

**Submission to the Portfolio Committee on Trade and Industry on
the Copyright Amendment Bill [B13-2017] – prepared and
presented by SECTION27**

09 July 2021

Table of Contents

Executive Summary	2
Endorsements.....	4
Introduction.....	5
I. Clause 13 is constitutionally required to rectify an existing unconstitutional copyright regime that limits the right to education, equality, and dignity.....	7
II. Clause 13 gives effect to several rights in the Bill of Rights.....	10
III. Clause 13 is not an arbitrary deprivation of property and so the right against arbitrary deprivation of property is not engaged	15
IV. CAB as a whole can be reasonably interpreted compatibly with international obligations South Africa intends to undertake, in particular the Marrakesh VIP Treaty.....	20
Conclusion.....	23

Executive Summary

SECTION27 welcomes the opportunity to comment on the Copyright Amendment Bill [B13-2017] ('CAB'). Our submission reinforces the importance of the CAB's exceptions for educational purposes from the perspective of the Bill of Rights. It also emphasises the urgency of passing the CAB due to the existing unconstitutionality of the apartheid-era Copyright Act 1978 and its Regulations. In particular, we submit that:

- A. The current Copyright Act 1978 and its Regulations are obsolete and unfairly discriminate against people living with disabilities and people living in poverty. In particular, the current Act does not respond to the entrenched inequalities in South African society and limits access to educational materials to those who have access to the market. The current Copyright Act 1978 also unjustifiably limits the right to education, participation in cultural life, and freedom to receive and impart information. Moreover, Parliament is under an obligation to bring old-order legislation, such as the Copyright Act 1978 in line with the Bill of Rights. The CAB is an instance of just that.
- B. The CAB gives effect to several rights in the Bill of Rights. In Clause 13 amongst other provisions, it gives effect to the rights to equality and non-discrimination by rectifying the unfair discrimination highlighted in the current Copyright Act 1978. Clause 13 also gives effect to the rights to education, participation in cultural life, freedom to receive and impart information and the right to dignity.
- C. In response to the President's concern, the CAB does not arbitrarily deprive copyright holders of their property. Notwithstanding whether copyright is constitutionally protected as property, the fundamental purpose of Clause 13 is to give effect to rights in the Bill of Rights. It is procedurally sound, and easily passes the sufficient reason test. Even if it is considered a deprivation, it is not arbitrary and therefore the property guarantee under the Constitution is not engaged. This is because the guarantee in the Constitution is drafted in the negative (a right *against* arbitrary deprivation of property) rather than a positive right *to* property.
- D. Finally, in respect of the CAB's compatibility with international law, the constitutional standard is not 'compliance' as suggested by the President's letter, rather, it is that the particular statute must be capable of reasonably being interpreted to be compatible with the sum of South Africa's international obligations. The inclusion of a broad definition of

'authorised entity' and an explicit guarantee that format-shifting would not take place for profit-making purposes in the CAB enables it to be interpreted compatibly with the Marrakesh VIP Treaty that Parliament intends to consent to in future.

In general, we submit that Parliament must bear in mind that the crucial Bill of Rights aims behind Clause 13 of the CAB must be retained, as South Africa is a constitutional democracy with the Bill of Rights as its cornerstone.

Endorsements

These submissions to Parliament are made by SECTION27 and are endorsed by the following organisations and individuals:

The Right to Know Campaign



BlindSA



Treatment Action Campaign



Oxford Human Rights Hub



South African Guild of Actors



Individual Endorsements:

1. Sanya Samtani, DPhil Researcher in copyright and human rights, University of Oxford
2. Marcus Low, Editor of Spotlight (endorsing in personal capacity)
3. Jako Olivier: Professor & UNESCO Chair on Multimodal Learning and Open Educational Resources, North-West University
4. Tess Peacock, Equal Education Treasurer
5. Sandra Fredman: FBA, QC (Hon.), Professor of Law, University of Oxford, Director of the Oxford Human Rights Hub
6. Nurina Ally, Lecturer, Faculty of Law, University of Cape Town
7. Unathi Noxolo Ndiki, Recreate ZA/R2K WC communication rights activists
8. Meghan Campbell, Reader, University of Birmingham, Deputy-Director of the Oxford Human Rights Hub
9. Makhosazana Mkhathshwa, Research Officer, Treatment Action Campaign
10. Dr Klaus D. Beiter: Associate Professor, Faculty of Law, North-West University, Potchefstroom; Affiliated Research Fellow, Max Planck Institute for Innovation and Competition, Munich
11. Denise R. Nicholson, Specialist Copyright Librarian
12. Christoffel Johannes de Klerk, Vice President of BlindSA
13. Jonathan Klaaren: Professor of Law, University of Witwatersrand

