copyright Act 1968, s 49(7A).

56 Li and Selvadurai, 'Facilitating Access to Published Works for Persons with a Print Disability' 636.

The ALRC analysis also indicated that publishers may be reluctant to make digital copies of copyrighted materials available to authorised entities, as publishers are not legally obliged to do so.[57] This outcome could also have serious financial implications for VIPs and those authorised entities assisting them who wish to reproduce the works in accessible format copies.[58] Further, the requirement for authorised institutions to confirm commercial availability every time they wish to make copies of copyrighted works in accessible formats could be a frustrating waste of time.[59] Similarly, the ALRC's Final Report raises concerns about the restrictions placed on the authorised institutions when dealing with the circumvention of TPMs. The Copyright Regulations 2017 provide that the institutions helping VIPs are permitted to circumvent TPMs while reproducing works in accessible formats.[60] However, the Copyright Act 1968 prohibits the manufacturing, importation, or distribution of any device for circumvention[61] which indirectly counters the circumvention process.

In response to the concerns raised, the ALRC proposed that the principle of 'fair use' should replace the provisions of section 200AB(4) of the Copyright Act 1968.[62] In addition, instead of applying the three-step test across the copyright exceptions for VIPs, the principle of fairness should be adopted.[63] In particular, the fair-use exception should be framed so that it benefits persons with disabilities with the aim of promoting their access to copyrighted works in adapted formats.[64] It is proposed that the new fair-use provision should contain an inclusive list of purposes and comprise, among other things, 'access for persons with disabilities.'[65] Similarly, the Copyright Law Review Committee ('CLRC')

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57 Australian Law Reform Commission, *Copyright and the Digital Economy* Final Report ALRC Report 122 358.

58 Li and Selvadurai, 'Facilitating Access to Published Works for Persons with a Print Disability' 636.

59 Australian Law Reform Commission, *Copyright and the Digital Economy* Final Report ALRC Report 122 358.

60 The Copyright Regulations of 2017, part 7, reg 40, made under the Copyright Act 1968.

61 Copyright Act 1968, s 132APC.

62 Australian Law Reform Commission, *Copyright and the Digital Economy* Final Report ALRC Report 122 158.

63 Australian Law Reform Commission, *Copyright and the Digital Economy* Final Report ALRC Report 122 25.

64 Australian Law Reform Commission, *Copyright and the Digital Economy* Final Report ALRC Report 122 148–149.

65 Australian Law Reform Commission, *Copyright and the Digital Economy* Final Report ALRC Report 122 150.

maintained that fairness factors should be incorporated into the fair-use exception, must demonstrate an element of flexibility that accommodates possible future uses, and must strike a balance between the conflicting interests of users and copyright owners.[66] This suggestion is in line with the view held in this thesis.

The Office of the Attorney-General's recommendation in its Implementation Options Paper published in 2014 ensures the compliance of the Copyright Act 1968 with the Marrakesh Treaty. The Office of the Attorney-General proposed three options for reforming copyright law in Australia: slight amendments to the Copyright Act 1968, moderate amendment to the Act, and amendments to show an element of flexibility.[67] Unlike the first and second options, the third option echoed a similar approach contained in the ALRC's Final Report (2013) by proposing that a fair-use exception should be incorporated into the Copyright Act 1968.[68]

The Parliamentary Committee report evaluated the compliance level of the Copyright Act 1968 with the Marrakesh Treaty.[69] The report, among other things, referred to the commercial availability test, the issue of the circumvention of TPMs, and the print disability statutory licence mechanism. As regards the issue of the commercial availability test, the report echoes the view of several interested parties that this test lacks flexibility.[70] The report also examined the liability associated with the circumvention of TPMs within the context of the ALRC's Final Report in 2013.[71] To address all other areas of concern, the Parliamentary Committee proposed that 'a print disability exception' should replace

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66 Copyright Law Review Committee (CLRC), *Simplification of the Copyright Act 1968: Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (1998) 53.

67 For more information on the various options, see the Department of the Attorney-General, *Marrakesh Treaty Implementation Options Paper* (2014).

68 Li and Selvadurai, 'Facilitating Access to Published Works for Persons with a Print Disability' 638.

69 Joint Standing Committee on Treaties, *Report 153: Treaties tabled on 16 June and 23 June 2015* (2015) (see Parliament of Australia, 'Report 153' (*Aph.gov.au*, 2015) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/16_June_2015/Report_153> accessed 21 March 2025).

70 Joint Standing Committee on Treaties, *Report 153: Treaties tabled on 16 June and 23 June 2015* (2015) 6.

71 Joint Standing Committee on Treaties, *Report 153: Treaties tabled on 16 June and 23 June 2015* (2015) 8.

the print disability statutory licence mechanism.[72] The concerns and proposals from the various quarters propelled the process of amending the Copyright Act 1968.

The discussion now turns to the actual amendment of the Copyright Act 1968 and the extent to which the provisions of the Copyright Act 1968 are consistent with the objectives of the Marrakesh Treaty. Upon the ratification of the Marrakesh Treaty in December 2015, the Australian Government introduced a Bill amending the Copyright Act 1968. Unlike South Africa, where it is almost eight years since the Copyright Amendment Bill (CAB) was first introduced in Parliament,[73] Australia enacted the Copyright Amendment Bill as law in under two years. Public consultations and submissions took approximately a year. In March 2017, the Bill was read in the House of Representatives,[74] and the Copyright Amendment (Disability Access and Other Measures) Act 2017 was enacted as law on 15 June 2017, though Schedule 1 commenced on 22 December 2017.[75]

5.4.3 Analysis of the relevant underlying factors in the Copyright Amendment Act 2017

Various factors were incorporated into the Australian Copyright Act 1968, aligning it with the Marrakesh Treaty. This thesis considers the following factors: the scope of beneficiaries; the various institutions permitted to assist persons with disabilities, and the extent of the uses that they are allowed to carry out; the issue of remuneration and the requirement of commercial availability; the scope of the copyright exceptions under the amended Copyright Act; and the nature of the fair-dealing exception in the context of the Copyright Amendment Act 2017.

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72 Joint Standing Committee on Treaties, *Report 153: Treaties tabled on 16 June and 23 June 2015* (2015) 9.

73 The Bill amending the South African Copyright Act was first introduced in the Parliament in 2015, and the amendment process continues.

74 'The House of Representatives is one of the two houses of the Australian Federal Parliament, the other being the Senate. It is sometimes called the *"people's house"* or the *"house of government"* (original emphasis) (Parliament of Australia, 'About the House of Representatives' (2025) https://www.aph.gov.au/About_Parliament/House_of_Representatives/About_the_House_of_Representatives> accessed 28 April 2025).

75 Li and Selvadurai, 'Facilitating Access to Published Works for Persons with a Print Disability' 639.

5.4.3.1 The scope of the person with a disability under the Copyright Amendment Act 2017

One of the factors meriting consideration is the scope of the 'person with a disability' under the Copyright Amendment Act 2017.[76] Unlike the Marrakesh Treaty, the Australian Copyright Amendment Act 2017 expanded the scope of beneficiaries. It now includes persons with all kinds of disabilities that impact the person's ability to have access to copyrighted works.[77] The term 'person with a disability' under the Copyright Amendment Act 2017 is expanded to include persons with different kinds of disabilities. This expansion is similar to the definition of 'beneficiary person' in the South African Copyright Amendment Bill (CAB) [13F-2017], as extensively discussed in Chapter Four of this thesis.[78] However, the Copyright Amendment Bill (CAB) [13F-2017] does not clearly define persons with disabilities.

The scope of the term 'person with a disability' in the Australian Copyright Amendment Act 2017[79] goes beyond the provisions of the Marrakesh Treaty. Unlike the Copyright Amendment Act 2017, the Treaty's definition of 'beneficiary' includes the following: a person who is blind, a person who experiences visual impairment or perceptual or reading disability and cannot read printed materials in the same way as a person who has no impairment or disability, or a person who, due to physical disability, will not be able 'to hold or manipulate a book or to focus or move the eyes to the extent that would normally be acceptable for reading, comma, regardless of any other disabilities.' [80]

The Marrakesh Treaty focuses only on persons with a print disability affecting the person's ability to read printed materials. In Australia, by contrast, the term 'person with a disability' is defined as a 'person with a disability that causes the person difficulty in reading, viewing, hearing or comprehending copyright material in a particular form.'[81] The term thus includes blind people, persons with other forms of visual impairments, and

76 Copyright Amendment Act 2017, sch 1, s 1.
77 Copyright Act 1968, s 10(1) sv 'person with a disability.'
78 The beneficiary persons are referred to as persons with disabilities in s 19D of Bill 13F-2017. Various subsections refer to persons with disabilities. For example, see s 19D(1) and s 19D(3) of Bill 13F-2017.
79 Copyright Amendment Act 2017, sch 1, s 1.
80 Marrakesh Treaty, Art 3.
81 Copyright Act 1968, s 10(1).

persons who, because of their disabilities, are unable to access copyrighted works to the same degree as able persons. The Australian Copyright Act 1968, as amended, accommodates individuals other than those listed in the Marrakesh Treaty who find it difficult to access copyrighted works as a result of their disabilities. So the scope of the expression 'person with a disability' under the Australian Copyright Act 1968 is not restricted to persons who experience challenges in reading printed materials as a result of their disabilities.

As the exception under section 113F of the Copyright Act 1968 applies to any person with any form of disability affecting his or her ability to access copyrighted works,[82] this means that individuals who experience aural, cognitive, and other forms of disabilities are also protected under the Copyright Act 1968, on condition that their disabilities hinder their access to copyrighted materials.[83] This position certainly separates the Australian concept of 'person with a disability' from the concept of a 'beneficiary person' under the Marrakesh Treaty.[84] Correspondingly, due to the lack of a proper definition, it is unclear whether the underlying interpretation of the term 'person with a disability' as contained in the South African Copyright Amendment Bill (CAB) [13F-2017], is compatible with the Australian definition of the phrase.

5.4.3.2 Organisations assisting persons with a disability, and the nature of the uses that they can perform

The next factor to consider is the meaning of an 'organisation assisting persons with a disability,' and the nature of the uses that these organisations are allowed to carry out while assisting these persons. The scope of these organisations under the Copyright Amendment Act 2017[85] is, therefore, not limited to those with the sole aim of assisting persons with print disabilities. The scope has been expanded to include educational

82 Copyright Act 1968, s 113F.

83 Laurence R Helfer, Molly K Land and Ruth Okediji, 'Copyright Exceptions across Borders: Implementing the Marrakesh Treaty' (2020) 42(6) European Intellectual Property Review 332–340, 337.

84 Marrakesh Treaty, Art 3 'Beneficiary Persons.'

85 Copyright Amendment Act 2017, sch 1, s 1 sv 'organisation assisting persons with a disability.'

institutions as well as those organisations whose key objective, or one of their central objectives, is to aid persons with disabilities.[86]

The interpretation of organisations assisting persons with a disability under the Australian Copyright Amendment Act 2017 is broader but also more precise than the interpretation ascribed by section 19D of the South African CAB [13F-2017].[87] Furthermore, in comparison with the Marrakesh Treaty, the definition of an 'organisation assisting persons with disabilities,' contained in the Australian Copyright Amendment Act 2017,[88] includes institutions that partially render services to the beneficiaries.[89] By contrast, the Marrakesh Treaty clearly states that an authorised entity also refers to government institutions or non-profit organisations that primarily render services to VIPs and other persons with print disabilities.[90]

The Australian Copyright Amendment Act 2017[91] permits any use of copyrighted works with the specific aim of helping individuals with disabilities access copies of the copyrighted materials in the formats applicable to their conditions.[92] This use is not considered an infringement of copyright and is therefore permitted under the Copyright Amendment Act 2017.[93] This position differs slightly from the provision of the Marrakesh Treaty that restricts the use of copyrighted works to specific beneficiaries.[94] In terms of the Australian Copyright Act 1968, organisations, as well as individuals representing such organisations, are authorised to use works without prior permission from the copyright owners if two conditions are met. The first condition is that 'the use is for the sole purpose of assisting one or more persons with a disability to access the material in a format that

86 Australian Copyright Act 1968, ss 10(1) and 113F.
87 Section 19D(1) of Bill 13F-2017, refers to '(A)n authorized entity, or any person as may be prescribed and who serves persons with disabilities' that carries the same meaning as 'authorized entities' as contained in the Marrakesh Treaty.
88 Copyright Amendment Act 2017, sch 1, s 1 sv 'organisation assisting persons with a disability.'
89 Copyright Act 1968, s 113F.
90 Marrakesh Treaty, Art 2(c).
91 Copyright Amendment Act 2017, sch 1, s 2.
92 Copyright Act 1968, s 113F.
93 Copyright Amendment Act 2017, sch 1, s 2.
94 Reference is made to persons who are blind, visually impaired or print disabled, including persons with specific conditions such as people with perceptual or reading disabilities or with physical disabilities who cannot read printed works. See the Marrakesh Treaty, Art 3.

the person or persons require because of the disability.'[95] The second condition is that 'the organisation, or the person acting on behalf of the organisation, is satisfied that the material (or a relevant part of the material) cannot be obtained in that format within a reasonable time at an ordinary commercial price.'[96]

5.4.3.3 The issue of remuneration and the requirement of commercial availability

The next factor to consider is the issue of remuneration and the requirement of commercial availability. Under section 113F of the Copyright Act 1968, the authorised organisations assisting persons with disabilities are not obliged to pay remuneration to copyright owners.[97] This position accords with the repealed section 135ZP of the Copyright Act 1968, which advocated the principle that copyright owners should not request the institutions assisting individuals with print disabilities to pay remuneration. However, to protect the interests of copyright owners, the copyrighted works must be used solely for assisting persons with disabilities.[98]

By contrast, the South African CAB [13F-2017], places too heavy a burden on persons with disabilities or the entities assisting them by stating that they should know or must have reasonable grounds to believe that the copies of the accessible format are meant only for such persons with disabilities.[99] This positive obligation placed on persons with disabilities or the entities assisting them is unnecessary and should have no place in South African copyright law. Any legal provision that promotes adherence to commercial availability within the context of the second requirement of the three-step test may hinder disabled people's opportunities of enjoying their right to access copyrighted works in versions that are suitable to their conditions. Maintaining and promoting the principle of commercial availability may be considered vital within the context of the three-step test,

95 Copyright Act 1968, s 113F(a).
96 Copyright Act 1968, s 113F(b).
97 Copyright Act 1968, s 113F.
98 Copyright Act 1968, s 113F(a).
99 See the CAB, s 19(4)(b).

but the provision of the Marrakesh Treaty does not make adherence to commercial availability compulsory.[100]

5.4.3.4 The scope of the copyright exception under the Copyright Amendment Act 2017

A further important factor to be considered is the scope of the copyright exceptions applicable to the various uses of copyrighted works in accessible format copies. Section 113F of the Copyright Act 1968 has increased the scope of the exceptions in relation to the use of copyrighted works by the authorised institutions. The increase in the scope of exceptions for use results from expansions to the scope of various factors such as the classification of beneficiaries, the nature of works that are subject to copyright exceptions, and the variety of accessible formats. For example, the increase in the classification of beneficiaries has expanded the exceptions for the use of accessible format copies.[101] Section 10(1) of the Copyright Act 1968 defines 'copyright material' as meaning 'anything in which copyright subsists.'[102]

In addition, the nature of works that can be reproduced for persons with disabilities is no longer restricted to literary and dramatic works but has increased to accommodate other areas such as artistic works.[103] Section 113F of the Copyright Act 1968 does not restrict the nature of works that are subject to copyright exceptions for persons with disabilities. Further, the flexibility of section 113 of the Copyright Act 1968 enables the adoption of a broader choice of accessible formats, compared to the repealed section 135 of that Act, which contributed to the increase in exceptions for use. This development is partly in line with the view of the South African Constitutional Court in *Blind SA CC* where the court indicated that people who experience other forms of disabilities, such as those with hearing impairments, may also require works in accessible formats,[104] and the court thus

100 The principle the three-step test is discussed fully in Chapter Three of this thesis, within the context of the provisions of the Marrakesh Treaty. For more information on the Treaty's position on commercial availability, see the Marrakesh Treaty, Art 4(4).

101 Copyright Act 1968, s 113F.

102 See also the Copyright Amendment Act 2017, sch 1, s 1.

103 Unlike s 135ZP, which has been repealed, s 113F of the Australian Copyright Act 1968 also applies to kinds of materials other than literary and dramatic works.

104 *Blind SA CC* [87].

held that the process of converting a work into accessible format copies may not be that straightforward.[105]

The scope of the copyright exceptions for uses of copyright works as contained in the Australian Copyright Act 1968[106] extends beyond the Marrakesh Treaty. The Treaty specifically provides that copyright exceptions should relate only to the published literary and artistic works in so far as they are considered in the Berne Convention for the Protection of Literary and Autistic Works,[107] which is more restrictive than section 113F of the Copyright Act 1968.[108] Expanding the scope of exceptions is also justifiable due to the increase in the scope of persons with disabilities in the Australian Copyright Act 1968 in comparison with those contained in the Marrakesh Treaty. It becomes necessary to increase the nature of works that are converted into various accessible formats to suit the conditions of persons with various disabilities. Similarly, the increase in the formats that are available to the beneficiaries is also necessary.

5.4.3.5 The nature of the fair-dealing exception in the context of the Copyright Amendment Act 2017

Finally, this thesis considers the nature of the fair-dealing exception in the context of the Copyright Amendment Act 2017.[109] The Copyright Act 1968 incorporates a new dimension of fair dealing that aims at promoting access to copyrighted materials among persons with disabilities.[110] The new fair-dealing exception is not restricted to specific works. Instead, it applies to all kinds of copyrighted materials, copyright material being defined as 'anything in which copyright subsists.'[111]

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105 *Blind SA CC* [85].
106 See s 113F of the Australian Copyright Act 1968.
107 Marrakesh Treaty, Art 2(a).
108 Copyright Act 1968, s 113F. This section does not restrict the nature of works subject to copyright exceptions for persons with disabilities.
109 Copyright Amendment Act 2017, sch 1, s 1.
110 Copyright Act 1968, s 113E Fair dealing for purpose of access by persons with a disability.
111 Copyright Act 1968, s 10(1) sv 'copyright material.' See also the Copyright Amendment Act 2017, sch 1, s 1.

In determining whether a fair dealing has occurred under the Copyright Amendment Act 2017, the following factors must be considered collectively:

> (a) the purpose and character of the dealing;
>
> (b) the nature of the copyright material;
>
> (c) the effect of the dealing upon the potential market for, or value of, the material;
>
> (d) if only part of the material is dealt with—the amount and substantiality of the part dealt with, taken in relation to the whole material.[112]

The new fair-dealing paradigm goes beyond the nature of copyright exceptions contained in the Marrakesh Treaty because persons with disabilities can circumvent TPMs through implementing the fair-dealing exception.

5.5 Post-amendment concerns and possible countermeasures proposed

Unlike South Africa, Australia acted promptly in ratifying the Marrakesh Treaty as one of its signatories. Australia considered it crucial to ratify the Treaty before amending its Copyright Act 1968. In addition, the Australian lawmakers acted reasonably quickly to amend the Copyright Act 1968 to bring it into line with the Marrakesh Treaty. In doing so, some provisions of the Copyright Act 1968 were affected by being repealed completely, or replaced with new ones, or transposed so that most parts of the Act became consistent with the Marrakesh Treaty. Although Australia has made significant advances in copyright law, particularly in promoting and protecting the rights of persons with disabilities, this part of the thesis considers some concerns raised by copyright commentators and researchers. In addition, this chapter considers some countermeasures that are proposed in addressing some of the defects detected in the amended Copyright Act 1968. Unlike South Africa, where the decision of the Constitutional Court in *Blind SA CC* as well as submissions from various stakeholders, copyright commentators, and academics, particularly the members of CAT,[113] established comprehensive analysis and criticisms of the existing and possible defects in both the South African Copyright Act 1978 and the

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112 See also the Copyright Amendment Act 2017, sch 1, s 1; Copyright Act 1968, s 113E.

113 This refers to a group of academic researchers known as the 'Copyright Amendment Bill (CAB) Academic Team.' This group compiled various Academic Opinions submitted to the South African Parliament during the public participation.

Copyright Amendment Bill (CAB) [13F-2017], the Australian Copyright Act 1968 and the Bill amending it did not receive such an extensive analysis and criticism.

5.5.1 Areas of concern detected in the amended Australian Copyright Act 1968

This thesis raises the following areas of concern in relation to the amended Copyright Act 1968: the issue of the commercial availability test, the limited promotion of digital access for persons with disabilities, and the application of the provision on cross-border exchange. The thesis now briefly considers different dimensions of these concerns.

5.5.1.1 The issue of commercial availability in the Australian context

The requirement of the commercial availability test, incorporated in section 113 of the Copyright Act 1968, was adopted because of concerns that applying the exception for persons with disabilities and the organisations assisting them affects the normal exploitation of the copyright holders' works.[114] The test is considered problematic because of the level of complexity associated with its workability and the effect of its application on the users of copyrighted works.[115] The concern about the test relates to factors such as the added financial constraints and the unnecessary delay caused by its application.[116] As considerable time and reasonable financial commitment are needed to investigate whether specific works are available, applying the commercial availability test overburdens potential users of these copyrighted works.[117]

Besides the financial constraint factor, there is an indication that implementing the commercial availability test may lead to a serious time constraint caused by unnecessary delay in seeking the availability of particular works.[118] Potential users or their representatives may experience considerable delay in attempting to determine the

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114 Corinne Tan and Perry Bing Peh, 'Improving Accessibility to Copyright Works for Persons with Print Disabilities in Australia and Singapore' (2021) 52(8) IIC-International Review of Intellectual Property and Competition Law 1020–1049, 1034.

