

A CRITICAL EXAMINATION OF COPYRIGHT LIMITATIONS AND  
EXCEPTIONS FOR THE VISUALLY IMPAIRED PERTAINING TO  
LITERARY WORKS IN SOUTH AFRICA IN THE LOCAL AND GLOBAL  
CONTEXT

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## CHAPTER 1: INTRODUCTION

### 1.1. Contextualising the issue

Imagine a world where 99.5 per cent of all books were locked away in a dark vault. These books will range from your favourite Stephen King novel and the prose of Charles Bukowski through to your local newspaper and the fifth grade prescribed history textbook. All these books are locked away in a vault, and only one man has the key to this vault. The holder of the key to unlocking the vault is a tentative man. He might allow you to have access to the vault for a limited use, but he is not sympathetic to your situation – access to the vault will come at a price. The price may or may not be in monetary terms, but will definitely require you to overcome an obstacle course he has created in order for you to prove that you are ‘worthy’ of entering the vault. You have no *de facto* right to enter. This is what the world is like for the visually impaired at present. The majority of books are being locked away in a dark vault that is copyright, and blind people are only able to access these works once, and if, the copyright owner of each work gives them permission to do so. This permission may cost them a price, such as payment to the copyright author, and will definitely cost them in terms of time and resources.

The situation above is very different for able bodied people. In this world, the man with the key to the vault allows you a free pass so that you may view the books within the vault at will. You have the right to enter the vault, and he cannot keep you from utilising this right even if he wanted to. Depending on what it is you want to do with the books once you enter the vault, you may or may not be required to meet certain conditions before the man with the key will allow it. For example, you would be able to freely copy a fair portion of the works within the vault, and the man with the key would be powerless to stop you doing so and unable to attach any obstacles to this so as to test whether or not you are ‘worthy’ of being allowed to utilise the books in that way. You therefore have permission to

enter the vault at will and browse through the many books kept there, as well as the right to use these books you find in the vault in different ways, which may or may not come with conditions.

It is this discrepancy in scenarios that demonstrates the unfair situation between the visually impaired community and the able bodied community with regards to accessing literary works protected by copyright. Where the man with the key allows able bodied people to enter his vault at will, he makes visually impaired individuals prove their worthiness by attaching certain conditions and obstacles before they may be allowed to enter his vault. This also means that visually impaired individuals are further limited in what they may and may not do with the books they find within. For example, sighted individuals are able to browse the books in the vault and make use of a fair portion of the works they find within, such as reproducing parts of them.<sup>1</sup> There is nothing the man with the key can do to prevent this, and he may not attach any requirements to this as everyone has the right to do so. Whilst visually impaired individuals also have this right on paper, they are unable to make use of their right to utilise a fair portion of any of the works that lie within the vault, because they may or may not be able to meet the ‘worthiness’ requirements stipulated by the man with the key in order to gain access to the works in the first place. It is the contention of this paper that the man with the key must be obliged by law to treat both visually impaired persons and able bodied persons the same, and that this therefore requires that he must grant a free pass into his vault for all people, and not only must refrain from stopping the visually impaired individuals from entering his vault, but he must additionally take active steps to ensure that both visually impaired and sighted individuals are able to realise their rights in respect of the books within. This is what shall be meant by the phrase ‘equal access’ as used throughout this paper.

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<sup>1</sup> A detailed explanation and critique of ‘fair dealing’ in terms of the South African Copyright Act will be addressed in later chapters of this paper.

The aim of the paper will be to demonstrate that South African law, as it stands in terms of the Copyright Act, fails to provide equal access to literary works for the visually impaired community compared to the able bodied community. In failing to provide equal access, the South African government has failed to realise the theoretical justifications underpinning the law of copyright, as well as its obligations on both a national (in terms of the constitution, legislation and case law) and international level. It will then be asked what South Africa ought to do so as to better this situation by examining what the international community is doing in order to better establish an environment of equal access to literary works, specifically in terms of the recent Marrakesh Treaty, and what implications this may have for South Africa in its quest to better balance the interests of copyright users and owners in such a way that equal access is achieved.

Whilst the above situation may seem somewhat dramatic, it is in fact an accurate metaphor for the situation pertaining to the visually impaired in South Africa and the vast majority of countries the world over. According to the World Health Organization (WHO), in 2012 there were 285 million people that were visually impaired worldwide. By visually impaired, this term encompasses both the 39 million individuals who suffer from legal blindness, as well as the 246 individuals who suffer from low vision.<sup>2</sup> Of those people with some degree of visual impairment, over 90 per cent of them live in developing, poorer countries. About 19 million of those affected by visual impairments are children under the age of fifteen.<sup>3</sup> A survey conducted by the World Intellectual Property Organisation (WIPO) in 2006 found that fewer than 60 countries worldwide had limitations and exceptions clauses for the visually impaired written into their national copyright

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<sup>2</sup> World Health Organisation 'Visual impairment and blindness.' Available at <http://www.who.int/mediacentre/factsheets/fs282/en/>

[Accessed 01 January 2014].

<sup>3</sup> Ibid.

laws.<sup>4</sup> This obviously fails to account for more recent amendments to some country's copyright laws, such as India's recent adoption of the Indian Copyright (Amendment) Act,<sup>5</sup> but is nonetheless a good indication of the lack of initiative taken by countries to deal with the existing book famine when left to their own devices. According to recent studies done by the World Blind Union (WBU), in 2012 only 7 per cent of books published were made available in a format accessible to those who are visually impaired in developed (or rather, richer) countries, whilst less than 1 per cent of books published for the year were made available in developing, poorer countries.<sup>6</sup> The situation is even worse in South Africa, where only 0.5 per cent of books ever published have been published in or converted to an accessible format for people with visual impairments.<sup>7</sup> The fact that there are over 800 000 visually impaired persons in South Africa makes this number all the more shocking and unacceptable.<sup>8</sup> This, in essence, is what has been known as the so-called 'book famine'. It is within this practical framework that the arguments and suggestions of this paper must be situated.

Having established a practical background upon which to situate this paper, we must now establish a legal one. This will be done by briefly providing an

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<sup>4</sup> WIPO 'Limitations and exceptions – access to books for the visually impaired.' Available at <http://www.wipo.int/pressroom/en/briefs/limitations.html#note> [Accessed 21 January 2014].

<sup>5</sup> Act 27 of 2012.  
(<file:///C:/Users/01438422/Desktop/India%20Copyright%20Amendment%20Act.pdf>).

<sup>6</sup> WBU 'WIPO negotiations treaty for blind people.'  
Available at <http://wbuap.org/index/archives/516> [Accessed 06 December 2014].

<sup>7</sup> Mara Kardas Nelson 'The rich turn a blind eye to poor readers.' Available at <http://mg.co.za/article/2013-03-28-00-the-rich-turn-a-blind-eye-to-poor-readers> [Accessed 29 March 2014]; South African National Council for the Blind 'Visually impaired persons have the right to read.' Available at <http://www.sancb.org.za/article/visually-impaired-persons-have-right-read> [Accessed 03 October 2014].

<sup>8</sup> Ibid.

explanation of the nature of copyright and its implications for copyright owners and copyright users. The laws will be those of South Africa, as the paper is focussed on the South African legal landscape and its implications and duties pertaining to the visually impaired.

Copyright is a right given to an author or creator of an original work in terms of the Copyright Act of South Africa.<sup>9</sup> It bestows upon the author a ‘bundle of rights’, which is made up of both economic and, in some jurisdictions (including South Africa), a moral rights.<sup>10</sup> The focus of this paper will be on the former. The economic rights range from the right to reproduce the work, the right to adapt and alter the work and so on.<sup>11</sup> It is also the copyright owner who has the sole right to authorise such actions occurring in regard to his work.<sup>12</sup> The ways in which someone who is not the copyright owner may go about performing any one of these economic rights that make up the bundle of rights owned by the copyright owner all rest on the idea of gaining the permission of the copyright owner to do so. This can range from being granted a license in exchange for royalties being paid to the copyright owner, assignment, testamentary disposition, or by operation of the law.<sup>13</sup> Save for the last two, there would be some form of financial benefit enjoyed by the copyright owner in his licensing or assigning of the right, and other than by operation of the law, he is in no way obliged to transfer any of his rights within his bundle. In short, save for a few exceptions where a legal exception exists (eg fair dealing), the copyright owner may authorise someone who is not the copyright owner to exercise a right/rights in respect of his copyright protected work, and this may be granted in exchange for the payment of royalties or the

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<sup>9</sup> Act 98 of 1978. For a general overview of the act, see: AJC Copeling *Copyright and the Act of 1978* (1978).

<sup>10</sup> Tana Pistorius ‘Copyright law’ in A van der Merwe (ed) *Law of intellectual property in South Africa* (2011) 143 - 255; AJC Copeling (note 9) at 26 – 33; page 139, Knowledge and Innovation in Africa.

<sup>11</sup> Copyright Act (note 9) at s 6.

<sup>12</sup> Ibid

<sup>13</sup> Copyright Act (note 9) s 22; AJC Copeling (note 9) at 78 – 84.

fulfilment of contractual obligations which may or may not also sound in monetary terms.<sup>14</sup>

Copyright is, by its very nature, territorial.<sup>15</sup> This means that ‘an IP right is limited to the territory of the state granting it’.<sup>16</sup> Whilst one work may meet the requirements to receive protection in terms of eg South African copyright laws, it need not be so in a different jurisdiction.<sup>17</sup> This means that different individuals may own certain rights in respect of the same work, according to the jurisdiction.<sup>18</sup> For example, I may have the right to publish J.K. Rowling’s latest book in South Africa, but someone else may have that same right in respect of publishing that same book in, say, America. However, the principle of national treatment, which is embodied in article 5(1) and 5(2) of the Berne Convention, attempts to soften the territoriality principle somewhat. The principle of national treatment states that each Member State of the Berne Convention grants the nationals of every Member State as if he were a national of the said Member State.<sup>19</sup> In other words, a German citizen who authored a work in Germany would be given the same rights as a South African national if he tried to obtain copyright protection for that work in South Africa. The territorial principle of copyright creates problems when it comes

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<sup>14</sup> Tobias Schonwetter et al ‘African Copyright and Access to Knowledge Project Country Report: South Africa.’ Available at

<http://www.aca2k.org/attachments/ACA2K%20South%20Africa%20CR.pdf>

[Accessed 09 September 2014].

<sup>15</sup> *Gallo Africa Ltd and Others v Sting Music (Pty) Ltd and Others* 2010 (6) SA 329 (SCA) para 15 – 17; Tana Pistorius (note 10) at 145.

<sup>16</sup> *Gallo Africa* (note 15) para 15; Alexander Puekert ‘Territoriality and Extraterritoriality in Intellectual Property Law’ in Gunther Handl & Joachim Zekoll (eds) *Beyond territoriality: transnational legal authority in an Age of Globalization* (2012) 1.

<sup>17</sup> Alexander Puekert (note 16) 2.

<sup>18</sup> Alexander Puekert (note 16) 3.

<sup>19</sup> For a detailed analysis of the principle of national treatment see: Robert Brauneis ‘National treatment in copyright and related rights: how much work does it do?’ Available at

[http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2113&context=faculty\\_publications](http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2113&context=faculty_publications)

[Accessed 05 January 2014].

to the cross border exchange of works, an issue that will be addressed later on in this paper.

## **1.2. Scope of paper: Depth over breadth**

As previously stated, the focus of this paper will be solely on copyright, particularly copyright pertaining to literary works. Literary works are defined in the Copyright Act as including, ‘irrespective of literary quality and in whatever mode or form expressed’—

- (a) novels, stories and poetical works;
- (b) dramatic works, stage directions, cinematograph film scenarios and broadcasting scripts;
- (c) textbooks, treatises, histories, biographies, essays and articles;
- (c) encyclopaedias and dictionaries;
- (e) letters, reports and memoranda;
- ( f ) lectures, speeches and sermons; an
- (g) tables and compilations, including tables and compilations of data stored or embodied in a computer or a medium used in conjunction with a computer, but shall not include a computer program

As has been expressly stated in the Copyright Act, textbooks are considered ‘literary works’ for the purposes of the Copyright Act. They will also be the literary work focussed on in this paper. In the South African context, the lack of available textbooks is a serious issue for able bodied students let alone those with a visual impairment,<sup>20</sup> and there is also the connection between education and the

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<sup>20</sup> The author recommends the following for a contextual overview and critique of the textbook crisis in South Africa: Faranaaz Veriava ‘The 2012 Limpopo textbook crisis: a study in rights-based advocacy, the raising of rights consciousness and governance.’ Available at

<http://www.section27.org.za/wp-content/uploads/2013/10/The-2012-Limpopo-Textbook-Crisis1.pdf>

standard of life enjoyed by persons. The focus of this paper will be on copyright protected literary works, with a focus on the South African context. The literary works that will be examined in this paper will consist exclusively of educational materials, such as textbooks.

The justification for limiting the scope of this paper has both practical and sociological elements. Firstly, the aim of this paper is to provide an in depth critical analysis of the law at present. In order to achieve this without making superficial claims one must make a choice as to whether one will focus on breadth or depth of the law. The author in this instance chose the latter.

Second, it must be noted from the outset that in the author's research for this paper, it became apparent to her that there is a lack of evidence on the specific effects the barriers to accessing literary works by the visually impaired has had on the blind community. Most evidence is clothed in general non-committal language such as stating that limited access to literary works means that visually impaired people are more likely to suffer at school,<sup>21</sup> but there is a distinct lack of empirical evidence and numerical figures to strengthen these claims.

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[Accessed 06 October 2014]; Servaas van der Berg and Ronelle Burger 'Education and socio-economic differentials: a study of school performance in the Western Cape' (2003) 71 3 *South African Journal of Economics* 496.

<sup>21</sup> AbleChildAfrica 'Still not going to school: a review of the state of disabled children's access to education in Africa.' Available at

<http://ablechildafrica.org/wp-content/uploads/2011/03/Still-not-going-to-school-report2.pdf>

[Accessed 05 December 2013]; International Council for Education of People with Visual Impairment 'EFA-VI Global campaign – a shared challenge.' Available at

[http://www.icevi.org/efa/global\\_campaign%20.html](http://www.icevi.org/efa/global_campaign%20.html)

[Accessed 20 December 2013]; WBU 'World Braille Day 2014.' Available at

<http://www.worldblindunion.org/English/news/Pages/World-Braille-Day-2014.aspx>

[Accessed 09 January 2014].

The justification for choosing to focus exclusively on educational materials is because of the connection between literary works in the form of textbooks, and the realisation of one's right to education. This connection does not exist when addressing it from the point of view of, for example, one's ability to access John Gray's 'Men are from Mars, Women are from Venus'. Whilst there may certainly be an argument that can be made regarding the visually impaired community's right to access all literary work, regardless of its nature, it is only when looking at literary works that serve the purpose of educating the community that one can see the stark interplay between foundational rights and the ability to access literary works, as well as the subsequent consequences of failing to do so. In order for schooling to be effective, students need basic literary skills in order for them to read the textbooks they are prescribed. Without access to textbooks, schooling will suffer. If the right to education is not fully realised, other rights will also be implicated and the economy will suffer due to a shortage of skills and people who are able to fill the jobs that run a country.<sup>22</sup> However, there are limitations with taking this chosen approach. Firstly, it addresses the problem of access from a consequential rather than deontological point of view. What this means is that the importance of access to literary works is defended largely in terms of the outcomes such a lack of access would have (ie not having access to literary works is problematic because of the effect this has on one's education), rather than in terms of an inherent right to access (ie not having access to literary works is problematic in and of itself, regardless of the consequences, because everyone has the right to access).