Introduction

1. The submissions focus on Clause 13 (ss 12A, 12B, 12C, and 12D) of the Copyright Amendment Bill [B13-2017] ('CAB') and South Africa's international obligations and discuss other provisions where necessary.¹
2. SECTION27 is a public interest law centre that seeks to influence, develop and use the law to protect, promote and advance human rights. Our name is drawn from s 27 of the Constitution, which enshrines everyone's right to health care services, food, water and social security.
3. The core focus of the work of SECTION27 is to protect, promote and advance the rights to health and basic education. In the context of this submission, SECTION27 is one of a small number of public interest organisations in South Africa that aims to pursue legal remedies to address the poor quality of education in the majority of South Africa's public schools. SECTION27 has also been involved in cases addressing issues of access to education in respect of the needs of the most vulnerable and marginalised learners such as learners with disabilities and migrant learners.
4. SECTION27 welcomes the opportunity to comment on the CAB. These submissions draw on our work to remedy the significant lack of access to textbooks materials in the Limpopo province and that of visually impaired learners across the country.
5. On 2 December 2015, the Supreme Court of Appeal ('SCA') in its judgment in the case of *Minister of Basic Education v Basic Education for All ('BEFA')*² held that every learner is entitled to a textbook in every subject at the commencement of the academic year. The judgment further explicitly noted that the corollary to this entitlement is the duty of the government to provide these textbooks to each and every learner. The *BEFA* judgment is the culmination of

¹ For a full analysis of the CAB and the specific provisions impugned by the President, see Malebakeng Forere, Klaus D. Beiter, Sean M. Fiil-Flynn, Jonathan Klaaren, Caroline Ncube, Enyinna Nwauche, Andrew Rens, Sanya Samtani, Tobias Schonwetter, Joint Academic Opinion, Re: Copyright Amendment Bill (B-13B of 2017) available at: <http://law.nwu.ac.za/sites/law.nwu.ac.za/files/files/10-May-2021-CAB-Academic-opinion.pdf>.

² [2016] 1 All SA 369 (SCA).

litigation that was first initiated by SECTION27 in 2012, in a matter that became widely referred to as the ‘Limpopo textbook saga’.³

6. State obligations under both international law and the Constitution require that the principle established in the *BEFA* case extend to learners with visual and other print disabilities to ensure textbooks are being translated into Braille or other accessible formats for learners with visual and other print disabilities.⁴ In 2017, SECTION27 represented the South African National Council for the Blind in an application requiring that the Department of Basic Education (DBE) deliver Braille textbooks to all learners that are required to learn in Braille. The DBE did not oppose the case and the settlement agreement was made an order of Court.⁵
7. In addition to these cases, we note that the South African Copyright Act 1978 poses a significant barrier to accessing educational materials for all. We have launched litigation on this basis in early 2021, on behalf of BlindSA,⁶ to compel the state to ensure that learners and students living with disabilities have access to educational materials at the same level as those learners and students living without disabilities.
8. We are committed to building a world where every learner or student has access to textbooks and other educational materials irrespective of their race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.⁷ We note that the Constitution requires the state to take

³ *Section 27 v Minister of Education* 2013 (2) SA 40 (GNP); [2012] 3 All SA 579 (GNP); *Section 27 II* no.24565/2012 (23 December 2012); *Better Education for All v Minister of Basic Education* 2014 (4) SA 274 (GP).

⁴ South Africa, having ratified the International Covenant on Economic, Social and Cultural Rights in 2015, undertakes obligations to domestically ensure that textbooks are available, accessible, acceptable, and adaptable. The current submission focuses on the accessibility, adaptability, and availability (affordability) dimensions. Further, having ratified the UN Convention on the Rights of Persons with Disabilities in 2007, South Africa undertakes obligations to domestically take steps to ensure that people living with disabilities are not excluded from participating in cultural life and accessing educational materials due to intellectual property laws.

⁵ *South African National Council for the Blind v Minister of Basic Education* case no 72622/2017 (4 April 2019).

⁶ SECTION27, ‘BlindSA and SECTION27 take govt to court to #EndTheBookFamine for blind people’ (April 2021), available at: <https://section27.org.za/2021/04/blindsa-and-section27-take-govt-to-court-to-endthebookfamine-for-blind-people/>

⁷ Constitution, s 9(3).

legislative measures for the achievement of equality.⁸ We submit that the CAB is a measure of this nature.

9. Against this background, we submit that:
 - a. Clause 13 (ss 12A, 12B, 12C, 12D) is constitutionally required as it rectifies an ongoing unconstitutional situation created by the Copyright Act 1978 which unjustifiably limits the rights to equality, dignity, and education in the Bill of Rights;
 - b. Clause 13 gives effect to several rights in the Bill of Rights;
 - c. Clause 13 is not an arbitrary deprivation of property and therefore the right against arbitrary deprivation of property is not engaged;
 - d. The CAB as a whole is drafted in a manner that enables it to be reasonably interpreted compatibly with international obligations that South Africa *intends to undertake in future*, according to the standard in the Constitution.

I. Clause 13 is constitutionally required to rectify an existing unconstitutional copyright regime that limits the right to education, equality, and dignity

10. South Africa is one of the most unequal countries in the world. Discriminatory apartheid-era education policy has led to significant setbacks in achieving universal quality education for all. As a result, even in the democratic era, historically former white schools and universities are better resourced than historically Black schools and universities. Amongst other issues, this translates into vastly differing library budgets, internet access, and differing levels of access to educational materials. For instance, the DBE's most recent National Education Infrastructure Management System Report states that 93% of schools in the Eastern Cape (4936 schools) and in Limpopo (3577 schools) do not have libraries at all despite the promulgation of the Norms and Standards for School Infrastructure that require schools to have stocked libraries.⁹

⁸ Constitution, s 9(2).