115 Li and Selvadurai, 'Facilitating Access to Published Works for Persons with a Print Disability' 642.

116 Australian Law Reform Commission, *Copyright and the Digital Economy* Final Report ALRC Report 122 109.

117 Australian Law Reform Commission, *Copyright and the Digital Economy* Final Report ALRC Report 122 109.

118 Australian Law Reform Commission, *Copyright and the Digital Economy* Final Report ALRC Report 122 358.

availability of particular works based on the requirement of the commercial availability test.

Universities Australia also argued that the commercial availability test makes it extremely difficult for universities to make copies of copyrighted materials in accessible formats for their disabled students.[119] Instead of burdening users and the institutions representing them to conduct a check, it is proposed that copyright holders should play a positive role in protecting their interests by providing, in a 'central notification system,' the necessary information about the availability of their works.[120]

5.5.1.2 Limited promotion of digital access for persons with disability

Another post-commencement concern is the need to adopt and implement a web accessibility paradigm that is inclusive. For example, the *Maguire* case identified the consequential effect of excluding persons with print disabilities from web content that should have been made available in accessible formats.[121] The presiding Commissioner clearly stated that he was convinced that Maguire's limited access to the web content must have caused him serious emotional trauma, humiliation, and rejection.[122] The consequential effect of such exclusion on him cannot be overstated. His persistent effort to cope with the negative and dismissive attitude of society, especially the organisation required to consider his interests, remains difficult to comprehend.[123]

Researchers and copyright commentators are greatly concerned that despite the emerging developments in digital technologies, persons with print disabilities still have only limited access to web content.[124] There is little or no collaboration among producers

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119 See Universities Australia, 'Submission to Attorney-General's Department,' *Marrakesh Treaty Options for Implementation* (2015) <https://www.infrastructure.gov.au/sites/default/files/submissions/MarrakeshSubmissionUniversitiesAustralia.doc> accessed 21 March 2025.

120 Australia Digital Alliance, Submission to Attorney-General's Department, *Marrakesh Treaty Options for Implementation* <https://www.infrastructure.gov.au/sites/default/files/submissions/MarrakeshSubmissionAustralianDigitalAlliance.doc> accessed 21 March 2025.

121 *Maguire v Sydney Organising Committee for the Olympic Games* 2000b.

122 *Maguire v Sydney Organising Committee for the Olympic Games* 2000b.

123 *Maguire v Sydney Organising Committee for the Olympic Games* 2000b.

124 Li and Selvadurai, 'Facilitating Access to Published Works for Persons with a Print Disability' 645.

and publishers of content in alternative formats, which may make it challenging for VIPs to gain access to a variety of electronic works.[125]

It may be argued that through ratifying and implementing the Marrakesh Treaty, the removal of legal barriers affecting the reproduction and distribution of print materials in accessible form could easily be achieved. However, there are still organisational and technical barriers linked to publishing print materials and producing web content in accessible formats. The achievement of the Marrakesh Treaty's objective of granting print-disabled persons equal access to copyrighted works depends mainly on factors such as implementing the Treaty's obligations at the level of domestic laws and the extent to which the specific exceptions are applied in practice.[126]

A further factor contributing to the issue of limited access to digital content among persons with disabilities is the inaccessibility of circumvention devices because of the prohibition on manufacturing, importing, and distributing those devices by the Copyright Act 1968.[127] Sections 116AO and 116AP of the amended Copyright Act 1968 have made it unlawful to distribute the devices and to offer services needed for circumventing TPMs. Although VIPs are permitted to circumvent TPMs,[128] it remains challenging for these persons and institutions assisting them to produce accessible format copies of copyrighted materials in digital form due to the restrictions placed on distributing devices and rendering the services that target the circumvention of TPMs.

5.5.1.3 Issues concerning the cross-border exchange provision

A few concerns have been identified about applying the cross-border exchange provision in the amended Australian Copyright Act 1968. The central aim of adopting the cross-border exchange provision in the Marrakesh Treaty is to promote the distribution and

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125 Nicola Suzor, Paul Harpur and Dilan Thampapillai, 'Digital Copyright and Disability Discrimination: From Braille Books to Bookshare' (2008) 13 Media and Arts Law Review 1–28, 2.

126 Karolina Sztobryn, 'A More Pluralistic Approach to Copyright Protection after the Marrakesh Treaty' 341–357, 341–342 in Susy Frankel (ed), *Is Intellectual Property Pluralism Functional?* (Edward Elgar 2019). See also Tan and Peh, 'Improving Accessibility to Copyright Works for Persons with Print Disabilities in Australia and Singapore' 1034.

127 Copyright Act 1968, s 116AO.

128 Australian Copyright Act 1968, ss 116AN(9)(c) and 132APC(9)(c). See also Australian Copyright Regulations 2017, reg 40(2)(b).

sharing of accessible format copies of works, with the intention of preventing unnecessary duplications that could lead to wasteful effort and expense. However, the application of the cross-border exchange provision in the amended Australian Copyright Act 1968 does not accord with the Marrakesh Treaty, as it fails to show how to engage the other contracting parties to the Treaty in implementing the cross-border exchange.[129] The provisions of the Act do not support cooperation between intermediary organisations assisting VIPs in Australia and those in other countries to exchange and distribute copyrighted works in accessible format copies for VIPs' benefit.[130]

The Copyright Act 1968 does not incorporate a provision dealing specifically with how to effectively promote the cross-border exchange of accessible format copies for persons with disabilities.[131] To the contrary, the amended Australian Copyright Act 1968 limits the number of accessible format copies that institutions assisting VIPs may import and distribute to persons with disabilities where the copyrighted works are first published in Australia.[132] It is further indicated that there is a need to adopt a legislative framework, which the Australian copyright system lacks, to govern issues regarding cross-border exchange.[133]

Turning to South Africa, section 19D(4) of the CAB [13F-2017] provides, among other things, that 'a person who serves persons with disabilities' is granted the authority to either export or import, for the benefit of persons with disabilities, lawful copies of works in accessible format without the permission of the copyright holder. Consequently, section 19(D) of the CAB [13F-2017] is appropriate for the implementation of cross-border trade as established in the Treaty.[134]

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129 Li and Selvadurai, 'Facilitating Access to Published Works for Persons with a Print Disability' 646.

130 Tan and Peh, 'Improving Accessibility to Copyright Works for Persons with Print Disabilities in Australia and Singapore' 1030.

131 For more information on how far the Copyright Act 1968 deals with the issue of importation and distribution of copyrighted works in accessible format copies, see ss 44A and 112A of the Australian Copyright Act 1968.

132 Australian Copyright Act, ss 44A and 112A.

133 Li and Selvadurai, 'Facilitating Access to Published Works for Persons with a Print Disability' 646.

134 See the Marrakesh Treaty, Art 5(1).

5.5.2 Possible countermeasures in addressing the defects detected in the Copyright Act 1968

Some measures have been proposed to address some of the defects detected in the amended Copyright Act 1968. It is recommended that the lodgement of the works available in accessible formats be combined with the operation of the Master Copy Catalogue that the Copyright Agency has established.[135] This agency supports those institutions that assist blind people and people with other forms of print disabilities to share information about the accessible format master copies.[136] The Copyright Agency Master Copy Catalogue enables persons with print disabilities and the authorised institutions that represent them to upload and search for print materials in accessible formats, including Braille, large print, and digital and audio formats.[137]

In their initial proposal, Nicola Suzor, Paul Harpur and Dilan Thampapillai identified the need to extend the function of the Copyright Agency Master Copy Catalogue to enable copyright holders to provide vital information about their works and also be able to upload their works in accessible formats in the database.[138] This process makes it not only possible but also easy for institutions to identify the available copies and assist persons with print disabilities to access these works in accessible formats.[139] This proposed measure may offer an inclusive solution to people with disabilities who desire to access works in adapted formats, including works that do not contain sufficient navigation information or those that cannot be easily accessed due to the TPMs attached to them.[140]

A further proposal considered is the issue of digital access to copyrighted materials for VIPs. To combat the issue of digital access and achieve equality, it is proposed that works

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135 For more information, see Copyright Agency, 'Masters Catalogue' (*Mastercopy.com.au*, 2025) <https://mastercopy.com.au/> accessed 21 March 2025.

136 Li and Selvadurai, 'Facilitating Access to Published Works for Persons with a Print Disability' 643.

137 Li and Selvadurai, 'Facilitating Access to Published Works for Persons with a Print Disability' 643.

138 Suzor, Harpur and Thampapillai, 'Digital Copyright and Disability Discrimination: From Braille Books to Bookshare' 1.

139 Li and Selvadurai, 'Facilitating Access to Published Works for Persons with a Print Disability' 643.

140 Peter Saunders, 'The Costs of Disability and the Incidence of Poverty' (2007) 42(4) Australian Journal of Social Issues 461–480, 460–461.

published electronically should be made available in formats accessible to VIPs.[141] In addition, for the VIPs and institutions assisting them to exploit the exception that allows them to circumvent TPMs, it is necessary to incorporate into the Copyright Act 1968 a provision that would allow the manufacturing, importation, and distribution of circumvention devices as well as rendering services for VIPs to circumvent TPMs.[142] Further, as VIPs and the organisations assisting them may lack the appropriate knowledge of how to circumvent TPMs and therefore need professional assistance, it is recommended that the scope of the exception for circumvention as well as the importation, manufacturing, and use of circumvention devices should be expanded.[143]

Proposals have been made about the provision that deals with the cross-border exchange of accessible format copies in the Australian Copyright Act 1968. It is recommended that sections 44A and 112A of the Act should be amended to incorporate provisions that will advance the cross-border exchange of copyrighted works in accessible format copies.[144] To adopt a cross-border exchange provision consistent with the object of the Marrakesh Treaty, Australian lawmakers should incorporate into sections 44A and 112A of the Copyright Act 1968 an exception that will allow organisations assisting VIPs to import and distribute more than two accessible copies of works first published in Australia. It is also proposed that a government agency should be established to facilitate the exchange of accessible format copies between Australia and other countries and ensure that only VIPs are the actual beneficiaries of this exchange.[145]

The provision of the South African bill 13F-2017 should guide the Australian Law Makers in adopting the appropriate exception to address the issue of cross-border exchange raised in this chapter. Section 19D(3) of the South African CAB [13F-2017] provides a mechanism for implementing cross-border trade as stated in the Marrakesh Treaty. Also,

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141 Natalie Cameron, Suzannah Wood and Nicholas Suzor, 'Submission to Attorney-General's Department,' *Marrakesh Treaty Option for Implementation* 1–8, 3. Discussion Paper, November 2014 (ID Code 216469, Commercial & Property Law Research Centre, Faculty of Law, QUT, QUT ePrints) <https://eprints.qut.edu.au/216469/> accessed 21 March 2025.

142 Li and Selvadurai, 'Facilitating Access to Published Works for Persons with a Print Disability' 646.

143 Li and Selvadurai, 'Facilitating Access to Published Works for Persons with a Print Disability' 646.

144 Li and Selvadurai, 'Facilitating Access to Published Works for Persons with a Print Disability' 646.

145 Li and Selvadurai, 'Facilitating Access to Published Works for Persons with a Print Disability' 646.

section 19D(4)(b) of the South African CAB [13F-2017], amidst the criticisms directed at it, makes provision for the import or export of works in accessible format copies.

Finally, despite the implementation of the Copyright Amendment Act 2017 and the ratification of the Marrakesh Treaty, a huge population of persons with print disabilities struggle to obtain print materials in accessible formats in Australia. To achieve inclusive publishing in Australia and other places in the world, there is a need to promote skills and awareness among publishers of print materials and producers of web content in accessible formats. Lack of skills and limited awareness of the importance of producing inclusive reading materials and web content are considered part of the barriers to producing print materials in accessible formats as well as accessible e-books.[146]

5.6 Conclusion

This analysis of the Australian Copyright Act 1968 has shown that the Act, in its current form, is largely consistent with the Marrakesh Treaty. In line with the objective of the Marrakesh Treaty, section 113F of the Copyright Act 1968 protects and promotes access to copyrighted works in accessible formats among persons with disabilities. In addition, section 10(1) aligned the Copyright Act 1968 with the Marrakesh Treaty by clearly identifying the persons who qualify as beneficiaries to gain access to copyrighted works using the specific exceptions. Further, in line with the provision of the Marrakesh Treaty, the Australian Copyright Act 1968 defined the organisations that qualify as authorised organisations to assist persons with disabilities in making copyrighted works available to them in accessible formats.[147] Section 113F of the Act contains the various uses that are permitted under the Act and the specific conditions that must be met for those uses to be exempted from copyright infringement.

In several instances, the Australian Copyright Act 1968 does not align with the Marrakesh Treaty. For example, the Act expanded the term ‘beneficiary’ to include persons with

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146 Agata Mrva-Montoya, ‘Inclusive Publishing in Australia: A Preliminary Report’ 1–28, 3 (2020) <https://ses.library.usyd.edu.au/bitstream/handle/2123/24113/InclusivePublishingReport_AMrvaMontoya.pdf?sequence=2&isAllowed=y> accessed 21 March 2025.

147 Australian Copyright Act 1968, ss 10(1) and 113F.

different kinds of disabilities. This expansion is similar to the definition of 'beneficiary person' under the South African Copyright Amendment Bill (CAB) [13F-2017]. The Marrakesh Treaty focuses only on persons with a print disability, where this disability affects the person's ability to read printed materials. However, unlike the Australian Copyright Act 1968, the South African Copyright Amendment Bill (CAB) [13F-2017] does not clearly define persons with disabilities.

A further instance in which the Australian Copyright Act 1968 differs from the Marrakesh Treaty is the nature of authorised entities. In comparison with the Marrakesh Treaty, the scope of authorised organisations as contained in the Australian Copyright Act 1968 includes organisations whose central objectives include aiding persons with disability, and thus the Act accommodates organisations that partially render services to the beneficiaries. This feature also makes the Australian concept of authorised organisations broader than the provisions of the South African Copyright Amendment Bill (CAB) [13F-2017].

To address the issue of commercial availability in compliance with Article 4(4) of the Marrakesh Treaty, the Australian Copyright Act 1968 provides that the copyrighted works must be used solely to assist persons with disabilities.[148] Unlike section 113F of the Australian Copyright Act 1968, section 19(4)(b) of the South African Copyright Amendment Bill (CAB) [13F-2017], requires persons with disabilities or the entities assisting them to know or have reasonable grounds to believe that the copies of the accessible format are meant only for persons with disabilities, and it thus imposes an excessive burden.

Although the Australian Copyright Act 1968 incorporated copyright exceptions for the benefit of persons with print disabilities, many gaps were still identified. With the collaboration of various non-government organisations and agencies, as well as researchers in copyright law, the Australian Government continued to make a concerted effort to address the challenges.[149] The Australian Government's ratification of the

148 Copyright Act 1968, s 113F.

149 Some of the initiatives led to the numerous amendments to the Australian Copyright Act as well as the introduction of numerous regulations into the Australian copyright system.

Marrakesh Treaty and amendment of the copyright law introduced several improvements in protecting and promoting the rights of persons with disabilities, particularly their right to receive and disseminate copyrighted works in accessible formats. Even though some gaps still remain in the Australian copyright exceptions for persons with disabilities within the context of the Marrakesh Treaty, Australia still has much to teach South Africa in this area of copyright law just like Australia has some lessons to learn from South Africa, for example about handling the issue of cross-border exchange. From Australia the discussion now moves to the second jurisdiction selected for comparison – India.

CHAPTER 6: COPYRIGHT EXCEPTIONS IN INDIA FOR PERSONS WITH DISABILITIES

6.1 Introduction

By ratifying the Marrakesh Treaty soon after it was signed into law, India demonstrated its commitment to addressing the challenges faced by persons with visual impairments (VIPs) and those with other forms of print disabilities in accessing and disseminating copyrighted works in accessible format copies. India signed the Marrakesh Treaty and was the first country to ratify it.[1] This prompt accomplishment reflects India's recognition of the urgency in addressing the issue of book famine affecting VIPs and individuals with other forms of print disabilities.

The aim of this chapter is to discuss Indian copyright law with reference to the South African situation. In the same vein, the purpose is not to deal with Indian copyright law in general. Instead, Indian copyright law is considered in relation to the specific exceptions that have been developed by the Indian Lawmakers to protect and promote the interests of persons with disabilities. Chapter six therefore analyses the specific copyright exceptions that have been developed by India and compare them with the South African situation.

Unlike South Africa, whose Copyright Act was not amended to accommodate the interests of VIPs until the judgment in *Blind SA*[2] declared some provisions of the Act unconstitutional,[3] India amended its Copyright Act 14 of 1957[4] in line with the Constitution of India (1949)[5] to protect and promote the rights of persons with disabilities, particularly

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1 India ratified the Marrakesh Treaty on 24 July 2014. The Treaty became effective on 30 September 2016 and became enforceable in India on the same day.

2 *Blind SA v Minister of Trade, Industry and Competition & Others* (CCT 320/21) [2022] ZACC 33 (21 September 2022), 2023 (2) BCLR 117 (CC), 2022 BIP 518 (CC).

3 *Blind SA CC* [112]. The court ruled that the provisions of ss 6 and 7, read with s 23 of the Copyright Act 78 of 1978, are unconstitutional to the extent that they limit the access of VIPs to copyrighted works in accessible format copies.

4 The most important amendment of the Indian Copyright Act that introduced the required copyright exception for disabled persons was adopted in May 2012.

5 The Constitution of India ('Indian Constitution') is the supreme legal document of India, adopted on 26 November 1949. It contains specific provisions that protect and promote the interests of all citizens. For example, the preamble to the Indian Constitution protects the rights of all citizens, including people with disabilities, and guarantees, among other things, their rights to justice and freedom of thought and expression. Article 15(1) of the Indian Constitution also prohibits discrimination against all citizens of India, including persons with disabilities.

their right to equality. The Indian Constitution enshrines the principle of equality before the law and the equal protection of the laws for all citizens, without exception.[6] Hence, it was necessary to amend the Indian Copyright Act to accommodate the interests of persons with disabilities and ensure that they enjoy equality with persons who do not have disabilities. This is consistent with the objective of the Marrakesh Treaty, as stated in its preamble, which is to achieve non-discrimination, equal opportunity for all, and an inclusive society that accommodates the interests of people with print disabilities.[7]

This chapter of the thesis examines copyright exceptions and other relevant legal principles adopted by India to protect and promote the rights of persons with disabilities, particularly their right to access information, as well as the applicable decisions of competent courts in India. The discussion includes the Indian Constitution and the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (Act 1 of 1996). Therefore, the scope of this chapter extends beyond the amended Indian Copyright Act 1957, which contains the copyright exceptions. It is also necessary to briefly consider the mapping of the amendment to the Copyright Act and other applicable exceptions, such as the principle of fair dealing, which are still relevant to advancing the interests of persons with disabilities. The doctrine of fair dealing, which has been and continues to be the backbone of the Indian copyright exceptions, has received considerable attention from the Indian courts. Although some of the copyright exceptions adopted before the amendment, including the fair-dealing doctrine, remain relevant to addressing the accessibility of copyrighted works for persons with disabilities, this thesis focuses more on the amendment of the Copyright Act and how far the amendment aligns that Act with the Marrakesh Treaty.

This chapter addresses two main topics. The first is the copyright exception in India before the amendment of the Copyright Act, as well as the mapping of the amendment. The second topic is the amendment of the Copyright Act and its implications. Although the

6 See the Indian Constitution, Art 14.
7 Marrakesh Treaty, preamble.

latter received more emphasis, discussions on the former are still vital, as they contain helpful underlying factors and principles.

6.2 Copyright exception in India before the amendment of the Copyright Act 1957 and the mapping of the amendment

This part of the chapter examines the copyright exception in India before the 2012 amendment of the Copyright Act, aiming to assess how far the interests of persons with disabilities were considered. Two aspects are discussed here. One is the copyright exception and the other relevant laws in India before the amendment of the Copyright Act. The other is the mapping of the amendment of the Indian Copyright Act.

6.2.1 The copyright exception and other relevant laws in India before the amendment of the Copyright Act 1957

Before the amendment of the Copyright Act, copyright owners had the exclusive right to reproduce their works in any form, including storing them in any medium.[8] This position resembles the position under the South African Copyright Act[9] before the *Blind SA* case[10] in which the Constitutional Court ruled that some provisions of the Copyright Act infringe the constitutional rights of VIPs and are thus unconstitutional.[11]

Just as in South Africa before the *Blind SA* decision,[12] when permissions from authors and copyright owners were required, so in India before the Copyright Act was amended, it was considered copyright infringement if disabled people or their representatives converted copyrighted works into accessible formats, such as Braille and audiobooks,

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8 Indian Copyright Act 1957, s 14(a)(i).

9 See the provisions of ss 6 and 7, read with s 23 of the South African Copyright Act 78 of 1978. Sections 6 and 7 of the South African Copyright Act provide that a copyright owner has the exclusive right to do or to authorise the doing of any of the acts listed therein. Section 23 deals with the issue of infringement of copyright which would occur where a person, other than the copyright owner, does or causes another person to do any of the acts listed in ss 6 and 7 without the copyright owner's prior permission.

10 *Blind SA v Minister of Trade, Industry and Competition & Others* (CCT 320/21) [2022] ZACC 33 (21 September 2022), 2023 (2) BCLR 117 (CC), 2022 BIP 518 (CC).