Next, the limitation regarding literary works must be justified. Whilst it must be conceded that textbooks are more than simply literary works (for example, the illustrations within the pages of the textbooks possibly being protected as artistic works in their own right), the primary works protected by copyright within most

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<sup>22</sup> Tobias Schonwetter et al (note 14).

textbooks are in fact literary works as many textbooks do not have illustrations, and even if they do, there will usually be accompanying text which explains the importance of the illustration and makes the reader able to adequately understand and interpret the illustration. It is for these reasons that the scope of this paper shall be limited to literary works within textbooks.

## **1.2. Paper outline**

The outline of this paper will be as follows. The first part of the paper will look at the theoretical justifications for copyright law and the underlying quest and need to find a balance between the rights of copyright owners and the rights of copyright users in general. The aim of analysing the theoretical and philosophical justifications underlying copyright law is to bring to the forefront the necessity for copyright to provide equal access to all citizens in order for copyright to attain its purpose.

The next part of the paper will ask the question of whether or not visually impaired persons are legally entitled to the same user rights as able bodied individuals. This will include examining international instruments which acknowledge the need to balance the rights of copyright owners against the rights of copyright users generally (for example, in terms of the 'three step test'), as well as put an obligation on South Africa (either because South Africa has signed or ratified the instrument containing the obligations) to find the balance between the right of copyright owners and the rights of visually impaired individuals who require the taking of additional active steps in order to ensure equal access to copyright protected literary works is realised (eg the Convention on the Rights of Persons with Disabilities). National obligations for South Africa to provide equal access to copyright protected literary works will also be examined in terms of the Constitution, legislation, and relevant statutes. It will be concluded that there is both an international and national duty for the South African government to realise

the rights of visually impaired individuals to access literary works at the same cost (in terms of money and otherwise) as sighted individuals, and that the national copyright legislation fails to meet these demands.

Once established that there is both an international and national imperative for South Africa to realise the right to equal access of copyright protected literary works, but that the law as it stands fails to do this, the paper will look at how the international community has met the challenge of achieving a balance between the rights of copyright users and the rights of copyright owners for the visually impaired. This has primarily been expressed through the recent creation of the Marrakesh Treaty, which will be critically examined in detail to assess its effect on the visually impaired community generally, and in South Africa in particular.

The next chapter will ask whether or not the Marrakesh Treaty provides all the answers to realising the right of equal access to copyright protected literary works for the visually impaired community in South Africa. This will include an evaluation of the practical implications of the Marrakesh Treaty in South Africa and will express the view that the road to achieving equal access to literary works between able bodied users of copyrighted literary works and visually impaired users is a long one.

The final chapter will conclude that, although visually impaired individuals in South Africa do indeed have the right to equal access to copyright protected literary works, and the Marrakesh Treaty provides a catapult to begin seeing the legislative changes required in order to realise this right, real grass roots change is a long way off.

## **CHAPTER 2: FINDING THE BALANCE BETWEEN THE RIGHTS OF COPYRIGHT OWNERS AND THE RIGHTS OF COPYRIGHT USERS IN**

## **THEORY AND PRACTICE: DOES SOUTH AFRICA'S COPYRIGHT LAW FIND THE RIGHT BALANCE?**

### **2.1. The importance of copyright law in general and in South Africa in particular**

On the face of it, one might ask why, if copyright law has given rise to so many problems pertaining to the equal access of literary works for the visually impaired, ought we not to do away with copyright law altogether? Surely, the disheartened reader might reason, doing away with copyright would mean that all persons, able and disabled, would be able to freely access literary works and therefore the particular problem which this paper aims to tackle will be rendered a moot point. However, this would be akin to cutting off the rose so as to dispose of the thorns, for there are various reasons why copyright can be seen as having a productive and useful role to play in society. These theoretical justifications will be briefly explained, and thus a disclaimer must be given at the outset. Given the practical importance and nature of the matter in point, it will be sufficient to not give a detailed jurisprudential analysis of each justification but merely enough skeletal information to illustrate a common foundational thread amongst all the varied theories, namely the vital role copyright law can and should play in balancing the need to protect the authors of original works against the need for users to have access to the wealth of knowledge that exists in society. It is in identifying this common feature that we will come to realise the problem of equal access does not lie with the notion of copyright itself, which is intended to play an important role in the democratisation of knowledge, but the way it is given effect to in terms of South African copyright law in particular.

There are many theoretical justifications that have been given through the years to justify the granting of intellectual property rights and their subsequent protection. These will be briefly looked at and assessed as we move from the traditional

theoretical justifications for intellectual property rights to a more practical justification for copyright law in developing nations such as South Africa.

To begin with, let us look at the philosophical or theoretical justifications for intellectual property laws in general.<sup>23</sup> First, there is the utilitarian theory of justification for intellectual property rights.<sup>24</sup> This concept states that intellectual property law is necessary to provide an incentive (financial or otherwise) to creators of original works to continue publishing such works. This, so the theory goes, is in the interest of society at large because society has an interest in there being the widest possible amount of creative works available for consumption so as to lead to progress in knowledge and learning for society as a whole. Therefore, intellectual property rights should aim to maximise net social welfare in this way. Without financial incentive given to authors, there would be no creation of new and original works, and this would be detrimental to the interest of society at large.<sup>25</sup>

Next there is a natural law justification for intellectual property rights, as first advanced by John Locke.<sup>26</sup> This theory says that every person is entitled to own the fruits of their own labour, and therefore the artist is entitled to own the product

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<sup>23</sup> For a much more detailed look at this theory and its flaws see: Edwin C. Hettinger 'Justifying intellectual property' (1989) 18 1 *Philosophy & Public Affairs* 31 at 47 – 52; William Fisher 'Theories of intellectual property' in Stephen R. Munzer (ed) *New essays in the legal and political theory of property* (2001) 168 – 200.

<sup>24</sup> Edwin C. Hettinger (note 23); Stephen Breyer 'The uneasy case for copyright: a study of copyright in books, photocopies and computer programs' (1970) 84 2 *Harvard Law Review* 281 at 291 – 323; Peter H. Karlan 'Worldmaking: property rights in aesthetic creations' (1986) 45 2 *The Journal of Aesthetics and Art Criticism* 183.

<sup>25</sup> William Fisher (note 23) at 168 – 169.

<sup>26</sup> Justin Hughes 'The philosophy of intellectual property' 1988 77 *Georgetown Law Journal* 287 at 295 – 332; Robert P. Merges *Justifying intellectual property* (2011); William Fisher (note 23); Sadulla Karjiker 'Justifications for copyright: the moral justifications' 2013 1 *IPLJ* 42 at 46 – 54; Edwin C. Hettinger (note 23) 31 – 47; Robert Nozick *Anarchy, state, and utopia* (1974); Stephen Breyer (note 24) 284 – 291.

of his own time, effort, skill etc.<sup>27</sup> The law, correspondingly, has a duty to protect such entitlements.<sup>28</sup>

The next concept is Hegel's personality-based justification for intellectual property rights.<sup>29</sup> This theory says that creative works are a part of the artist, which is necessary for self-actualization. The creators have a moral claim over their own intellectual property because their own self has become fused with the object they have created.<sup>30</sup> Therefore, intellectual property rights can be justified either in that they shield from appropriation the vehicles through which authors "express their will" or that they create an environment that is conducive to creative intellectual activity, which in turn is conducive to human flourishing.<sup>31</sup> One must not confuse Hegel's personality-based justification with Locke's natural law justification. For Hegel, property exists not because of the labour that the creator has invested into its creation and maintenance, but because of the human will that has been invested in the property, making it an extension of one's own person.<sup>32</sup>

The last of the theoretical justifications is that intellectual property rights should be used to help aid in the creation of a just and attractive society.<sup>33</sup> Therefore, the purpose of intellectual property rights is to balance the interests of the individual against the needs of society as a whole. It is similar to utilitarian, but takes a

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<sup>27</sup> Stanford University 'Stanford encyclopedia of philosophy.' Available at <http://plato.stanford.edu/entries/intellectual-property/#JusCri>

[Accessed 8 January 2013].

<sup>28</sup> William Fisher (note 23) 170.

<sup>29</sup> Justin Hughes (note 26) 28 – 50; Sadulla Karjiker (note 26) 54 – 57; Stephen Breyer (note 24) 284 – 291; Jeanne L. Schroeder 'Unnatural rights: Hegel and intellectual property' (2005 - 2006) 60 *University of Miami Law Review* 453.

<sup>30</sup> Stanford University (note 27).

<sup>31</sup> William Fisher (note 23) 171.

<sup>32</sup> Julie E. Cohen et al *Copyright in a global information economy* (2006) 13.

<sup>33</sup> William Fisher (note 23); Stephen Breyer (note 24) 291 – 323; David Vaver 'Intellectual property today: of myths and paradoxes' (1990) 69 *Canadian Bar Review* 98.

broader approach of what ‘social welfare’ entails. For example, it sees the purpose of intellectual property to be to encourage creative expression pertaining to a wide array of political, social, economic etc issues and in this way to encourage the creation and protect that sustainability of a democracy platform.<sup>34</sup>

As dealt with above, intellectual property rights are theoretically important to the world at large for many reasons, be it to ensure that one has ownership of the fruits of their labour or to ensure that the creative minds of society are encouraged to keep on creating. However, there are also many reasons why copyright is of importance that are specific to developing countries like South Africa. This is emphasised by viewing intellectual property, namely copyright law, through what Neil Weinstock Netanel calls the ‘democratic copyright paradigm’.<sup>35</sup> This argues that copyright law must be understood as enhancing democracy through its ‘fostering expressive diversity and the dissemination of knowledge’.<sup>36</sup> Whilst the arguments made by Netanel are to be found in other literature,<sup>37</sup> the focus will be mainly on the writings of Netanel for ease of explanation. Netanel argues that copyright law achieves this aim through three main consequences. Each of these consequences will be discussed in turn.

First, copyright provides incentives for the production and dissemination of creative, original expression. This ties in with the theoretical defence of intellectual property rights as a whole. One may counter this, as Neil Weinstock

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<sup>34</sup> Neil Weinstock Netanel ‘Copyright and a democratic civil society’ (1996-1997) 106 *Yale L.J.* 283 at 288.

<sup>35</sup> Neil Weinstock Netanel ‘Asserting copyright’s democratic principles in the global arena’ (1998) 2 *Vanderbilt Law Review* 217 at 228.

<sup>36</sup> *Ibid.*

<sup>37</sup> For example, see: A.J. Van der Walt and M. Du Bois ‘The importance of the commons in the context of intellectual property’ (2013) 24 1 *Stell. L.R.* 31; William Fisher ‘Reconstructing the fair use doctrine’ (1988) 101 *Harv. L.R.* 1661; Oren Bracha ‘Standing copyright law on its head? The Googlization of everything and the many faces of property’ (2007) 85 *Texas L.R.* 1799; Niva Elkin-Koren ‘Cyberlaw and social change: a democratic approach to copyright law in cyberspace’ (1996) 14 *Cardozo Arts & Entertainment Law Journal* 215.

Netanel himself concedes, with the proposition that there are those artists who would be willing to create art for art's sake, ie without any compensation or protection from 'free rider competition'.<sup>38</sup> John Mukum Mbatia argues that, even if this is indeed the case for some, those 'pro bono artists' will necessarily need to depend on the private publishing industry in order to publicise their works, and those private publishing industries are profit-driven; if the private publishing industry is not going to maximize their profits, then it will not remain a viable industry for any length of time, and without there being a viable publishing industry the artists of creative works will have no public platform from which to publicise their works.<sup>39</sup> Therefore, whether or not copyright incentivises the authors to create or the publishing industry to continue publishing the author's creations, the incentivisation offered by copyright is essential for the dissemination of creative expression in any meaningful sense of the word.

Second, copyright encourages a relatively independent, non-state sector of authors and publishers of cultural works to be created and to thrive. This is important in promoting democracy for four reasons. The first is that it enhances the ability of the media to act as a watchdog of the state. Although traditionally confined to the state, modern watchdog journalism is defined as 'independent scrutiny by the press of the activities of government, business, and other public institutions'.<sup>40</sup> The second is that it allows for the creation of creative works to be manifested by authors who are not constrained by any political agenda. It is well-known that in authoritarian governments, like Nazi Germany, any media that contradicts the present powers is likely to be censored or the author himself penalised. The third is that it encourages locally produced creative works. A natural extension of this is that creative works emanating from locals are naturally better able to identify and

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<sup>38</sup> John Mukum Mbatia 'Copyright and democratization in Africa' (2010 - 2011) 7 *International Law and Management Review* 52 at 85 – 86.

<sup>39</sup> Ibid.

<sup>40</sup> Timothy E. Cooke 'The functions of the press in a democracy' in Geneva Overholser and Kathleen Hall Jamieson (eds) *The institutions of American democracy: the press* (2005) 115 at 169.

address home-grown problems and dilemmas. The fourth is that, once the third reason is realised (ie once there has been an increase in the creation of locally produced creative works), it necessarily lends itself to the creation of a local public platform from which those locally produced creative works can penetrate the local discourse.<sup>41</sup>

Third, by ‘rewarding’ the authors of creative works with copyright protection, the state is practically acknowledging the high value placed on such works and artistic endeavours in its society, and this enhances personal liberty which itself undermines authoritarian governments.<sup>42</sup>

Arguably, Neil Weinstock Netanel’s proposition displays copyright in its best light. What I mean by this is that his proposition envisions copyright as enabling those who are visually impaired to be counted as a part of the ‘democracy’ which helps to make up the ‘democratic paradigm’. It is in this sense that Mihály J. Ficsor argues that current international trends as expressed by way of the Marrakesh Treaty signals that existing copyright law do in fact ‘offer an adequate basis for establishing and operating a well-balanced system suitable both to grant the necessary incentives and conditions for the creation of valuable works and due reward for the creators and to ensure availability of those works to the general public’.<sup>43</sup>

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<sup>41</sup> Neil Weinstock Netanel (note 35) at 277.

<sup>42</sup> Ibid at 228 – 231.

<sup>43</sup> Mihály J. Ficsor ‘Commentary to the Marrakesh Treaty on accessible format copies for the visually impaired.’ Available at

[http://www.copyrightseesaw.net/archive/?sw\\_10\\_item=50](http://www.copyrightseesaw.net/archive/?sw_10_item=50)

[Accessed 12 February 2014].

However, there is far from consensus amongst academics regarding the ‘democratic theorists’ like Netanel.<sup>44</sup> One of the main contenders is DA Snyder. He argues that there are two main problems with the democratic paradigm, namely with regards to the value placed on participation, and what he calls the ‘neutrality thesis’.<sup>45</sup> Firstly, he argues that the definition of ‘participation’ as promoted by such theorists is vague and ‘open for further specification’.<sup>46</sup> Whilst most democratic theorists agree that participation is valuable, they disagree on the reasons this is so.<sup>47</sup> Some, like Netanel, argue it is valuable as a means to an end, the end of which is a democratic political process, which is a social good.<sup>48</sup> Others value participation because it aids in the creation of a democratic society or culture, which is an individual good.<sup>49</sup> Alternatively, there are those who value participation because, they say, it is inherently valuable.<sup>50</sup>

The problems with these justifications for valuing participation are identified by Snyder. In terms of the first justification, he states that this leaves open the question of whether or not all expressions are valuable (which he dismisses as being a ‘bold claim’) or if only those expressions that seek to further the democratic process are valuable (in which case value is limited to the subject matter of the work). If the latter is true, then one is left asking should copyright

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<sup>44</sup> For example, see: Uma Suthersanen ‘Technology, time and market forces: the stakeholders in the Kazaa era’ in Meir Perez Pugatch (ed) *The intellectual property debate: perspectives from law, economics and political economy* (2006) 230.

