BLINDSA AND SECTION27: SUBMISSIONS ON AMENDMENTS (PUBLISHED ON 8 DECEMBER 2021) TO THE COPYRIGHT AMENDMENT BILL B13B-2017

TABLE OF CONTENTS

I. Executive summary of submissions and recommendations

1. SECTION27 and BlindSA submit and recommend that:

    a. The proposed inclusion of the definition of 'authorised entity', though not constitutionally necessary, if retained, must be interpreted broadly to give effect to the constitutional rights to equality and dignity for all.

    b. The proposed addition of s 19D(3)(b) irrationally contradicts its stated purpose, creates further barriers, and risks unfair discrimination. Therefore, we recommend that it be rephrased as follows:

        > A person contemplated in paragraph (a) may only so export or import provided that prior to the distribution or making available they did not know or have reasonable grounds to know that the accessible format copy would be used for other than beneficiary persons.

    c. The proposed addition of s 27(5B) must remain subject to s 28P to ensure that the constitutional rights to education, equality, dignity, culture, and freedom of expression are protected.

    d. The proposed definition of 'lawfully acquired' in s 1 is restrictive, retrogressive, and limits rights in the Bill of Rights. We recommend that it be deleted and replaced with 'lawfully accessed' which is the appropriate phrase used in the CAB and the Marrakesh VIP Treaty more generally.

    e. The proposed addition of the three-step test to educational and academic activities makes s 12D impracticable and potentially contravenes the principle of legality under the Constitution. The appropriate standard under international law is 'fair practice' and we welcome its addition in s 12D(8)(b). We therefore recommend that the proposed additions of ss 12D(1)(c)-(d) must *not* be made.

    f. The proposed deletion in s 19C(4) risks limiting access to educational, and cultural materials from libraries in crises such as the global pandemic and the UCT library

fire of 2021. We recommend that the proposed deletion of 'commercial purposes' be reversed.

II. Introduction

2. These submissions to Parliament are made by SECTION27 jointly with BlindSA.[1] The submissions focus on proposed amendments to provisions of the Copyright Amendment Bill ("CAB") regarding disability and education, and the impact that these amendments have on the constitutional rights to education, freedom of expression, equality and dignity that are guaranteed to all.

3. SECTION27 is a public interest law centre that seeks to influence, develop and use the law to protect, promote and advance the rights to basic education and health in South Africa. The name of the organisation is drawn from s 27 of the Constitution, which enshrines everyone's right to health care services, food, water and social security.

4. BlindSA is an organisation that equips people with visual disabilities with the skills they need to fully and independently participate in society, through education, braille and developmental services. Moreover, BlindSA advocates for equality, and standing up for the rights of people with visual disabilities across the country.

5. At the outset, SECTION27 and BlindSA convey our heartfelt condolences on the untimely passing of the Chair of the Portfolio Committee, Honourable Member Duma Nkosi and the former Chief Director of Policy and Legislation at the Department of Trade and Industry, Mr MacDonald Netshitenzhe. Their stewardship throughout this process was invaluable.

6. SECTION27 and BlindSA welcome the opportunity to comment on the CAB. However, we note the Minister of Trade, Industry and Competition's comments at the meeting of 9

[1] These submissions have been prepared by Dr Sanya Samtani, postdoctoral research fellow, University of Pretoria.

November 2021 that the CAB has already received extensive public consultation. At the same meeting, the Minister noted the passage of a 'lengthy period of ten years' over which the CAB has been debated and discussed, with further public consultation as and where required.[2] Taken together, we believe that the Portfolio Committee on Trade and Industry ('the Committee' or 'PC') must expedite the finalisation of this Bill, as continued delays impact upon the discrimination experienced by people with disabilities and other marginalised groups seeking access to education.