11 Sections 6 and 7 as read with s 23 of the SA Copyright Act 78 of 1978 infringe on the rights of VIPs in terms of ss 9(2), 10, 16(1)(b), 29(1)(a) and (b) and 30 of the Constitution of the Republic of South Africa, 1996. See *Blind SA v Minister of Trade, Industry and Competition & Others* [74].

12 *Blind SA v Minister of Trade, Industry and Competition & Others* (CCT 320/21) [2022] ZACC 33 (21 September 2022), 2023 (2) BCLR 117 (CC), 2022 BIP 518 (CC).

without obtaining such permission.[13] Similar to section 23 of the South African Copyright Act, section 51(a)(i) of the Indian Copyright Act stated that copyright infringement would occur when a third party, without prior authorisation, did anything reserved explicitly for copyright owners to do as their exclusive right. Consequently, persons with disabilities were not allowed to reproduce or convert copyrighted works into accessible formats without the copyright owners' prior permission.[14] Before the amendment, there was no special provision in the Indian Copyright Act permitting VIPs and individuals with other forms of print disabilities to access copyrighted works in accessible formats.[15]

The provisions of some parts of the Indian Copyright Act, such as sections 14(a)(i) and 51(a)(i), restricted individuals with disabilities from gaining access to copyrighted works in accessible format copies. Under that Act, before its amendment, no provision specifically allowed disabled persons to produce accessible format copies of lawfully acquired copyrighted works. However, the Indian Copyright Act does provide for the doctrine of fair dealing.[16]

6.2.1.1 The doctrine of fair dealing in Indian copyright law

The fair-dealing doctrine was incorporated into the Indian Copyright Act 1914, which had its roots in the law of the United Kingdom. The doctrine was subsequently incorporated into the current Indian Copyright Act, which was passed in 1957.[17] This doctrine allows a person who is not a copyright owner to use copyrighted works for purposes such as private study, research, criticism, or review without obtaining the prior permission of the copyright owners.[18] Granting exceptions to the exclusive rights of copyright owners in section 14, the Indian Copyright Act also provides for instances where copyrighted works

13 Rachita Agrawal, 'Copyright Law in the Digital World: With special emphasis on Provisions for Access to the Disabled in the United States and India' (2021) 2(2) Indraprastha Law Review 15-23, 22.

14 Pubali Sinha Chowdhury, 'Right to Read: Time to Recognize Rights of Print Disabled under Indian Copyright Law' (2011) 4 Indian Journal of Intellectual Property Law 35–51, 43.

15 Chowdhury, 'Right to Read: Time to Recognize Rights of Print Disabled under Indian Copyright Law' 42.

16 Indian Copyright Act 1957, s 52.

17 Indian Copyright Act 1957, s 52.

18 Indian Copyright Act 1957, s 52. For more analysis of this, see also Robert Burrell, 'Reining in Copyright Law' (2001) 4 Intellectual Property Quarterly 361–388, 361.

can be reproduced without the copyright owners' prior permission.[19] Fair dealing can occur in relation to any work, including literary, dramatic, musical, and artistic works.[20]

The Indian Copyright Act does not contain a clear definition of fair dealing.[21] This gap has made its application difficult. The courts ultimately applied the principle of fair dealing on a case-by-case basis.[22] In an attempt to apply the doctrine of fair dealing to cases before them, the courts developed various interpretations of the term 'fair dealing' to fill the gap in the Indian copyright law without deviating too much from the intent of the provisions.[23]

6.2.1.2 The various interpretations of fair dealing by the Indian courts

One of the older English cases in which the court addressed the issue of fair dealing is *Hubbard v Vosper*, holding that it is impossible to define fair dealing.[24] Several factors must be considered, and defining fair dealing must be a matter of degree, making it a challenging task.[25] The decision in this case, particularly the factors considered by the court formed the basis for the subsequent decisions by the Indian courts. There are three essential factors that the Indian courts often consider in the interpretation and application of the fair-dealing doctrine: the substantiality and quantity of the dealing, the nature of the dealing in relation to its purpose as well as its commercial undertone, and the effect of the dealing on the potential market and the likelihood of competition occurring. These are the three requirements by which the court determines whether using a copyrighted work constitutes fair dealing. None of the three is considered in isolation. Each exhibits characteristics that make it stand out as a unique and independent factor. In this chapter

19 Indian Copyright Act 1957, s 52. For more analysis of this, see also Burrell, 'Reining in Copyright Law' 361.

20 For more information on the categories of works that can be used for fair dealing, see the Indian Copyright Act 1957, s 52.

21 See GB Reddy, 'Infringement of Copyright and Doctrine of Fair Use' (2007) 27(4) DESIDOC Bulletin of Information Technology 29–36, 28.

22 See Revant Ranjan, 'The 'Fair Dealing' Exceptions under Indian Copyright Law: A Critical Appraisal' (2019) 5 South Asian Law Review Journal 1–15, 7.

23 Latika Choudhary, Ketki Chhaya Chaudhary and Samarth Gupta, 'From Photocopier to Pirates: Study on Concept of Fair Dealing in Indian Copyright Law with Brief Analysis of Du Photocopy Judgment' (2018) 4 Pen Acclaims 1–17, <http://www.penacclaims.com/wp-content/uploads/2018/12/Latika-Choudhary.pdf> accessed 27 March 2025.

24 *Hubbard v Vosper* [1972] EWCA Civ 9 (16 February 1972), [1972] 2 QB 84.

25 *Hubbard v Vosper*.

of the thesis, the factors are not considered separately but as a set of factors that collectively play a crucial role in determining whether dealing is fair.

In determining whether fair dealing exists, the principle of substantiality plays a crucial role as one of the key factors to be considered.[26] Determining whether a substantial portion of the copyrighted work has been affected is essential.[27] The general principle is that the more a portion of the work is used, the less fair the dealing will become, which results in a higher likelihood of copyright infringement.[28] To prove that a particular dealing is unfair, it is necessary to show that a material and substantial portion of the work has been affected. The question, therefore, is whether a substantial part of the work has been infringed and whether the alleged infringement is fair.[29]

The principle of substantiality has two legs: the qualitative and the quantitative aspects. Substantiality has a qualitative aspect. Yet it is often necessary to consider qualitative and quantitative elements to achieve a balanced outcome. In *RG Anand v M/S Delux Films*, the Supreme Court of India, the country's apex court, held that the number of words copied may not be the primary factor in determining the occurrence of copyright infringement; instead, both qualitative and quantitative tests must be considered in order to establish substantiality.[30] However, in *Civic Chandran v Ammini Amma*, the Kerala High Court held that copying is not infringement even if it is substantial, as long as it is made for the purpose of criticism.[31] In the same light, criticism of a specific part of a work, for example, in a parody, does constitute fair dealing.[32]

In *RG Anand v M/S Delux Films*,[33] the Supreme Court of India acknowledged the principle of the idea-expression dichotomy. The court confirmed that some ideas are common and,

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26 Choudhary, Chaudhary and Gupta, 'From Photocopier to Pirates: Study on Concept of Fair Dealing in Indian Copyright Law with Brief Analysis of Du Photocopy Judgment' 8.

27 Laura G Lape, 'Transforming Fair Use: The Productive Use Factor in Fair Use Doctrine' (1995) 58(3) Albany Law Review 677–724, 677.

28 Choudhary, Chaudhary and Gupta, 'From Photocopier to Pirates: Study on Concept of Fair Dealing in Indian Copyright Law with Brief Analysis of Du Photocopy Judgment' 8.

29 Lape, 'Transforming Fair Use: The Productive Use Factor in Fair Use Doctrine' 677–724, 677–678.

30 [1978] INSC 140 (18 August 1978), AIR 1978 SC 1613, 1979 (1) SCR 218 (Supreme Court of India).

31 1996 (16) PTC 670 (Kerala High Court).

32 *Civic Chandran v Ammini Amma*. In *Campbell v Acuff-Rose Music, Inc.*, (1994) 510 U.S. 569, 114 S. Ct. 1164, the US Supreme Court ruled that parodies may be categorised as a form of criticism.

33 [1978] INSC 140 (18 August 1978), AIR 1978 SC 1613, 1979 (1) SCR 218 (Supreme Court of India).

to a large degree, are bound to share some similarities.[34] Therefore, to determine whether an infringement has occurred, it is necessary to consider the substantial part of the work.[35] However, the intention of the person who committed the alleged infringement is always crucial in determining whether the infringement is fair.[36]

The issue of the permissible purpose test was considered in subsequent cases as one of the essential factors that need to be analysed. In *Academy of General Education, Manipal v B Manini Mallya*, the Supreme Court of India held that a dealing does not infringe copyright if it is for private use, including research, criticism, or review.[37] The purpose of applying the fair-dealing exception must be clear and must be permitted as one of the grounds listed in section 52 of the Indian Copyright Act.[38] For example, if the purpose of the use is for commercial or economic reasons, the dealing cannot be fair.

In *The Chancellor, Masters & Scholars of the University of Oxford & Others v Rameshwari Photocopy Services & Others*,[39] the Delhi High Court made a remarkable ruling that the preparation of course packs by compiling copies of applicable portions of various prescribed textbooks and distributing them to students does not constitute copyright infringement, provided that the compilation of the photocopied works are used for the purpose of educational instruction.[40] Ordinarily, this conduct should have been considered a copyright infringement under the principle of substantiality.

The third factor often considered by Indian courts when applying the fair-dealing doctrine is its impact on the potential market and the likelihood of confusion. In *ESPN Stars v Global Broadcast News Ltd & Others*, the concept of the 'likelihood of confusion' was recognised.[41] The Delhi High Court held that to determine the existence of unfairness

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34 See *RG Anand v M/S Delux Films.*

35 *RG Anand v M/S Delux Films*.

36 See *Blackwood and Sons Ltd & Others v AN Parasuraman & Others* AIR 1959 Mad 410 (Madras High Court).

37 AIR 2009 SUPREME COURT 1982, 2009 (39) PTC 393 (SC), (2009) 4 SCC 256 (Supreme Court of India). See also *Blackwood and Sons Ltd & Others v AN Parasuraman & Others* [86].

38 If the purpose of the use does not fall under one of those listed in s 52 of the Indian Copyright Act, it is not considered fair. See *Blackwood and Sons Ltd & Others v AN Parasuraman & Others* [84].

39 CS (OS) 2439/2012 (Delhi High Court).

40 For more information about when such a situation may arise, see *The Chancellor, Masters & Scholars of the University of Oxford & Others v Rameshwari Photocopy Services & Others*.

41 2008 (36) PTC 492 (Delhi High Court) [17].

where two works are concerned, it is necessary to consider the likelihood of confusion.[42] A crucial deciding factor to consider is the third party's impression of the work on which the allegation of infringement is based.[43] Although the Indian courts considered this factor important, it does not stand out on its own in comparison with other factors, unlike in the United States of America, where it is viewed as 'the single most important factor to determine fair use.'[44]

In applying the doctrine of fair dealing, the court maintains that a balance must be struck between the exclusive rights of copyright owners and the rights of users of copyrighted works.[45] Similarly, the Delhi High Court holds that although the law encourages research and learning, this should not be done at the expense of ignoring the rights of copyright owners to prevent the misappropriation of their works. Additionally, it emphasises that copyright is a form of protection, not a barrier to research and learning.[46] This view had also been confirmed in the English case *University of London Press Ltd v University Tutorial Press Ltd*.[47] At the centre of these decisions by the various courts is a balancing act between the interests of copyright owners and those of copyright users. Though the facts and circumstances are different, there is an element of similarity between the approach followed by the courts in dealing with the conflicting interests and the South African Constitutional Court in *Laugh It Off Promotions CC*, where the court considered the interrelationship between intellectual property rights and the right to freedom of expression, confirming that neither right is absolute.[48] The Constitutional Court insisted on balancing the right of the owner of the trade mark against the right to freedom of expression on the premise that neither of the rights is less important than the other.[49] In

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42 *ESPN Stars Sport v Global Broadcast News Ltd & Others* 2008 (36) PTC 492 (Delhi High Court) [17].

43 *ESPN Stars Sport v Global Broadcast News Ltd & Others* [17].

44 Choudhary, Chaudhary and Gupta, 'From Photocopier to Pirates: Study on Concept of Fair Dealing in Indian Copyright Law with Brief Analysis of Du Photocopy Judgment' 11.

45 *The Chancellor Masters & Scholars of the University of Oxford v Narendra Publishing House* 2008 (38) PTC 385.

46 *Syndicate Press of University of Cambridge v Kasturi Lal & Sons* (2006) 32 PTC 487.

47 [1916] 2 Ch 60.

48 *Laugh It Off Promotions CC v SA Breweries International (Finance) BV t/a Sabmark International & Another* (CCT42/04) [2005] ZACC 7 (27 May 2005), 2006 (1) SA 144 (CC) [43].

49 *Laugh It Off Promotions CC v SA Breweries International (Finance) BV t/a Sabmark International & Another* [43].

his separate judgment, Sachs J confirmed the need to strike a balance between the rights of intellectual property owners and the individual rights of users.[50]

Although the principle of fair dealing plays a crucial role in Indian copyright law, limiting the rights of copyright owners for the benefit of users of copyrighted works, some gaps have been detected in its application. One of the significant limitations of applying fair dealing to address the challenges confronting VIPs in retrieving copyrighted works in accessible format copies is that the categories of purposes listed in section 52(1) of the Indian Copyright Act 1957 are limited. Section 52(1) specifies the purposes regarded as exceptions to the exclusive rights of copyright owners.[51] Considering how section 52(1) is framed in relation to exceptions contained in paragraphs (a) to (z), the list of purposes that apply to fair dealing is exhaustive and, therefore, inflexible.

Section 52(1) contains a list of the various acts that are not considered copyright infringement, which create exceptions to the exclusive rights of copyright owners. These exceptions include activities that may be categorised as fair dealings when copyright works are used for various purposes such as: criticism or review of a work; reporting of current events and current affairs; teaching and research; and making copies or adaptations for non-commercial personal use from a legally obtained copy among others. Consequently, any use of the copyrighted works that falls outside the listed grounds may be considered a copyright infringement and thus unlawful. However, some other legal provisions were adopted in India before the amendment for the benefit of persons with disabilities.

6.2.1.3 Other relevant legal provisions adopted in India before the amendment of the Copyright Act 1957 for the benefit of persons with disabilities

Before the amendment of its Copyright Act and the adoption of the Marrakesh Treaty, various provisions were incorporated into the Indian legal system to protect and promote the rights of persons with disabilities to access copyrighted works. These provisions

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50 In *Laugh It Off Promotions CC* Sachs J spent a lot of time balancing the right to freedom of expression and the rights of trade-mark owners.

51 For the comprehensive list of the purposes for which the fair-dealing doctrine may be applicable, see the Indian Copyright Act 1957, s 52(1)(a)–(z).

appear in the Indian Constitution and the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. Additionally, to fulfil its action plan for achieving inclusive education for children and young people with disabilities, the Indian Government adopted relevant policies and legal frameworks.[52] The government recognised education for all children, including those with disabilities, as a fundamental right in line with the Constitution of India.[53] In its National Plan of Action for Children (2005), the government highlighted the need to provide all children with an adequate learning environment that helps them develop their learning abilities.[54] This step ensures the inclusion of children with disabilities in all mainstream educational systems that are made available to all, aligning with the objective of the Marrakesh Treaty as stated in its preamble.[55]

The Indian Constitution guarantees the rights of persons with disabilities, including their rights to freedom of thought and expression, equality, and education. The preamble to the Constitution protects and promotes the rights of all citizens, including their rights to justice and liberty of thought and expression.[56] Article 14 of the Indian Constitution states: 'The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.'[57] Consequently, all laws and legal provisions must protect the interests of all persons, including those with disabilities. Similarly, Article 15 of the Indian Constitution protects all citizens, including those with disabilities, from all forms of discrimination.[58] Moreover, Article 21A of the Indian Constitution promotes the right to education for all children from 6 to 14 years old.[59]

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52 Junaid Rayini, 'Library and Information Services to the Visually Impaired Persons' Library Philosophy and Practice (e-journal) 1510. 1–14 <http://digitalcommons.unl.edu/libphilprac/1510> accessed 27 March 2025.

53 See the Indian National Plan of Action for Children (2005), Introduction. See also Art 21A of the Indian Constitution, which considers the right to education a fundamental right for all citizens of India.

54 Indian National Plan of Action for Children (2005) paras 8.1.2, 8.1.3.

55 One of the objectives is to achieve non-discrimination, equal opportunity for all, and an inclusive society that accommodates the interests of the print disabled. See the Marrakesh Treaty, preamble.

56 Indian Constitution, preamble.

57 Indian Constitution, Art 14.

58 Indian Constitution, Art 15.

59 Indian Constitution, Art 21A.

Another vital statute that, in line with the provisions of the Indian Constitution, protects and promotes the rights of persons with disabilities is the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.[60] This Act aimed to eliminate all barriers to the full participation of people with disabilities in society.[61] In keeping with the Indian Constitution, the 1995 Act promotes the principle of non-discrimination by providing for equal education for all while focusing on how to protect and promote the interests of persons with disabilities to ensure their full participation in society. For example, the Act requires the government and local authorities to provide free education to all children with disabilities under the age of 18.[62] Moreover, section 27 of the Act requires the government to adopt and implement schemes and programmes necessary for the improvement of non-formal education for disabled children, on the one hand, and for the advancement of free access to works in accessible formats such as special books and materials required by disabled children in their educational programmes, on the other hand.[63]

Similarly, the Act requires the government to establish a research process to design and develop measures and materials, such as assistive devices and teaching aids that may be necessary to provide disabled children with equal educational opportunities, similar to those of children without disabilities.[64] Furthermore, section 48 stipulates that the government and local authorities, where equipped, must promote and sponsor research in various areas, including, among other things, the development of assistive devices for children with disabilities.[65] What is unique about the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 is that requires the government not only to promote the availability of works in accessible formats for persons

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60 See the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.

61 Sanjay V Jadhav and Kailas R Jagdeo, 'Recent Patenting Trends in India – A Critical Study' (2020) 8(4) International Journal of Creative Research Thoughts 2320–2882, 2323.

62 Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, s 26.

63 Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, s 27.

64 Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, s 28.

65 Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, s 48.

with disabilities, but also to take active steps, by conducting and sponsoring research, in developing technologies necessary for converting works into accessible formats.[66] However, it was still necessary to amend the Indian Copyright Act by incorporating other aspects of the copyright exceptions that are either unclear or inconsistent with the provisions of the Marrakesh Treaty to the extent that they protect and promote the interest of persons with disabilities in accessing copyrighted works.

6.2.2 Mapping of the amendment of the Indian Copyright Act 1957

This part of the current chapter briefly examines the underlying factors that influenced the amendment of the Copyright Act, offering readers a comprehensive understanding of copyright exceptions for persons with disabilities in India. The two aspects considered here are, first, the relevance of the campaign leading to the amendment of the Copyright Act and the government's proposals and, secondly, the impact of the establishment of the parliamentary standing committee on the amendment of the Copyright Act.

6.2.2.1 The relevance of the campaign leading to the amendment of the Copyright Act 1957 and the Government's proposals

Before its amendment, the Indian Copyright Act did not contain any provisions that specifically protected and promoted the right of persons with disabilities to receive and disseminate copyrighted works in accessible formats. It has been demonstrated that the provisions of section 52(1) of the Act have their limitations, rendering them insufficient to effectively address the challenges faced by persons with disabilities in accessing copyrighted works in formats that accommodate their diverse needs.

The campaign led by Professor Vinod Sena, which advocated for incorporating a copyright exception for persons with disabilities into the Copyright Act, gathered such momentum that the government responded by proposing the inclusion of a clause to constitute a copyright exception.[67] The proposed exception refers to specific acts that

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66 Jadhav and Jagdeo, 'Recent Patenting Trends in India – A Critical Study' 2323.

67 Rahul Cherian Jacob, Sam Taraporevala and Shamnad Basheer, 'The Disability Exception and the Triumph of New Rights Advocacy' (2012) 5(4) National University of Juridical Sciences Law Review 603–634, 607.

would not constitute copyright infringement: reproduction, making copies, or communicating any work to the public in a special format, including sign language.[68] These acts would not constitute copyright infringement on the condition that they are performed for the benefit of persons who suffer from a visual, aural, or any other form of disability preventing them from enjoying copyrighted works in their ordinary formats.[69]

Therefore, the proposed amendment focused on two aspects: the provision of a fair dealing exception to be included in the later proposed section 52(1)(zb), and the provision of a compulsory licence, which was subsequently included in the proposed section 31B of the Indian Copyright Act. Regarding the provisions of section 52(1)(zb), it was suggested that the amendment aimed to introduce exceptions to address the challenges faced by individuals with a print, aural, or any other disability by allowing the adaptation, reproduction, and communication of copyrighted works in special formats.[70] The formats contained in the proposed amendment, which include sign language, must be designed specifically to benefit individuals who suffer from a visual, aural, or any other disability that prevents them from enjoying copyrighted works in their regular formats.[71] Furthermore, section 31B was proposed so as to provide a compulsory licence for persons with disabilities and those assisting them.

However, the government's proposed clause could be considered inadequate, as the exception is limited to special formats that do not cover other forms of disability that do not need the support of Braille and sign language. When narrowly construed, the implementation of such an exception infringed the rights of a class of persons by violating the Indian Constitution.[72] The court's decision in *Gauri Shankar v Union of India* accords with Article 14 of the Constitution, which prohibits unfair discrimination among classes of persons.[73] The Supreme Court of India held that

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68 The Copyright (Amendment) Bill, 2010 (Bill No. XXIV of 2010).
69 The Copyright (Amendment) Bill, 2010 (Bill No. XXIV of 2010).
70 The Copyright (Amendment) Bill, 2010 (Bill No. XXIV of 2010).
71 The Copyright (Amendment) Bill, 2010 (Bill No. XXIV of 2010).
72 For more information, see the Indian Constitution, Art 14.
73 [1994] INSC 459, 1994 4 SCALE 29, 1994 5 JT 634, (1994) 6 SCC 349, AIR 1995 SC 55.