<sup>45</sup> David A. Snyder ‘Two problems with the value of participation in democratic theory and copyright’ (2011) 89 4 *Texas L. R.* 1019 at 1019.

<sup>46</sup> Ibid.

<sup>47</sup> For a more detailed overview of all the problems arising from the lack of specification, see: Ibid 1020 – 1024.

<sup>48</sup> Neil Weinstock Netanel (note 34) 351

<sup>49</sup> Jack M. Balkin ‘Digital speech and democratic culture: a theory of freedom of expression for the information society’ (2004) 79 *New York University Law Review* 1 at 35.

<sup>50</sup> Rosemary J. Coombe ‘Objects of property and subjects of politics: intellectual property laws and democratic dialogue’ (1991) 69 *Texas L. R.* 1853 at 1860.

law 'be concerned only with promoting certain instances of participation'?<sup>51</sup> The same is true with the second justification for valuing participation, as one must ask whether or not copyright ought to only extend to works which do indeed have a connection to creating a democratic culture, therefore limiting protection according to the subject matter.<sup>52</sup>

The second problem Snyder identifies is that of the neutrality thesis, which conflicts with the value placed by the democratic theorists on participation.<sup>53</sup> The neutrality thesis argues that it is inappropriate for the government to take coercive steps to promote the benefits of copyright, as the government has no place acting in order to promote such moral goods.<sup>54</sup> The neutrality thesis is therefore about the justifications of government action (ie it is illegitimate for the government to justify its action on the basis of moral goods) rather than the outcome or effect of government actions (ie it is irrelevant as to whether or not the government, in promoting the benefits of copyright, do indeed lead to a democratic process and democratic culture).<sup>55</sup> However, this position appears to be nonsensical since the value of participation seems to mandate government action, because the value of participation is largely outcomes based (ie participation is valued because of what it does for society).<sup>56</sup>

Whilst the democratic theory of Netanel has been shown to be far from flawless, it does highlight the potential good of copyright on society. This is accepted even by

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<sup>51</sup> David A. Snyder (note 45) 1025.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid 1032.

<sup>54</sup> Ibid 1032 - 1034; Neil Weinstock Netanel (note 34) 352–353.

<sup>55</sup> David A. Snyder (note 45) 1033.

<sup>56</sup> Ibid 1036.

Snyder, albeit on different theoretical grounds.<sup>57</sup> It is therefore true that the notion of copyright in itself is not the problem, but rather the imperfect means by which it is expressed that is the problem. Where copyright fails to achieve the democratic ends to which a view of copyright as a ‘democratic paradigm’ aspires, or the more general ‘good’ to which it aspires according to Snyder, then one would presumably be able to confidently state that the copyright of the said society is not copyright in its best light as envisioned by the promoters of copyright as being a means to a beneficial end.

## **2.2. Finding the balance in international law: Berne Convention and the three step test**

Having established the importance of copyright and its role in finding a balance between the interests of the author and the interests of the consumer, it now comes time to ask how the international community has sought to realise this need for balance. One example of this can be found in the specific Berne Convention for the Protection of Literary and Artistic Works’s exceptions.<sup>58</sup> Article 10 allows for certain free uses of works pertaining to quotations, illustrations for teaching, the indication of the source and author of the work and so on.

Another expression of this balance can be found what is called the ‘three step test’.<sup>59</sup> This can be found in the Agreement on Trade-Related Aspects of International Property Rights (TRIPS Agreement),<sup>60</sup> as well as the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention,

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<sup>57</sup> For a full account of Snyder’s theory see: Ibid.

<sup>58</sup> 828 UNTS 222.

<sup>59</sup> For a detailed and interesting commentary, see: Michael Blakeney ‘A critical analysis of the TRIPS Agreement’ in Meir Perez Pugatch (ed) *The intellectual property debate: perspectives from law, economics and political economy* (2006) 17 at 17 - 31.

<sup>60</sup> 1994 (1994) 33 ILM 1197.

both of which South Africa is a party to. The three tests comprising article 13 of the TRIPS Agreement states as follows:

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.

The three step test has been compartmentalised and analysed in detail by the Dispute Settlement Body of the World Trade Organisation. The Dispute Settlement Body serves as the judiciary for the purpose of interpreting treaties such as the TRIPS Agreement. It is important to note that prior Dispute Settlement Body decisions ('reports') that interpret a said provision do not strictly dictate future interpretations of that provision. In other words, the outcomes of the Dispute Settlement Body are not binding, although in many cases prior reports of the Dispute Settlement Body often affects future interpretations. For the purposes of this paper, it is sufficient to base our interpretation of article 13 of the TRIPS Agreement on the only Dispute Settlement Body report that has discussed the said article, namely the European Community-United States: Section 110(5) of US Copyright Act (the 'Section 110(5) Dispute').<sup>61</sup> The facts of the matter will be succinctly summarised for the purposes of this paper, and revolve around section 110(5) of the US Copyright Act. This section created an exception which made it permissible for non-copyright holders to play radio and television music in public places without paying any royalties. The European Communities contended that this meant the US was in violation of their duties under article 9(1) of the TRIPS Agreement which requires the US to act in accord with articles 1 – 21 of the Berne

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<sup>61</sup> World Trade Organisation 'United States – section 110(5) of the US Copyright Act.' Available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/1234da.pdf](http://www.wto.org/english/tratop_e/dispu_e/1234da.pdf) [Accessed 23 January 2013].

Convention. In other words, the European Communities contended that this exception created by section 110(5) was incompatible with article 13 of the TRIPS Agreement, to which the US was bound.<sup>62</sup> It was therefore of crucial importance that the Dispute Settlement Body interpret the scope and meaning of article 13.

First, the Dispute Settlement Body identified that article 13 of the TRIPS Agreement clearly states limitations or exceptions are to be confined to ‘certain special cases’. What was unclear was what these ‘certain special cases’ were. The Dispute Settlement Body defined ‘certain’ as being ‘an exception or limitation in national legislation [that] must be clearly defined’,<sup>63</sup> although each possible situation to which the limitation or exception may apply need not be explicitly stated,<sup>64</sup> and ‘special’ to mean that ‘an exception or limitation must be limited in its field of application or exceptional in its scope. In other words, an exception or limitation should be narrow in quantitative as well as a qualitative sense’.<sup>65</sup> Therefore, ‘certain special cases’ was taken to include national legislation that clearly defines exceptions or limitations which are narrow in scope both qualitatively and quantitatively.

Second, the Dispute Settlement Body had to identify the meaning of the phrase ‘which do not conflict with a normal exploitation of the work’. According to William Baude et al,<sup>66</sup> the first thing to note is that both commercial and non-commercial uses may potentially conflict with the ‘normal exploitation’ of the work. In other words, exceptions for educational uses of a copyright work do not automatically pass the ‘no conflict’ step. Further, the Dispute Settlement Body

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<sup>62</sup> Ibid.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid.

<sup>66</sup> William Baude et al ‘Model language for exceptions and limitations to copyright concerning access to learning materials in South Africa’ (2006) 7 *African Journal of Information and Communication* 82.

decided that this step requires allocating all potential sources of revenue to the right holder, and subjecting each and every exclusive right to a separate analysis.<sup>67</sup> In order to limit the severity of this (because it suggests that every use of a work that includes a right held by the copyright holder, exploited for commercial gain, would conflict with what is considered ‘normal exploitation’), the Dispute Settlement Body stated that this step will only be satisfied when the use of the work ‘enters into economic competition with the ways in which the right holders normally extract economic value from the right at stake and thereby deprive them of significant or tangible commercial gains’.<sup>68</sup> It covers not only forms of use that currently are able to generate an income, but also those that, in the future, may have the potential to do so, and in this way the test has been interpreted in a forward-looking manner.<sup>69</sup> One problem with this, as pointed out by Annette Kur, is that it makes the test a purely arithmetic one, void of any scope to allow for policy reasons to be considered.<sup>70</sup> As Kamiel J. Koelman states, the fact that public interest is present in the first step in the sense of cases being ‘special’ is of no consolation given that each step is to be assessed individually, all being of equal weight.<sup>71</sup> Another problem with this second step is that it does not allow the judges and the legislators the scope to, as in the third step, compensate copyright holders by means of equitable damages instead of conferring a right limiting usage.<sup>72</sup> When assessing article 9(2) of the Berne Convention, Sam Ricketson states that ‘it therefore seems logical to conclude that the scope of the inquiry required under the second step of article 9(2), does include consideration of non-economic normative

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<sup>67</sup> Anette Kur ‘Limitations and exceptions under the three step test – how much room to walk the middle ground?’ in Anette Kur and Marianne Levin (eds) *Intellectual property rights in a fair world trade system: proposals for reform of TRIPS* (2011) 208 at 230; - 231; World Trade Organisation (note 61).

<sup>68</sup> *Ibid.*

<sup>69</sup> Kamiel J. Koelman ‘Fixing the three-step test’ (2006) 28 *8 European Intellectual Property Review* 407 at 409.

<sup>70</sup> Anette Kur (note 67).

<sup>71</sup> Kamiel J. Koelman (note 69).

<sup>72</sup> *Ibid.*

considerations, ie whether this particular kind of use is one that the copyright owner should control'.<sup>73</sup>

Third, the Dispute Settlement Body had to identify what is meant by 'not unreasonably prejudice the legitimate interests of the right holder'. The court stated that legitimate interests includes, but is not limited to, economic interests.<sup>74</sup> Therefore, a legitimate interest can include an interest that is not necessarily of any economic value. In determining what degree of prejudiced would be unreasonable, the Dispute Settlement Body stated that 'if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner', such an exception or limitation would cause unreasonable prejudice for the purposes of article 13 of the TRIPS Agreement unless he has been equitably compensated.<sup>75</sup>

### **2.3. South Africa's lopsided scale: How South Africa fails to find the balance**

We must now ask ourselves if, given the necessity for copyright to strike the balance between the owner and the user of a work, South Africa has been able to achieve this balance in its Copyright Act. The unfortunate answer must be a definite negative. There are various problems with the South African Copyright Act which make it too steadfastly seated in the owner's corner. Its failure will first be addressed in terms of the theoretical justifications for copyright law, as expressed in the prior chapter.

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<sup>73</sup> World Trade Organisation (note 61).

<sup>74</sup> Ibid.

<sup>75</sup> Ibid.

The democratic justifications and aims of copyright law in its best light do not find expression in the South African copyright regime. There are various problems with our over-strict and exclusive copyright regime and its effects on the democratic paradigm of copyright law, particularly with regards to the visually impaired. First, it enables copyright owners to exploit their rights over the said property which in turn achieves an underlying effect of undermining political, social or other criticisms as those who are visually impaired are effectively and indirectly excluded from the audience of creative works.<sup>76</sup> Second, it increases the cost of access to the said material to such a degree that it effectively prohibits certain people from accessing the said material as they are unable or unwilling to pay the said inflated costs.<sup>77</sup> This is particularly true when dealing with those potential consumers who are visually impaired and therefore required to pay additional costs in terms of acquiring permission from the copyright owner to reproduce or adapt their work, and in terms of paying additional monetary costs to convert the original work into an accessible format.<sup>78</sup> Third, which follows through from the second, is that the increased costs would prohibit the creation of new, transformative works based on pre-existing intellectual property. In this way, it would prohibit the expression of authors who are a part of the visually impaired community.<sup>79</sup> As most creative works are in one way or another a transformation of a pre-existing creative expression, this would have a chilling effect on cultural expression and expressive diversity, not just amongst those who are visually impaired, but amongst the greater society who are deprived from the cultural and social input that could be fostered and garnered from those who are visually

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<sup>76</sup> Neil Weinstock Netanel (note 34) 294.

<sup>77</sup> Ibid 295.

<sup>78</sup> Denise Rosemary Nicholson 'Copyright – are people with sensory-disabilities getting a fair deal?' Available at

<http://pcf4.dec.uwi.edu/viewabstract.php?id=379>

[Accessed 05 May 2013].

<sup>79</sup> Neil Weinstock Netanel (note 34) 295 – 296.

impaired consumers of creative works.<sup>80</sup> This is particularly problematic in a country where the right to freedom of expression is given constitutional recognition and protection.

In terms of the general, able bodied public, this balance fails to be achieved because of a lack of clarity regarding the provisions pertaining to the scope of an owner's copyright, or put another way, the definition and scope of a copyright user's rights/freedoms.<sup>81</sup> The Copyright Act gives the copyright owner the exclusive economic rights in their said work. The specific boundaries and content of these economic rights will vary according to the type of work in which copyright subsists, and are listed in section 6 through to section 11.<sup>82</sup> However, these rights are not absolute. The rights are limited by the time limitations imposed on the subsistence of copyright,<sup>83</sup> the fact that the Copyright Act allows for copyright to be held in a work that is an infringement of another's copyright,<sup>84</sup> that copyright has only been infringed where an unauthorised body has used a substantial portion of a protected work, and most importantly for our purposes, the statutory defences found in sections 12 – 19B.<sup>85</sup>

Section 12(1) of the Copyright Act embodies the South African 'fair dealing' provision. According to the act, fair dealing in respect of a copyright protected literary or musical work will not be considered an infringement of the copyright owner's economic rights where it is done

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<sup>80</sup> Ibid.

<sup>81</sup> Richard M. Shay *Users' entitlements under the fair dealing exceptions to copyright* (2012).

<sup>82</sup> Copyright Act (note 9).

<sup>83</sup> Ibid s 3(2) – (4).

<sup>84</sup> Ibid s2(3).

<sup>85</sup> Ibid.

- (a) for the purposes of research or private study by, or the personal or private use of, the person using the work;
- (b) for the purposes of criticism or review of that work or of another work; or
- (c) for the purpose of reporting current events—
  - (i) in a newspaper, magazine or similar periodical; or
  - (ii) by means of broadcasting or in a cinematograph film:

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

‘Fair dealing’ in terms of section 12 also applies to artistic works in terms of section 15(4), broadcasts in terms of section 18, and published editions in terms of section 19A.<sup>86</sup> There is no definition of what ‘fair dealing’ given by either the Copyright Act or by the South African courts, save for requiring that ‘such use shall be compatible with fair practice’.<sup>87</sup> This particularly tautological statement demonstrates the uncertainties around which the users of copyright protected works must navigate around.<sup>88</sup>

As stated, it is in trying to define what exactly is meant by the ‘fair dealing’ in terms of section 12 that one realises why the South African Copyright Act woefully fails to find a balance of interests amongst the general public. According to the fair dealing provision, research or private study constitute justifiable (or fair) reasons for what would otherwise be considered an infringement on the owner’s copyright. It is therefore alarming that the South African courts or legislature have failed to adequately define these terms. The concept of research has been interpreted to be different from private study in that it need not be private and may

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<sup>86</sup> Ibid.

<sup>87</sup> Section 12(4).