⁹ Department of Basic Education, NEIMS Standards Report (April 2021), available at: <https://www.education.gov.za/Portals/0/Documents/Reports/NEIMS%20STANDARD%20REPORT%202021.pdf?ver=2021-05-20-094532-570>.

11. Several studies have highlighted the link between unequal access to textbooks and other educational materials and detrimental learning outcomes. For instance, in the Southern and Eastern African Consortium for Monitoring Educational Quality (SACMEQ) III study, textbooks are classified as an “essential classroom resource” on the basis that effective teaching and learning cannot take place without them. They provide a minimum standard of educational environment to which all learners are entitled. The study found that in 2007, the average South African Grade 6 learner was in a school where only 45% of learners had reading books and 36.4% mathematics textbooks. This was significantly lower than our neighbouring states who have better educational outcomes in both literacy and numeracy.¹⁰ In considering the impact of textbook availability on performance, analyst, education researcher, Nic Spaul in his analysis of the SACMEQ study notes that learners with their own reading textbooks perform significantly better than learners who have to share their textbooks with more than one other learner.¹¹
12. In the South African context, the Fee Commission Report in particular highlighted that textbooks and other educational materials formed a part of the indirect costs placing significant burdens upon students from poor and marginalised communities in the country that inhibited them from accessing quality education.¹²
13. We submit that the current Copyright Act 1978, an instance of old-order legislation, does not adequately address these inequalities and is likely unconstitutional on the grounds that it limits several rights in the Bill of Rights – including the rights to equality, education and dignity. We submit that it must be amended to respond to the needs of democratic South Africa. We believe that Clause 13 of the CAB is tailored to our unique context and thus must be retained.

¹⁰ Department of Education and SAQMEQ, The SACMEQ III project in South Africa: A study of the conditions of schooling and the quality of education in South Africa country report (2010). Available: http://www.sacmeq.org/sites/default/files/sacmeq/reports/sacmeq-iii/national-reports/s3_south_africa_final.pdf

¹¹ N Spaul ‘A preliminary analysis of SAQMEQ iii South Africa’, (2011) Stellenbosch Economic Working Papers 11/11.

¹² See Presidential Commission of Inquiry into Higher Education and Training (Fee Commission) Report, at 9-20, available at : <http://www.dhet.gov.za/Commissions%20Reports/Report%20of%20Commission%20of%20Inquiry%20into%20the%20Feasibility%20of%20Making%20Higher%20Education%20and%20Training%20Fee-free%20in%20South%20Africa.pdf>.

14. The current Copyright Act 1978 and its attendant Regulations severely restrict the number of copies that can be made from published materials under copyright for educational purposes. It provides for single copies to be made for classroom use thereby precluding the creation of course packs. It also restricts the scale at which libraries and archives can embark on making reproductions of works in order to preserve them for future generations. Moreover, the scheme was promulgated before the advent of the internet and is obsolete. Particular regulations mention facsimiles and photocopies, but not digital copies thereby excluding them. Clause 13 of the CAB rectifies this by modernising South African copyright law, and understanding ground realities that educational access does not only take place in public spaces – but also in private spaces especially during the ongoing global pandemic.¹³
15. Further, we submit that our litigation on behalf of BlindSA argues that the current Copyright Act is unconstitutional on the basis that it unfairly discriminates against persons who are blind or visually impaired.¹⁴ In short, the current Copyright Act does not contain provisions enabling accessible format shifting, excluding people living with visual and print impairments from accessing cultural and educational materials entirely. We submit that the longer Parliament takes to address this unconstitutional situation, the more it remains complicit in the pervasive denial of the right of access to educational and cultural materials for persons living with disabilities.
16. In addition to the right to equality and non-discrimination, we submit that the current Copyright Act 1978 and its Regulations unjustifiably limit several other rights in the Bill of Rights – those relevant to our submissions are the rights to education, participation in cultural life, and freedom to receive and impart information.¹⁵

¹³ See, for a constitutional analysis of the Copyright Act 1978 and regulations, Sanya Samtani, 'The Right of Access to Educational Materials and Copyright: International and Domestic Law', unpublished doctoral thesis on file (2021).

¹⁴ And thus violates the right to equality and non-discrimination. Constitution, s 9.

¹⁵ This analysis has been undertaken in respect of the right to education, equality and non-discrimination in Sanya Samtani, 'The Domestic Effect of South Africa's Treaty Obligations: The Right to Education and the Copyright Amendment Bill' [2020] Programme for Information Justice and Intellectual Property/Technology, Law and Security Research Paper Series no. 61.

17. Importantly, the CAB remedies this unconstitutional situation through the enactment of Clause 13, among other provisions. Not only is Clause 13 a discharge of Parliament's obligations to respect, protect, promote and fulfil all the rights described above,¹⁶ but it is also a move by Parliament to bring the apartheid-era Copyright Act 1978 and its Regulations in line with the Bill of Rights and into the democratic era.