> equals should not be treated unlike and unlikes should not be treated alike. Likes should be treated alike.[74]

It was argued that the application of the restricted copyright exception, as proposed by the government, would be directed only to a minimal section of the community of people with disabilities who need Braille and sign language.[75]

It could be argued that limiting the exception to 'special formats,' as proposed by the government, has specific implications amid the evolution of digital technologies that continue to influence the various formats available to both people with disabilities and those without. On the contrary, it is suggested that the exception should cover multiple formats, including digital formats such as audio formats, which can be used by individuals of all types, including those without disabilities.[76] However, an application of the exception in its broad sense, as suggested by the critics of the government's proposal, fell outside the provision of the Marrakesh Treaty. Under the Treaty, contracting parties are obliged to adopt specific exceptions to the rights of copyright holders to facilitate the production and distribution of copyrighted works in formats that are easily accessible to VIPs.[77] One of the functions of the Treaty, therefore, deals with the mandatory adoption of copyright exceptions for the benefit of individuals with different forms of print disabilities.[78]

The government also raised concerns that the exception proposed by the organisations supporting persons with disabilities was too broad, which would lead to its misuse to the extent that those without disabilities might begin to take advantage of such an exception.[79] Instead of limiting the exception to special formats, the organisation assisting disabled persons argued that the Indian Government should instead limit the scope of beneficiaries

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74 *Gauri Shankar v Union of India* [7].

75 Jacob, Taraporevala and Basheer, 'The Disability Exception and the Triumph of New Rights Advocacy' 608.

76 Jacob, Taraporevala and Basheer, 'The Disability Exception and the Triumph of New Rights Advocacy' 608.

77 Marrakesh Treaty, preamble; and Lida Ayoubi, 'The Marrakesh Treaty: Fixing International Copyright Law for the Benefit of the Visually Impaired Persons' (2015) 13(2) New Zealand Journal of Public and International Law 255–276, 255.

78 Marrakesh Treaty, Art 2(b).

79 Jacob, Taraporevala and Basheer, 'The Disability Exception and the Triumph of New Rights Advocacy' 609.

to exclude persons without disabilities.[80] Consequently, only persons with disabilities should benefit from the accessible format adopted under the proposed exception.[81] In summary, it is necessary to ensure that persons with disabilities remain the only beneficiaries of works in accessible format copies. The government's proposal for a copyright exception necessitated the formation of a parliamentary standing committee.

6.2.2.2 The impact of the establishment of the Parliamentary Standing Committee on the amendment of the Copyright Act 1957

The Parliamentary Standing Committee[82] was established to review the recommendations made by the Indian Government regarding amendments to the Copyright Act. Upon reviewing the government's recommendations, the Committee aligned itself with the observations of organisations acting on behalf of persons with disabilities.[83] Consequently, the Committee noted the following concerns raised by the organisations working for persons with disabilities. First, the compulsory licensing system proposed under section 31B might potentially hinder educational institutions, affected groups, and persons with disabilities from converting and disseminating copyrighted works. Secondly, obtaining permission from the Copyright Board can be a challenging and time-consuming process. Thirdly, the subsequent conversion of copyrighted works might result in further delays, creating a significant financial challenge for students with disabilities. Fourthly, there might be discrimination between blind individuals who are familiar with Braille and those who are not. Finally, the exception provision, as proposed

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80 Jacob, Taraporevala and Basheer, 'The Disability Exception and the Triumph of New Rights Advocacy' 609.

81 It means that persons who do not suffer from any form of disability and so are not prevented from enjoying access to copyrighted works should be excluded as the beneficiaries of the special formats. By contrast, the scope of the special format should be as broad as possible to cover various aspects of adaptions and conversions of the works.

82 See Parliament of India, Rajya Sabha 227, Department-Related Parliamentary Standing Committee on Human Resource Development, *Two Hundred Twenty-Seventh Report on the Copyright (Amendment) Bill, 2010* (presented to the Rajya Sabha on 23rd November, 2010) (laid on the Table of Lok Sabha on 23rd November, 2010) Rajya Sabha Secretariat, New Delhi, November 2010/ Agrahayana, 1932 (SAKA) para 13.3 https://prsindia.org/files/bills_acts/bills_parliament/2010/SCR_Copyright_Bill_2010.pdf accessed 7 April 2025. The Rajya Sabha, also known as the Council of States, is the upper house of India's bicameral Parliament. The Lok Sabha, also known as the House of the People, is the lower house.

83 See Jacob, Taraporevala and Basheer, 'The Disability Exception and the Triumph of New Rights Advocacy' 611.

under section 52(1)(zb), referred only to the 'specially designed' format, particularly Braille, and did not accommodate the interests of persons with various other disabilities, such as cerebral palsy and dyslexia.[84]

Objecting to the idea of 'special formats' as proposed by the government, the Committee leaned towards the 'non-special' approach and maintained that conversions into any accessible format should be allowed.[85] Regarding the nature and definition of 'beneficiary,' it was argued that the concept 'beneficiary' should not be limited to VIPs but should include persons with various forms of disabilities, which warrants the implementation of a 'broad-based format.'[86] For example, regular Braille users may sometimes need to supplement Braille with other accessible formats, such as audio and electronic texts. Even the Braille translation software, in its modern usage, relies on copyrighted material to be first converted into suitable electronic formats. The Committee, therefore, insisted that extending access to works to accessible formats rather than special formats would yield a positive result.[87]

Similarly, the Committee objected to the notion of compulsory royalty payments. According to the government's proposal, fees would probably be charged for copies in addition to the free copies prescribed by the Copyright Board.[88] Such compulsory payment might discourage organisations representing persons with disabilities, as their services are not profit-oriented.[89] However, the issue of compulsory payment for excess

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84 See Jacob, Taraporevala and Basheer, 'The Disability Exception and the Triumph of New Rights Advocacy' 611.

85 See Parliament of India, Rajya Sabha 227, Department-Related Parliamentary Standing Committee on Human Resource Development, *Two Hundred Twenty-Seventh Report on the Copyright (Amendment) Bill, 2010* para 13.6.

86 Parliament of India, Rajya Sabha 227, Department-Related Parliamentary Standing Committee on Human Resource Development, *Two Hundred Twenty-Seventh Report on the Copyright (Amendment) Bill, 2010* paras 13.6–13.7.

87 Parliament of India, Rajya Sabha 227, Department-Related Parliamentary Standing Committee on Human Resource Development, *Two Hundred Twenty-Seventh Report on the Copyright (Amendment) Bill, 2010* para 13.7.

88 Parliament of India, Rajya Sabha 227, Department-Related Parliamentary Standing Committee on Human Resource Development, *Two Hundred Twenty-Seventh Report on the Copyright (Amendment) Bill, 2010* para 13.8.

89 Parliament of India, Rajya Sabha 227, Department-Related Parliamentary Standing Committee on Human Resource Development, *Two Hundred Twenty-Seventh Report on the Copyright (Amendment) Bill, 2010* para 13.8.

copies was addressed by the government department responsible for amending the Copyright Act.

Having considered the recommendations of the Standing Committee regarding the proposed amendment to the Copyright Act, the Indian Government deemed it necessary to revisit the disability exception that it had proposed earlier to accommodate some of the points raised by the Standing Committee. As a result of the continuous pressure from interested groups and the corresponding recommendations, there was a need to finalise the process of amending the Copyright Act.

6.3 The amendment of the Copyright Act 1957 and the impact of the adoption of the copyright exception in India

Considering the various proposals made by different organisations, as well as the Indian Government and the Parliamentary Standing Committee, among others, the Indian legislature decided to embark on amending the Copyright Act to incorporate the appropriate copyright exceptions for persons with disabilities. Therefore, on 17 May 2012, the Indian Parliament introduced a crucial Bill incorporating the copyright exception for persons with disabilities as well as other relevant provisions into the Copyright Act. The adoption of the amendment by the Indian Parliament resulted in the incorporation of the provisions of section 52(1)(zb) and section 31B, which form the first leg and the second leg of the amendment, respectively.

6.3.1 The first leg of the amended Copyright Act 1957

The significant aspect of the amendment is the incorporation of section 52(1)(zb) into the Copyright Act, which states that subject to the specific conditions[90] mentioned in the section, any adaptation, reproduction, or issue of copies or communication to the public of any work in any accessible format does not amount to copyright infringement.[91]

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90 The conditions take into account the persons authorised to carry out the act as well as the purpose for carrying out the act. Moreover, such an act should be carried out on a non-profit basis.

91 Indian Copyright Act as amended, s 52(1)(zb).

The first factor to consider concerns the various acts permitted by section 52(1)(zb). The specific exceptions incorporated into the Act refer to adaptation, reproduction, as well as the issue of copies or communication of the copyrighted works in accessible formats. This position differs slightly from the provisions of the Marrakesh Treaty, which requires contracting parties to adopt exceptions to the rights of copyright holders to facilitate the production and distribution of copyrighted works in formats that are easily accessible to persons with visual impairments.[92] The Treaty merely requires the contracting parties to incorporate specific exceptions into their copyright laws that would allow the reproduction, distribution, and making available of accessible formats of copyrighted works for the benefit of persons with disabilities.[93]

Unlike the provision of the Treaty, section 52(1)(zb) of the Indian Copyright Act refers specifically to the 'adaptation' of copyrighted works for the benefit of persons with disabilities. In the same vein, one of the issues fiercely debated in the *Blind SA CC* case is whether only reproduction is necessary to convert works into accessible formats for VIPs or whether adaptation is also required for the conversion to take place. In analysing the various views in *Blind SA CC*, the Constitutional Court ruled that 'a content-based distinction between reproduction and adaptation will not always be definitive.'[94] The Constitutional Court maintained that converting a work into an accessible format copy may not be straightforward and may require more than mere reproduction.[95]

Additionally, unlike the Marrakesh Treaty, which does not mention adaptation, the amended Indian Copyright Act refers explicitly to adaptation as one of the acts that should be permitted under the copyright exception.[96] In line with the provision of the Treaty which requires contracting parties to adopt copyright exceptions that make it possible to, among other things, distribute and make available the accessible formats copies to VIPs,[97] the

92 Marrakesh Treaty, preamble.
93 Marrakesh Treaty, Art 2(b).
94 *Blind SA v Minister of Trade, Industry and Competition & Others* [84].
95 *Blind SA v Minister of Trade, Industry and Competition & Others* [85].
96 Indian Copyright Act as amended, s 52(1)(zb).
97 Marrakesh Treaty, Art 4.

Indian Copyright Act incorporated the 'issue of copies or communication' of the accessible format copies as part of the copyright exception introduced into that Act.[98]

In comparison with the South African position, section 19D(1) of the Copyright Amendment Bill (CAB) [13F-2017], in South Africa refers to making copies of works in accessible formats for the benefit of persons with disabilities without requiring permission from the copyright holders. Interpreting section 19D(1) within the context of the South African Copyright Act, it could be inferred that only the process of reproduction is applicable in converting copyrighted works to accessible format copies.[99] Therefore, there seems to be a clear distinction between 'reproduction of a work' and 'adaptation of a work.' Unlike the Indian Copyright Act,[100] the interpretation of the term 'conversion' in reference to section 19D(1) is narrow and may not include adaptation.[101]

Arguably, section 19D(1) of the Copyright Amendment Bill (CAB) [13F-2017], in South Africa, compared with section 52(1)(zb) of the Indian Copyright Act, is more consistent with the provisions of the Marrakesh Treaty. However, section 52(1)(zb) of the Indian Copyright Act aligns more closely with the decision of the South African Constitutional Court in *Blind SA CC*.[102] According to the Marrakesh Treaty, the exception adopted by member states must allow the reproduction of works in accessible formats without the permission of the authors and other copyright holders.[103] However, the Treaty does not prevent member states from adopting copyright exceptions and permits the adaption of copyrighted works in its general sense.

Another important aspect of copyright exception incorporated into the Indian Copyright Act indicates that 'any person' is permitted to facilitate access to copyrighted works among persons with disabilities subject to conditions mentioned in the Act.[104] Reference to 'any person' is too broad and falls outside the scope of permitted persons or entities

98 Indian Copyright Act as amended, s 52(1)(zb).
99 South African Copyright Act, s 6.
100 See s 52(1)(zb) of the Indian Copyright Act as amended.
101 For more information on the issue of adaptation, see the South African Copyright Act, s 1.
102 *Blind SA v Minister of Trade, Industry and Competition & Others* [84]–[85].
103 Marrakesh Treaty, Art 4(1).
104 In terms of s 52(1)(zb) of the Indian Copyright Act as amended, the use of the accessible format copies shall be, among other things, for private, personal, or educational purposes.

as incorporated in the Marrakesh Treaty. And according to the Indian Copyright Act, 'any organisation' assisting disabled persons is allowed to make accessible format copies available to such persons.[105] The use of the term 'organisation' in section 52(1)(zb) of the Indian Copyright Act is more inclusive than the use of 'authorized entities' in the Marrakesh Treaty.[106]

In terms of the Marrakesh Treaty, an authorized entity refers to

> an entity that is authorized or recognized by the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a nonprofit basis.[107]

The term 'authorized entity' also refers to government institutions or non-profit organisations that primarily render services to VIPs to enhance their access to works in adaptive formats.[108] This term may include educational institutions and libraries as well as healthcare organisations, civil society groups, and other governmental or non-profit organisations whose primary obligation is to promote the interest of the beneficiaries as provided in the Marrakesh Treaty.[109]

Within the South African context, section 19D(3) of the Copyright Amendment Bill (CAB) [13B-2017] refers to the 'person that serves persons with disabilities' and clearly indicates that the activity of such a person should be carried out 'on a non-profit basis' and should be solely for the benefit of such persons with disabilities. The provision of section 19D(3) does not align with the Marrakesh Treaty because it does not make a specific reference to the term "authorized entity". On this basis, the CAT members recommended that for greater clarity and to align the South African Copyright Act with the provisions of the Marrakesh Treaty, a proper definition of 'authorized entity' should be incorporated into the Bill.[110] The use of the term 'authorized entity' and the definition of 'authorized entity' are

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105 See the Indian Copyright Act 1957 as amended, s 52(1)(zb).
106 Marrakesh Treaty, Art 2(c).
107 Marrakesh Treaty, Art 2(c).
108 Marrakesh Treaty, Art 2(c).
109 Laurence R Helfer and others, *The World Blind Union Guide to the Marrakesh Treaty: Facilitating Access to Books for Print-Disabled Individuals* 28 (Oxford University Press 2017) <https://doi.org/10.1093/acprof:oso/9780190679644.001.0001> accessed 3 December 2025.
110 For information see Beiter and others, 'Copyright Reform in South Africa: Two Joint Academic Opinions on the Copyright Amendment Bill [B13B-2017]' (2022) 25 Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad 1–45, 26.

now incorporated in Bill 13F-2017 as contained in section 19D(4)(b) and section 1(c) respectively.

According to the Indian Copyright Act, the term ‘any organization"

> includes [an] organization registered under section 12A of the Income-tax Act, 1961 (43 of 1961) and working for the benefit of persons with disability or recognized under Chapter X of the Persons with Disabilities (Equal Opportunities, Protection or Rights and Full Participation) Act, 1995 (1 of 1996) or receiving grants from the government for facilitating access to persons with disabilities or an educational institution or library or archives recognized by the Government.[111]

However, section 52(1)(zb) applies in instances where the specified activities are carried out for the benefit of disabled persons and strictly on a non-profit basis.[112] In comparison with the Marrakesh Treaty and the South African CAB, the term ‘organization’ under the amended Indian Copyright Act is more inclusive, as it is used more broadly and refers to both ‘any person’ and ‘any organization.’[113]

The scope of section 52(1)(zb) of the Indian Copyright Act extends to private or personal use, as well as educational purposes or research, which enables the effective actualisation of the right to education and participation in cultural activities among persons with disabilities. The activities listed in section 52(1)(zb) must be carried out by any person whose primary aim is to facilitate access to copyrighted works for the benefit of disabled persons. The effective implementation of section 52(1)(zb) is of the utmost importance, as it targets the interest of disabled persons who have been significantly marginalised. Another crucial benefit of the effective implementation of this provision is, in line with the objective of the Marrakesh Treaty, to reduce the unnecessary duplication costs associated with making copyrighted works available in accessible formats for persons with disabilities.

The Indian Copyright Act refers to persons with disabilities as beneficiaries who should exercise their right to adaptation, reproduction, and communication of works in accessible formats. Therefore, the term ‘persons with disabilities,’ under the Indian Copyright Act, is

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111 Indian Copyright Act as amended, s 52(1)(zb).

112 Anjana Girish and Saraswathy Vaidyanathan, ‘Visually Impaired Persons and Access to Copyrighted Works: The Indian Roadmap’ (2021) 18(4) Indonesian Journal of International Law 501–522, 505.

113 Indian Copyright Act as amended, s 52(1)(zb).

not restricted to persons who are blind, visually impaired, or print disabled, as provided in the Marrakesh Treaty. Just like the Indian Copyright Act, the amended Australian Copyright Act 1968, under its definition of 'person with a disability,' expanded the scope of beneficiaries to include persons with all kinds of disabilities that affect those persons' ability to access and enjoy copyrighted works.[114] In defining the term beneficiaries within the context of copyright law, there is a similarity between India, Australia and South Africa, though South African definition of persons with disabilities lacks clarity.[115]

The South African CAB[116] refers to 'persons with disabilities' as the beneficiaries, but it fails to provide a clear definition of persons with disabilities. Unlike the Australian Copyright Act 1968, the Indian Copyright Act does not specify the nature of disability that qualifies a person as a beneficiary; instead, it refers to 'disabilities,' making it more inclusive. Similarly, the South African CAB [13F-2017] merely refers to 'persons with disabilities' as beneficiaries of the proposed copyright exceptions.

By contrast, the Marrakesh Treaty is very specific about the beneficiary persons of copyrighted works in accessible format copies as prescribed in the Treaty. The specific exceptions outlined in the Treaty are intended for individuals who are blind, visually impaired, or print disabled.[117] According to Article 3 of the Treaty, the different categories of beneficiary persons include a person who is blind; a person who experiences visual impairment or perceptual or reading disability and cannot read printed materials at the same level as a person who has no impairment or disability; and a person who, through physical disability, is unable 'to hold or manipulate a book or to focus or move the eyes to the extent that would normally be acceptable for reading; regardless of any other disabilities.'[118] However, the Treaty does not contain any provision restricting member states from expanding the scope of beneficiaries, provided that the categories of beneficiaries stipulated in the Treaty are covered. Although the definition of 'persons with

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114 Australian Copyright Act 1968, s 10(1) 'person with a disability.'

115 CAB, s 19(1)(h).

116 The provisions of both Bills 13B-2017 and 13F-2017 contain the definition of 'persons with disabilities'.

117 For more information, see Brook K Baker, 'Challenges Facing a Proposed WIPO Treaty for Persons Who are Blind or Print Disabled' (May 21, 2013) Northeastern University School of Law Research Paper No. 142-2013 <https://ssrn.com/abstract=2267915> accessed 7 April 2025.

118 Marrakesh Treaty, Art 3.

disabilities' in the South African CAB [13F-2017] extends beyond the definition of 'beneficiary persons' in the Marrakesh Treaty, it encompasses all the categories of beneficiaries under the Treaty. This thesis supports the expansion of beneficiaries to include disabilities other than those listed in the Treaty.

Regarding the nature and scope of works that can be made available to beneficiary persons, the Indian Copyright Act refers to 'works' without specifying the types of works that can be converted into accessible formats. Under the Marrakesh Treaty, the applicable works are limited to literary and artistic works, as defined in the Berne Convention for the Protection of Literary and Artistic Works.[119] Whereas the exceptions adopted in section 52(1)(zb) of the Indian Copyright Act apply to all kinds of works, the exceptions contained in the Marrakesh Treaty are restricted to published literary and artistic works, provided that they are available to persons with visual impairments (VIPs) in specific formats that are accessible to them.[120]

Although expanding the nature and scope of works beyond literary and artistic works may be necessary to accommodate persons with various forms of disabilities, it is recommended that the category 'work' be clearly defined. Similarly, the nature and scope of 'accessible format copies' should be broad enough to accommodate persons with disabilities other than print disabilities as contained in the Marrakesh Treaty. This view aligns with the ruling of the Constitutional Court in *Blind SA CC* that people who experience other forms of disabilities, such as those with a hearing impairment, may also require works in accessible formats.[121]

Contrary to Article 5(2) of the Marrakesh Treaty, section 52(1)(zb) of the Indian Copyright Act and section 19D(4)(b) of the South African CAB [13F-2017] are formulated in such a way that they overburden the organization[122] and the authorized entity or the person,[123] respectively, assisting persons with disabilities. The Indian Copyright Act requires the

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119 Marrakesh Treaty, Art 2(a).

120 Marketa Trimble, 'The Marrakesh Puzzle' (2014) 45(7) IIC - International Review of Intellectual Property and Competition Law 768–795, 775.

121 *Blind SA v Minister of Trade, Industry and Competition & Others* [87].

122 This refers to the Indian copyright exception.

123 As contained in the South African CAB.

organizations assisting persons with disabilities to ensure that disabled persons use the accessible format copies;[124] section 19D(4)(b) of the South African CAB [13F-2017] provides that the import or export of works in accessible format copies would be allowed only if the person[125] assisting persons with disabilities 'knows, or has reason to know, that the accessible format copy will be used for purposes other than to aid persons with a disability.'[126] The positive obligation placed on individuals with disabilities or persons, as well as institutions assisting those individuals, is unnecessary, because this obligation may hinder the achievement of non-discrimination and affording equal opportunity to all as stipulated in the preamble to the Marrakesh Treaty.