7. SECTION27 and BlindSA have litigated on the issue of delays in finalising the CAB causing further discrimination, exclusion and dignity-based harms to people with visual disabilities. The current Copyright Act 1978 and its attendant regulations do not contain an accessible format shifting provision, placing an onerous burden upon people with disabilities to access accessibly-formatted educational and cultural materials. On 21 September 2021, the Pretoria High Court held that the apartheid-era Copyright Act 1978 is unconstitutional on the basis that the burden that it imposes unfairly discriminates against people with visual and print disabilities – and that proposed s 19D of the CAB should be read-in as interim relief.[3] The Department of Trade, Industry and Competition, the Department of International Relations and Cooperation, Parliament and the President who were cited as respondents all filed notices to abide by the court's decision. It was therefore unopposed by any party. The matter has now been set down for 12 May 2022 by the Constitutional Court in order to confirm the declaration of constitutional invalidity according to standard constitutional procedure.

[2] See Meeting of the National Assembly Portfolio Committee on Trade and Industry on 9 November 2021, Parliamentary Monitoring Group <https://static.pmg.org.za/211109pctrade_am.mp3>.

[3] *BlindSA v Minister of Trade, Industry and Competition and others* (Case no. 14996/21, Pretoria High Court) < https://blindsa.org.za/wp-content/uploads/2021/12/BLIND-SA-v-MINISTER-OF-TRADE-INDUSTRY-COMPETITION-OTHERS-FINAL-4-Copy-Right-Act-1.pdf>.

8. Moreover, SECTION27 and BlindSA were dismayed that the amendments under consideration were published for public comment in a manner utterly inaccessible to people with visual and print disabilities – when several amendments directly concerned people with visual and print disabilities. This is unacceptable from an organ of state. All organs of state have a *constitutional* obligation to ensure the 'full and equal enjoyment of all rights and freedoms' irrespective of disability, race, and gender amongst other protected grounds.[4] This extends to participation in democratic governance and its processes.
9. However, we do note that the Portfolio Committee Secretariat immediately reverted and initiated processes to republish these amendments in an accessible format, upon bringing our exclusion to his notice. We trust that in future all calls for public consultations will be made accessible to ensure the full and equal participation of all members of the public in democratic governance.
10. Finally, SECTION27 and BlindSA submit that some of these proposed amendments, especially the amendments concerning s 19D, are outside the scope of the Portfolio Committee's mandate. Section 79 of the Constitution requires that the President clearly 'itemise' the reservations that he may have regarding a Bill that is on his desk in respect of its constitutionality.[5] The PC is required to then address these itemised reservations and confine itself to them.[6] Section 19D was not included within the President's referral letter and its amendments are thus beyond the scope of the PC's mandate.
11. Not only was s 19D excluded, but also the paragraphs of the referral letter that make mention of the Marrakesh VIP Treaty perform a purely descriptive function.[7] Although

[4] Constitution s 9(2).

[5] *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* [1999] ZACC 15; 2000 (1) SA 732; 2000 (1) BCLR 1 [12].

[6] ibid [11]-[13] stating the same limitation in respect of courts.

[7] '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).

the PC interpreted those paragraphs as setting out a concern regarding the alignment of the CAB with the Marrakesh VIP Treaty, there is no reference to specific provisions of the CAB or the Marrakesh VIP Treaty that are misaligned. In any event, we submit that alignment with a treaty that South Africa seeks to accede to is not strictly a constitutional issue.[8]

12. Further, we submit, given that the CAB has been retagged as a s 76 bill, the National Council of Provinces is the appropriate body to be concerned with the CAB *as a whole*, rather than the National Assembly Portfolio Committee. In light of this, we urge the Committee to remain circumspect regarding the scope and extent of changes that it seeks to make to the CAB.
13. Without prejudice to the above position, we submit that any and all amendments made to the CAB at any stage, including this one, *must* be in line with the Bill of Rights of the Constitution.
14. Against this background, we group our submissions in response to the consolidated call for public consultation published on 8 December 2021 as follows:
    a. Submissions concerning accessible format shifting:
        i. The proposed inclusion of the definition of 'authorised entity', though not constitutionally necessary, if retained must be interpreted to give effect to the right to equality and dignity for all;
        ii. The proposed amendment to s 19D(3)(b) contradicts its stated purpose of aligning the CAB with the Marrakesh VIP Treaty and places additional burdens upon people with disabilities risking further unfair discrimination;