II. **Clause 13 gives effect to several rights in the Bill of Rights**

18. Clause 13 in particular regulates the operation of copyright in a resource-effective way that ensures that everyone can access educational materials in the format that is most adaptable to their needs and the needs of an information society. In particular, during the COVID-19 pandemic, at different stages of restrictions the government has required that educational institutions move tuition online, demonstrating the inadequacy of the current Copyright Act and the need for a law enabling the digitisation of educational materials. Clause 13 thus gives effect to several rights in the Bill of Rights set out below.

19. We submit that Clause 13 promotes the rights to education,¹⁷ equality and non-discrimination,¹⁸ the right to dignity,¹⁹ the right to freedom to impart and receive information,²⁰ the right to academic freedom and scientific research,²¹ and the right to participate in cultural life.²²

20. It must be noted that the right to basic education for all, and within it the right to textbooks and other educational materials, is immediately realisable. This means that resource

¹⁶ Constitution, ss 7(1) and 8(2).

¹⁷ Constitution, s 29.

¹⁸ Constitution, s 9.

¹⁹ Constitution, s 10.

²⁰ Constitution, s 16(1)(b)

²¹ Constitution, s 16(1)(d).

²² Constitution, s 30.

constraints cannot limit their realisation.²³ The state is bound to take positive steps not only to provide textbooks but also to regulate the textbook market. As regards further education, the state is required to take reasonable steps to make such education, and within it access to educational materials, available and accessible to all. Regulating copyright by the inclusion of exceptions for educational purposes is a globally recognised measure undertaken by all WIPO member states around the world²⁴ to make access to educational materials available, affordable, accessible, and adaptable. Further, 170 out of 189 WIPO member states have an average of 13 distinct provisions relating to educational purposes within their domestic copyright laws, with Australia having 32 distinct exceptions for educational purposes.²⁵ Clause 13 thus constitutes regulation of the market and a reasonable measure as a discharge of state obligations in respect of the right to education at all levels.

21. Additionally, the right to equality and non-discrimination entails that the right to education (and indeed any right in the Bill of Rights) must be realised for everyone to the same extent *immediately* – irrespective of their sex, gender, race, socio-economic status, disability, place of birth etc.²⁶ We submit that no student or learner must be deprived of access to educational materials on the basis of their language, social class or disability amongst other prohibited grounds of discrimination. Clause 13 regulates copyright to entail access to these materials for marginalised groups at the same level as groups that are not marginalised.

22. The right to participate in cultural life and the rights to receive and impart information as well as conduct research entail the existence of public institutions with publicly accessible research output. The recent devastating fire at the University of Cape Town’s African studies collection destroyed several rare manuscripts.²⁷ While the originals sadly may be lost, had many of these valuable works been digitised, the content of these works would have been preserved. The

²³ See generally, Faranaaz Veriava, *Realising the Right to Basic Education: The Role of the Courts and Civil Society* (1st edition, JUTA 2019).

²⁴ See Daniel Seng, ‘Study on Copyright Limitations and Exceptions for Educational Activities’ WIPO SCCR/33/6 p. 26.

²⁵ *ibid* p. 27-28.

²⁶ Constitution, s 9.

²⁷ African Studies Unit, ‘Public Statement on the Fire that Destroyed UCT African Studies Library and Special Collections’ (April 2021), available at: <http://www.africanstudies.uct.ac.za/news/public-statement-fire-destroyed-uct-african-studies-library-and-special-collections>.

slow pace of digitisation in libraries, museums, archives, and galleries across the country is in large part due to unclear copyright exceptions in the current Copyright Act 1978 and the existence of criminal penalties for infringement.²⁸

23. As we submit below, Clause 13 and indeed Clause 20²⁹ contain such provisions and can ensure improved access to educational materials as well as ensure that valuable pieces of South African cultural heritage are not lost to natural or man-made disasters.

24. Therefore, we support the retention of Clause 13 in its current form. We also support the retention of Clause 20 on the same basis. Even if Parliament decides to amend Clause 13, we urge Parliament to retain the aims behind Clause 13 which we understand to be the promotion of access to educational materials for all and indeed the use of law to realise the spirit, purport and objects of the rights to equality, education, and dignity in the Bill of Rights.

25. We submit that each proposed provision under Clause 13 furthers the spirit of particular rights in the Bill of Rights:

- a. Section 12A in particular contemplates the use of works under copyright for an illustrative list of purposes. Chief among these are research³⁰ and educational activities³¹ that enable the fulfilment of the constitutional right to education at all levels; review or criticism of a work,³² reporting current events,³³ comment, illustration and pastiche among others³⁴ that enable the fulfilment of the constitutional right of access to information and freedom of expression; the preservation of and access to the collections of libraries, archives and museums³⁵ that

²⁸ Copyright Act 1978, s 27.

²⁹ CAB, Clause 20 encapsulates s 19C of the CAB which is entitled 'General exceptions regarding protection of copyright work for libraries, archives, museums and galleries'.

³⁰ CAB, s 12A(a)(i).

³¹ CAB, s 12A(a)(iv).

³² CAB, s 12A(a)(ii).

³³ CAB, s 12A(a)(iii).

³⁴ CAB, s 12A(a)(v).