6.3.2 The second leg of the amended Copyright Act 1957

The amended Indian Copyright Act also addresses the issue of compulsory licences for persons with disabilities. While section 52(1)(zb) focuses on the conversion of copyrighted works to accessible formats on a non-profit basis as well as the sharing of such works among disabled people, section 31B on a compulsory licence for the benefit of disabled persons deals with circumstances where reproduction and conversion of works for the benefit of persons with disabilities are carried out for profit. Section 52(1)(zb) prohibits any form of conversion of copyrighted works to make a profit. By contrast, section 31B allows, on a for-profit basis, the conversion of works that would only benefit persons with disabilities on the condition that a licence is obtained from the Copyright Board as prescribed in the Indian Copyright Act.[127]

If section 52(1)(zb) does not apply to the situation, any person assisting persons with disabilities on a for-profit basis or for business is allowed to apply to the Copyright Board for a licence to convert copyrighted works into any format for the benefit of disabled persons.[128] This application must be accompanied by the required fee. On receipt of the application, the Board is expected to attend to it as expeditiously as possible and try to

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124 Indian Copyright Act as amended, s 52(1)(zb).

125 This refers to a 'person', including an authorized entity, who assists a person with disabilities in receiving or obtaining copies of works in an accessible format.

126 CAB, s 19D(4)(b).

127 Indian Copyright Act as amended, s 31B.

128 Indian Copyright Act as amended, s 31B.

finalise the application within two months calculated from the date on which the application is received.[129] The Board may also conduct an inquiry that it considers necessary to establish the credentials of the applicant and satisfy itself that the application has been made in good faith.[130]

If satisfied that all requirements have been met,[131] the Board may direct the Registrar of Copyrights to grant the applicant the required licence to publish the work in question. The compulsory licence issued by the Registrar must indicate both the means and format of the publication. It must also specify the period during which the compulsory licence is to be executed and indicate the number of copies that may be issued, where copies need to be made, as well as the rate or royalty for payment.[132] Although section 31B of the Indian Copyright Act falls outside the scope of the Marrakesh Treaty, it accommodates the elements of the three-step test, and it does not contradict the object of the Treaty.[133]

6.3.2 The impact of the adoption of the copyright exception in India

The adoption of the copyright exception has addressed the hindrance to accessible format copies caused by the Indian Copyright Act, which required prior permission from the copyright owners to convert their works into other formats.[134] The amendment of the Copyright Act has abolished the requirement of obtaining prior permission from copyright owners to convert their works into accessible format copies. The adoption of the copyright exception has largely aligned the Indian Copyright Act with the provisions of the relevant international treaties, including the WCT, the WPPT, and the Marrakesh Treaty.[135] Even though the copyright exception was incorporated into the Indian Copyright Act before the

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129 Indian Copyright Act as amended, s 31B.

130 Indian Copyright Act as amended, s 52(1).

131 For example, the Copyright Board is expected to establish the credentials of the applicant and determine whether the application is made in good faith. Moreover, it must be determined that a compulsory licence is actually required to make the accessible format copies available to persons with disabilities.

132 For more information, see the Indian Copyright Act as amended, s 31B.

133 To show the importance of the three-step test in achieving its objectives, the Marrakesh Treaty made various references to the obligations of the contracting parties to comply with the test in adopting copyright exceptions. See the Marrakesh Treaty, preamble, Arts 1, 11.

134 Before the amendment of the Copyright Act, it was considered a copyright infringement under Indian copyright law to convert copyrighted work into accessible formats for the benefit of persons with disabilities without the prior permission of the copyright owner.

135 The Marrakesh Treaty was adopted almost a year after the amendment of the Indian Copyright Act.

adoption of the Marrakesh Treaty, the exception ensured the former's compliance with the latter.

The adoption of the copyright exception has expanded the scope of works that can be used for private and personal purposes to include works such as cinematograph films and musical works. By implication, the application of the copyright exception has removed the barriers that prevented disabled people and organisations assisting them from reproducing, issuing copies, adapting, or communicating to the public any work in an accessible format. This improvement has made it possible for those persons and organisations to access various works and where necessary share them with any other persons who have a disability for private or personal use as well as for research or any other educational purpose. South Africa should consider expanding the scope of its copyright exceptions to include the accessible formats of works other than literary and artistic works.

6.4 Conclusion

With its progressive copyright system, India has consistently striven to align its copyright law with international treaties. Before the amendment of its Copyright Act, India had already adopted several legal frameworks to protect and promote the interests of persons with disabilities. It has also been demonstrated that Indian court judgments have established a well-balanced jurisprudence in the field of intellectual property law, particularly in the area of copyright law. Before the adoption of the Marrakesh Treaty, the Indian Government had already considered it urgent to amend its Copyright Act to incorporate the necessary exceptions that would protect and promote the rights of persons with disabilities, including their right to access information in accessible formats. By the time the Marrakesh Treaty was adopted by the international community, India had largely complied with the Treaty's provisions. By ratifying the Marrakesh Treaty soon after it was signed into law, India demonstrated its unwavering commitment to addressing the 'book famine' among print-disabled people. India was also the first country to ratify the Treaty.

Generally, the Indian Copyright Act, as amended, covers all the basic requirements as specified in the Marrakesh Treaty and thus complies with its provisions. However, it may be argued that the Indian Copyright Act differs from the provisions of the Treaty in certain respects. Some provisions of the Act are more liberal and broader than those of the Treaty. Concepts such as 'persons with disability' and 'works' that can be converted into accessible format copies are interpreted more broadly under the Indian Copyright Act than are the corresponding provisions of the Marrakesh Treaty. However, some aspects of the Treaty are not adequately covered by the Indian Copyright Act. A typical example is the area of cross-border exchange, which is not addressed explicitly under the Act. Although copyright exceptions for the benefit of persons with print disabilities were incorporated into the Copyright Act, numerous gaps remain.

Unlike the CAB [13F-2017], the decision of the South African Constitutional Court in *Blind SA CC*[136] aligns with the provisions of the Indian Copyright Act regarding the requirements for converting works into accessible formats. This thesis recommends that the interpretation of the conversion of copyrighted works within the context of the South African Copyright Act should follow the approach developed by India, incorporating a provision to transcend reproduction as the sole process of converting works into accessible formats. This expansion is necessary because accessible formats should accommodate the interests of persons with disabilities beyond those who have print disabilities. A typical example is a hearing-related disability that falls outside the scope of the Marrakesh Treaty.

The interpretation of the conversion of works into accessible formats is informed by the Constitutional Court's decision in *Blind SA CC*.[137] For example, the court referred to e-books, which may contain various forms of 'multi-media presentations' and may require some element of adaptation to convert them into accessible format copies.[138] In line with the Indian approach, the Constitutional Court recognised that people who experience

136 *Blind SA v Minister of Trade, Industry and Competition & Others* (CCT 320/21) [2022] ZACC 33 (21 September 2022), 2023 (2) BCLR 117 (CC), 2022 BIP 518 (CC).

137 *Blind SA v Minister of Trade, Industry and Competition & Others* (CCT 320/21) [2022] ZACC 33 (21 September 2022), 2023 (2) BCLR 117 (CC), 2022 BIP 518 (CC).

138 *Blind SA CC* [87].

other forms of disabilities, such as those with a hearing impairment, may also need works in accessible formats, which makes it necessary to consider whether 'the conversion of a written text into an audio' constitutes a mere reproduction or an adaptation of the work. For this reason, South Africa needs to transcend the concept of the Marrakesh Treaty regarding the conversion of copyrighted works into accessible formats.[139]

Some gaps still exist in the Indian copyright exceptions for persons with disabilities in the context of the Marrakesh Treaty. However, there are a few aspects of the Indian copyright exceptions that South Africa may consider incorporating into its copyright law as it embarks on amending the Copyright Act to protect and promote the rights of persons with disabilities, particularly their right to receive and disseminate copyrighted works in accessible format copies.

The discussion now moves to the evaluation and recommendations in the concluding chapter that brings this thesis to a close.

139 *Blind SA CC* [87].

CHAPTER 7: EVALUATION AND RECOMMENDATIONS

7.1 Introduction

The two main aspects of South African law that form the backbone of this thesis are the case of *Blind SA*[1] and the CAB particularly the provisions of Bill 13F-2017[2]. Since the case of *Blind SA CC* focused on Bill 13B-2017, the provisions of Bill 13B-2017 are also considered in this thesis but only in relation to the decisions in the *Blind SA CC*. Dealing with the Constitutional Court's decision in *Blind SA CC*,[3] this thesis critically analysed the South African Copyright Act 98 of 1978 including the provisions of section 13A which the Court ordered, as a temporary measure, to be incorporated into the Copyright Act.[4]

Therefore, the thesis considered the Constitutional Court decision in *Blind SA CC* and the provisions of the CAB particularly Bill 13F-2017, to determine the extent to which the South African Copyright Act complies with the Constitution of the Republic of South Africa, 1996,[5] the relevant international human rights instruments[6] and other international legal documents, particularly the three-step test, the Marrakesh Treaty, and technological protection measures (TPMs). The thesis established the need for South Africa to incorporate specific exceptions into its Copyright Act that will bridge the access gap between persons with disabilities and those without disabilities in relation to copyright-protected works, which directly or indirectly affect various rights discussed in this thesis.

The thesis analysed the following aspects:

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1 Though the decisions of both the Pretoria High Court and the Constitutional Court were considered, there was more emphasis on the latter.

2 Bill 13F-2017 is considered in this thesis mainly in relation to the provisions of section 19D.

3 *Blind SA v Minister of Trade, Industry and Competition & Others* (CCT 320/21) [2022] ZACC 33 (21 September 2022), 2023 (2) BCLR 117 (CC), 2022 BIP 518 (CC).

4 See *Blind SA CC* [112.5]. The provisions of section 13A, in terms of the Constitutional Court's decision, is deemed to be incorporated into the Copyright Act and should remain in place for a period of 24 month.

5 The relevant human rights, as contained in the Bill of Rights of the Constitution of the Republic of South Africa, 1996, were fully discussed: equality, human dignity, culture and participation in cultural life, education, and freedom of expression.

6 The international human right instruments considered included the Universal Declaration of Human Rights (1948) (UDHR), the International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR), the Convention on the Rights of the Child (1989) (CRC), and the Convention on the Rights of Persons with Disabilities (2006) (CRPD).

1. The various obligations imposed by the Marrakesh Treaty that are subject to the three-step test;

2. The requirements of the three-step test as contained in the relevant international legal instruments on intellectual property (IP);

3. The obligations in the various international human rights treaties underpinned by the principle of equality for all and the achievement of human freedom; and

4. The various constitutional obligations that require everyone to be treated equally, with respect and dignity and without unfair discrimination.

The thesis then determined how far the South African Copyright Act meets these obligations if the relevant provisions of the CAB [13F-2017] are adopted.

The Constitutional Court's decision in *Blind SA CC* forms part of the foundations of the thesis. Therefore, the different aspects of this case were thoroughly analysed in the context of this thesis to determine the gaps in the CAB [13F-2017] and how to improve its provisions to align the Copyright Act with the Constitution, the Marrakesh Treaty, and other international human rights treaties.

The thesis explored the copyright exceptions for persons with disabilities as practised in two foreign jurisdictions – Australia and India. The various aspects of copyright exceptions in these jurisdictions were analysed to establish their relevance in achieving the purpose of this thesis. The outcome of this legal comparison showed that South Africa can learn a few lessons from both jurisdictions.

Chapter Four of the thesis showed that the implementation of copyright law in South Africa has specific implications for actualising the rights of persons with disabilities, including their right to access copies of copyright-protected works in adapted formats. Adopting appropriate copyright exceptions is fundamental to improving the lives of these persons by granting them equal access to copyrighted works in adapted versions.

7.2 Evaluation of the main issues

7.2.1 The obligations that emanate from the provisions of the international human rights treaties and the South African Constitution[7]

Chapter Two of the thesis extensively discussed the various human rights relevant to this thesis. The discussion proceeded in relation to the provisions of international human rights law and the Constitution of the Republic of South Africa, 1996. The thesis showed an overlap among the various human rights instruments,[8] the South African Constitution,[9] and the regional laws typified by the African Charter on Human and Peoples' Rights (the African Charter, also known as the Banjul Charter).[10] The thesis also demonstrated that the human rights instruments under consideration advocate protecting and advancing human dignity and freedom, which are underpinned by the principle of equality for all. Generally, Chapter Two demonstrated that the provisions of the South African Constitution that have been considered are consistent with the objectives of the international legal instruments that promote human rights.

As for the obligations placed by the various legal instruments on the South African Government, the thesis showed that the constitutional rights[11] have a more substantial effect than those contained in the international laws[12] and human rights instruments.[13] The South African Constitution is supreme.[14] Law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.[15] Therefore, the Constitution, by comparison with other legal instruments, places a heavier burden on the government to

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7 This refers to the Constitution of the Republic of South Africa, 1996.
8 See the various human rights instruments such as the ICESCR, the CRPD, and the UDHR.
9 As the supreme law of the Republic of South Africa with reference to the Bill of Rights as enshrined in the Constitution.
10 Reference is made to a few laws that are applicable within regions such as the European Union (EU) and the African Union (AU). However, only the provisions of the African Charter are discussed in detail in this thesis.
11 These are rights enshrined in the Bill of Rights. See the South African Constitution, ch 2.
12 The main focus is on the Marrakesh Treaty.
13 Reference is made to the ICESCR, the CRPD, and the UDHR.
14 South African Constitution, s 1(c).
15 South African Constitution, s 2.

promote equality[16] and fundamental human rights for all.[17] Accordingly, the Constitutional Court[18] declared the provisions of sections 6 and 7 as read with section 23 of the Copyright Act 98 of 1978 unconstitutional and invalid because they hindered the right of visually impaired persons (VIPs) to access copyright-protected works in adapted formats.[19]

As a contracting party to the human rights treaties discussed in Chapter Three of the thesis, South Africa must fulfil the obligations they impose. They are related mainly to protecting and promoting individual human rights, which were considered in this thesis in relation to the Universal Declaration of Human Rights (1948) (UDHR),[20] the International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR),[21] the Convention on the Rights of the Child (1989) (CRC),[22] the Convention on the Rights of Persons with Disabilities (2006) (CRPD),[23] the International Covenant on Civil and Political Rights (1966) (ICCPR),[24] and the African Charter.[25] Member states have essential roles to play in achieving the objectives of the various international human rights treaties and declarations and regional treaties on protecting and advancing human rights, especially among persons with disabilities. The relevant treaties and declarations aim to achieve and advance the equal enjoyment of human rights and freedom by all persons, without exception.

The United Nations General Assembly Resolution 2007, to which South Africa is a party, requires member states to take the necessary measures to ensure that persons with disabilities can exercise their right to freedom of expression and opinion, including the freedom to seek, obtain, and share 'information and ideas on an equal basis with others

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16 The principle of equality is considered one of the underlying values of the Constitution. See the South African Constitution, s 1(a).

17 See ch 2 of the Constitution for all the relevant rights.

18 *Blind SA v Minister of Trade, Industry and Competition & Others* (CCT 320/21) [2022] ZACC 33 (21 September 2022), 2023 (2) BCLR 117 (CC), 2022 BIP 518 (CC) [112].

19 The requirement of authorisation contained in ss 6, 7, and 23 of the South African Copyright Act infringes the constitutional rights of VIPs. See *Blind SA CC* [74].

20 See Arts 2, 11, 18, 19, 26, 27, and the preamble.

21 See Arts 13(1), 15(1)(a) and (b), and the preamble.

22 See Arts 13, 28, and 29.

23 See Arts 2, 3(c), 9(1) and (6), 21, 30(1) and (2), and the preamble.

24 See Arts 11, 19(2).

25 See Arts 1, 3(1) and (2), 5, 9(1), 17, and 19.

and through all forms of communication of their choice.'[26] Member states therefore must take relevant steps to ensure that these persons have equal access to information and communications.[27] Under CRPD Article 9(1), South Africa, as a member state, must take appropriate steps to ensure that disabled persons enjoy access to information on an equal basis with others.[28] South Africa is specifically obliged to provide VIPs with reasonable access to the copyright content necessary to actualise their right to information and freedom of expression.[29] To achieve this objective, South Africa must eliminate all obstacles and barriers that may hinder the realisation of equal access to information.[30] So it is paramount to amend the South African Copyright Act to align its provisions with the underlying values and objectives of the relevant international and regional human rights instruments.

Regarding the provisions of the CRPD applied to new advances in digital technologies, South Africa must ensure that persons with disabilities are not left behind as the world, through digital influence, progresses towards improving life for humans.[31] South Africa must ensure that persons with disabilities enjoy the freedom to receive and disseminate information in accessible formats by applying the appropriate technologies suitable for various kinds of disability, which prepare these people to participate actively throughout the world.[32]

Similarly, South Africa as a member state is expected to take all necessary measures to ensure that disabled persons enjoy, among other things, access to cultural materials in accessible formats.[33] South Africa also has specific obligations to persons with disabilities regarding the human right to education. Failure to take measures to address existing discrimination in education violates Article 13 of the ICESCR.[34] Furthermore, South Africa

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26 UN General Assembly Resolution 2007, Art 21.
27 See the UN General Assembly Resolution 2007, Art 9(1).
28 CRPD, Art 9(1).
29 CRPD, Arts 2 and 21.
30 CRPD, Art 9(1).
31 CRPD, Art 21(a).
32 CRPD, Art 21(a).
33 UN General Assembly Resolution 2007, Art 30(1).
34 See the CESCR, 1999 General Comment No. 13 Implementation of the International Covenant on Economic, Social and Cultural Rights.

is required to prevent third parties from interfering with anyone's right to education, including people with disabilities,[35] and, in terms of Article 24 of the CRPD, South Africa must promote the education of disabled persons, which should take place through the modes and means of communication that are most appropriate under the circumstances.[36]

As regards the right to equality and non-discrimination, South Africa, as a member state of the CRPD, is obliged to proscribe all forms of discrimination based on disability and to ensure that disabled persons are treated equally and receive effective legal protection against discrimination on all grounds.[37] In line with the international conventions that promote equality and non-discrimination, South Africa, as a party to the African Charter, has a duty, among other things, to eliminate all forms of discrimination.[38] At the same time, the relevant provision of the CRPD indicates that treating persons with disabilities differently to achieve equality should not be considered a form of discrimination.[39] Consequently, the provisions of the CAB [13F-2017] may be framed to achieve equality for persons with disabilities, even though these provisions may appear to differentiate the persons with disabilities from others by giving them the desired attention. Ultimately, South Africa is allowed, where necessary, to take additional measures through the provisions of the law to ensure that the adverse conditions of persons with disabilities are enhanced to achieve the underlying objectives of the various international human rights treaties, such as the CRPD.[40]

Furthermore, South Africa is obliged to address the challenge of discrimination faced by persons with disabilities and promote the full realisation of their inalienable human rights and fundamental human freedoms. The recommendations of this thesis aim to promote the interests of persons with disabilities in accessing copyright works in line with the provisions of international human rights treaties. To achieve the objectives of these

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35 CESCR, 1999 General Comment No. 13 Implementation of the International Covenant on Economic, Social and Cultural Rights 59.
36 CRPD, preamble.
37 CRPD, Art 5(2).
38 African Charter, preamble.
39 See Art 3 of the CRPD.
40 The amendment of the Copyright Act has opened the gateway to achieving these objectives.

treaties, which complement the recommendations in this thesis, South Africa must meet the following obligations:

1. Adopt appropriate legislative and administrative measures to protect and promote the rights of persons with disabilities;[41]

2. Develop legal provisions and any other suitable mechanisms in the context of the law and regulations to eradicate all forms of discrimination against these persons;[42]

3. Ensure that all relevant policies and programmes protect and advance the rights of these persons;[43]

4. Ensure that all actions or practices of public authorities and institutions comply with the CRPD;[44]

5. Prevent individuals, organisations, and private entities from perpetuating discrimination against persons with disabilities;[45]

6. Conduct research that will advance the availability and use of new technologies, particularly information and communication technologies (ICTs), that will promote the interests of persons with disabilities;[46]

7. Equip persons with disabilities with the necessary skills and information on how to operate technologies that may help them improve their situations;[47] and

8. Ensure that professionals and other persons who help people with disabilities are appropriately trained in the rights of these persons as provided in the CRPD.[48]

41 CRPD, Art 4(1)(a).
42 CRPD, Art 4(1)(b).
43 CRPD, Art 4(1)(c).
44 See the CRPD, Art 4(1)(d).
45 CRPD, Art 4(1)(e).
46 CRPD, Art 4(1)(g).
47 CRPD, Art 4(1)(h).
48 CRPD, Art 4(1)(i).

By amending the provisions of the Copyright Act that infringe the rights of persons with disabilities, South Africa has begun to address the obligations described above. However, more attention needs to be paid to some of them.

Turning to the provisions of the Constitution and the obligations that emerge from it, the underlying constitutional and democratic values on which South Africa is founded include the principle of human dignity, which aims to achieve equality and advance human rights and freedom.[49] The state and its various institutions and organisations are obliged to respect, promote, and assist in realising the underlying values of the Constitution and to protect and advance the human rights in the Bill of Rights.[50] The state and various institutions and organisations are required to fulfil the obligations derived from the Constitution.