[8] Constitution s 233. See also, SECTION27's submissions to Parliament in July 2021 < https://section27.org.za/2021/07/submissions-on-copyright-amendment-bill-july-2021/>.

iii. The proposed addition of s 27(5B) must remain subject to s 28P to ensure that the constitutional rights to education, equality, dignity, culture, and freedom of expression are protected.

b. Submissions concerning access to educational and cultural materials:

i. The proposed inclusion of the definition of 'lawfully acquired' in section 1 is retrogressive and limits the rights to education and cultural participation;

ii. The proposed deletion of ss 12A(a)(i) and (iv) risks limiting the freedom of research and education and limits the scope of time and device shifting;

iii. The proposed addition of the three-step test makes s 12D impracticable;

iv. The proposed amendments to s 19C(4) risk limiting access to educational, and cultural materials from libraries in contemporary life.

III. Submissions concerning accessible format shifting

15. At the outset, we submit that the CAB, prior to the proposed amendments, could reasonably be interpreted to be compatible with the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled ('Marrakesh VIP Treaty') as well as the UN Convention on the Rights of Persons with Disabilities ('UNCRPD'). Nevertheless, our submissions on the amendments proposed on 8 December 2021 are set out below.

III.A The proposed inclusion of the definition of 'authorised entity', though not constitutionally necessary, if retained, must be interpreted to give effect to the constitutional rights to equality and dignity for all

16. The proposed definition of 'authorised entity' is as follows:

> (a) an entity that is authorised or recognised by the government to provide education, instructional training, adaptive reading or information access to persons with a disability on a non-profit basis; or

(b) a government institution or non-profit organization that provides education, instructional training, adaptive reading or information access to persons with a disability as one of its primary activities or institutional obligations.

17. The proposed definition of 'authorised entity' is a verbatim lift from art 2(c) of the Marrakesh VIP Treaty. As a general principle, it must also be noted that 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'.[9]

18. 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.

19. We submit first, that the proposed definition is not strictly constitutionally necessary, given that the CAB has previously specified that s 19D applies to beneficiary persons and those who serve beneficiary persons. This is similar to the Canadian Copyright Act, which simply characterises an authorised entity as 'a person acting at the request of such a person or for a non-profit organization acting for the benefit of such a person'.[10] Canada defines a 'nonprofit organization' broadly, as including 'a department, agency or other portion of any order of government, including a municipal or local government, when it is acting on

[9] Constitution, s 233. See, for the full argument, SECTION27's submissions to Parliament in July 2021 < https://section27.org.za/2021/07/submissions-on-copyright-amendment-bill-july-2021/>.

[10] Canada Copyright Act (R.S.C., 1985, c. C-42) s 32(1).

a non-profit basis'.[11] We submit that the approach taken by the CAB, prior to the proposed inclusion of the verbatim definition of 'authorised entity' is already aligned with the Marrakesh VIP Treaty, and is similar to Canada's approach.

20. In any event, we recognise that the discretion to determine the shape and form of a domestic law, having regard to treaty obligations South Africa is yet to undertake, lies with Parliament.[12] However, we also recognise – and emphasise – that Parliament must always perform its function within the bounds of the Constitution[13] and that the draft legislation that emerges must give effect to rights in the Bill of Rights.[14]

21. We therefore submit that should the PC decide to include the verbatim definition of 'authorised entity' as the Marrakesh VIP Treaty, proposed in the 8 December 2021 document, the phrase 'one of its primary activities' must be interpreted broadly, to include organisations like BlindSA, whose key purpose is to advocate for the interests of people with visual and print disabilities. We submit that this is in line with the practice of several countries including Australia,[15] Kenya,[16] Malawi,[17] Botswana,[18] and Peru.[19]

---

[11] Canada Copyright Act s 32(2).

[12] Constitution, s 231. See also, L Chenwi, 'Using International Human Rights Law to Promote Constitutional Rights: The (Potential) Role of the South African Parliament' (2011) 15 Law Democracy and Development 1.

[13] Constitution ss 7(2), 8(1). See also, for the constitutional extent of Parliament's discretion in law-making, *S v Baloyi* [1999] ZACC 19 [30]; *Minister of Home Affairs v NICRO* [2004] ZACC 10 2005 [35].