³⁵ CAB, s 12A(a)(vi).

enables the fulfilment of the right to culture and education. The constitutional right to equality and non-discrimination and the right to dignity are also furthered through the use of open textured standards such as 'fair' which enables the decision-maker to take into account the particular socio-economic conditions of the user, as well as adapting to the particular requirements of people living with disabilities across a spectrum.

- b. Section 12B in particular contemplates the use of works under copyright for the purpose of making quotations,³⁶ that enables the fulfilment of the constitutional right of access to information and freedom of expression; for the purpose of illustrations for teaching,³⁷ that enables the fulfilment of the constitutional right to education at all levels; for the purpose of lectures and public addresses³⁸ as well as translation by those giving or receiving instruction³⁹ that enables the fulfilment of the constitutional right of access to information and freedom of expression and the right to education at all levels; for the purposes of making a personal copy of a work in order to make it accessible on the basis of time or format⁴⁰ as well as backup and storage,⁴¹ that enables the fulfilment of the right of access to information and freedom of expression, the right to equality and non-discrimination, as well as undergirds the realisation of other rights depending on who the user is (e.g., a museum, educational institution, library, archives etc.); for the purposes of making a copy of the work or an adaptation of it in a different language,⁴² that enables the realisation of the rights of the multitude of cultural and linguistic communities across the country at a substantively equal level.

³⁶ CAB, s 12B(1)(a).

³⁷ CAB, s 12B(1)(b).

³⁸ CAB, s 12B(1)(d), (e).

³⁹ CAB, s 12B(1)(f).

⁴⁰ CAB, s 12B(2).

⁴¹ CAB, s 12B(2).

⁴² CAB, s 12B(3).

- c. Section 12C in particular takes into account the realities of using modern technology. It recognises that unlike physical copies of works, using works in the digital realm requires multiple temporary copies to be made e.g., when emails are sent containing attachments, and when virtual learning environments are used. It also recognises the increasing incidence of the sale of e-books and other works under copyright tied to a single device in a single format which reduces its accessibility for people living with disabilities and for people living in poverty who only have access to the internet through their mobile phones. In doing so it rectifies this accessibility problem by enabling the work to be used on different devices according to technological availability.⁴³ This provision furthers the rights to equality, dignity, and freedom of expression.
- d. Section 12D in particular details the specific uses available to those engaging in educational and academic activities. The specific uses that are contemplated under this section include the creation and use of materials under copyright in course packs in the course of instruction which enable the realisation of the right to education at all levels and across resource-constrained institutions;⁴⁴ the reproduction of a whole textbook where the textbook is out of print, the copyright holder cannot be found, or the book is unavailable for sale in South Africa at the normal market price⁴⁵ to enable the realisation of the right to education where a particular textbook is part of course curriculum, for instance; the incorporation of excerpts of works under copyright in theses, institutional repositories and other academic assignments by people receiving educational instruction⁴⁶ that further facilitates the right to education at all levels. Finally, in order to capture the realities of how libraries work, the section explicitly enables third parties including librarians to carry out the activities contemplated in the section⁴⁷ in order to meaningfully realise the right to education.

⁴³ CAB, s 12C.

⁴⁴ CAB, s 12D(2).

⁴⁵ CAB, s 12D(4).

⁴⁶ CAB, s 12D(6)

⁴⁷ CAB, s 12(D)(7)(d).

26. We submit that all of the above uses are crucial for the realisation of the above mentioned rights in the Bill of Rights and to promote good governance. Through the CAB, Parliament is acting in furtherance of its duty to respect, protect, promote and fulfil these rights taking particular notice of the widespread inequality in the country and crisis in accessing educational materials.
27. We submit that none of the above contemplated uses under Clause 13 are unfettered or absolute. They are subject to particular textual limits that we set out below and hence do not infringe any other rights in the Bill of Rights, least of all the right against arbitrary deprivation of property.

III. Clause 13 is not an arbitrary deprivation of property and so the right against arbitrary deprivation of property is not engaged

28. Parliament's call for further public comment regarding Clause 13 details the concern raised by the President that 'certain copyright exceptions may be unconstitutional'.⁴⁸ The President's referral letter returning the CAB to Parliament states that 'sections 12A, 12B(1)(a)(i), 12B(1)(e)(i), 12B(1)(f), 12D [...] may constitute arbitrary deprivation of property'.⁴⁹
29. We confine our submissions to these provisions raised by the President, according to the Joint Rules of Parliament. We submit that these provisions further the above rights in the Bill of Rights, are textually limited in nature, and hence do not constitute an arbitrary deprivation of property. Moreover, their fundamental purpose is to give effect to the Bill of Rights, and they are therefore not arbitrary.
30. Section 25 of the Constitution is not a positive right to hold property – rather it is drafted in the negative, as a right against arbitrary deprivation of property. The Constitutional Court has interpreted this to mean that the interest sought to be protected from deprivation must first be established as a form of constitutionally protectable property; second that a deprivation

⁴⁸ Call for comment by Parliament, available at: https://pmg.org.za/call-for-comment/1066/?utm_source=transactional&utm_medium=email&utm_campaign=request-for-comment-from-parliament.