As part of those obligations, the Constitution provides that the law must protect and benefit all individuals equally, including those with disabilities. Furthermore, it assures everyone, without exception, that unfair discriminations are prohibited.[51] Section 9(2) of the Constitution states that everyone must experience full and equal enjoyment of rights and freedom.[52] To achieve equality for all without exception, section 9(2) adds that 'legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.'[53] Further, if everyone is equal before the law as stated in section 9(1) of the Constitution, it is therefore correct to infer that the interests of persons with disabilities should be considered in an attempt to achieve equality for all.

Due to the constitutional obligation placed on the state and the relevant institutions to achieve equality for all, section 9(3) of the Constitution stipulates the grounds on which no one may be discriminated against unfairly, including the ground of disability.[54] As there is no limitation on the nature or extent of the disability considered, it is inferred that this

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49 Constitution of the Republic of South Africa, 1996, preamble.
50 Constitution of the Republic of South Africa, 1996, s 7.
51 Constitution of the Republic of South Africa, 1996, s 9(1).
52 Constitution of the Republic of South Africa, 1996, s 9(2).
53 Constitution of the Republic of South Africa, 1996, s 9(2).
54 Constitution of the Republic of South Africa, 1996, s 9(3).

provision incorporates all forms of disability, without exception. In addition, the inclusive nature of section 9(3) also confirms that the grounds are not limited to those provided in the section and so may include those to be determined in future. And the Constitution obliges the state, particularly the legislature, to enact the appropriate legislation to combat unfair discrimination.[55] The recommendations of this thesis would assist the legislature in re-amending the Copyright Act to become compliant with the obligations of the pertinent international human rights treaties and the South African Constitution. This further amendment will avert future litigation that may challenge the constitutionality of the Copyright Act in relation to promoting and protecting the rights of persons with disabilities in regard to receiving and disseminating copyrighted works in accessible formats.

In addition, under the South African Constitution, everyone, without exception, has the right to a basic education.[56] This means that persons with disabilities are entitled to a basic education and cannot be denied this right. Therefore, they are entitled to all materials and techniques that will make the enjoyment of their right to education realisable. According to the second leg of section 29 of the Constitution, even adults with disabilities are entitled to enjoy their right to education.[57] And according to the third leg of section 29, everyone, including persons with disabilities, has the right to further education, and the state is required to take all reasonable measures to make all means of education available and accessible. In the context of section 29, the state is obliged to provide all kinds of processes that make the enjoyment of education achievable, which include making it possible for persons with disabilities to access materials in adapted formats.

It is the responsibility of the state and relevant institutions to respect and protect the inherent dignity of every human being[58] as the foundational value[59] of constitutional democracy in South Africa, without exception. The obligation to respect and protect the human dignity of everyone was considered by the Constitutional Court in both *National Coalition for Gay and Lesbian Equality v Minister of Justice*[60] and *Nyathi v MEC for*

55 Constitution of the Republic of South Africa, 1996, s 9(4).
56 Constitution of the Republic of South Africa, 1996, s 29(1).
57 Constitution of the Republic of South Africa, 1996, s 29(1).
58 Constitution of the Republic of South Africa, 1996, s 10.
59 Constitution of the Republic of South Africa, 1996, s 1.
60 (CCT11/98) [1998] ZACC 15 (9 October 1998), 1999 (1) SA 6 (CC) [29].

Department of Health, Gauteng & Another,[61] where it was acknowledged that the constitutional protection of human dignity of everyone, including persons with disabilities, as contained in the Constitution[62] makes it compulsory to appreciate and safeguard the inherent worth of every human person in society without exception. This view accords with the Constitutional Court's decision in *S v Dodo*,[63] where Ackerman J referred to human beings as creatures with inherent and infinite worth to be treated as ends in themselves.[64]

Chapter Two of the thesis argued that by considering the right to human dignity in the Constitution[65] as the most important[66] of all human rights and the foundation of the Constitution,[67] there is a need, in addition to other human rights, to protect and promote the dignity of every human being, including those who experience disabilities. The full recognition of the right to dignity of every human person is connected to the idea of equal respect for all individuals in the Republic that is demonstrated in *National Coalition for Gay and Lesbian Equality v Minister of Justice*.[68] There, the Constitutional Court ruled that 'it is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society' which propels the need to promote the right to equality.[69]

Therefore, the worth and dignity of every human being, including those of persons with disabilities, should be held in high esteem. This approach is consistent with the underlying principle of moral philosophy that considers human dignity the basis for the inherent worth and value that characterise every human person without exception.[70] The

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61 (CCT 19/07) [2008] ZACC 8 (2 June 2008), 2008 (5) SA 94 (CC) [45].

62 The Constitution of the Republic of South Africa, 1996, s 10 specifies the need to respect and protect the dignity of every human person in the Republic.

63 (CCT 1/01) [2001] ZACC 16 (5 April 2001), 2001 (3) SA 382 (CC).

64 *S v Dodo* [38].

65 Constitution of the Republic of South Africa, 1996, ss 1 and 10.

66 For more information about the Constitutional Court's views on the principle of human dignity, see *S v Makwanyane & Another* (CCT3/94) [1995] ZACC 3 (6 June 1995), 1995 (3) SA 391 (CC) [144].

67 Ackermann J reiterated that the right to dignity remains the cornerstone of the Constitution of South Africa. See *National Coalition for Gay and Lesbian Equality v Minister of Justice* [28].

68 (CCT11/98) [1998] ZACC 15 (9 October 1998), 1999 (1) SA 6 (CC).

69 *National Coalition for Gay and Lesbian Equality v Minister of Justice* [29].

70 Arthur Chaskalson, 'Human Dignity as a Foundational Value of Our Constitutional Order' (2000) 16(2) South African Journal on Human Rights 193–205, 198.

recommendations made by this thesis would help the legislature to re-amend the Copyright Act and help the government to formulate the appropriate policies and regulations to protect and promote the dignity of persons with disabilities concerning access to copyright works. The recommendations should guide lawmakers in implementing legal provisions and mechanisms that will make it easy for persons with disabilities to receive and disseminate copyright-protected materials in accessible formats, which in effect will make the realisation of other rights[71] discussed in this thesis possible.

Chapter Two also argued that all humans, including those with disabilities, have 'the freedom to receive, or impart information or ideas'[72] without restriction, except under the law of general application.[73] Therefore, it is also the responsibility of the state to adopt and implement legal provisions and mechanisms that will make this goal realisable. This view is confirmed in *Case & Another v Minister of Safety and Sec. & Others; Curtis v Minister of Safety and Sec. & Others*,[74] where Mokgoro J reasoned that everyone, without exception, is entitled to enjoy the right to freedom of expression, which includes the right to 'receive, hold and consume expressions transmitted by others.'[75]

Based on section 16(1)(b) of the Constitution, it is also argued in Chapter Four that all human beings who experience various forms of disability should also enjoy the right to freedom of expression by receiving information in adaptive formats that are easily accessible, on the one hand, which makes it possible for them to express their views and opinions, on the other hand. This view is consistent with Article 21 of the CRPD, which obliges member states to take the necessary steps to ensure that persons with disabilities enjoy their right to freedom of expression and opinion.[76] By implementing the recommendations in this chapter, the legislature would carry out the specific obligation

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71 Reference is made to the right to education, the right to participate in the cultural life of one's choice, and the right to human freedom, among others.

72 Constitution of the Republic of South Africa, 1996, s 16(1)(b).

73 See the provisions of s 36 of the Constitution regarding the limitation of human rights as contained in the limitation clause.

74 (CCT20/95, CCT21/95) [1996] ZACC 7 (9 May 1996), 1996 (3) SA 617 (CC).

75 *Case v Minister of Safety and Security* [25].

76 CRPD, Art 21.

that will make the Copyright Act comply with the Constitution and international human rights instruments, particularly the CRPD.

7.2.2 The obligations derived from the provisions of the three-step test and the Marrakesh Treaty, as well as the principle of TPMs

The three-step test that underpins the Berne Convention for the Protection of Literary and Artistic Works, the Trade-Related Aspects of Intellectual Property Rights Agreement (the TRIPS Agreement), as well as the specific provisions of the Marrakesh Treaty, as discussed in this thesis, places specific obligations on South Africa. In relation to these obligations, the Constitutional Court held in *Blind SA CC*[77] that section 19D[78] must comply with the three-step test as contained in the Berne Convention,[79] the TRIPS Agreement,[80] and the Marrakesh Treaty.[81]

As for the obligation on the contracting parties to adhere to the requirements of the three-step test when adopting copyright exceptions for VIPs, Article 11 of the Marrakesh Treaty specifies that the exceptions and limitations adopted by member states, in the context of the Treaty, must be confined to certain special cases, should not conflict with a normal exploitation of the works, and should not unreasonably prejudice the legitimate interests of authors and other copyright holders.[82]

In line with Article 9(2) of the Berne Convention, Article 13 of the TRIPS Agreement, and Articles 10(1) and 10(2) of the WIPO Copyright Treaty, the Marrakesh Treaty confirms the importance of the three-step test and it requires member states to comply with the three-step test obligation relating to the rights and interests of authors and other copyright holders.[83] Although member states are allowed reasonable flexibility in implementing the

77 *Blind SA v Minister of Trade, Industry and Competition & Others* [35].
78 This refers to the proposed s 19 contained in the Copyright Amendment Bill [B 13B-2017].
79 Constitution of the Republic of South Africa, 1996, s 29(1); Art 9(2) of the Berne Convention.
80 See Art 13 of the TRIPS Agreement.
81 The Marrakesh Treaty acknowledges the significance of the three-step test when contracting parties adopt copyright exceptions to serve the interests of VIPs. See Art 11 of the Marrakesh Treaty.
82 Marrakesh Treaty, Art 11.
83 Marrakesh Treaty, Arts 1 and 11.

Marrakesh Treaty, they must still ensure that the requirements of the three-step test are met.

The three-step test commenced by confirming that countries of the Berne Union, which South Africa is part of, may permit the reproduction of copyrighted works subject to the fulfilment of the conditions contained in the test.[84] However, the reproduction of copyright-protected works is allowed only in 'certain special cases,'[85] limiting the instances when this reproduction may occur.[86] As a member state, South Africa may adopt new exceptions or retain the existing ones in copyright legislation to meet the requirements of the three-step test.

The obligation that underscores the three-step test is necessary to regulate how member states may restrict the right of authors and other copyright holders to reproduce their works. It also plays a vital role in restricting how states may limit authors' other rights, such as the rights to distribution, adaptation, performance, or display of their works.[87]

Next, the thesis briefly considered the obligations emanating from the Marrakesh Treaty for evaluation. The Marrakesh Treaty, which advocates the value of non-discrimination and equal opportunity for all, requires member states to adopt exceptions that may promote the accessibility of information for all, as well as complete and effective participation in educational, social, and cultural activities to achieve an inclusive society as stated in instruments such as the UDHR and the CRPD.[88] Part of the obligations placed on the contracting parties to the Marrakesh Treaty, which are linked to the underlying objective of the Treaty, concerns how to address the challenges that VIPs confront in accessing copyrighted works in adaptive formats. As a signatory to the Marrakesh Treaty, South Africa is expected to take legal and other measures to minimise barriers to the reproduction, use, and sharing of copyrighted works in accessible versions among VIPs.

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84 See also the beginning of the test as contained in Art 9(2) of the Berne Convention.

85 Berne Convention, Art 9(2).

86 The restriction is considered over and above the three conditions that must be fulfilled in the context of the test itself.

87 Patrick R Goold, 'The Interpretive Argument for a Balanced Three-Step Test?' (2017) 33(1) American University International Law Review 187–230, 195.

88 Marrakesh Treaty, preamble.

The Marrakesh Treaty obliges contracting parties to adopt exceptions to the rights of copyright holders to facilitate the production and distribution of copyrighted works in formats easily accessible by people with visual impairments.[89] As a signatory to the Marrakesh Treaty and in order to ratify it, South Africa must provide copyrighted works in accessible format copies to the beneficiary persons or their authorised entities.[90] To promote the availability of works in accessible format copies, South Africa, as a member state, is also obliged to adopt in its national legislation specific exceptions to the rights of authors and other copyright holders in relation to their works.[91] This adoption will make it possible for beneficiary persons or authorised entities representing them to produce copies of works in accessible format, obtain these copies from other authorised entities, and disseminate copies to the beneficiaries.[92]

Under the Marrakesh Treaty, South Africa, as a contracting party, is also required to provide for the free transfer of copyright-protected works in accessible format copies across borders.[93] For example, South Africa is obliged to allow authorised entities, representing the beneficiaries, to participate in the cross-border export of the accessible format copies to the beneficiary persons or other authorised entities representing those persons.[94]

Furthermore, to perform its obligation, South Africa must adopt specific exception clauses in its national copyright legislation that would allow authorised entities to distribute the accessible format copies to other authorised entities representing the beneficiaries or directly to the beneficiary persons in other member states.[95] This distribution is permitted on the condition that the copies in the accessible format should be for the exclusive use of the beneficiaries.[96] Similarly, South Africa is required to provide in its legislation that the authorised entity that intends to carry out the cross-border transfer of the accessible format copies should not, before distributing the copies or making them available, know

89 Marrakesh Treaty, preamble.
90 See the Marrakesh Treaty, Art 4(1)(a).
91 Marrakesh Treaty, Art 4(1).
92 Marrakesh Treaty, Art 4(2)(a).
93 Marrakesh Treaty, Art 5(1).
94 Marrakesh Treaty, Art 5(1).
95 Marrakesh Treaty, Art 5(1).
96 Marrakesh Treaty, Art 5(1).

or have reasonable grounds to know that the accessible format copy would be used for other than beneficiary persons.[97]

As a contracting party to the Marrakesh Treaty, South Africa is also obliged to permit the beneficiary persons or the authorised entities representing the beneficiaries to import the accessible format copies of the copyrighted works from other contracting parties for the benefit of the beneficiaries.[98] In granting permission to the beneficiaries or their authorised entities to import copies of the copyright-protected works in accessible formats, South Africa should consider the legislation of those member states allowing the production of copies of copyright works in accessible formats.[99]

According to Article 7 of the Marrakesh Treaty, South Africa, as a contracting party, is further obliged to protect the beneficiary persons' enjoyment of copyright exceptions as contained in the Treaty compared to the protection enjoyed by copyright holders through applying TPMs and anti-circumvention measures.[100] Article 7 of the Treaty, which relates to the provisions of the 'digital agenda,' focuses on balancing the interests of beneficiary persons against those of copyright holders.

The obligations derived from the Marrakesh Treaty are mapped to various factors necessary for realising the objective of the Treaty. Relevant factors include the following:

1. The meaning and scope of the term 'beneficiary;'

2. The meaning of authorised entities and who qualifies as such an entity;

3. The nature and scope of copyrighted works that can be reproduced or adapted for the beneficiaries;

4. The various forms that the accessible format copies can take;

97 Marrakesh Treaty, Art 5(2).
98 Marrakesh Treaty, Art 6.
99 Marrakesh Treaty, Art 6.
100 Marrakesh Treaty, Art 7.

5. The required process for the conversion of copyrighted works into accessible formats; and

6. The nature and scope of copyright exceptions.

Regarding the 'digital agenda' in relation to the issue of TPMs, Article 11 of the WIPO Copyright Treaty (1996) stipulates that contracting parties, of which South Africa is one, must adopt an appropriate legal process that aims to protect copyrighted works against infringement through digital technologies.[101] Contracting parties must also implement effective legal remedies against the circumvention of technological controls used by authors and other copyright holders while exercising their rights under the WIPO Copyright Treaty.[102]

The question is how South Africa will deal with the issue of digital copyright infringements and the circumvention of technological measures without compromising the effort to protect and promote the right of persons with disabilities to receive and disseminate copyright materials in accessible formats. The approach adopted by South Africa to address the issue of TPM circumvention should accommodate the interests of copyright users, particularly persons with disabilities.

In addressing the circumvention of TPMs, the relevant provision of the CAB [13F-2017] defines protections against circumvention as 'any process, treatment, mechanism, technology, device, system or component that in the normal course of operation prevents or restricts infringement of copyright in a work.'[103] The approach adopted in CAB [13F-2017] accords with Article 11 of the WIPO Copyright Treaty (1996). This differs slightly from the position taken in this thesis, which expands the definition of technological measures to include non-commercial use to allow access by persons with disabilities.

101 For more information, see the WCT, Art 11.
102 WCT, Art 11.
103 CAB, s 1(i)(a).

7.2.3 The extent to which South African copyright law has complied with international human rights treaties and the Constitution

One of the significant issues investigated in this thesis is how far the provisions of the CAB [13F-2017] align the South African Copyright Act with the underlying principles[104] of the international human rights instruments discussed in the thesis. Incorporating copyright exceptions in the CAB [13F-2017] has largely bridged the gap between persons with disabilities and those without disabilities in accessing copyrighted works.[105] Implementing the provisions of section 19D will make it possible for persons with disabilities to enjoy their right to access information in adapted formats that suit their conditions. Since most human rights considered in Chapter Two of the thesis are interrelated and interdependent, protecting and advancing the right to access information among persons with disabilities will, directly or indirectly, improve other rights such as the rights to education, culture and science, and freedom of expression.

Another significant issue examined in this thesis is how far the South African Copyright Act will comply with the Constitution once the CAB [13F-2017] is adopted and implemented.[106] The Constitution recognises the importance of protecting and advancing the rights of everyone in the Republic, including persons with disabilities, based on the principle of equality.[107] Protecting and promoting the rights[108] of persons with disabilities will be achieved by adopting the amended provisions of section 19D of the CAB [13F-2017] in the light of the recommendations in this chapter. This outcome will address the discriminatory nature of some provisions of the Copyright Act[109] that infringe the rights of VIPs and other persons with disabilities, as identified by the Constitutional Court.[110]

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104 Reference is made to the principles of equality, human dignity, and other basic human rights, especially those discussed in Chapter Two of this thesis.

105 CAB, s 19D.

106 See specifically the provisions of s 19D of the CAB.

107 On the importance of achieving equality for all, see the Constitution of the Republic of South Africa, 1996, preamble. For more information on the various rights, see the Constitution of the Republic of South Africa, 1996, ch 2.

108 With particular reference to the right of persons with disabilities to receive and disseminate information in accessible formats.

109 See the provisions of ss 6 and 7 read with s 23 of the South African Copyright Act.

110 *Blind SA v Minister of Trade, Industry and Competition & Others* [74], [112].

7.2.4 The extent to which South African copyright law has complied with the three-step test and the Marrakesh Treaty, as well as the principle of TPMs

Through the incorporation of section 19D of the CAB [13F-2017], the South African Copyright Act has essentially become consistent with several aspects of the Marrakesh Treaty. Furthermore, South Africa will accommodate the three-step test in adopting the copyright exceptions for persons with disabilities. South Africa will thus satisfy the significant obligations emanating from the Marrakesh Treaty, making the country ready to ratify the Treaty. The evolution of digital technologies affects the ability of persons with disabilities to access copyrighted materials. As the world moves speedily towards online education and other forms of virtual communications, especially after the advent of the coronavirus (COVID-19) pandemic forced most learning and educational activities to take place online, this thesis considered the appropriate copyright exceptions that should accommodate such developments in the digital environment. Similarly, this thesis evaluated the various views on TPMs and their implications for access to digital content among persons with disabilities, who may need different technological methods to enhance their participation in the virtual world.

Much effort has been made to align South African copyright law with the provisions of international human rights instruments, the Constitution, and international copyright law, notably the Marrakesh Treaty, as well as the principle of the three-step test and the TPMs. Despite the development of the CAB [13F-2017] and all the essential provisions that it incorporates, especially in section 19D, as well as the recommendations of the Constitutional Court, as contained in the adopted section 13A[111] that was part of the court's order, some gaps remain. Some essential recommendations are helpful for the adoption and implementation of appropriate copyright exceptions for persons with disabilities.

7.3 Compliance and recommendations

The recommendations by this thesis for re-amending the Copyright Act, particularly the relevant provisions of the CAB [13F-2017], are made in the context of the three-step test,

111 *Blind SA v Minister of Trade, Industry and Competition & Others* [112.6].

the provisions of the Marrakesh Treaty, the Constitutional Court decision in *Blind SA CC*, and the relevant provisions of the international human rights treaties, with particular reference to the CRPD. Furthermore, both the application of the TPMs and the limitations of the Marrakesh Treaty are considered in the recommendations made by this thesis.

This part of the thesis, therefore, deals with the following aspects:

1. The implementation of the three-step test;
2. Compliance with the Marrakesh Treaty and the three-step test;
3. Limitations in the Marrakesh Treaty and transcending its provisions;
4. Adoption of an appropriate approach to applying TPMs;
5. Recommendations based on the analysis of the Constitutional Court decision in *Blind SA CC*;
6. Lessons from the viewpoint of comparative law; and
7. Recommendations dealing with specific proposed amendments in the Copyright Act with particular reference to the CAB [13F-2017].

7.3.1 The implementation of the three-step test in the context of this thesis

The provision of the three-step test is essential for the harmonisation of copyright exceptions at the international level, on the one hand, and for the regulation of copyright exceptions that are adopted domestically in various jurisdictions, on the other. However, the nature of the interpretation applied to the three-step test as a whole and to the individual steps contained in the test has specific implications for achieving the objective of this thesis.