<sup>88</sup> Foreign law might be of assistance to the courts when it comes time for them to decipher the cryptic phrase ‘fair dealing’. In England, another country making use of fair dealing, the test has been interpreted by the courts as ‘whether a fair minded and honest person would have dealt with the copyright work in the manner that [the defendant] did, for the purpose [in question]’ in *Hyde Park Residence Ltd v Yelland* 2000 EMLR 363 at para 38 CA; *Newspaper Licensing Agency v Marks & Spencer* 2001 AC 551 at para 44 HL.

even be done for a purely commercial use purpose.<sup>89</sup> Private study, in contrast, must be done for one's own personal use (the image of a student reproducing sections of a work at a photocopy machine in the school library coming to mind).<sup>90</sup> It seems that research undertaken in terms of this section can be of an entirely commercial nature and still fall within the scope of fair dealing.<sup>91</sup> This leads nicely into the conundrum of what is understood as personal use in terms of fair dealing, and how it is to be differentiated from private use for although it is not immediately understood what the distinction between personal and private use is, the use of the word 'or' in the fair dealing provision implies that there must indeed be a difference between the two terms.<sup>92</sup> It has been suggested by that personal use may include personal but public use, such as the use of a copyrighted work in a public lecture, whereas private use is by definition not able to be public but must be limited to the user and his or her domestic circle only.<sup>93</sup> A definitive answer has yet to be found. It should also be noted that the South African courts have yet to determine how much of a work can be fairly dealt with for one of the said purposes in section 12(1). In Australia, the Copyright Act provides users with a guideline to determine when they are and are not acting within the scope of fair dealing for the purposes of research or study.<sup>94</sup> No such guidelines are provided in the South African Copyright Act.

Another section within the Copyright Act that is of particular importance regarding the delineation of user rights is section 13. Section 13 states the following:

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<sup>89</sup> Tana Pistorius (note 10) at 212.

<sup>90</sup> Ibid.

<sup>91</sup> Coenraad Visser et al *South African Mercantile and Company Law* 8ed (2003) 724.

<sup>92</sup> Tana Pistorius (note 10) at 212.

<sup>93</sup> Ibid.

<sup>94</sup> Australian Copyright Act 63 of 1968 s 40(2).

In addition to reproductions permitted in terms of this Act reproduction of a work shall also be permitted as prescribed by regulation, 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.

With respect to the regulations created from section 13, there is also much to be desired. According to regulation 7, ‘multiple copies (not exceeding one copy per pupil per course) may be made by or for a teacher for class-room use or discussion’. This is however constrained by regulation 8, which prohibits the copying for classroom use or for the use of teachers where it is used as a substitute for the purchase of books and may not be repeated in respect of the same material by the same teacher every term.<sup>95</sup> Both regulation 7 and 8 are subject to regulation 2, which states that

The reproduction of a work in terms of section 13 of the Act shall be permitted-

- (a) except where otherwise provided, if not more than one copy of a reasonable portion of the work is made, having regard to the totality and meaning of the work; \* and
- (b) if the cumulative effect of the reproductions does not conflict with the normal exploitation of the work to the unreasonable prejudice of the legal interest and residuary rights of the author.

The regulations do not determine how much of a work would constitute ‘reasonable portion’, and therefore leaves it to the discretion of the person making the copies.<sup>96</sup> Another problem with the regulations is that it confines the education exceptions to ‘class-room use or discussion’, meaning that distance educational

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<sup>95</sup> Copyright Regulations 1978.

<sup>96</sup> Tobias Schonwetter (note 14).

institutions like the University of South Africa would not be able to utilise the regulations.<sup>97</sup>

Whilst the South African Copyright Act clearly fails to achieve a balancing of interests with regards to the general public, the scale is even more unevenly tipped when assessing the situation with the visually impaired community. It is of vital importance to note that there is no limitation or exception in the Copyright Act for access to works by the visually impaired community. This means that whenever a person with a visual disability transforms a work that is protected under copyright into an accessible format, such as Braille, the said person will first need to seek out the copyright holder, whereupon they will need to apply for and attain permission from the copyright holder. This can be contrasted with the example of an able bodied student who is protected by – and therefore may freely act in pursuance of – the fair dealing provision of the Copyright Act in making a photocopy of a ‘fair amount’ of a book for private study. The transactional costs at play for the able bodied student are slim (the cost of the book should he or she be required to buy it) to none (if the book is available in the school library). The situation for a visually impaired student is drastically different because the transactional costs associated with attaining access in order to exercise their fair dealing rights in relation to a work are much higher than for an able bodied individual.

The ambiguity and resulting uncertainty with which the fair dealing provision applies makes it, in its current form, a practically unworkable doctrine that fails to find the balance between the interests of copyright owners on the one hand and copyright users.<sup>98</sup> I would further and respectfully agree with Olu Fasan,<sup>99</sup> who

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<sup>97</sup> Ibid.

<sup>98</sup> Ibid.

<sup>99</sup> Olu Fasan ‘Commitment and compliance in international law: a study of the implementation of the WTO TRIPS Agreement in Nigeria and South Africa’ (2012) 20 *Journal of International and Comparative Law* 191 at 201.

argues that the limitations and exceptions in South Africa's copyright law are contrary to article 13 of the TRIPS Agreement. This contention, like that made by Fasan, is based upon the understanding of article 13 of the TRIPS Agreement posited by the Dispute Settlement Body in the Section 110(5) Dispute. However, it should be noted that there are some who argue that article 13 is not adequate as a test for the legitimacy of national copyright law pertaining to limitations and exceptions of exclusive rights. An example of this is the opinion of Kamiel J. Koelman, who argues that the three step test of article 13 is unsuited to application in courts, mainly due to the problems with the second step of the test mentioned above, as it is contended that most national copyright laws would fail at this requirement.<sup>100</sup>

### **CHAPTER 3: IS THERE A DUTY ON SOUTH AFRICA TO ENSURE THE EQUAL ACCESS OF COPYRIGHTED WORKS FOR THE VISUALLY IMPAIRED?**

Now that we have established that there is no equal access of copyright protected literary works in South Africa, one must find out whether or not there is an obligation or duty on South Africa to take proactive means to achieve this aim. This will be answered on an international level by looking at selected international obligations, as well as on a local level in terms of the South African constitution, case law and legislation.

#### **3.1. An international obligation for South Africa to find the balance between user and owner rights**

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<sup>100</sup> Kamiel J. Koelman (note 69) 407.

In terms of international obligations, we will examine some of the most important international instruments that are binding on South Africa, either because South Africa has ratified it or because South Africa is a signatory to the instrument. The difference is that once a country has signed a treaty it may not act in any way that would contravene the content of the treaty, whereas once a country has ratified a treaty the treaty becomes a part of the country's domestic law and so is binding within the country.<sup>101</sup> Whilst ratification clearly creates a stronger obligation and therefore most of the instruments addressed will be ones that have been ratified, being a signatory to a treaty also creates binding obligations on South Africa and therefore deserves mention. The United Nations Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on Rights of the Child, the United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities, and the Convention on the Rights of Persons with Disabilities will be the instruments that will be examined. Each of these in turn will be shown to lend support for the statement that there is, on an international level, an obligation on the South African government to find a balance and achieve equal access to copyright protected literary works for the visually impaired. Whilst this is not a closed list of international instruments, the author has chosen to focus on what she considers the most important and representative instruments to which South Africa is bound. Whilst the instruments in their entirety are relevant, certain descriptive and representative portions that are of specific relevance to question at hand have been used to illustrate the overall intention and importance of each of these international instruments.

### **3.1.1. United Nations Universal Declaration of Human Rights**

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<sup>101</sup> John Dugard *International law: a South African perspective* (2005) 408 – 409.

The first multilateral instrument of importance is the United Nations Universal Declaration of Human Rights. Whilst not a treaty, the declaration was created in order to define ‘fundamental freedoms’ and ‘human rights’ in terms of the United Nations Charter, and is therefore binding on all Member States, including South Africa. The aim of the declaration was to create a ‘common standard of achievement for all peoples and all nations’ against which to measure their fulfilment of their duty in terms of the United Nations Charter to realise the ‘promotion of universal respect for and observance of human rights and fundamental freedoms’.<sup>102</sup>

Article 27 (1) states 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’. Article 19 gives everyone the right to ‘freedom of opinion and expression’, which includes ‘the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers’. Article 26 gives everyone the right to education. According to article 22

Everyone [. . .] has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

It is clear that this instrument is important in terms of the right to dignity and one’s personality rights.

### **3.1.2. International Covenant on Economic, Social and Cultural Rights**

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<sup>102</sup> 1948 United Nations General Assembly Resolution 217A (III) (1948).

Next is the International Covenant on Economic, Social and Cultural Rights which South Africa became a signatory to in 1994, but which it has yet to ratify.<sup>103</sup> Compliance is monitored by the Committee on Economic, Social and Cultural Rights. All Member States are required to submit initial and periodical reports to the committee on the implementation of the Covenant and the committee will examine these reports, making recommendations and addressing its concerns.<sup>104</sup> The aim of the covenant is to create the environment ‘whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political right’.<sup>105</sup> This it does in various ways.

According to article 1, everyone has the right to self-determination, which means the right to ‘determine their political status and freely pursue their economic, social and cultural development’. Article 6 deals with the right to employment, and states that parties to the ICESCR recognize the ‘right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right’. Coupled with the right to work must necessarily come the right to education, which is present in article 13, which states that everyone has the right to education, and that:

- (a) Primary education shall be compulsory and available free to all;
- (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and

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<sup>103</sup> United Nations Human Rights ‘Ratification Status for South Africa.’ Available at [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=162&Lang=EN](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=162&Lang=EN) [Accessed 02 January 2014].

<sup>104</sup> United Nations Human Rights ‘Monitoring the economic, social and cultural rights.’ Available at <http://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIntro.aspx> [Accessed 15 December 2013].

<sup>105</sup> 1966 General Assembly Resolution 2200A (XXI) (1966).

accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education

According to article 15, everyone has the right ‘to take part in cultural life’ and to ‘enjoy the benefits of scientific progress and its applications’.

In this multilateral treaty we see the emphasis on education and its impact on other economic, social and cultural rights of the individual. For this reason it too provides strong support for the obligation on the South African government to amend its laws in order to provide equal access and achieve a fair, balanced copyright system.

### **3.1.3. United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities**

One of the most pertinent multilateral instruments regarding the subject of copyright accessibility is rule 5 of the United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities, which deals specifically with state responsibilities regarding access for the disabled as a way of manifesting equal rights in all spheres.<sup>106</sup> The specific duties placed on the state are to ‘introduce programmes of action to make the physical environment accessible’ and more importantly for our purposes, to ‘undertake measures to provide access to information and communication’. According to rule 5(b)(6), ‘states should develop strategies to make information services and documentation accessible for different groups of persons with disabilities. Braille, tape services, large print and other appropriate technologies should be used to provide access to written information and documentation for persons with visual impairments’.

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<sup>106</sup> 1993 United Nations General Assembly Resolution 48/96 (1993).

The focus of this multilateral instrument is on equal access to information for persons suffering from disabilities, such as visual impairments. As these rules focus specifically on the rights and needs of disabled persons, it provides a compelling argument for the existence of an international duty on South Africa to adjust its current copyright provisions in order to achieve a more balanced copyright regime.

### **3.1.4. Convention on the Rights of the Child**

This is a convention which deals specifically with the rights of disabled children to receive education, and was ratified by South Africa in 1995.<sup>107</sup> It is enforced through the Committee on the Rights of the Child. Member States must submit initial and periodic reports to the committee on the steps they have taken to give effect to the rights embodied in the convention, and the progress they have made in terms of the realisation of the rights embodied by the convention. The committee may request the involvement of specialised agencies where appropriate, and will address concerns and make recommendations to the State party.<sup>108</sup> The purpose of the convention is to ‘protect children from discrimination, neglect and abuse’, and does this by addressing their civil, political, economic, social and cultural rights.<sup>109</sup> The particular ways in which this is done in the convention will be examined below.

According to article 23 of the Convention

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<sup>107</sup> United Nations Human Rights (note 102).

<sup>108</sup> 1989 United Nations General Assembly Resolution 44/25 (1989) articles 43 – 45.

<sup>109</sup> United Nations Human Rights ‘Monitoring children’s rights.’ Available at

<http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIntro.aspx>

[Accessed 16 April 2013].

1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.

[. . .]

3. Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.

In this international instrument we see the importance the international community places on the right of disabled children to receive education as a way of enjoying a 'full and decent life', and therefore recognising the correlation between the disabled child's right to receive an education and the disabled child's sense of self and dignity.

### **3.1.5. Convention on the Rights of Persons with Disabilities**

Lastly, there is the Convention on the Rights of Persons with Disabilities which requires our attention. It was ratified by South Africa in 2007.<sup>110</sup> The Committee on the Rights of Persons with Disabilities is in charge of monitoring the implementation of the treaty. It does this by requiring Member States like South

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<sup>110</sup> United Nations Human Rights (note 103).

Africa to submit reports on a regular basis outlining the legislative, policy and other steps taken to implement the treaty.<sup>111</sup>

Article 1 defines the purpose of the convention as being ‘to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity’. How it intends to achieve this will be broadly examined.

According to article 9(1) of the convention, state parties have the duty ‘to enable persons with disabilities to live independently and participate fully in all aspects of life [and so] States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others . . . to information and communications, including information and communications technologies and systems’. This right to access to information and communications is more specifically addressed in article 21. Article 21 deals with freedom of expression and opinion, and access to information. It states that

States Parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice.

According to article 29 States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others. The rights to equal access to work and employment (article 27) and education (article 24) are also of importance to the question of access to copyright materials. Another particularly pertinent right recognised in the Covenant is the right to

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<sup>111</sup> 2007 United Nations General Assembly Resolution 61/106 (2007) articles 34 – 35.

participation in cultural life, recreation, leisure and sport. According to article 30(1):

States Parties recognize the right of persons with disabilities to take part on an equal basis with others in cultural life, and shall take all appropriate measures to ensure that persons with disabilities:

- a. Enjoy access to cultural materials in accessible formats;
- b. Enjoy access to television programmes, films, theatre and other cultural activities, in accessible formats;
- c. Enjoy access to places for cultural performances or services, such as theatres, museums, cinemas, libraries and tourism services, and, as far as possible, enjoy access to monuments and sites of national cultural importance.

What is important to note is the emphasis on the right to freedom of expression and opinion, as expressed in the convention. This displays the importance of finding a balance between the rights of the copyright owner and the rights of the copyright user from a different, proactive user perspective. It highlights the importance of equal access not only in so far as the visually impaired community are passive consumers, but additionally in so far as they may go on to make up part of the proactive, creative owners of copyright works themselves.

### **3.1.6. Conclusion**

Each of these instruments have been addressed in turn to demonstrate that there is an international obligation on South Africa to provide equal access to copyright protected literary works for the visually impaired. The combination of these instruments and their varied rights and freedoms protected within, ranging from

the emphasis on education as a gateway to realising one's economic, social and cultural rights (as expressed in the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child) to the more direct manner in which those with disabilities are guaranteed/given the right to freedom of expression and opinion through equal access of information (as expressed in the Standard Rules on the Equalization of Opportunities for Persons with Disabilities and Convention on the Rights of Persons with Disabilities), shows that there is indeed an international obligation on South Africa to alter its national laws in order to provide equal access to copyright protected literary works for the visually impaired.

### **3.2. A national obligation for South Africa to find the balance between user and owner rights**

Whilst it has been clearly stated that there exists an international obligation on the South African government to alter its current copyright regime, the focus will now move on to whether or not there is a local obligation on South Africa to do so as well. This will include examining whether or not there is a constitutional obligation on the government, as well as examining any relevant case law and/or legislation.