⁴⁹ 'Referral of the Copyright Amendment Bill B13-2017 and the Performers Protection Amendment Bill B24-2016 to the National Assembly' (President of South Africa, 16 June 2020) paras 15.1, 22.3.

must be established as an interference in the exercise of the right. Once these two factors have been fulfilled the inquiry moves to whether or not the interference in the right (the deprivation) is arbitrary.⁵⁰ If adjudged to be arbitrary, then the right is engaged and the interference will be tested on an all-things-considered constitutional limitations analysis. However, if it is not adjudged to be arbitrary, the right is not engaged. The right, as submitted previously, is a right *against* arbitrary deprivation of property rather than a positive right to property.

31. The Constitutional Court has set out a test for non-arbitrariness where if ‘sufficient reason’ and procedural fairness can be demonstrated, that particular deprivation does not constitute arbitrary deprivation and the property right is not engaged.⁵¹ We discuss this below.
32. We submit that it is not settled in law whether copyright is an interest protected under s 25 as, amongst other reasons, the Constitutional Court has yet to decide a case concerning copyright. In any event, we submit that even if the President has considered copyright as falling within the ambit of s 25 in the referral letter, the particular exceptions detailed above do not constitute arbitrary deprivations. The property right is not engaged and therefore not infringed.
33. At the outset we submit that since this is a legislative process that is taking place through Parliament and undergoing multiple rounds of public consultation, the issue of procedural unfairness is not engaged.
34. With respect to the test of sufficient reason, we submit that there is a clear fundamental purpose for the enactment of the relevant sections under Clause 13 – to give effect to rights in the Bill of Rights. We also submit that the relevant provisions have textual limitations to ensure that they are not unfettered. We set out the purposes and their textual limitations below:
 - a. Section 12A has multiple purposes, chiefly the realisation of the rights to education, freedom of expression and access to information and the rights to equality and

⁵⁰ *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* [2002] ZACC 5 [70].

⁵¹ *ibid* [100].

dignity. These are constitutional purposes. The uses contemplated under this section explicitly require attribution of the work to the author and the source of publication. Further, in determining whether a particular use falls within the ambit of s 12A, the CAB requires that the following factors be taken into account - the nature of the work; the amount and substantiality of the use and the extent to which it affects the work; the purpose and character of the use, including whether the purpose is different from the 'original' work, whether the nature of the use is commercial or for non-profit research, library or educational purposes; and whether the market for the work is affected ('the substitution effect') by the use. These factors ensure that the interests of all the relevant actors are taken into account including the authors, publishers, and users.

- b. Section 12B(1)(a)(i) has the purpose of limiting the use of the quotations exception. It sets out a proportionality standard to measure the extent of the use and limits uses that do not achieve the particular purpose for which they are used. This provision borrows heavily from the language of the Berne Convention 1886, that South Africa is party to that also limits the use of quotations to the extent justified by the stated purpose. There is thus sufficient reason for its inclusion.
- c. Section 12B(1)(e)(i) exists in a similar form under the current Copyright Act.⁵² We submit that the purpose of this provision is informatory and furthers the right of access to information and freedom of expression in the Bill of Rights. The provision enables the press to disseminate information where rights in that information have not been expressly reserved by the right holder. This is not unique - the African Intellectual Property Organisation includes a near-identical clause.⁵³ There is thus sufficient reason for its inclusion.
- d. Section 12B(1)(f) enables the translation of works for a variety of purposes. We submit that given South Africa's linguistic diversity this provision is essential for the realisation of the equal right to education for all in languages of their choice (where

⁵² Copyright Act, s 12(7).

⁵³ African Intellectual Property Organization (OAPI), Agreement Revising the Bangui Agreement of March 2, 1977, art 16.

reasonably practicable), participation in cultural life, and the right to dignity where one's language does not become a barrier to future opportunities. The provision is limited to non-commercial translation only. This, we submit, limits the impact on the economic interests of publishers. There is thus sufficient reason for the inclusion of this provision.

- e. Section 12D as a whole is essential for the realisation of the right to education for all, across levels of education and across differential socio-economic situations. We have set out the full range of purposes for the provision above. Here, we focus on the limitations textually included within the provision in order to limit any perceived deprivation as raised by the President. Different subsections under s 12D contain different limits.
 - i. Section 12D(1) is subject to two limitations – first, that the extent of the use must be proportionate to the purpose, and second that the copying of whole works is only possible in very limited circumstances detailed in s 12D(3).
 - ii. Section 12D(2) is subject to two limitations – first, that only educational institutions can make course packs and circulated digitised materials in virtual learning environments, and second, that virtual learning environments must only be limited to secure networks and must only be accessed by the people giving and receiving instruction.
 - iii. Section 12D(3) is framed negatively. It provides for a single circumstance where educational institutions can incorporate a full book/journal article/recording within its course packs – where a licence is unavailable on reasonable terms and conditions. The concern regarding indiscriminate photocopying of entire books is thus significantly diminished.
 - iv. Section 12D(4) is limited to textbooks. It explains that there are only three circumstances where an individual engaging in educational activities may copy a full textbook – first, where the textbook is out of print; second, where the holder of the copyright cannot be found; and third where the textbook is not for sale or cannot be obtained at the normal market price in South Africa. The first and third of these circumstances do not impact domestic publishers' economic interests at all. The second is a defensible legislative policy choice to ensure that the access to textbooks as held repeatedly by courts to be a part of the right to education is not limited by the inability to find copyright

holders and secure their consent. Several other open and democratic societies have similar provisions in order to ensure that copyright remains a limited monopoly.⁵⁴ We submit that this constitutes sufficient reason for the inclusion of this provision.