This thesis recommends that the nature of the three-step test adopted in the CAB [13F-2017] should transcend the restrictive interpretation approach as discussed in Chapter Three. The principle that underpins the restrictive approach derives from the traditional interpretation of the test, which supports the idea that the basis of international copyright

law is to sustain copyright standards by granting copyright owners complete legal protection over their works. Therefore, according to proponents of the restrictive interpretation approach, an appropriate interpretation of the three-step test should map to the traditional standpoint that considers each of the three steps independently and restrictively.[112]

If applied in the context of a restrictive interpretation approach, the scope of exceptions will be defined restrictively. This outcome supports the view of the WTO Panel, which argues that every exception must be narrow, both quantitatively and qualitatively.[113] This approach offers member states a limited choice to balance protecting the economic interests of copyright owners and the interests of users as well as the public at large. The approach leaves little or no flexibility in the hands of lawmakers in the member states. This outcome could have specific implications for the actualisation of inclusive access to information, as this thesis advocates. Based on the arguments presented in Chapter Three of the thesis, applying the three-step test in the context of the restrictive interpretation approach would pose a serious challenge for South Africa in achieving equal access to information and freedom of expression as required by the Constitution and the international human rights instruments considered in this thesis.

An alternative approach that may be considered as an option for South Africa is a balanced interpretation approach. Contrary to the restrictive interpretation model, this approach aims at striking a reasonable balance between the interests of copyright owners and those of users of the copyrighted works, which is in line with the Constitutional Court decision in *Laugh It Off Promotion CC*.[114] To determine whether exceptions are consistent with the provisions of the three-step test based on the balanced interpretation model, it is necessary to consider the exceptions in relation to all three steps and then reach a decision based on the inferences drawn from the analysis. Under these circumstances,

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112 Goold, 'The Interpretive Argument for a Balanced Three-Step Test?' 189.

113 WTO Panel Report, *United States – Section 110(5) of the US Copyright Act* para 6.109.

114 *Laugh It Off Promotions CC v SA Breweries International (Finance) BV t/a Sabmark International & Another* (CCT42/04) [2005] ZACC 7 (27 May 2005), 2006 (1) SA 144 (CC) [43], [50].

the exception is generally considered to follow the provisions of the three-step test even if it does not meet all three requirements.

However, since the intention of the drafters of the three-step test is ultimately to promote the ordinary meaning of the language of the test rather than applying the purpose of the test as required, to achieve the balancing of interest, the balanced interpretation approach is not suitable and, therefore, not recommended for South Africa. The possible option recommended in this thesis is an interpretation approach underpinned by the doctrine of fair use.

Consequently, any interpretation of the three-step test that accommodates the principle of fair use is considered appropriate, and this interpretation affords lawmakers in copyright law the flexibility to promote the interests of persons with disabilities, though not to the detriment of the interests of copyright owners. Chapter Three of the thesis argued that the interpretation of the three-step test that accommodates the fair-use doctrine qualifies as a balanced interpretation approach, which may be referred to as an integrated moderate approach. This thesis recommends that South Africa adopt the three-step test based on an integrated moderate paradigm, which does not require an exception to pass all three steps to comply with the three-step test. On the contrary, the three elements are regarded as interrelated and interdependent, to the extent that an individual step will not serve as a deciding factor on its own. The values and principles that underpin fundamental rights should receive special attention when South Africa adopts and implements the provisions of the three-step test.

7.3.2 Compliance with the Marrakesh Treaty and the three-step test

South Africa has made a tremendous effort in the CAB [13F-2017] to align the Copyright Act with the Marrakesh Treaty. Chapter Four of the thesis showed how the South African legislature has extensively engaged the public in amending the Copyright Act. After several proposed amendments following public comments that emanated from consultations and workshops, the provisions of the CAB [13F-2017], particularly section 19D, have been revised to become compliant with and to ratify the Marrakesh Treaty.

Still, Parliament has more to do for the Copyright Act to comply with the Marrakesh Treaty and the requirements of the three-step test.

An example of the aspect of the Bill amending the South African Copyright Act that does not strictly comply with the provision of the Marrakesh Treaty and the requirement of the first step of the three-step test is the definition of the term 'beneficiary.' Section 19D of the CAB [13F-2017], merely refers to beneficiaries as persons with disabilities, as opposed to the provision of the Marrakesh Treaty that considers beneficiaries as persons who are blind, visually impaired, or otherwise print disabled. The recommendation in this thesis on beneficiary persons is made in the light of the first step contained in the three-step test, which refers to a 'certain special case' that requires some level of certainty and clarity, as discussed extensively in Chapter Three of the thesis.

A further example of an aspect of the CAB [13F-2017] that does not comply with the Marrakesh Treaty and the requirement of the first step in the three-step test is the definition of 'accessible format copy.' Whereas 'accessible format copy' in Article 2(b) of the Marrakesh Treaty refers to 'a copy of a work in an alternative manner or form which gives a beneficiary person access to the work,'[115] section 19D of the CAB [13F-2017] does not clearly define 'accessible format copy.' This failure also extends to the non-compliance of section 19D with the three-step test as contained in instruments such as Articles 9(2) and 13 of the Berne Convention and the TRIPS Agreement, respectively.

An additional example of the CAB that does not fully comply with the Marrakesh Treaty provision on 'cross-border exchange' is that the CAB, particularly section 19D(3) of Bill 13B-2017, uses the phrase 'a person who serves persons with disabilities' in the first leg of section 19D(3), in contrast to the clause 'authorized entities' in the Marrakesh Treaty. The non-compliance has been remedied through the incorporation of the provision of section 19D(4)(b) into Bill 13F-2017, which replaced Bill 13B-2017. However, this thesis recommends that the scope of 'authorized entity' contained in Bill 13F-2017 be extended

[115] Marrakesh Treaty, Art 2(b).

similar to that of Australia. The relevant recommendations that Parliament needs to consider are provided in the second part of this chapter.

7.3.3 Limitations in the Marrakesh Treaty and transcending its provisions

The scope of the term 'beneficiary persons' in Article 3 of the Marrakesh Treaty is reasonably broad in this context. However, contrary to its founding statement in the preamble, which advocates the value of non-discrimination by providing equal opportunities for all, the Treaty's definition of 'beneficiary persons' in Article 3 is still restrictive in so far as it does not consider other forms of disability that do not fall within the scope of print disability, which is based entirely on a person's inability to read works in print formats.

The provisions of the Marrakesh Treaty on the nature and scope of works allowed to be made available for beneficiary persons are consistent with Article 2(1) of the Berne Convention. The Treaty clarifies that the applicable works are limited to literary and artistic works as considered in the Convention.[116] Thus, the exceptions contained in the Marrakesh Treaty should relate only to the published literary and artistic works in so far as they are available to print-disabled people in specific formats that are accessible to those people.[117] For example, the works may be in the form of texts, notations, or illustrations that are made available to the public[118] and could be converted to accessible format copies for the benefit of VIPs. This thesis recommends that the scope of materials that are allowed to be converted to accessible formats should extend beyond literary and artistic works, because copyrighted works can take different forms influenced by digital technologies.

The relevant provision of the Marrakesh Treaty focused on the reproduction and distribution of works in accessible format copies. This thesis argued that the conversion of works into accessible formats should not be restricted to mere reproduction, no matter how broadly the term 'reproduction' is defined. This argument is supported by the

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116 Marrakesh Treaty, Art 2(a).

117 Marketa Trimble, 'The Marrakesh Puzzle' (2014) 45(7) IIC - International Review of Intellectual Property and Competition Law 768–795, 775.

118 Marrakesh Treaty, Art 2(a).

Constitutional Court's decision in *Blind SA CC* that converting works into accessible format copies may not be straightforward.[119] To demonstrate its standpoint, the court referred to e-books, which may contain various forms of 'multi-media presentations.' Some adaptation may be needed for these books to be converted into accessible format copies.[120] However, it would seem unrealistic to achieve some of the processes required to convert the works into accessible format copies without any form of adaptation. Even people who experience other forms of disability, such as hearing impairment, may also require work in accessible formats, and this requirement will extend beyond reproduction.[121]

Under Article 11 of the Marrakesh Treaty, the exceptions and limitations adopted in the context of the Treaty must be confined to certain special cases, should not conflict with a normal exploitation of the works, and should not unreasonably prejudice the legitimate interests of authors and other copyright holders. In implementing the three-step test, the Treaty adopted a cumulative method based primarily on combining the 'restrictive interpretation approach' and the moderate interpretation approach discussed in Chapter Three of this thesis. This thesis also recommends that the approach to be considered by Parliament should incorporate the principle of fair use.

Finally, South Africa should consider developing an inclusive framework of copyright exceptions and limitations that accommodates emerging technological advancements. Given the continuous evolution of technology, failure to regulate the application of TPMs properly may harm the conversion of electronic materials into other formats accessible to persons with disabilities.

7.3.4 Adopting an appropriate approach to the application of TPMs

In line with the discussion of TPMs in Chapter Three, this thesis maintains that the expansion of the definition of TPMs as proposed by the Portfolio Committee to include non-commercial use that permits access by persons with disabilities does not cause harm

119 *Blind SA v Minister of Trade, Industry and Competition & Others* [85].
120 *Blind SA v Minister of Trade, Industry and Competition & Others* [87].
121 The concept of conversion as contained in the CAB should be extended to transcend the provisions of the Marrakesh Treaty.

and so should form part of the amending [13F-2017]. Even though the wording of the proposed expansion of the definition of TPMs differs from the corresponding wording of the WIPO Copyright Treaty, this expansion will contribute to increasing the accessibility of works among persons with disabilities. And although this thesis advocates a moderate approach in implementing the TPMs and in adopting legal remedies for the circumvention of protection measures, the thesis also supports a view in line with the second leg of the proposed section 1(i) of the CAB [13F-2017], which embodies some flexibility.

South Africa should avoid adopting any legal provision that promotes extreme protection of TPMs, though this is prescribed by the international copyright law, as this extreme protection may hamper the effort to achieve equal access to information, especially in digital form. This matter was extensively discussed in Chapter Three of the thesis, which considered various perspectives on implementing TPMs and the corresponding implications. Insisting on the extreme protection of TPMs may result in technological constraints that may, in turn, supplant the use of legislation to manage and control copyright issues in the digital environment. Furthermore, adopting a legal principle that encourages the extreme protection of TPMs in South Africa may make it difficult for users of copyrighted works, including persons with disabilities, to make copies for legitimate uses, such as for format shifting, library making, thesis writing, or any other private use.

One of the major concerns identified in this thesis, because of strict adherence to the protection of TPMs, is that the users of copyright-protected works in digital form who have lawful access to the works may not be able to rely on one of the copyright exceptions to reuse some parts of the works without interruptions. In adopting the legal principles underpinning the protection of TPMs, South Africa should be guided by the constitutional value of *ubuntu*, which considers the dignity of both users and copyright owners and the freedom of expression inherent in every human being.

7.3.5 Lessons from the comparative law viewpoint

Chapters Five and Six of the thesis, respectively, considered the relevant Australian and Indian experiences to determine whether the South African Parliament may take lessons

from those jurisdictions as it finalises amending the Copyright Act in compliance with international human rights and copyright treaties, notably the Marrakesh Treaty.

With regards to protecting the interest of persons with disabilities, the Indian Copyright Act, as amended, and the South African Copyright Act Bill (CAB) [13F-2017], share some similarities. For example, both jurisdictions have transcended the concept of 'beneficiary' as contained in the Marrakesh Treaty. In the same vein, both the South African CAB [13F-2017] and the amended Australian Copyright Act have defined the concept 'beneficiaries' in relation to the term 'disabilities'. However, section 19D of the CAB merely refers to persons with disabilities, while section 10(1) of the Australian Copyright Act identifies the persons who may qualify as beneficiaries to gain access to copyrighted works using the specific exceptions.

This thesis recommends that South African lawmakers learn from their Australian counterparts and incorporate a clear and precise definition of the term 'beneficiary' in the CAB [13F-2017] by specifying the nature of disabilities that may be applicable. At the same time, this definition should not be exhaustive, allowing for the possibility of including further beneficiaries in future.

However, by comparison with Australia, both India and South Africa have failed to provide a clear definition and the scope of the expression 'persons with disabilities.' So this thesis recommends that South Africa follow Australia's approach in providing a clear definition of a 'person with a disability'

Furthermore, compared to the Marrakesh Treaty, the scope of an 'authorised institution' in the Australian Copyright Act includes those whose central objectives include helping persons with disabilities. Thus, the Australian statute accommodates institutions that partially render services to the beneficiaries. This feature also makes the Australian concept of authorised institutions wider than the South African concept contained in the CAB [13F-2017]. This thesis proposes that the South African Parliament adopt the Australian approach to deciding on the scope of the authorised entity.

In addition, South Africans can learn from how the Australian copyright law addresses the issue of commercial availability in compliance with Article 4(4) of the Marrakesh Treaty. Unlike section 113F of the Australian Copyright Act, which maintains that the use of the copyrighted works must be solely for assisting individuals with disabilities, section 19D(4)(b) of the South African CAB [13F-2017] requires persons with disabilities or the entities assisting them 'not to export or import an accessible format copy' if they 'know or have reason to know' that the copies of the accessible format are intended for purposes other than for persons with disabilities. It means that the conditions created by section 19D(4)(b) have two legs; 'actual knowledge' and 'possible knowledge'. The burden created by section 19D(4)(b) lies mainly on the second leg since the term 'reason to know' is subject to interpretations and may result in possible litigations in future. Unlike the provision of section 19D(3) of Bill 13F-2017 that is free of such conditions, the burden created by section 19D(4)(b) of Bill 13F-2017 can add strain on persons or entities assisting persons with disabilities. There could be fear of possible infringement in the effort to distribute copies of works in accessible format for the benefit of persons with disabilities

Turning to the Indian Copyright Act, Chapter Six of the thesis showed that this Act gives a broader interpretation to the concepts of beneficiaries and works that can be converted into accessible format copies than these concepts receive in the Marrakesh Treaty. Yet the Act does not pay adequate attention to some other aspects of the Marrakesh Treaty. An example is the issue of cross-border exchange.

With the necessary changes, South Africa can still learn some crucial lessons from India. For example, in line with the Constitutional Court's decision in *Blind SA CC*,[122] the Indian Copyright Act contains a process to convert works into accessible formats that is broader than the corresponding provisions of the South African CAB. This thesis recommends that the South African Parliament, in interpreting the conversion of copyrighted works in the context of the South African Copyright Act, should follow the Indian approach by

[122] *Blind SA v Minister of Trade, Industry and Competition & Others* (CCT 320/21) [2022] ZACC 33 (21 September 2022), 2023 (2) BCLR 117 (CC), 2022 BIP 518 (CC).

including a provision to transcend the idea that reproduction is the only process of converting works into accessible formats.

7.3.6 Recommendations based on the analysis of the Constitutional Court decision

The interim relief granted by the Constitutional Court in 2023[123] has been part of South African copyright law since the recent Constitutional Court's judgment in *Blind SA v President of the Republic of South Africa & Others.*[124] Thus, the read-in section 13A contained in the judgment of the Constitutional Court[125] has become relevant in determining the compliance of the Copyright Act with the Marrakesh Treaty, the South African Constitution, and other applicable international agreements. Following the decision in *Blind SA CC*, this thesis argues that Parliament now has an opportunity to do the following.

1. Critically analyse the court's decisions and consider all the aspects of the case that apply to the CAB [13B-2017];

2. Consider all the possible defects that may arise from public comments and submissions;

3. Pay attention to other comments from the court that fall outside the scope of the case (which was VIPs) and that may be relevant to the review of the CAB [13F-2017];

4. Consciously strive to eliminate from the CAB [13F-2017], particularly the provisions of section 19D, anything that may expose the proposed Copyright Amendment Act to any further litigation because that statute may infringe the rights entrenched in the Bill of Rights; and

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123 Within a period of 24 months from the date of the judgment, Parliament is required to deal with those defects identified by the Constitutional Court as well as the defects that may arise from comments and submissions from individuals or groups of persons such as the members of the CAT.

124 Case number CCT 300/24, Constitutional Court of South Africa, 13 December 2024; see <https://powerlaw.africa/wp-content/uploads/2025/01/doc03468520241213154349.pdf> accessed 16 March 2025.

125 See *Blind SA v Minister of Trade, Industry and Competition & Others* [6].

5. Transcend the provisions of the Marrakesh Treaty in deciding the scope of various aspects of Bill 13F-2017 such as the nature of beneficiary persons, the nature of accessible format copies, the process of converting works into accessible format copies, and the adoption of specific exceptions that are not opposed to the principle of fair use.

In *Blind SA CC*, the Constitutional Court identified the various rights of VIPs that were infringed by the Copyright Act, which required authorisation from owners of copyrighted works as a condition to convert these works into accessible format copies.[126] These rights, which are entrenched in the Bill of Rights and are accorded maximum protection and promotion under the various international human rights treaties, were extensively discussed in Chapter Two of the thesis. Parliament must ensure that all amendments to the Copyright Amendment Bill, [13F-2017] cure all possible infringements of these rights in order to align the South African Copyright Act with all the relevant international law documents and also keep the Copyright Act constitutionally compliant.

An example of section 19D that Parliament must reconsider is the test contemplated in section 19D(4)(b) of Bill 13F-2017. This provision requires that those who serve persons with disabilities, including 'authorised entities' should not have known, or should not have reason to have known that the accessible format copy will be used for purposes other than to aid persons with a disability.[127] This requirement, especially the second leg, overburdens these helpers. Allowing this provision would promote inequality and unfair discrimination against persons with disabilities and could attract a further constitutional challenge. It may have foreseeable constitutional implications that may render the Copyright Act non-compliant with the Constitution even after the Copyright Act has been amended. The excessive burden arising from the test under section 19D(4)(b) of Bill 13F-2017 applies only to persons with disabilities and those persons or entities serving them. So this thesis recommends that the test under section 19D(4)(b) of Bill 13F-2017 should be drafted in line with the Australian approach. This improvement would eliminate the

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126 Constitution of the Republic of South Africa, 1996; *Blind SA v Minister of Trade, Industry and Competition & Others* [112].

127 See the CAB, s 19D(4)(b).

unjustified burden placed on persons with disabilities or persons responsible for distributing the accessible format copies.

Although the Constitutional Court in *Blind SA CC* limited its judgment to VIPs, the category of beneficiary persons in section 19D of Bill 13F-2017 should be kept in mind in determining the nature and scope of accessible format copies. A proper interpretation of the phrase ‘conversion of works’ into accessible format copies should consider the categories of beneficiaries expected to access adapted format copies in terms of the Copyright Amendment Bill (CAB) [13F-2017]. Given the recommendations of this thesis in the second part of this chapter, it will be appropriate to extend the concept of ‘beneficiaries’ to persons with different forms of disabilities. At the same time, Parliament must precisely define the term ‘persons with disability’ by stating who qualifies as such a person in the context of section 19D of Bill 13F-2017.

The accessible format copies are intended for VIPs and persons with other forms of disability. It is also necessary to consider the continuing shift in the copyright paradigm, especially in the digital environment.

In deciding the nature and scope of accessible format copies, the question is whether to follow the approach of a more restrictive interpretation or the approach of an integrated interpretation that is moderate and inclusive. This thesis proposes following the latter interpretation.

Furthermore, the objective of Article 4(1)(a) of the Marrakesh Treaty requires the member states to adopt exceptions that should allow changes that are required to make copyrighted works accessible in an alternative format. The thesis recommends widely interpreting the term ‘conversion’ to include adaptation. This recommendation allows works to be converted into different formats that make adapted copies accessible to persons with various forms of disability, such as hearing impairments.

The thesis recommends that Parliament be open-minded in its legislative process to amending the Copyright Act in the context of section 19D of Bill 13F-2017. Parliament should also consider the following factors:

1. The decision of the Constitutional Court in *Blind SA* that deals strictly with the case before it;

2. The various observations by the court that, while falling outside the scope of the case before it, are vital in adopting an amending Bill to stand the test of time;

3. The constitutional principles that were not considered in *Blind SA* and that are deemed necessary in making the Bill constitutionally compliant in every aspect; and

4. Public comments and submissions that highlight certain defects in the Copyright Amendment Bill (CAB) [13F-2017], that deserve the attention of Parliament.

Having explored the recommendations that flow from the analysis of the judgment in *Blind SA CC*, the discussion now turns to the specific recommendations for Parliament to consider in re-amending the Copyright Act, in the light of the existing CAB [13F-2017], for proper compliance with the relevant provisions of the Constitution and the applicable international legal documents, particularly the Marrakesh Treaty and the CRPD.

7.3.7 Recommendations dealing with specific amendments in the Copyright Act

7.3.7.1 Amendment relating to the beneficiaries

Although Chapter Four of the thesis justified why the CAB [13F-2017], defines the term 'beneficiary' to mean 'a person with a disability,' this thesis recommends that, to satisfy the Marrakesh Treaty and the three-step test, the Parliamentary Standing Committee should consider the following proposal to define the term 'beneficiaries' that must be incorporated into the Copyright Act:

> 'Beneficiary persons' shall include, but not be limited to:
> (a) persons who are blind, the visually impaired or persons who are otherwise print disabled, and
> (b) persons with all kinds of disabilities that affect their ability to access copyrighted works in different formats that suit their conditions.

The first part of this recommended definition of the term 'beneficiaries' is consistent with the relevant provision of the Marrakesh Treaty. The second part of the definition extends

to persons with other forms of disability. The major difference between the second part of the definition of 'beneficiaries' proposed in this thesis and the definition as it currently appears in the CAB [13F-2017], is that the latter merely refers to 'persons with disabilities,' while the definition in this thesis specifies who may qualify as a person with a disability in the context of the South African copyright exception. The second part of the proposed definition is similar to that of the Australian Copyright Act as amended.

Furthermore, this thesis recommends that the amendment of the Copyright Act should transcend the provision of the Marrakesh Treaty by providing a clear and precise definition of the term 'beneficiaries' that accommodates all forms of disability that affect people's ability to access copyrighted works.