#### **3.2.1. The Constitution of the Republic of South Africa, 1996**

As South Africa is a constitutional democracy, it seems pertinent to begin the search for a nationally-sourced obligation owed by the government to the visually impaired population regarding equal access to copyright protected literary works by surveying the Constitution of the Republic of South Africa. The fact that South Africa is a constitutional democracy means that the Constitution is the supreme

law of the land.<sup>112</sup> In other words, any legislation or conduct inconsistent with it is invalid according to South African law.<sup>113</sup> In terms of section 39(1)(a) of the Constitution, the courts have a duty to interpret the Bill of Rights in such a way that ‘promote[s] the values that underlie an open and democratic society based on human dignity, equality and freedom’. The court must also consider international law, and may consider foreign law.<sup>114</sup> According to section 39(2) of the Constitution, ‘when interpreting any legislation, and when developing common law or customary law, every court [. . .] must promote the spirit, purport and objectives of the Bill of Rights’. It is clear the pivotal role the Constitution plays in interpreting and creating South African law, and it will be argued that there is the possibility of sourcing such an obligation in the foundational structures of South African law.

According to section 9(3) of the Constitution, ‘the state may not *unfairly* discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual origin, age, *disability*, religion, conscience, belief, culture, language and birth’ (emphasis added). Any discrimination in terms of one of the listed grounds will be presumed to be unfair.<sup>115</sup> It is important to note that, in terms of section 9(4), this is not a negative right – the state has a duty to enact national legislation that will prohibit or prevent such unfair discrimination. The state therefore has a positive duty to protect its citizens from unfair discrimination.

We must now ask ourselves whether or not the discrimination in terms of the government’s failure to provide equal access for visually impaired community to copyright protected literary works as expressed in the Copyright Act is indeed

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<sup>112</sup> Constitution of the Republic of South Africa, 1996 s 1(c).

<sup>113</sup> Ibid s 2.

<sup>114</sup> Ibid s 39(b) - (c).

<sup>115</sup> Ibid s 9(5).

unfair. In the case of *Harksen v Lane NO and Others*,<sup>116</sup> the court stated that there are two steps when dealing with discrimination in the constitutional context. Firstly, one must ask if the provision differentiates between categories of people and, if so, does this discrimination bear a rational connection to a legitimate government purpose.<sup>117</sup> Secondly, one must ask if the differentiation amounts to ‘discrimination’, and where the differentiation is based on one of the listed grounds in section 9 it will indeed be discrimination.<sup>118</sup> Thirdly, one must ask if this discrimination is unfair, and where the discrimination is on one of the listed grounds in section 9 it will be presumed to be so.<sup>119</sup> It appears that the determining factor in deciding whether or not discrimination is unfair is its *impact* on the people affected by the discrimination (emphasis added).<sup>120</sup> In the case of *Prinsloo v Van der Linde and Another*,<sup>121</sup> the court defined unfair discrimination as ‘treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity’.<sup>122</sup> Where the discrimination is found to be unfair, the court will have to determine whether or not the potentially offending law can be justified in terms of the section 36 limitations clause.<sup>123</sup>

Looking at the Copyright Act, it is clear that the right to education, the right to freedom of expression, as well as the subsequent right to dignity, are the primary constitutional rights infringed by the Copyright Act. The right to education, found in section 29 of the Constitution, gives everyone the right to ‘a basic education, including adult basic education,<sup>124</sup> and to further education, *which the state,*

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<sup>116</sup> 1998 (1) SA 300 (CC).

<sup>117</sup> *Ibid* para 53.

<sup>118</sup> *Ibid*.

<sup>119</sup> *Ibid*.

<sup>120</sup> *Ibid* para 50 – 51.

<sup>121</sup> 1997 (3) SA 1012 (CC).

<sup>122</sup> *Ibid* para 31.

<sup>123</sup> *Harksen* (note 116) para 53.

<sup>124</sup> Constitution of South Africa (note 112) s 29(1)(a).

*through reasonable measures, must make progressively available and accessible*'.<sup>125</sup> It is important to note that the right to education imposes a positive duty on the state – it is therefore not a negative right, but a positive one in that it demands the government to take reasonable measures to realise the right in a substantial way.

There is also the right to freedom of expression that stands to be compromised. According to section 16 of the Constitution, everyone has the right to freedom of expression, which includes the 'freedom to receive or impart information or ideas, freedom of artistic creativity, and academic freedom and freedom of scientific research'.<sup>126</sup> A case which touched on the balancing of the constitutionally granted freedom of expression versus the legislatively created intellectual property right of having one's trademark protected from dilution is *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another*.<sup>127</sup> The facts of the case concerned South African Breweries (SABS) suing Laugh It Off Promotions CC for altering the images and words of the SABS trademarks for their 'Carling Black Label' beer in the creation and selling of t-shirts parodying their brand (an example being a shirt with the words 'black labour, white guilt').<sup>128</sup> SABS alleged that Laugh It Off Promotions had infringed their right according to section 34(1)(c) of the Trademarks Act. This section, known as the anti-dilution clause, 'takes the form of a prohibition against dilution and in particular against blurring or tarnishment of a registered trademark'.<sup>129</sup> In its defence, Laugh It Off Promotions CC alleged that this amounted to an infringement of their constitutional right to freedom of expression. The Constitutional Court chose to remain silent on the question of whether or not the

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<sup>125</sup> Ibid s 29(1)(b).

<sup>126</sup> Ibid s 16 (1)(b) - (d).

<sup>127</sup> 2005 (8) BCLR 743 (CC).

<sup>128</sup> Ibid para 1 – 7.

<sup>129</sup> Ibid para 3.

right to freedom of expression could or would trump the anti-dilution clause in the Trademarks Act ('I have expressly refrained from making any finding on any of the submissions [ . . . ] on fair use of a mark under section 34(1)(c) and freedom of expression'),<sup>130</sup> deciding instead that there had been no infringement of section 34(1)(c) on the basis that SABS had suffered no demonstrable economic harm as a result of the t-shirts.<sup>131</sup> However, the court did state that all categories of expression, save those excluded by the Constitution itself, ordinarily enjoy constitutional shield and may be restricted only in a way constitutionally authorised.<sup>132</sup>

This finding is important for present purposes because it shows a hesitancy by the courts to find that a constitutionally given right or freedom may be trumped by a legislatively granted right. In this case, the court ruled that there was the additional requirement of economic harm which needed to be shown for the expression to have been found actionable. In the matter of equal access to literary works, it is the users who are suffering economic harm and having their freedom of expression stifled according to the rights given to the copyright holders in terms of the Copyright Act. It would therefore seem plausible that a constitutional court would find the constitutionally given rights and freedoms of the visually impaired trump the legislatively granted right of copyright owners in terms of the Copyright Act.

The right to dignity is collateral damage to the onslaught of the preceding two rights that have been infringed by the Copyright Act. If one is unable to have equal access to education, one is less likely to find viable means of employment and one who is unable to support oneself and/or one's family is necessarily going to have their dignity compromised. The same holds true for infringement of the right to

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<sup>130</sup> Ibid para 65.

<sup>131</sup> Ibid.

<sup>132</sup> Ibid.

freedom of expression. If one is unable to adequately participate in the cultural and social environment around them, they are not being treated with their inherent human dignity. Dignity is one of the three fundamental values upon which South Africa has built their post-apartheid constitutional democracy,<sup>133</sup> and can therefore not be understated.

It is therefore submitted that, in so far as the Copyright Act fails to make provision for access to works by the visually impaired, the said Act potentially amounts to unfair discrimination in terms of the aforementioned law. Therefore, the Copyright Act, in so far as it potentially unfairly discriminates against the visually impaired, would have to be assessed by a court of law as to whether or not it meets the requirements of the section 36 limitations clause. I would earnestly submit that the Copyright Act, as it stands and for the reasons given in this paper, does not meet the requirements of the section 36 limitations clause and may therefore be identified as being unconstitutional in so far as it unfairly limits access to literary works for the blind and visually impaired in the country. The Copyright Act, in failing to make provision for the visually impaired to have equal access to literary works, is potentially unconstitutional.

### **3.2.2. Legislation**

In this section of the paper, a brief overview of South African legislation will be introduced to show that there is indeed a duty on the South African government in regards to existing legislation to provide equal access to copyright protected literary works. This does not claim to be a complete overview of all relevant

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<sup>133</sup> Constitution of South Africa (note 112) s 1.

legislation, but rather a brief overview of what is the most pertinent legislation for the purposes of this paper.

### **3.2.2.1. Employment Equity Act and Code of Good Practice on Key Aspects on the Employment of People with Disabilities**

The aim of the Employment Equity Act is to require that ‘every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice’.<sup>134</sup> This act applies to the employers of ‘people with disabilities’, and defines such employees as ‘people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment’.<sup>135</sup> The act requires that employers of ‘people with disabilities’ make reasonable accommodation for such individuals. Reasonable accommodation is defined as ‘any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment’.<sup>136</sup> Further, every designated employer must ‘in order to achieve equality, implement affirmative action measures for people from designated groups in terms of [the Employment Equity Act]’.<sup>137</sup>

The Employment Equity Act is important in so far as it highlights the positive onus on employers to take reasonable steps to achieve substantive equality between able bodied and disabled employers/potential employers. This statute

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<sup>134</sup> Act 55 of 1998 s 5.

<sup>135</sup> Ibid s 1.

<sup>136</sup> Ibid.

<sup>137</sup> Ibid s 13(1).

highlights the importance the government puts on promoting a proactive approach to alleviating inequality on the basis of disability at the level of employment. This is the kind of proactive approach that ought to be adopted at a pre-employment, school-going stage.

Leading on from the Employment Equity Act is the Code of Good Practice on Key Aspects on the Employment of People with Disabilities.<sup>138</sup> According to section 2(2) of the Code, the Code is a guide to help employees and employers realise the aim of the Employment Equity Act, which is promoting equal opportunities and fair treatment for people with disabilities. Whilst failure to observe the Code is not, in itself, a legal offense, the courts and tribunals must consider the Code in all proceedings where they are called to interpret and apply the Employment Equity Act.<sup>139</sup>

It elaborates on what the aim of the ‘reasonable accommodation’ employers are required to take is, namely ‘to reduce the impact of the impairment on the person’s capacity to fulfil the essential functions of the job’.<sup>140</sup> The Code makes it clear that what is meant by reasonable accommodation is as varied and flexible as the disabled community is.<sup>141</sup> The degree of reasonableness regarding the steps employers are expected to take is high. According to section 6(11),<sup>142</sup> an employer need not take steps that would cause ‘unjustifiable hardship’ on his business. ‘Unjustifiable hardship’ is defined as ‘an action that requires significant or considerable difficulty or expense’.<sup>143</sup> This standard will be measured considering, amongst other things, ‘the effectiveness of the accommodation and the extent to

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<sup>138</sup> GNR 1345 GG 25789 of 19 August 2002.

<sup>139</sup> Ibid s 3(1).

<sup>140</sup> Ibid s 6(1).

<sup>141</sup> Ibid s 6(7).

<sup>142</sup> Ibid.

<sup>143</sup> Ibid s 6(12).

which it would seriously disrupt the operation of the business'.<sup>144</sup> The Code therefore reaffirms the high level of accommodation expected by employers of persons with disabilities. This demonstrates that what is required by legislation is not only the show of an effort to accommodate, but rather that the default position requires the employer to make every effort save for the possibility of disrupting his enterprise.

### **3.2.2.2. Skills Development Act**

Another piece of South African legislation that is relevant is the Skills Development Act,<sup>145</sup> which focuses on disadvantaged groups such as persons with disabilities. The purpose of this act is, amongst other aims, 'to improve the employment prospects-of persons previously disadvantaged by unfair discrimination and to redress those disadvantages through training and education',<sup>146</sup> and 'to ensure the quality of education and training in and for the workplace'.<sup>147</sup> It does this in various ways, for example by creating learnerships designed to assist disabled people find either formal sector employment or to become self-sufficient through being self-employed.<sup>148</sup> In this way we see a recognition by the government of the long-term economic, social and emotional problems that arise as a by-product of a disabled individual failing to acquire a sufficient education, namely manifested in their failure to find work and therefore be self-sufficient individuals. This act recognises that the government has a duty to help the disabled community find employment, which in turn correlates with its obligation to provide education.

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<sup>144</sup> Ibid s 6(13).

<sup>145</sup> 97 of 1998.

<sup>146</sup> Ibid s 2(1)(e).

<sup>147</sup> Ibid s 1(f).

<sup>148</sup> Ibid Chapter 4.

### 3.2.2.3. Promotion of Equality and Prevention of Unfair Discrimination Act

The final statute to be examined is the Promotion of Equality and Prevention of Unfair Discrimination Act.<sup>149</sup> According to section 9 of the Constitution, provision is made for the enactment of national legislation to prohibit unfair discrimination and promote the achievement of equality. The Promotion of Equality and Prevention of Unfair Discrimination Act is the government's fulfilment of this mandate.<sup>150</sup> Chapter 5 deals with the promotion of equality and states that, not only is it the state's duty and responsibility to promote and achieve equality,<sup>151</sup> but this duty expands to all people too.<sup>152</sup> According to the act, unfair discrimination on the grounds of disability will include 'failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons'.<sup>153</sup> This act highlights that what may constitute discrimination on the grounds of disability is not merely a positive action, but also the failure to act when there is a duty to do so.

### 3.3. Case law

There is also case law which deals with the responsibility of the South African government in assisting persons with disabilities to live as normal a life as possible. One such case is that of *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa*.<sup>154</sup> This case concerned severely or

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<sup>149</sup> 4 of 2000.

<sup>150</sup> Ibid s 2(a).

<sup>151</sup> Ibid s 5(1).

<sup>152</sup> Ibid s 5(2).

<sup>153</sup> Ibid s 9(c).

<sup>154</sup> 2011 (5) SA 87 (W).

profoundly intellectually disabled children. In the Western Cape, there are so-called ‘special schools’ which are available by the state for the teaching of children with disabilities. However, the state does not make provision for the funding of special or any other schools for those children who are considered severely (IQ levels of 20 - 35) or profoundly (IQ levels under 25) intellectually disabled. The only option if these children wish to attend school is to attend a ‘Special Care Centre’ run by a non-governmental organisation. The government pays an annual subsidy to children who attend such Special Care Centres, but this amount is less than that paid to children attending mainstream or special schools. The lack of Special Care Centres also meant many of these children do not receive any education whatsoever. It was argued by the Western Cape Forum for Intellectual Disability (Western Cape Forum) that this infringed the children’s right to education, right to equality, right to dignity, and right to be protected from neglect and degradation.<sup>155</sup>

The government’s arguments are disturbing. Their first argument made was that, with respect to severely or profoundly intellectually disabled children, ‘no amount of education will be beneficial for them and they will be dependent on the imparting of life skills to them by their parents’.<sup>156</sup> Its other argument was that budgetary constraints meant that the severely or profoundly intellectually disabled children’s right to education should not be allowed to trump the socio-economic rights of others.<sup>157</sup> Both these arguments were rejected by the court. It was concluded that the state had failed to take reasonable measures to provide education for children with severe or profound intellectual disabilities, and had

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<sup>155</sup> Ibid para 1 – 5.

<sup>156</sup> Ibid para 153. For an explanation of the inconsistency between the government’s stance on the futility of education being expended to such severely disabled children and the government’s policy in terms of Education White Paper 6, see: Meryl Du Plessis ‘The social model of disability, rights discourse and the impact of South Africa’s Education White Paper 6 on access to the basic education system for persons with severe or profound intellectual impairments’ (2013) 17 *Law, Democracy & Development* 202 at 215 – 216.