[14] Provided that it does not set out to limit rights, in which case it must pass muster under s 36 of the Constitution. See also, *Glenister v President of the Republic of South Africa* [2011] ZACC 6 (Glenister II) [97], [189]-[202].

[15] Authorised entities (WIPO) < https://www.wipo.int/marrakesh_treaty/en/entities.jsp>.

[16] Marrakesh Treaty Questionnaire – Kenya (WIPO) <https://www.wipo.int/export/sites/www/marrakesh_treaty/en/docs/mt_questionnaire_ke.pdf>.

[17] Marrakesh Treaty Questionnaire – Malawi (WIPO) < https://www.wipo.int/export/sites/www/marrakesh_treaty/en/docs/mt_questionnaire_mw.pdf>.

[18] Authorised entities (WIPO) < https://www.wipo.int/marrakesh_treaty/en/entities.jsp>.

[19] Marrakesh Treaty Questionnaire – Peru (WIPO) < https://www.wipo.int/export/sites/www/marrakesh_treaty/en/docs/mt_questionnaire_pe.pdf>

22. In fact, the World Blind Union Guide to the Marrakesh VIP Treaty specifies that[20]

> This phrase [authorised entity] should be interpreted broadly to include educational institutions, libraries, healthcare organizations, civil society groups, and other governmental or non-profit organizations that are open to the general public or that serve a broader membership or client base—if one of their primary activities is providing a service listed in Article 2(c) [of the Marrakesh VIP Treaty].

23. During the drafting of the Marrakesh VIP Treaty, there was consensus among several civil society groups,[21] the Asian delegation,[22] the American delegation,[23] and the South African delegation[24] that a broad interpretation of the phrase 'one of its primary activities or institutional obligations' was to be adopted to respond to the concern that a restrictive interpretation would exclude university libraries and educational institutions performing several different activities of which accessible format shifting was one.

24. Further, we submit that the existence of subsection (a) in the proposed definition of 'authorised entity' does *not* entail the promulgation of regulations by the relevant Minister as the *only* way in which an entity may be recognised as serving people with visual and print disabilities. In particular, Agreed Statement concerning art 9 of the Marrakesh VIP Treaty specifies that 'mandatory registration' (for instance, the specific authorisation of entities by the government through regulations) is *not* 'a precondition for authorised entities to engage in activities recognized under this Treaty'. Rather, that it is an additional means for

---

[20] Laurence R. Helfer, Molly K. Land, Ruth L. Okediji, and Jerome H. Reichman, World Blind Union Guide to the Marrakesh VIP Treaty (OUP, 2014) 83, available at <https://worldblindunion.org/programs/marrakesh-treaty/wbu-guide-to-the-marrakesh-treaty-2/>

[21] The International Federation of Library Associations and Institutions, Centre for Internet and Society, Knowledge Ecology International, Electronic Frontier Foundation among others. See, WIPO Standing Committee on Copyright and Related Rights Report, SCCR/22/18 [215].

[22] ibid. India and Pakistan specifically [125]-[127].

[23] ibid. USA [126] stating that 'The concept of a primary mission was not meant to be something so restrictive that it must be stated in the bylaws of an entity'.

[24] ibid. South Africa [170].

the government to specify entities who do not necessarily self-designate under subsection (b) of the proposed definition.[25]

25. We therefore recommend that should the PC retain this definition, it be interpreted in the manner described above, that gives effect to the right to equality of access to educational and cultural materials. This interpretation ensures that cross border import and export of accessible format works is easily accessible by people with disabilities living in different parts of the country and with access to different types of organisations.