7.3.7.2 Amendment relating to the term 'accessible format copy'

Next, to satisfy the Marrakesh Treaty and the three-step test, the Parliamentary Standing Committee should also consider incorporating the following proposed definition of the term 'accessible format copy' in the Copyright Act:

> 'Accessible format copy' is defined as, but not limited to:
> (a) a copy of a work in an alternative version or form which gives the beneficiaries, as well as persons and entities authorized to represent them, access to the work;
> (b) shall include large print materials, audio recordings that have been transcribed and photographic enlargements as well as other formats that have emerged as a result of technological developments;
> (c) shall be used exclusively by beneficiaries on the condition that the integrity of the work in its original form must be respected and not compromised; and
> (d) shall be made available to the extent to which the beneficiaries could enjoy these works, such as persons without disabilities.

Some parts of the definition of 'accessible format copy' are consistent with the relevant provision of the Marrakesh Treaty. However, other aspects of the definition, which accommodate persons with other forms of disability as well as the influence of technological developments, fall outside the provision of the Treaty. Furthermore, whereas the CAB [13F-2017], refers only to 'accessible format copy,' the definition of 'accessible format copy' proposed in this thesis is clear and precise.

The proposed definition of ‘accessible format copy’ derives from the combination of both the Australian and Indian Copyright Acts. However, the actual language of the definition is that of the thesis author.

7.3.7.3 Amendment relating to section 19D(4)(b) requirements in the context of cross-border exchange

The introduction of the Copyright Amendment Bill (CAB) [13F-2017], unlike the provisions of Bill 13B-2017, has incorporated the term ‘authorized entity’ in section 19D(3) and (4)(a) of the CAB and has also given a clear definition of ‘authorized entity’ in section 1(c) of the CAB in compliance with the relevant provisions of the Marrakesh Treaty. However, the provisions of section 19D(4)(b) of the CAB [13F-2017], may create a problem in implementing the ‘cross-border exchange,’ with particular reference to the importation and exportation of works in accessible format copies, as specified in Article 5(2) of the Marrakesh Treaty.

Section 19D(4)(b) of the CAB [13F-2017], overburdens the persons serving persons with disabilities, including authorised entities, by stating that the importation or exportation of works in accessible format copies should not be allowed if such persons ‘know, or have reason to know’ that the accessible format copies will be used for purposes other than to help the beneficiary persons.[128] The requirement that the persons should not ‘have reason to know’ that the importation or exportation of the accessible format copies are for other purposes than assisting persons with disabilities is prone to different interpretations. This may attract series of litigations that could have been avoided by amending the portion of the Bill concerned. The application of the provisions of section 19D(4)(b) in its current form is deemed prejudicial to persons with disabilities and may be construed to constitute unfair discrimination against such persons. More to the point, if this aspect is left unattended, this part of section 19D of the CAB [13F-2017], is prone to future challenge over its unconstitutionality, as it may appear to promote inequality and unfair discrimination against persons with disabilities.

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[128] CAB, s 19D(4)(b).

7.3.7.4 Amendment to deal with the payment of remuneration to copyright holders

Further, to comply with the Marrakesh Treaty, the South African Parliament should consider adopting a provision in the Copyright Act that will introduce a national body that would be responsible for the payment of remuneration to copyright holders. This proposal would accord with Article 4(5) of the Marrakesh Treaty, which gives member states the option to adopt national legislation that may incorporate the necessary laws on how to remunerate authors and other copyright holders whose legitimate interests have been unreasonably prejudiced. This proposal would also satisfy the third leg of the three-step test, which protects the legitimate interests of the copyright owners. Incorporating this provision into the Copyright Act would support the idea that the principle of *ubuntu* should be considered one of the underlying values of copyright exceptions, as proposed in this thesis. Granting reasonable and equitable remuneration to copyright owners, where the economic impact of the exception on their legitimate interests is no longer justifiable, would recognise their dignity as human beings.

7.3.7.5 Amendment on the application of TPMs in South African law

The provision of TPMs in South African copyright law should always take a moderate approach that recognises the need to balance granting certain rights to the copyright holders and permitting certain uses by individuals. However, the interests of the public that focus on promoting knowledge and learning may prevail over the interests of copyright holders in some instances, especially where the interests of persons with disabilities are at stake.

7.3.7.6 Other recommendations to be considered by Parliament and relevant institutions

Although the Marrakesh Treaty failed to consider the principle of fair use as an essential part of the copyright exceptions for VIPs, this thesis strongly recommends that Parliament, either immediately or soon, should consider incorporating fair use as one of the underlying principles that validates the protection and promotion of access to copyrighted works in adapted formats. The doctrine of fair use is regarded as an important legal tool in the hands of lawmakers that is necessary for the development of justifiable

copyright exceptions for persons with disabilities amid the digital innovations that continuously influence the copyright paradigm. Adopting the fair-use doctrine would allow South Africans to determine what qualifies as a 'normal exploitation' of a work, on the one hand, and as the 'legitimate interests of authors,' on the other, while accommodating the socio-economic dynamics in South Africa. Parliament must always consider the role of the fair-use doctrine in adopting legal provisions that deal with implementing the three-step test and applying measures such as TPMs. This thesis thus inclines to proposing the balanced interpretation of the three-step test that is based on the doctrine of fair use.

In addition, this thesis proposes that the principle of *ubuntu* be incorporated into the amending Bill and that it forms part of the underlying values of South African copyright law, especially for developing exceptions for persons with disabilities. The 'spirit of *ubuntu*' should be infused into the law regulating the relationship between the copyright owners and the users of copyrighted works, particularly persons with disabilities and those assisting them. Since neither the rights of persons with disabilities nor those of copyright owners are absolute, all parties are required to be conscious of the principle of human dignity inherent in every individual. This thesis has shown that it is necessary to promote and protect the constitutional rights of persons with disabilities as entrenched in the Bill of Rights, which rely on the principle of human dignity as the threshold. It is also important to protect the rights of authors and copyright holders to fair remuneration and contractual terms that are reasonable and equitable, as required to promote their right to dignity by recognising the value of their works.

Above all, it is recommended that South Africa should establish the necessary bodies and agencies to focus on creating awareness of the importance of promoting access to copyrighted works in adapted formats suitable for the needs of persons with disabilities. In the spirit of *ubuntu*, the accessible format copies should be distributed only to persons with disabilities by authorised persons and entities on a non-profit basis. Awareness should also be created, targeting persons with disabilities and the authorised persons and entities assisting them about different aspects of the Copyright Act that are adopted to promote equal access to copyrighted works for people with disabilities. Finally, the established agencies should strive to formulate techniques to train persons with

disabilities and the authorised persons and entities that assist them in new developments in digital technologies to improve access to works among people with disabilities.

7.3.8 Areas for future studies

There are a few issues raised in this thesis that were not addressed. For example, the introductory chapter pointed out that online education and other forms of virtual communication, which were accelerated by the coronavirus (COVID-19) pandemic, have become a daily phenomenon. There is a need to investigate how the paradigm shift has affected persons with disabilities and how access to copyrighted materials through digital processes can help to address the situation. Lastly, there is a need to examine the role of digital copyright law in developing technological systems through machine learning and other forms of artificial intelligence (AI) to assist persons with disabilities in actively participating in online learning programmes and other forms of communication.

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Media 24 Books (Pty) Ltd v Oxford University Press Southern Africa (Pty) Ltd (886/2015) [2016] ZASCA 119 (16 September 2016), 2017 (2) SA 1 (SCA)

Minister of Home Affairs and Another v Fourie and Another; Lesbian and Gay Equality Project and Others v Minister of Home Affairs

Minister of Home Affairs and Another v Fourie and Another; Lesbian and Gay Equality Project and Others v Minister of Home Affairs (CCT60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC)

Mogale and Others v Speaker of the National Assembly and Others (CCT

Mogale and Others v Speaker of the National Assembly and Others (CCT 73/22) [2023] ZACC 14; 2023 (9) BCLR 1099 (CC); 2023 (6) SA 58 (CC)

Moneyweb (Pty) Limited v Media 24 Limited & Another

Moneyweb (Pty) Limited v Media 24 Limited & Another (31575/2013) [2016] ZAGPJHC 81 (5 May 2016), 2016 (4) SA 591 (GJ)

N

National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others

National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others (CCT11/98) [1998] ZACC 15 (9 October 1998), 1999 (1) SA 6 (CC)

Nyathi v MEC for Department of Health, Gauteng & Another

Nyathi v MEC for Department of Health, Gauteng & Another (CCT 19/07) [2008] ZACC 8 (2 June 2008), 2008 (5) SA 94 (CC)

P

Pharmaceutical Manufacturers Association of South Africa & Another: In re Ex parte President of the Republic of South Africa & Others

Pharmaceutical Manufacturers Association of South Africa & Another: In re Ex parte President of the Republic of South Africa & Others (CCT31/99) [2000] ZACC 1 (25 February 2000), 2000 (2) SA 674 (CC)

President of the Republic of South Africa & Another v Hugo

President of the Republic of South Africa & Another v Hugo (CCT11/96) [1997] ZACC 4 (18 April 1997), 1997 (4) SA 1 (CC)

President of the Republic of South Africa & Others v United Democratic Movement (African Christian Democratic Party & Others Intervening; Institute for Democracy in South Africa & Another as Amici Curiae)

President of the Republic of South Africa & Others v United Democratic Movement (African Christian Democratic Party & Others Intervening; Institute for Democracy in South Africa & Another as Amici Curiae) (CCT23/02) [2002] ZACC 34 (4 October 2002), 2003 (1) SA 472 (CC)

Prinsloo v Van der Linde & Another

Prinsloo v Van der Linde & Another (CCT4/96) [1997] ZACC 5 (18 April 1997), 1997 (3) SA 1012 (CC)

S

S v Dodo

S v Dodo (CCT 1/01) [2001] ZACC 16 (5 April 2001), 2001 (3) SA 382 (CC)

S v Makwanyane & Another

S v Makwanyane & Another (CCT3/94) [1995] ZACC 3 (6 June 1995), 1995 (3) SA 391 (CC)

Singh v Minister of Justice and Constitutional Development & Others

Singh v Minister of Justice and Constitutional Development & Others (57331/2011) [2013] ZAEQC 1 (23 January 2013), 2013 (3) SA 66 (EqC)

South African Breweries International (Finance) BV trading as Sabmark International v Laugh It Off Promotions

South African Breweries International (Finance) BV trading as Sabmark International v Laugh It Off Promotions (3271/2002) [2003] ZAWCHC 100 (16 April 2003), 2003 BIP 83 (C), [2003] 2 All SA 454 (C)

U

Union of Refugee Women & Others v Director: Private Security Industry Regulatory Authority & Others

Union of Refugee Women & Others v Director: Private Security Industry Regulatory Authority & Others (CCT 39/06) [2006] ZACC 23 (12 December 2006), 2007 (4) SA 395 (CC)

Z

Zondi v MEC for Traditional and Local Government Affairs

Zondi v MEC for Traditional and Local Government Affairs (CCT 73/03) [2004] ZACC 19 (15 October 2004), 2005 (3) SA 589 (CC)

United Kingdom

H

Hubbard v Vosper

Hubbard v Vosper [1972] EWCA Civ 9 (16 February 1972), [1972] 2 QB 84

U

University of London Press Ltd v University Tutorial Press Ltd

University of London Press Ltd v University Tutorial Press Ltd [1916] 2 Ch 60

United States of America

C

Campbell v Acuff-Rose Music, Inc.

Campbell v Acuff-Rose Music, Inc., (1994) 510 U.S. 569, 114 S. Ct. 1164

Legislation

Australia

C

Copyright Amendment (Digital Agenda) Act; CADA

Copyright Amendment (Digital Agenda) Act 2000

Copyright Amendment (Disability Access and Other Measures) Act

Copyright Amendment (Disability Access and Other Measures) Act 2017

Copyright Regulations

Copyright Regulations 2017

D

Disability Discrimination Act; DDA

Disability Discrimination Act 1992

U

US Free Trade Agreement Implementation Act

US Free Trade Agreement Implementation Act 2004

India

C

Constitution of India; Indian Constitution

Constitution of India (1949)

Copyright Act 1914

Copyright Act 3 of 1914

Indian Copyright Act; Copyright Act

Copyright Act 14 of 1957

Copyright (Amendment) Bill, 2010

Copyright (Amendment) Bill, 2010 (Bill No. XXIV of 2010)

P

Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act

Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (Act 1 of 1996)

R

Rights of Persons with Disabilities Act

Rights of Persons with Disabilities Act, 2016 (Act No. 49 of 2016)

Japan

C

Copyright Law; Japanese Copyright Law

Copyright Law No. 48 of 1970

South Africa

C

CAB

Copyright Amendment Bill [B 13F–2017]

Citation of Constitutional Laws Act

Citation of Constitutional Laws Act 5 of 2005

Constitution; South African Constitution

Constitution of the Republic of South Africa, 1996

Copyright Act; South African Copyright Act

Copyright Act 98 of 1978

P

PPAB; Performers' Protection Amendment Bill

Performers' Protection Amendment Bill [B 24F- 2016]

R

Regulation on Interception of Communications and Provision of Communication-Related Information Act

Regulation on Interception of Communications and Provision of Communication-Related Information Act 70 of 2002

T

Trade Marks Act

Trade Marks Act 194 of 1993

United Kingdom

C

Copyright Act 1911

Copyright Act 1911

Copyright Act 1956

Copyright Act 1956

United States of America

D

Digital Millennium Copyright Act; DMCA

Digital Millennium Copyright Act, Pub. L. 105-304, 112 Stat. 2860

U

United States-Australia Free Trade Agreement Implementation Act

United States-Australia Free Trade Agreement Implementation Act Pub. L. 108–286

International Instruments

A

Additional Protocol to the European Social Charter Providing for a System of Collective Complaints

> Additional Protocol to the European Social Charter Providing for a System of Collective Complaints 1998, adopted in Strasbourg, France on 9 November 1995, and entered into force on 1 July 1998

African Charter

> African Charter on Human and Peoples' Rights (1986), adopted on 27 June 1981, in Nairobi, Kenya, and entered into force on 21 October 1986

African Charter on the Rights and Welfare of the Child; ACRWC

> African Charter on the Rights and Welfare of the Child (1999), adopted in Addis Ababa, Ethiopia, in July 1990, and entered into force on 29 November 1999

B

Beijing Treaty on Audiovisual Performances; Beijing Audiovisual Treaty

> Beijing Treaty on Audiovisual Performances was adopted in Beijing, China on June 24, 2012, and entered into force on 28 April 2020

Berne Convention

> Berne Convention for the Protection of Literary and Artistic Works (1886), adopted in Berne, Switzerland on 9 September 1886, and entered into force on 5 December 1887. Major revisions have been made in Paris (1896), Berlin (1908), Rome (1928), Brussels (1948), Stockholm (1967), and Paris (1971)

C

CEDAW; Convention on the Elimination of All Forms of Discrimination against Women

> Convention on the Elimination of All Forms of Discrimination against Women, adopted on 18 December 1979, and entered into force on 3 September 1981

CESCR, 1999 General Comment No. 13: Implementation of the International Covenant on Economic, Social and Cultural Rights

> CESCR, 1999 General Comment No. 13: Implementation of the International Covenant on Economic, Social and Cultural Rights, adopted on 8 December 1999 during the 21st session of the Committee on Economic, Social and Cultural Rights (CESCR) (15 November to 3 December 1999)

CESCR, General Comment 2009 No. 21: Right of Everyone to Take Part in Cultural Life

> CESCR, General Comment 2009 No. 21: Right of Everyone to Take Part in Cultural Life, adopted on 21 December 2009, during the 43rd session of the Committee on Economic, Social and Cultural Rights (CESCR) (2 to 20 November 2009)

Charter of Fundamental Rights of the European Union

> Charter of Fundamental Rights of the European Union (2000), proclaimed on 7 December 2000, and rendered legally binding by the Treaty of Lisbon (2007) on 1 December 2009

Charter of the Organization of African Unity

> Charter of the Organization of African Unity, adopted in Addis Ababa, Ethiopia on 25 May 1963, and entered into force on 13 September 1963

Charter of the Organization of American States

> Charter of the Organization of American States (1951), adopted in Bogotá, Colombia on 30 April 1948, and entered into force on 13 December 1951

Constitutive Act of the African Union; CAU

> Constitutive Act of the African Union, adopted in Lomé, Togo on 11 July 2000, and entered into force on 26 May 2001

Convention against Discrimination in Education; CDE

> Convention against Discrimination in Education, adopted in Paris, France on 14 December 1960, and entered into force on 22 May 1962

CRC; Convention on the Rights of the Child

> Convention on the Rights of the Child (1989), adopted by the United Nations General Assembly on 20 November 1989, and entered into force on 2 September 1990

CRPD; Convention on the Rights of Persons with Disabilities

: Convention on the Rights of Persons with Disabilities (2006), adopted by the United Nations General Assembly on 13 December 2006, and entered into force on 3 May 2008

D

Declaration of the Rights of the Child

: Declaration of the Rights of the Child (1959), adopted unanimously by the United Nations General Assembly on 20 November 1959

Declaration on the Rights of Disabled Persons

: Declaration on the Rights of Disabled Persons (1975), adopted by the United Nations General Assembly on 9 December 1975

E

European Convention for the Protection of Human Rights and Fundamental Freedoms; ECHR

: European Convention for the Protection of Human Rights and Fundamental Freedoms (1954), opened for signature in Rome on 4 November 1950 by the member states of the Council of Europe, entered into force on 3 September 1953

European Social Charter; ESC

: European Social Charter 1965, adopted in Turin, Italy on 18 October 1961, and entered into force on 26 February 1965

G

General Agreement on Tariffs and Trade; GATT

: General Agreement on Tariffs and Trade (1947), signed in Geneva, Switzerland on 30 October 1947, and entered into force on 1 January 1948

H

Human Rights Strategy for Africa

: The Human Rights Strategy for Africa was formally adopted by the African Union in 2011

I

ICERD; International Convention on the Elimination of All Forms of Racial Discrimination

International Convention on the Elimination of All Forms of Racial Discrimination (1966), adopted by the United Nations General Assembly on 21 December 1965, and entered into force on 4 January 1969

ICCPR

International Covenant on Civil and Political Rights (1966), adopted by the United Nations General Assembly on 16 December 1966, and entered into force on 23 March 1976

ICESCR

International Covenant on Economic, Social and Cultural Rights (1966), adopted by the United Nations General Assembly on 16 December 1966, and entered into force on 3 January 1976

Intellectual Property Rights and Human Rights, Resolution 2000

Resolution 2000/7, “Intellectual Property Rights and Human Rights”, adopted by the United Nations Sub-Commission on the Promotion and Protection of Human Rights in Geneva, Switzerland on 17 August 2000

M

Marrakesh Treaty

Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, adopted in Marrakesh, Morocco on 27 June 2013, and entered into force on 30 September 2016

P

Pact of San José, Costa Rica; American Convention on Human Rights; ACHR

American Convention on Human Rights (‘Pact of San José, Costa Rica’), adopted in San José, Costa Rica on 22 November 1969, and entered into force on 18 July 1978

Paris Convention

> Paris Convention for the Protection of Industrial Property, signed in Paris, France, on 20 March 1883, and entered into force on 7 July 1884. It has been revised in Brussels (1900), Washington (1911), The Hague (1925), London (1934), Lisbon (1958), Stockholm (1967), and amended in Geneva in 1979.

Protocol No. 12

> Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (2005), adopted in Rome, Italy, on 4 November 2000, and entered into force on 1 April 2005

Protocol of San Salvador

> Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights 'Protocol of San Salvador' (1999), adopted in San Salvador, El Salvador, on 17 November 1988, and entered into force on 16 November 1999

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights

> Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights was adopted in Ouagadougou, Burkina Faso on 9 June 1998, and entered into force on 25 January 2004

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa; the Maputo Protocol

> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted in Maputo, Mozambique on 11 July 2003, and entered into force on 25 November 2005

Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms; the First Protocol

> Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (1954), adopted in Paris, France on 20 March 1952, and entered into force on 18 May 1954

S

Standard Rules on the Equalization of Opportunities for Persons with Disabilities; SREOPD

: Standard Rules on the Equalization of Opportunities for Persons with Disabilities (1993), adopted by the United Nations General Assembly on 20 December 1993

T

TRIPS; TRIPS Agreement; Agreement on Trade-Related Aspects of Intellectual Property Rights

: Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 United Nations Treaty Series 299, 33 International Legal Materials 1197 (1994); signed in Marrakesh, Morocco, on 15 April 1994, entered into force on 1 January 1995

U

UNESCO Constitution

: Constitution of the United Nations Educational, Scientific and Cultural Organization (1945), adopted in London on 16 November 1945, and entered into force on 4 November 1946

UNESCO Convention on Technical and Vocational Education

: UNESCO Convention on Technical and Vocational Education (1989), adopted in Paris, France, on 10 November 1989, and entered into force on 29 August 1991

United Nations Charter

: Charter of the United Nations and Statute of the International Court of Justice, San Francisco (1945), unanimously adopted in a plenary session at the San Francisco Opera House on 25 June 1945, and entered into force on 24 October 1945

Universal Declaration of Human Rights; UDHR

: Universal Declaration of Human Rights (1948), adopted by the United Nations General Assembly at the Palais de Chaillot in Paris, France, as Resolution 217(III)[A] on 10 December 1948

W

WIPO Copyright Treaty; WCT

: WIPO Copyright Treaty (1996), adopted in Geneva, Switzerland, on 20 December 1996, and entered into force on 6 March 2002

WIPO Performances and Phonograms Treaty; WPPT

: WIPO Performances and Phonograms Treaty (1996), was adopted in Geneva, Switzerland on 20 December 1996, and entered into force on 20 May 2002