<sup>157</sup> *Western Cape Forum for Intellectual Disability* (note 154) para 17.

therefore violated their rights to equality, dignity, basic education, and to be protected from neglect and degradation.<sup>158</sup>

However, as pointed out by Du Plessis, this case dealt with formal inequality rather than substantive equality ie arguing based on the fact that severely or profoundly intellectually disabled children were receiving less than other children, rather than arguing that severely or profoundly disabled children require more support and therefore more resources than other children, and it is therefore unclear how the case would have been concluded had the government been spending the same amount on all children (ie if the case had been one premised on substantive rather than formal equality).<sup>159</sup> Nonetheless, this case demonstrates the high importance put on the constitutional obligation resting on government to make available education to all children, no matter their level of disability. This includes taking reasonable measures to realise the rights of disabled children, and stresses that it is no excuse to merely state that limited resources means the government has justifiably limited the rights of those most disabled in order to better realise the rights of others.

It should therefore be clear that another body of case law which, although not dealing specifically with disability is still relevant to the subject-matter at hand, is that dealing with the right to education in general.<sup>160</sup> As stated prior, the constitution gives everyone the right to basic education.<sup>161</sup> What this constitutional right means has been determined by the Constitutional Court in the case of

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<sup>158</sup> Ibid para 52.

<sup>159</sup> (Note 156) 217 – 218.

<sup>160</sup> For a general overview of this area, see: Marius Smit and Petra Engelbrecht 'South Africa' in Charles J. Russo (ed) *The legal rights of children with disabilities: international perspectives* (2011) 195.

<sup>161</sup> Constitution of South Africa (note 112) s 29(a).

*Gauteng Provincial Legislature In re: Gauteng School Education Bill of 1995*,<sup>162</sup> where it was found that the right ‘creates a positive right that basic education be provided for every person and not merely a negative right that such a person should not be obstructed in pursuing his or her basic education’.<sup>163</sup> This therefore means that the right to education requires the government to take positive steps to realise the right to education, and in this way it is a positive right rather than a negative one.

In interpreting what kind of steps the government is required to take to positively realise the socio-economic right of education, the court in *Governing Body of the Juma Masjid Primary School and Others v Essay N.O. and Others* said the following:

Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be “progressively realised” within “available resources” subject to “reasonable legislative measures”. The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom” [. . .] The state is, in terms of that right, obliged, through reasonable measures, to make further education “progressively available and accessible.”<sup>164</sup>

In other words, the right to education is to be prioritised by the state in its budgetary allocations, because unlike other socio-economic rights in the constitution, the unqualified nature of the right to education requires a higher

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<sup>162</sup> 1996 (3) SA 165 (CC).

<sup>163</sup> Ibid para 9; Stu Woolman and Michael Bishop ‘Education’ in Stu Woolman and Michael Bishop (eds) *Constitutional Law of South Africa: Volume 3* 2ed (2006) 57-8 – 57 – 15.

<sup>164</sup> 2011 (8) BCLR 761 (CC).

standard of obligation owed to the public than with regard to qualified rights.<sup>165</sup> People do not have the right to access basic education, but to basic education itself.<sup>166</sup> Part of having the right to education means the obligation on the government to make education accessible for all,<sup>167</sup> including those with visual impairments who are unable to access mainstream textbooks.<sup>168</sup> This means that the government must ensure ‘appropriate steps are taken to make access easier for persons that were either’ confined to inferior learning institutions (such as schools for the visually disabled) or denied access to learning institutions in the past.<sup>169</sup>

In conclusion, the South African government has a duty in terms of the constitution, legislation and case law to realise the right to education for all people, and this includes making textbooks accessible in appropriate formats for visually impaired students. In so far as this has not been achieved by the Copyright Act, the South African government has acted in a manner that is unconstitutional, contrary to its international obligations, and contrary to the theoretical and philosophical foundations upon which the law of copyright rests.

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<sup>165</sup> Faranaaz Veriava and Fons Coomans ‘The right to education’ in Danie Brand and Chrisof H. Heyns (eds) *Socio-economic rights in South Africa* (2005) 57 at 62 – 64; Stu Woolman and Michael Bishop (note 163) 57 – 10.

<sup>166</sup> Ibid.

<sup>167</sup> See: Julian Jonker ‘Access to learning materials in South Africa: the convergence developmental and rights-based arguments for access to knowledge.’ Available at

<http://www.yaleisp.org/wp-content/uploads/2009/10/A2K-in-SA.pdf>

[Accessed 19 May 2013].

<sup>168</sup> South African Human Rights Commission ‘3<sup>rd</sup> Economic and social rights report 1999/2000.’ Available at

[file:///C:/Documents%20and%20Settings/User/My%20Documents/Downloads/3rd\\_esr.pdf](file:///C:/Documents%20and%20Settings/User/My%20Documents/Downloads/3rd_esr.pdf)

[Accessed 17 July 2013]; Stu Woolman and Michael Bishop (note 163) 57 – 21.

<sup>169</sup> Ibid.

## **CHAPTER 4: HOW THE INTERNATIONAL COMMUNITY HAS FOUND THE BALANCE AND ACHIEVED EQUAL ACCESS TO COPYRIGHT PROTECTED LITERARY WORKS: THE MARRAKESH TREATY TO FACILITATE ACCESS TO PUBLISHED WORKS FOR PERSONS WHO ARE BLIND, VISUALLY IMPAIRED, OR OTHERWISE PRINT DISABLED**

### **4.1. Background and history**

Having established the obligation, both nationally and on an international level, to promote equal access and in this way better balance the competing interests of the copyright owners against the interests of the copyright users, and having established the problematic situation in which the visually impaired community are forced to live, not only in South Africa but in many other countries, it becomes pertinent to ask how the international community has taken steps to eliminate these shortcomings of the copyright system. It is within the above mentioned problematic climate that is the book famine that the international community has banded together with the aim of creating a multinational treaty to alleviate the said difficulties of the visually impaired on a global scale regarding access to copyrighted literary works.

Prior to the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled (henceforth 'Marrakesh Treaty'), there was no direct international obligation on states to include any exceptions in their national copyright laws pertaining to the visually impaired. This is why South Africa is far from being the only country which does not provide any exceptions in its Copyright Act. Furthermore, the situation regarding cross-border exchange of accessible format reading materials has also been left up to individual agreements established between states on agreed upon

terms; there has been no international instrument that has set out an obligation that accessible format copies of literary works protected by copyright be able to be imported/exported, and what the possible conditions attached to such an obligation would be. This means that there have been instances where resources, although being available for use by visually impaired individuals in another state, have been unable to be shared because of a lack of agreement between the two or more states. The Marrakesh Treaty aims to address these two problems, namely to oblige Member States to include exceptions in their national copyright legislation for the visually impaired, and to set out the possible conditions upon which the cross-border exchange of accessible format copies of copyrighted literary works may proceed. As Mihály Ficsor says, the Marrakesh Treaty is unique and exceptional because it is an international co-operation agreement offering legal and organizational framework for enhanced co-operation to promote practical availability of accessible format copies.<sup>170</sup>

In order to fully understand and navigate around the provisions of the current Marrakesh Treaty, it is necessary to provide a brief look at the historical context of the said treaty and its gradual formation through years of multi-national negotiations. The first proposal made to the Standing Committee on Copyright and Related Rights (SCCR), a committee set up by the 1998 – 1999 biennium ‘to examine matters of substantive law or harmonization in the field of copyright and related rights’,<sup>171</sup> for a copyright exception and limitation for the visually impaired came in the form of the Proposal by Brazil, Ecuador and Paraguay, Relating to Limitations and Exceptions: Treaty Proposed by the World Blind Union made in 2009 and later endorsed by Mexico.<sup>172</sup> It is unsurprising, given the economical

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<sup>170</sup> Mihály J. Ficsor (note 43).

<sup>171</sup> WIPO ‘Standing Committee on Copyright and Related Rights,’ Available at <http://www.wipo.int/policy/en/sccr/> [Accessed 28 January 2013].

<sup>172</sup> WIPO ‘Proposal by Brazil, Ecuador and Paraguay, Relating to Limitations and Exceptions:

splits between developing and developed countries and their interests that the first call for such an action came from the developing South American community. Whilst the said proposed treaty was broader in population scope, pertaining to ‘persons who are visually impaired or have other disabilities in accessing copyrighted works’,<sup>173</sup> the purpose of the proposed treaty as expressed in article 1 was to deal with copyright limitations and exceptions regarding people with disabilities. This is further seen in article 4, which demarcates the limitations and exceptions to exclusive rights under copyright for the visually impaired.

This proposed treaty was followed by the Draft Proposal of the United States of America for a Consensus Instrument of 2010.<sup>174</sup> This proposal applies to people with ‘print disabilities’, which encompassed persons who were blind, persons who have ‘a visual impairment or a perceptual or reading disability which cannot be improved by the use of corrective lenses’, or persons who have ‘an orthopaedic- or neuromuscular-based physical disability that prohibits manipulation and use of standard print materials.’<sup>175</sup> Again, we see the scope of the proposed treaty being broader than the current Marrakesh Treaty.

The third is the 2010 Draft Joint Recommendation Concerning the Improved Access to Works Protected by Copyright for Persons with a Print Disability.<sup>176</sup>

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Treaty Proposed by the World Blind Union (WBU).’ Available at

[http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_18/sccr\\_18\\_5.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_18/sccr_18_5.pdf)

[Accessed 23 May 2013].

<sup>173</sup> Ibid article 2(a).

<sup>174</sup> WIPO ‘Draft Consensus Instrument: Proposal by the Delegation of the United States of America.’ Available at

[http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_20/sccr\\_20\\_10.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_20/sccr_20_10.pdf)

[Accessed 04 March 2013].

<sup>175</sup> Ibid article 1.

<sup>176</sup> WIPO ‘Draft Joint Recommendation Concerning the Improved Access to Works Protected by

This was a proposal by the delegation of the European Union. Interestingly, the proposal does not allow for direct distribution to a said disabled person, but requires the use of a so-called ‘trusted intermediary’.<sup>177</sup> Further, the definition of ‘print disability’ is given a much wider scope as it is defined in article 1(ii) as any person

- a) who is blind; or
- b) who has an impairment of visual function which cannot be improved, by the use of corrective lenses, to a level that would normally be acceptable for reading without a special level or kind of light; or
- c) who is dyslexic; or
- d) who is unable, through physical disability, to hold or manipulate a book; or
- e) who is unable, through physical disability, to focus or move his eyes to the extent that would normally be acceptable for reading; and whose disability results in an inability to read commercially available standard editions of works; and who can be helped to read by reformatting the content (but, does not require the text itself to be re-written in simpler terms to facilitate comprehension).

From this was borne the Marrakesh Treaty, which will be examined in detail in the next part of this paper. The aim of spending much time on the Marrakesh Treaty is to investigate what the international community is doing in regards to eliminating the book famine through making access to copyright protected literary works easier, and what the implications of this will or may be for South Africa’s current copyright laws.

In addressing the Marrakesh Treaty, the first questions that will be addresses will deal with the nature of the treaty. It will be established whether or not the

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Copyright for Persons with a Print Disability: Proposal by the Delegation of the European Union.’ Available at

[http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_20/sccr\\_20\\_12.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_20/sccr_20_12.pdf)

[Accessed 19 May 2013].

<sup>177</sup> Ibid article 1(iv).

Marrakesh Treaty ought to have been a recommendation or a treaty, and whether or not it falls within the scope of article 13 of the TRIPS Agreement. The situating of the Marrakesh Treaty within current law and an analysis of its nature will be done next, moving on to establishing the crux of the treaty and what it means for the visually impaired. Next there will be an examination of the most contentious areas surrounding the Marrakesh Treaty, and an ongoing dialogue around what exactly South Africa ought to do in light of the Marrakesh Treaty. The paper will then ask the question of whether or not the Marrakesh Treaty signals the end of the 'book famine', particularly in South Africa.

#### **4.1.1. The nature of the Marrakesh Treaty: A treaty or a recommendation?**

A question that must be addressed at the outset of our examination of the Marrakesh Treaty is the issue of why it is necessary to create a treaty rather than a recommendation to achieve the aims expressed and embodied in the Marrakesh Treaty.<sup>178</sup> Treaties are 'written agreements between states or between states and international organisations'.<sup>179</sup> They are a primary and binding source of international law which 'takes the place of legislation in the domestic sphere'.<sup>180</sup> Therefore the answer to the question of why the aims of the Marrakesh Treaty needs to be expressed through the medium of a treaty rather than a recommendation is very simple, namely that a treaty is binding whereas a recommendation is not. A look at the past gives every indication that a mere recommendation is and will continue to be of little effect. For example, between the creation of the 2010 Draft Joint Recommendation Concerning the Improved Access to Works Protected by Copyright for Persons with a Print Disability and

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<sup>178</sup> Author notes this as a topic arising during her attendance at the Open A.I.R. Conference on Innovation and Intellectual Property in South Africa between 9 and 13 December 2013 held at the Breakwater Lodge, Cape Town.

<sup>179</sup> John Dugard (note 101) 28.

<sup>180</sup> Ibid 28 - 29.

present day, countries have still not included specific provisions in their national copyright legislation pertaining to the visually impaired. Countries have shown through their actions – or rather, through their inactions – that they are not willing to take the initiative freely to provide for copyright exceptions for the visually impaired, and so there is no reason to think that another recommendation will yield any different outcome and effect on them. The ‘extent to which recommendations of the political organs of the United Nations play a part in the formation of custom is a matter of much debate’, as recommendations are not binding on states although an accumulation of recommendations might have the effect of evidencing collective practice.<sup>181</sup> However, as an historical overview of the Marrakesh Treaty has shown, there is no reason to believe another recommendation will have any effect. It is therefore necessary for the use of a binding international instrument, which carries with it penalties for non-compliance, to be used as the primary means of realising the changes that years of prior negotiations have failed to realise. It is unquestionably that the binding instrument of a treaty is, in this case, absolutely necessary.

#### **4.1.2. The Marrakesh Treaty and the Berne Convention: Within or without**

Another preliminary question regarding the nature of the Marrakesh Treaty is its place in international law. In particular, it has been questioned whether or not the Marrakesh Treaty is a part of the Berne Convention or not.<sup>182</sup> Does the Marrakesh Treaty fit into the article 13 requirements of the TRIPS Agreement/article 9(2) of the Berne Convention, or is it something external, creating rules and boundaries of its own? This question is important in light of the fact that the three step test appears, in its various forms, in many international instruments which include

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<sup>181</sup> Ibid 31 – 32.

<sup>182</sup> Author notes this as being a topic of much debate at both the South African Government’s Department of Arts and Culture Consultative Workshop on Intellectual Property and the Beijing Treaty on Audiovisual Performances, and the 3rd Global Congress on Intellectual Property and the Public Interest conferences she attended.

article 9(2) of the Berne Convention, article 13 of the TRIPS Agreement, article 10 of the WIPO Copyright Treaty,<sup>183</sup> and article 16 of the WIPO Performances and Phonograms Treaty.<sup>184</sup> The three step test therefore acts as an international standard, binding the vast majority of countries.

In regards to the question posed, it is submitted that the answer is the former, namely that the Marrakesh Treaty is indeed a part of the Berne Convention and the TRIPS Agreement, rather than an external instrument. The various reasons for making this claim will now be examined as proof thereof. First, one must look at the preamble of the Marrakesh Treaty. The preamble reaffirms the ‘obligations of Contracting Parties under the existing international treaties on the protection of copyright and the importance and flexibility of the three-step test for limitations and exceptions established in Article 9(2) of the Berne Convention’.<sup>185</sup> It therefore makes direct reference to the three step test and makes it clear that part of the aim of the treaty is to reaffirm and therefore reinforce the obligations Contracting Parties have in terms of article 9(2) of the Berne Convention and article 13 of the TRIPS Agreement.