- v. Section 12D(5) explicitly prevents the making of copies of works for commercial purposes. This reinforces the particular concern of the provision as a whole – to enable educational access rather than derive economic benefit. This provision fits with the scheme of s 12D and constitutes sufficient reason.
- vi. Section 12D(6) enables the use of materials under copyright to be included within academic assignments and institutional repositories. The provision is limited to academic settings and aims to facilitate learning outcomes to realise the right to education at all levels; as well as to enable research and innovation through repositories. In the same vein, s 12D(7)(a) enables public access to research that is publicly funded. We submit there is sufficient reason for these two provisions.
- vii. Sections 12D(7)(c) and (e) and 12D(8) encapsulate the importance of attributing the work to the author and source of first publication in respect of all the uses contemplated by s 12D. This ensures that authors' attribution is guaranteed their interests protected. We submit there is sufficient reason for these provisions.

35. We submit that the deprivation here, if at all, does not encompass all incidents of ownership (e.g., authors' moral rights of attribution and non-degradation of the work remain protected), and therefore requires a less compelling justification.

36. We submit therefore that all the provisions analysed above do not constitute arbitrary deprivations of property, even if copyright is understood as falling within the ambit of s 25, and the constitutional property right is therefore not engaged.

⁵⁴ E.g., Canada Copyright Act, s 29(4); India Copyright Act, s 52(1)(o); Afghanistan, Law Supporting the Rights of Authors, Composers, Artists and Researchers (Copyright Law) (2008), art 44; Australia Copyright Act, s 40(2)(c); Sudan, Copyright and Neighbouring Rights (Protection) and Literal and Artistic Works Act 2013, art 31.

37. In fact, we go one step further and submit that these provisions were not created with the explicit purpose of depriving authors of profit, but rather that several of these provisions are necessary to realise constitutional rights that are currently being denied to people living in poverty, people living with disabilities and people seeking to realise their rights to participate in cultural and linguistic life and education at all levels through the apartheid-era Copyright Act. Section 9(2) of the Constitution, in fact, obliges the state to be proactive and adopt legislative and other measures to promote the achievement of equality for these categories of persons that have been disadvantaged by unfair discrimination.

38. This is analogous to legislation regulating the housing market, for instance, to oblige the state to provide housing stock, unlock the private market, and ensure that the right to adequate housing is meaningfully realised by creating a conducive legislative framework.⁵⁵ We submit that the CAB may be understood as a measure regulating the publishing market in respect of educational materials, and the creative industry in respect of all other cultural and linguistic materials, through the exceptions and limitations to copyright.

39. We submit that Clause 13 should be retained in its entirety. If Parliament intends to amend any of these provisions, we submit that their objects and purposes must remain focused on enabling access to educational materials for the most marginalised members of society. A narrower set of exceptions runs the risk of limiting the rights to dignity, culture, education, equality, and freedom of expression and would have to pass muster under s 36 of the Constitution.

IV. CAB as a whole can be reasonably interpreted compatibly with international obligations South Africa intends to undertake, in particular the Marrakesh VIP Treaty

40. In response to the second part of the call for public comment, we submit that perceived incompatibility with prospective international obligations that South Africa seeks to undertake is not an independent ground for constitutional review.⁵⁶ Without prejudice to this position,

⁵⁵ See extent of state obligations set out in *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19 [35]-[37].

⁵⁶ Constitution, s 79(3).

in our submissions we focus on the compatibility of the prospective obligations South Africa seeks to undertake with the CAB.

41. We submit that the CAB as a whole can be reasonably interpreted to be compatible with the treaties South Africa is seeking to accede to in the near future. The Constitution does not require a verbatim adoption of treaty language in order for legislation to give the treaty domestic effect. Rather, we submit that the constitutional standard is that of reasonableness: the interpreter 'must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent'.⁵⁷
42. We submit that at best, Parliament's obligation extends to ensuring that legislation that it deems necessary to give effect to international treaties domestically can be reasonably interpreted to do so – *not* that legislation must contain verbatim the text of a treaty that Parliament is considering pursuant to s 231(2) of the Constitution.
43. The CAB contains particular provisions to ensure that South Africa can avail of the international consortium of accessible format works that it will gain access to once it accedes to the Marrakesh Treaty to Facilitate Access to Published Works for Person Who Are Blind, Visually Impaired, or Otherwise Print Disabled ('Marrakesh VIP Treaty'). Specifically, we submit that s 19D of the CAB is the single most important provision to rectify the ongoing deprivation of access to educational and cultural materials for people living with disabilities. It is not the only provision relevant to facilitating access for people living with disabilities. Clause 13 described above as well as Clause 20 are crucial for access to educational and cultural materials for all.
44. The President's referral letter is silent on the exact contours of the alleged incompatibility of the CAB with the Marrakesh VIP Treaty. In the public discourse, it has been claimed by the publishing lobby that the absence of a definition for 'authorised entities' renders it infirm.
45. We submit, in response to this allegation, that s 19D(3) of the CAB clearly contemplates a broad definition of 'authorised entities' as 'a person that serves persons with disabilities'.