Second, one must look at article 1 of the Marrakesh Treaty. This article states that ‘nothing in this Treaty shall derogate from any obligations that Contracting Parties have to each other under any other treaties, nor shall it prejudice any rights that a Contracting Party has under any other treaties’.<sup>186</sup> The clear implications of this

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<sup>183</sup> (1997) 36 ILM 65.

<sup>184</sup> (1997) 36 ILM 76.

<sup>185</sup> WIPO ‘Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired, or Otherwise Print Disabled.’ Available at

[http://www.wipo.int/edocs/mdocs/copyright/en/vip\\_dc/vip\\_dc\\_8\\_rev.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/vip_dc/vip_dc_8_rev.pdf)

[Accessed 02 August 2013].

<sup>186</sup> Ibid article 1.

article is that it does not intend to limit rights but rather to increase them, which is keeping in line with the purpose of the treaty.

Thirdly, one must look at article 11. Article 11 states the following:

In adopting measures necessary to ensure the application of this Treaty, a Contracting Party may exercise the rights and shall comply with the obligations that that Contracting Party has under the Berne Convention, the Agreement on Trade-Related Aspects of Intellectual Property Rights and the WIPO Copyright Treaty.

This includes interpretive agreements pertaining to article 9(2) of the Berne Convention and article 13 of the TRIPS Agreement.<sup>187</sup> It is therefore clear according to article 11, that the Marrakesh Treaty envisions itself as being a part of article 9(2) of the Berne Convention and article 13 of the TRIPS Agreement rather than something additional to it. The Marrakesh Treaty, it is arguable, sees itself as necessitating the realisation of rights held by the visually impaired which are in many cases not being realised by the international community who, in so far as this realisation is lacking, falls short of meeting their article 9(2) and article 13 mandate. This interpretation of the Marrakesh Treaty's nature within the Berne Convention is one also supported by Mihály J. Ficsor, who states that

It follows unequivocally from Article 1 that the Marrakesh Treaty does not derogate from the obligations under any other treaties; thus it does not change the scope of any exclusive rights provided in those treaties (of course, in the sense that it does not reduce it in a way other than through limitations and exceptions that are also applicable in accordance with the provisions of those treaties, and particularly in accordance with the three-step test). As regards the question of extension of rights provided in other treaties, there is no provision in the Treaty in view of which the slightest reason for such a question might emerge. The essence of the Treaty is exactly that it foresees limitations and

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<sup>187</sup> Ibid article 11 (a) – (b)

exceptions to the *existing* rights provided in other treaties to the extent allowed by those treaties.<sup>188</sup>

It is for the aforementioned reasons that I respectfully submit it is without question that the Marrakesh Treaty does indeed operate within the bounds of the three step test, and is not an additional or external standard.

#### **4.2. Analysis of the Primary Contents of the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled**

In order to fully appreciate the importance of the Marrakesh Treaty, one must understand the implications of it for the visually impaired.<sup>189</sup> First the application of the Marrakesh Treaty must be identified by understanding who the beneficiaries are in terms of the treaty. According to article 3

A beneficiary person is a person who:

(a) is blind;

(b) has a visual impairment or a perceptual or reading disability which cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability; or

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<sup>188</sup> Mihály J. Ficsor (note 43).

<sup>189</sup> For a general overview of the Marrakesh Treaty and its place in the 'new disability politics', see: 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.

- (c) is otherwise unable, through physical disability, 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.

The limitations and exceptions promoted by the Marrakesh Treaty are to be confined to the benefit of the above-mentioned people. The initial version of the Marrakesh Treaty did in fact include exemptions for those suffering from other sensory disabilities other than visual impairments.<sup>190</sup> However, this was excluded from the final draft of the Marrakesh Treaty after the United States of America insisted they be excluded from the scope of the treaty.<sup>191</sup> This means that people who are inflicted with other sensory disabilities, such as hearing loss, are excluded from the benefits of the benefits enjoyed within the Marrakesh Treaty. However, certain countries may choose to alter their copyright laws in order to include those with other sensory disabilities. A case in point is Israel, who has published a bill which contains a copyright exception that follows the Marrakesh Treaty (even though Israel is not yet a signatory to the Marrakesh Treaty), but broadens the scope of application to include other disabilities such as hearing loss.<sup>192</sup>

The heart of the Marrakesh Treaty can be found in article 4(1)(a). According to article 4(1)(a), contracting parties to the treaty

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<sup>190</sup> Eg: WIPO ‘Draft Joint Recommendation Concerning the Improved Access to Works Protected by Copyright for Persons with a Print Disability.’ Available at

[http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_20/sccr\\_20\\_12.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_20/sccr_20_12.pdf)

[Accessed 17 March 2013] where disabilities that varied from dyslexia to the inability to hold a book were included in the scope of the proposed treaty.

<sup>191</sup> James Love ‘Final text before Marrakesh, WIPO treaty for the blind.’ Available at

<http://keionline.org/node/1707>

[Accessed 26 June 2013].

<sup>192</sup> Jeremy Phillips ‘Israel publishes bill on disability-related exceptions.’ Available at

<http://the1709blog.blogspot.com/2013/12/israel-publishes-bill-on-disability.html>

[Accessed 19 February 2014].

Shall provide in their national copyright laws for a limitation or exception to the right of reproduction, the right of distribution, and the right of making available to the public as provided by the WIPO Copyright Treaty,<sup>193</sup> to facilitate the availability of works in accessible format copies for beneficiary persons [and] the limitation or exception provided in national law should permit changes needed to make the work accessible in the alternative format.

This puts a general requirement on all contracting parties to amend their current copyright laws in so far as they fail to provide limitations and exceptions pertaining to the visually impaired converting traditional format literary works into accessible formats, and in this way failing to achieve equal access to such works between able bodied individuals and the visually impaired community. It is important to note that the limitations and exceptions in the Marrakesh Treaty ‘do not extend to substantive modifications that would amount to adaptations’, an exclusive right given to the copyright owner of a literary work according to article 12 of the Berne Convention and which is omitted from article 4(1)(a) of the Marrakesh Treaty.<sup>194</sup> Therefore, all that is permitted is the transformation of the traditional formatted work into an accessible format, not the adaptation or alteration of the content of the original work itself. The integrity of the original work is to be respected at all times.<sup>195</sup>

This would mean there will be a duty on South Africa, as a contracting party, to amend the archaic Copyright Act so as to bring it in line with the nation’s international obligations. As the South African Copyright Act currently does not include an exception for the visually impaired, and in this way visually impaired individuals are not able to freely access copyright protected literary works in the

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<sup>193</sup> For more information on the WIPO Copyright Treaty, see: Tana Pistorius ‘Developing countries and copyright in the information age: the functional equivalent of the WCT’ (2006) 9 2 *Potchefstroom Electronic Law Journal* 1.

<sup>194</sup> Mihály J. Ficsor (note 43).

<sup>195</sup> Article 2(b)

same way as their able bodied counterparts, the government would not to amend the Copyright Act to include such a provision. This provision would need to permit the visually impaired community to change literary works that are copyright protected into accessible formats free from any additional costs not suffered by the able bodied community.

One of the most novel aspects of the Marrakesh Treaty is the provision pertaining to cross-border exchange of accessible format copies of copyrighted works.

According to article 5(1):

Contracting parties shall provide that if an accessible format copy is made under a limitation or exception or pursuant to operation of law, that accessible format copy may be distributed or made available by an authorized entity to a beneficiary person or an authorized entity in another Contracting Party.

What article 5(1) means is that the territorial nature of copyright law is relaxed, allowing for a copyright exception pertaining to the import and export of reading material in accessible formats for the visually impaired. In practical terms, it is that there will be a newly created copyright exception allowing for a visually impaired person in Country X to request a book in an accessible format via a local organisation, and for an organisation in Country Y - where the book happens to be available in the said format - to export the said book to the requesting organisation in Country X where the visually impaired person may have access to it. This is life changing for the visually impaired population. In a country like Argentina, which has over 50 000 books in accessible formats for the visually impaired community, not being able to share these books with the many neighbouring Spanish-speaking countries around it would become a wasteful thing of the past. This provision therefore allows for the avoidance of duplicate expenditure in having to make accessible format copies of the same work in the same language, which in turn

makes it easier for the visually impaired community to have accessible format works available.<sup>196</sup>

In order for South Africa to take advantage of the provisions regarding the cross-border exchange of works, it will need to include a provision in its national copyright legislation permitting the importation and exportation of such accessible works. The details of what such provision ought or ought not to include will be discussed later on in this paper where the contentious areas of the Marrakesh Treaty are analysed.

However, noble as the aims of the Marrakesh Treaty doubtlessly are, it is not without some hotly contested points. Pertinent areas of controversy involve the requirement of commercial availability, the question of direct access to imported copies, and the TRIPS Agreement's three step test (of which has already been introduced in the prior chapters). All three of these issues will be individually and critically addressed in due course, with special mention as to how South Africa ought to go about implementing the Marrakesh Treaty in light of each of these contentions.

### **4.3. Main areas of contention**

#### **4.3.1. The commercial availability requirement**

The first contentious area of the Marrakesh Treaty is the so called 'commercial availability requirement'. This can be found in article 4(4) of the Marrakesh Treaty. It states that:

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<sup>196</sup> Mihály J. Ficsor (note 43).

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. Any Contracting Party availing itself of this possibility shall so declare in a notification deposited with the Director General of WIPO at the time of ratification of, acceptance of or accession to this Treaty or at any time thereafter.

In other words, article 4(4) permits, but does not require, Contracting Parties to confine the limitations or exceptions given to the visually impaired population to circumstances where the accessible format work ‘cannot be obtained commercially under reasonable terms for the beneficiary persons in that market’. One of the by-products of a country availing itself of the commercial availability requirement is that article 5(1) will not apply to accessible format copies which may be obtained commercially and under reasonable terms.<sup>197</sup> Article 5(1) states that

Contracting Parties shall provide that if an accessible format copy is made under a limitation or exception or pursuant to operation of law, that accessible format copy may be distributed or made available by an authorized entity to a beneficiary person or an authorized entity in another Contracting Party.

It is important to note that in the Marrakesh Treaty’s predecessor, the Draft Text of an International Instrument/Treaty on Limitations and Exceptions for Visually Impaired Persons/Persons with Print Disabilities,<sup>198</sup> reference was made in an alternative provision found in article D (which dealt with the cross-border exchange of accessible format copies) to ‘reasonable price’ rather than ‘on reasonable terms’.<sup>199</sup> This is titled as being ‘Alternative A’, and reads that ‘the

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<sup>197</sup> Mihály J. Ficsor (note 43).

<sup>198</sup> WIPO ‘Draft Text of an International Instrument/Treaty on Limitations and Exceptions for Visually Impaired Persons/Persons with Print Disabilities.’ Available at

[http://www.wipo.int/edocs/mdocs/diplconf/en/vip\\_dc/vip\\_dc\\_3\\_rev.pdf](http://www.wipo.int/edocs/mdocs/diplconf/en/vip_dc/vip_dc_3_rev.pdf)

[Accessed 17 May 2013].

Member State/Contracting Party may limit said distribution or making available of published works which, in the applicable accessible format, cannot be otherwise obtained within a reasonable time and at a reasonable price, in the country of importation'. The Draft Text gives a proposed definition of 'reasonable price for developed countries' as 'mean[ing] that the accessible format copy of the work is available at a similar or lower price than the price of the work available to persons without print disabilities in that market'. Regarding 'reasonable price for developing countries', it is proposed that this 'means that the accessible format copy of the work is available at prices that are affordable in that market, taking into account the needs and income disparities of persons who have limited vision and those with print disabilities'. There is absolutely no express mention of 'reasonable price' anywhere in the Marrakesh Treaty. It is therefore important to ask what the implications of this change are. Was it a superficial alteration, or does it have any meaningful significance, and if so, what?

According to Pescod of the WBU, the institution accepts the need for a clause on commercial availability like the one in article C (which dealt with national law limitations and exceptions on accessible format copies) that will allow countries which already have such a clause in their national law to keep it. 'What we have a big issue with, and reject, is a clause for commercial availability in articles D and E,' he said.<sup>200</sup> Article D dealt with the cross-border exchange of accessible format copies and article E dealt with the importation of accessible format copies.<sup>201</sup> To this end, it would seem Pescod ought to be satisfied as the placement of the said clause is now only to be found in its updated version under article 4 (the present version of article C). However, it is the choice of language and not the placement

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<sup>200</sup> Catherine Saez 'In UN talks on treaty for the blind, concern about heavy focus on rightholders' interest.' Available at

<http://www.ip-watch.org/2013/04/20/in-un-talks-on-treaty-for-the-blind-concern-about-heavy-focus-on-rightholders-interests/>

[Accessed 17 June 2013].

<sup>201</sup> WIPO (note 198).

of the clause that is of immediate and current issue. It is submitted that, whilst ‘on reasonable terms’ is clearly broader in scope than ‘at a reasonable price’, many of the criticisms levelled at and problems identified with article D’s ‘Alternative A’ language may also apply to the newer, article 4(4) version of the commercial availability requirement and that the change is thus of little practical benefit for the visually impaired.

The commercial availability requirement has quite rightly been labelled as being ‘unworkable’. First, such a clause puts the burden on institutions providing reading materials to the visually impaired to check whether the text is already available in South Africa commercially, and if so, it then puts the additional burden on them to determine whether or not it is available under ‘reasonable terms’. For institutions that are not made up of trained legal experts and which have limited resources (both human and financial), these demands are near impossible to satisfy, rendering the institutions practically paralyzed to assist the visually impaired in any meaningful way for fear of facing a myriad of legal actions. This is an insurmountable obstacle for such organisations. This is especially evident when looking at developing nations, for example an organisation in South Africa wanting to send a book in an accessible format to another part of Africa. In such an instance the organisation would have no resources to perform the required checks, and so would effectively be unable to satisfy the said request for purely pragmatic and economic reasons.<sup>202</sup> Further, there is no definition for what ‘accessible’ means, or how ‘accessible’ a work must be before it will be considered to have been available in an accessible format. There is also the problem of compatibility issues. For example, where a work is only available in an accessible format on an iPad it would be unreasonable, especially in a developing country like South Africa, to expect a blind person to purchase an iPad simply so they can have access to a particular work. However, this may or may not be enough to deem the said work ‘commercially available’ for the purposes of the

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<sup>202</sup> Catherine Saez (note 200).

treaty, despite the clear practical absurdity of it. It is especially ludicrous in a developing country like South Africa where there are still many members of the population without access to such basic necessities as electricity and clean sanitation, and where most of the blind population are without a means of employment. What this all translates to is that the transaction costs for the visually impaired will be much higher than those for sighted readers, which defeats the supposed aim of the treaty.<sup>203</sup>

However, as with all things there are two sides to every story. The argument in support of the commercial availability requirement is that it is necessary in order to incentivise commercial publishers to originally publish accessible formats of their works.<sup>204</sup> However, this ignores the fact that over 40 per cent of the world's visually-impaired population resides in India, and most of the blind also make up a significant portion of the poor. These people would probably not be able to afford commercially available accessible copies in any case.<sup>205</sup> So, even if costs were cut and the audio-book was made cheaper, it would still be significantly out of the range of the poorer communities that make up a large part of the visually impaired in the first place. This means transaction costs for the visually impaired will be much higher than those for sighted readers – which defeats the supposed aim of the treaty.<sup>206</sup> Changing the terminology from 'reasonable price' to 'reasonable terms' hardly helps the matter, as what exactly the necessary 'terms' that need to be assessed are remains to be seen, but one may suppose that it would include the

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<sup>203</sup> William New 'Mixed reactions among participants in WIPO talks on treaty for the blind.' Available at

<http://www.ip-watch.org/2013/04/22/mixed-reactions-among-participants-in-wipo-talks-on-treaty-for-the-blind/>

[Accessed 17 May 2013].

<sup>204</sup> Mihály J. Ficsor (note 43).

<sup>205</sup> After much searching, the author was unable to find a textbook published in both braille and standard formats. However, the author's own practical research has yielded that publishers would be able to reproduce a mathematics textbook into braille for R750.00 and up, on condition that the textbook is available to them with permission to do so.

<sup>206</sup> William New (note 203).

price of the said item, thereby widening the scope of discretion but still including the offending term in the wider net which potentially encompasses more of a value judgement on the part of the courts. Furthermore, even if it does not include the price of the said item, it still places an onerous duty on the entities entrusted to provide accessible materials to the visually impaired, and ignores time and money constraints at play with such institutions, as well as their lack of legal expertise, thereby burdening the already resource-constrained entities to such an extent that it might become practically impossible for them to fulfil their mandate of providing access to as many visually impaired people as possible.

It is therefore suggested that South Africa exercise their ability to not include such a clause in its national law, as to do so would be to defeat the aim of the Marrakesh Treaty. Including such a clause in the South African Copyright Act would put undue burdens on non-profit organisations providing accessible format copies of literary works protected by copyright law. The ambiguity as to how such a commercial availability requirement will be interpreted by courts and its potential application to developing countries with vast economic divides that coexist in the same geographical area, makes it a provision that is ill-suited to South Africa if we are to attain the outcomes envisioned by our signing the Marrakesh Treaty.

#### **4.3.2. The need for direct access to accessible copies**

The next problem is one more pragmatically relating to the access of accessible copies. According to article 5(1) (which deals with the exportation of accessible works) of the Marrakesh Treaty:

Contracting Parties shall provide that if an accessible format copy is made under a limitation or exception or pursuant to operation of law, that accessible

format copy may be distributed or made available by an authorized entity to a beneficiary person or an authorized entity in another Contracting Party.

In defining what is meant by an ‘authorized entity’, article 2(C) states that it is

[A]n 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. It also includes a government institution or non-profit organization that provides the same services to beneficiary persons as one of its primary activities or institutional obligations.

In terms of importation, article 6 states the following:

To the extent that the national law of a Contracting Party would permit a beneficiary person, someone acting on his or her behalf, or an authorized entity, to make an accessible format copy of a work, the national law of that Contracting Party shall also permit them to import an accessible format copy for the benefit of beneficiary persons, without the authorization of the rightholder.

In other words, the Marrakesh Treaty only permits and requires Contracting Parties to allow ‘authorized entities’ to export accessible format works to a beneficiary person or authorized entity in another Contracting Party. The situation is different when it comes to importing accessible copies, as article 6 allows for the importation of those works to occur via an authorized entity or by the beneficiary person himself or herself, provided this is permitted according to the Contracting Party’s national law. In other words, if the national law allows for only an ‘authorized entity’ to make an accessible format copy of a work, then only an authorized entity need be allowed to import a work. The importance of the authorized entities is that they make sure ‘accessible format copies *may truly be*

*available* to the beneficiaries with visually impairment’, as well as that they ensure ‘that those copies *may only be available* to the beneficiaries’.<sup>207</sup>

It is once again prudent that South Africa allow beneficiary persons to make an accessible format copy of a work and to therefore be enabled to directly access imported works rather than requiring them to access works through authorised entities. There are various reasons why to not do so would be a grave mistake.

If beneficiary persons are required to make use of an authorised entity as a ‘middle-man’, the practical implication may again stifle the effectiveness of the Marrakesh Treaty. Practically, this means the request for a work is made by an individual in Country X to a local institution, who then requests the work from an institution in Country Y. Once the work is brought into Country X, it is delivered to the local institution and it is for the institution to deliver the work to the visually impaired person requesting it. The problem with this is again a resource based one. With approximately 80 per cent of the visually impaired population living amongst the 19 million South Africans residing in remote rural areas according to the South African National Council for the Blind,<sup>208</sup> the resources needed by institutions to deliver reading materials to such individuals would be immense. The fact that article 6 defers the situation to a Contracting Party’s national law is a clear nod of validation to the resource difficulties that would be experienced by many predominantly developing, poorer countries such as South Africa or India if there were no alternative method of distribution. It is therefore strongly urged that South Africa utilise the option of direct access to imported copies by beneficiary persons rather than requiring access to be made through authorised entities. It would be impractical and unreasonable for us not to adopt this approach and would greatly

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<sup>207</sup> Mihály J. Ficsor (note 43).

<sup>208</sup> Growing Tomorrow ‘SA National Council for the Blind: Support in rural areas.’ Available at <http://www.agritv.co.za/articles/sa-national-council-for-the-blind-support-in-rural-areas/> [Accessed 14 February 2014].

water down the effectiveness of our being a Contracting Party to the treaty is we were unable to adequately distribute the newly-available accessible copies of literary works.

#### **4.3.3. Article 13 of the TRIPS Agreement: The three step test**

As examined in a prior chapter of this paper, the so called ‘three step test’ is a complex piece of legal jargon that has caused much uncertainty and controversy in the international arena. This controversy has extended to the Marrakesh Treaty.

A difficulty identified with the three step test is the so called ‘three step test gap’ pertaining to countries that are not parties to any of the agreements embodying the three step test. The answer to dealing with this gap is expressed in article 5(4)(a):

When an authorized entity in a Contracting Party receives accessible format copies pursuant to Article 5(1) and that Contracting Party does not have obligations under Article 9 of the Berne Convention, it will ensure, consistent with its own legal system and practices, that the accessible format copies are only reproduced, distributed or made available for the benefit of beneficiary persons in that Contracting Party’s jurisdiction

In other words, where the receiving party is not obliged under any of the three international instruments to make use of the three step test, such a party will only be permitted to reproduce, distribute and make available the accessible format work within its own borders. Its scope of conduct, therefore, is territorially limited.

Whilst some have demanded the inclusion of the TRIPS Agreement’s three step test in the Marrakesh Treaty, there are others who have vehemently argued against it. As seen in the prior chapter from our examination of the Dispute Settlement Body’s interpretation of the three step test, the three step test is a default position,

ie if another alternative standard is used, this will not necessarily infringe the three step test. The Berne Convention itself identifies certain different standards to be applied to different literary and artistic works. For example, it identifies the ‘news of the day’ as a complete exception in article 2(8). Regarding teaching, article 10(2) states the following:

It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.

These are just two examples of intrinsic exceptions to the three step test identified within the Berne Convention itself. Therefore, goes the argument of those who did not want the three step test included in the Marrakesh Treaty, the idea that the three step test is a complete and blanket rule goes contrary to the source of the three step test. Different standards are not alterations of the three step test, but an exception to the three step test itself as identified by the legal source of the test. The argument has been made by groups such as James Love’s Keionline that a treaty for copyright limitations and exceptions for the visually impaired is not the place in which to mention the three step test at all.<sup>209</sup> The WBU too has expressed worry and dissatisfaction with the debate surrounding such legal matters as the three step test threatens to overshadow the humanitarian aspects of the Marrakesh Treaty.<sup>210</sup>

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<sup>209</sup> James Love ‘Disney, Viacom and other MPAA members join book publishers to weaken a treaty for the blind.’ Available at

[http://www.huffingtonpost.com/james-love/disney-viacom-and-other-m\\_b\\_3137653.html](http://www.huffingtonpost.com/james-love/disney-viacom-and-other-m_b_3137653.html)

[Accessed 19 May 2013].

<sup>210</sup> Catherine Saez (note 200).

It is submitted that whether or not the three step test is included in the treaty is of little practical consequence due to the flexibility and openness of the three step test.<sup>211</sup> In terms of South Africa, this is even more so as, because South Africa is a party to both the Berne Convention and the TRIPS Agreement, the limitations of article 5(4)(a) will not apply to it.

In conclusion, the Marrakesh Treaty brings with it many opportunities to eliminate the book famine. On paper, it appears to be the answer to the lack of equal access problem that has been the subject of this paper. However, it will soon be shown that the promise of the Marrakesh Treaty does not necessarily live up to the realities.

## **CHAPTER 5: THE PRACTICAL IMPLICATIONS OF SIGNING ON TO THE MARRAKESH TREATY: CASE CLOSED?**

### **5.1. Future problems and obstacles to expect at the end of the rainbow**

Having examined the Marrakesh Treaty in depth, we must now ask ourselves whether or not the Marrakesh Treaty is the answer to the long unheard prayers of the visually impaired community, or if more than the signing of a treaty is required to make the kind of change necessary for the wrongs of the today to be rectified. It is submitted that the Marrakesh Treaty does not signal the end of the problem as we know it. There are still many challenges to be faced by the international community at large and especially developing countries like South Africa in order for the Marrakesh Treaty to achieve its ultimate aim. These obstacles will be discussed below.

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<sup>211</sup> Mihály J. Ficsor (note 43).

### 5.1.1. Technological barriers to access

The first barrier to the effectiveness of the Marrakesh Treaty is the lack of access to technology. In South Africa, only 17.4 per cent of the total population have access to the internet.<sup>212</sup> As the populations of developed countries have access to more and better technology, they will be the first to benefit from the provisions of the Marrakesh Treaty. This means that the visually impaired populations in the developing countries - like South Africa - will have to wait to feel the benefits of the Marrakesh Treaty. This problem means that the majority of visually impaired persons, who happen to reside in developing countries such as India, will have to wait to be relieved from their suffering. Therefore the majority of visually impaired people will need to wait to feel the benefits of the Marrakesh Treaty so that the minority can enjoy it first.

The above-mentioned is the result of a wider battle that needs to be brought to the forefront of the Marrakesh Treaty's agenda, namely the technological battle that is being faced by developing countries. It is unacceptable that 82.6 per cent of South Africans are not a part of the inaptly named worldwide web, or global village. Whether one chooses to view this from the point of view of a visually impaired person not being able to access literary works, or an able-bodied person not being able to access works on the internet, it is merely a different symptom of the same problem, which is poverty. There is a dire need for the development of low-cost (I shy away from the term 'cheap' because of its connotation regarding quality) devices that will make the visually impaired from low-income countries able to utilize the Marrakesh Treaty to its fullest extent sooner rather than later. This is a

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<sup>212</sup> Internet World Stats 'Africa internet usage and population statistics.' Available at <http://www.internetworldstats.com/stats1.htm> [Accessed 18 February 2014].

battle that needs to be advocated more and brought to the forefront of the Marrakesh Treaty's dialogue. Only then will it garner international support.

### **5.1.2. Time delays in implementation**

Another issue with regards to the effectiveness of the Marrakesh Treaty's agenda is the time delay in getting the Marrakesh Treaty ratified. For example, in South Africa there has been no mention of ratifying the Marrakesh Treaty in the draft South Africa National Intellectual Property Policy, which was made available after the Marrakesh Treaty had been finalised.<sup>213</sup> The longer politics delay the implementation of the Marrakesh Treaty, the more visually impaired persons lose out during the wait. This is not acceptable. There needs to be pressure put on countries to fully appreciate the magnitude of the problems the Marrakesh Treaty aims to resolve, and to accordingly act swiftly.<sup>214</sup>

### **5.1.3. Technical and legal jargon**

The Marrakesh Treaty is not the most reader-friendly piece of law. It is not written in plain language, and is therefore difficult for people who are not experts to comprehend. As the Marrakesh Treaty deals with largely non-expert individuals, this means that most people affected by the Marrakesh Treaty will be unable to adequately independently make sense of the rights and limitations embodied in the Marrakesh Treaty. They will largely be reliant on second-hand accounts. This is problematic because with every interpretation of a law, something is lost in

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<sup>213</sup> Draft National Policy on Intellectual Property Notice 918 of 2013.

<sup>214</sup> However, it must be noted that the South African government has taken certain proactive steps with regards to the Marrakesh Treaty. The author herself was invited to the Consultative Workshop on Intellectual Property and the Beijing Treaty on Audio-visual Performances hosted by the Department of Arts and Culture on 14 October 2013 at the Save Lodge in Cape Town, where the Marrakesh Treaty took centre stage.

translation. It also means that only people who have access to these second hand accounts (eg taking into account technological barriers, language barriers etc) will be somewhat aware of what the Marrakesh Treaty means for them. A lack of plain language also means that it is more difficult for organisations like the WBU to effectively mobilize around the issues embodied in the Marrakesh Treaty. It is important that interest groups like Legal Friends of the Blind understand the implications of the Marrakesh Treaty so they can meaningfully implement it, as well as so the people who are ultimately the beneficiaries can be empowered. This is particularly relevant in regards to beneficiaries urging the government to act swiftly, as pointed out in the above section.

#### **5.1.4. Evidentiary backing of argumentative claims**

As stated upfront in this paper, there is a distinct lack of evidence on the specific effects the barriers to accessing copyright protected literary works by the visually impaired has had on the blind community. In order for the Marrakesh Treaty's wider developmental agenda to be pushed, this will need to be rectified. There needs to be research which clearly maps the connection between restrictive access to literary works due to disability, and the subsequent lack of realised rights (eg education, employment). This lack of clear work showing a conclusive connection has been noted in other literature,<sup>215</sup> and must be addressed in the future.

## **CHAPTER 6: CONCLUSION**

As argued in this paper, South Africa has failed to find the balance between the rights of copyright owners and the rights of copyright users, specifically when

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<sup>215</sup> The Copy/South Research Group *The Copy/South dossier: issues in the economics, politics, and ideology of copyright in the global south* (April 2006).

those users are members of the visually impaired community. The South African government has failed in providing equal access to copyright protected literary works to the visually impaired community, and this has meant that the current Copyright Act is woefully inadequate at achieving its constitutional, international and theoretical aims and obligations. This failure to deliver on the obligations owed to the visually impaired community in providing equal access to copyright protected literary works in the form of textbooks in terms of the constitution, legislation and case law has potential effects on the other rights of the visually impaired community, particularly in regards to the right to education, freedom of expression, dignity and so on.

One of the primary ways forward would be for South Africa to follow suit with the international community in trying to realise the right to equal access owed to the visually impaired community on a global scale is to sign and accede to the Marrakesh Treaty. Once having done so, South Africa will need to make suitable amendments to its current body of national copyright legislation so as to realise its duties in terms of the Marrakesh Treaty. Once signing and acceding to the treaty, South Africa will have to be wise about the ways in which it chooses to implement the provisions in the Marrakesh Treaty, for if it is not then the entire exercise might very well amount to nought. Merely signing and ratifying the Marrakesh Treaty will not be enough. In implementing the Marrakesh Treaty, South Africa must take into account the forewarnings highlighted in chapters 4 and 5. Namely, South Africa would need to make use of certain avenues the Marrakesh Treaty has for the realisation of its rights through alternative measures, such as bypassing the need for authorised entities to act as middle-men in the importation of accessible format reading materials, and excluding the 'commercial availability' requirement from its national legislation. If it does not make these tactful decisions, then its accession to the Marrakesh Treaty will greatly been watered down and it will probably fail to rectify the wrongs of the current copyright legislation. Such an outcome would not only be morally unacceptable, but legally dubious at best. As

Sam Cooke famously sang in his hit 'A Change Is Gonna Come' regarding the American Civil Rights Movement, 'it's been a long, long time coming, but I know a change is gonna come'.

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