⁵⁷ Constitution, s 233.

46. In any event, the Marrakesh VIP Treaty does *not* mandate that domestic legislation define precisely a list of authorised entities.⁵⁸
47. Moreover, we submit that the CAB fulfils South Africa’s *existing* binding obligations under the United Nations Convention on the Rights of Persons with Disabilities (CRPD). In particular, ss 12A-D and 19D act to fulfil the binding obligation upon South Africa to ‘take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials’.⁵⁹
48. Importantly, these provisions are essential to fulfil the rights to education, culture, dignity and equality of persons living with disabilities as protected by the Constitution. In the absence of these provisions, as argued in our BlindSA litigation in the context of the current Copyright Act, these rights are unjustifiably infringed and any such legislation is unconstitutional.
49. In this regard, we submit that the CAB as a whole has been drafted such that it can be reasonably interpreted to be compatible with the Marrakesh VIP Treaty.
50. In respect of the President’s mention of the three-step test in the Marrakesh VIP Treaty,⁶⁰ we submit that there is no risk of any of the CAB’s provisions pertaining to accessible format shifting leading to a substitution effect on the market. Section 19D itself clearly indicates that in order to format-shift, the relevant person must have access to a lawful copy of that work;⁶¹ and importantly, must undertake the relevant format-shifting activity on an explicit not-for-profit basis.⁶² This precludes the commercial sale of accessible format copies through the use of this provision and allays any perceived fears of the three-step test in the Marrakesh VIP Treaty not being fulfilled. Moreover, we submit that any interpretation of the three-step test under any prospective treaty obligations cannot be made in isolation to South Africa’s existing

⁵⁸ Marrakesh VIP Treaty, arts 5(1) read with 5(3).

⁵⁹ UNCRPD, art 30.

⁶⁰ President’s referral letter, para 15.1.

⁶¹ CAB, s 19D(1)(a).

⁶² CAB, s 19D(1)(c).

bouquet of binding international obligations – including its international human rights obligations under the CRPD.⁶³

51. In respect of the other listed treaties that South Africa is yet to accede to, we submit that the same standard of reasonableness applies. We also draw Parliament’s attention to the obligations that already bind South Africa – namely the International Covenant on Economic, Social and Cultural Rights (ICESCR) that requires South Africa to fulfil its immediately realisable obligation and provide access to educational materials for all at the primary school level, and take steps to make them available and accessible to students at all other levels of education. We submit that the exceptions and limitations set out in this submission are an instance of South Africa’s harmonious interpretation of its ICESCR obligations and its obligations under the Berne Convention and the TRIPS Agreement.

52. Parliament must remain aware that in a bid to include verbatim text from international obligations that South Africa has not yet undertaken, it must not derogate from obligations that it already has such as in respect of the CRPD and the ICESCR – especially when those obligations have the same subject matter as rights in the Bill of Rights.

Conclusion

53. We therefore submit that given its Bill of Rights implications, Parliament must act urgently to pass the CAB. We urge Parliament to recognise and remedy the existing unconstitutional situation that the apartheid-era Copyright Act has created and perpetuates for people living in poverty and people living with disabilities amongst other marginalised groups.

54. We submit that Clause 13 of the CAB is necessary to remedy this unconstitutional situation and that it objectively does so by giving effect to the rights to education, equality and non-

⁶³ See for instance, Klaus D. Beiter, ‘Not the African Copyright Pirate is Perverse, but the Situation in which (s)he Lives: Text-books for Education, Extraterritorial Human Rights Obligations, and Constitutionalization ‘from below’ in IP Law,” 26 Buffalo Human Rights Law Review (2020) 54-55 stating: “[T]he three-step test must *perfectly mirror* the demands of human rights. Or, stated differently: the three-step test must permit any such use as constitutes an entitlement under human rights. Naturally, a solution that is legitimate in a developing country need not be so in an industrialized country.”

discrimination, dignity, freedom to receive and impart information and conduct scientific research, and participation in cultural life.

55. We further submit that Clause 13 fulfils a fundamental purpose and easily passes the test of 'sufficient reason' and thereby does not constitute an arbitrary deprivation of property, therefore not engaging the constitutional right against arbitrary deprivation of property.

56. Finally, we submit that to the extent that the Constitution requires, Parliament has discharged its obligations to draft the CAB in a manner that can be interpreted to be reasonably compatible with *all* its currently binding international obligations and treaty obligations that it intends to undertake in future.

57. We trust that these submissions will be helpful to the Committee in its deliberations on the CAB.

58. In addition to our submissions, we humbly request permission for Sanya Samtani and Marcus Low to speak on our behalf at the public hearings to take place on 04 and 05 August 2021.

59. Should Parliament require any further information, please contact:

For SECTION27:



Faranaaz Veriava

Head of the Education Programme

Email: veriava@section27.org.za