III.B The proposed addition of s 19D(3)(b) irrationally contradicts its stated purpose, creates further barriers, and risks unfair discrimination

26. The proposed s 19D(3)(b) reads as follows:

> A person contemplated in paragraph (a) may only so export or import **where such person knows, or has reasonable grounds to believe** that the accessible format copy, will **only be used** to aid persons with a disability. (emphasis added)

27. We submit that the proposed addition of s 19D(3)(b) contradicts the Committee's stated purpose and imposes additional burdens upon people with disabilities or people serving people with disabilities. The stated purpose of this proposed amendment is to further align the CAB to the Marrakesh VIP Treaty. In order to understand the contradiction, a closer look at the relevant article of the Marrakesh VIP Treaty is imperative. Art 5(2) of the Marrakesh VIP Treaty, that governs cross-border exchange of accessible format copies, reads as follows:

> A Contracting Party may fulfil Article 5(1) by providing a limitation or exception in its national copyright law such that:
>
> (a) authorised entities shall be permitted, without the authorisation of the rightholder, to distribute or make available for the exclusive use of beneficiary

[25] Laurence R. Helfer, Molly K. Land, Ruth L. Okediji, and Jerome H. Reichman, World Blind Union Guide to the Marrakesh VIP Treaty (OUP, 2014) 82, available at <https://worldblindunion.org/programs/marrakesh-treaty/wbu-guide-to-the-marrakesh-treaty-2/>.

persons accessible format copies to an authorised entity in another Contracting Party; and

(b) authorised entities shall be permitted, without the authorisation of the rightholder and pursuant to Article 2(c), to distribute or make available accessible format copies to a beneficiary person in another Contracting Party;

provided that prior to the distribution or making available **the originating authorised entity did not know or have reasonable grounds to know** that the accessible format copy would be **used for other than** beneficiary persons. (emphasis added)

28. Comparing the bold portion of proposed s 19D(3)(b) and art 5(2) set out above, it is clear that the onus placed upon authorised entities and other persons serving people with disabilities set out in art 5(2) has been *reversed* in s 19D(3)(b).

29. According to the formulation in proposed s 19D(3)(b) of the CAB, people with disabilities and those serving people with disabilities, including authorised entities, must have positive knowledge or a reasonable basis for such positive knowledge that the particular accessible format copy imported or exported will 'only be used to aid persons with a disability'. This is akin to an investigative obligation that notably does not exist for people seeking to access materials under copyright without making use of the accessible format shifting provision. The proposed provision thus creates an onerous burden that falls only on people serving people with disabilities or people with disabilities and not on people without disabilities. This is *prima facie* unfair discrimination and a violation of the right to equality and non-discrimination in the Constitution.

30. Moreover, this investigative obligation renders the utilisation of the cross-border import and export provisions onerous and near impossible, contravening the principle of legality under s 1(c) as well as s 33 of the Constitution. It requires positive knowledge of the end user of the work being a person with a disability. It is not practically possible for a member of BlindSA, for instance, responding to a request from an authorised entity from another country to *actually know* whether the end user that the authorised entity in the other country

is serving will definitely be a person with a disability. This is an instance of irrationality. All that it is practicably possible for BlindSA to know in this instance would be that the authorised entity from the other country has contacted them in good faith to serve people with disabilities.

31. The Marrakesh VIP Treaty does not require such an onerous and impracticable standard for cross-border import and export of works. In contrast, according to the formulation in art 5(2) of the Treaty, there must be an *absence* of knowledge or potential knowledge of *non*-beneficiary use of that particular work. In other words, all that the Treaty requires is that the authorised entity or person serving people with disabilities 'did not know or have reasonable grounds to know' that the accessible format copy would be used for people 'other than beneficiary persons'. The only obligation that this imposes is akin to a 'red flag' approach – that if the authorised entity is approached in good faith, and has knowledge or reasonable grounds to believe that the copy would be used for persons *other* than beneficiary persons then they do not have to provide such a copy.

32. This is far less stringent than the investigative approach set out in proposed s 19D(3)(b). It also mirrors the standard that exists in s 19C(14) of the CAB, for instance, which only requires that a library employee discharges their duty in good faith and is satisfied that a particular use of an item from a library's collection is in line with copyright legislation including exceptions and limitations. It is irrational and discriminatory to impose a higher burden on other gatekeepers performing similar functions such as authorised entities. This higher burden potentially falls foul of the constitutional right to equality and non-discrimination and the rule of law.

33. Moreover, according to the World Blind Union Guide to the Marrakesh VIP Treaty, art 5(2) read with the Agreed Statement concerning it explicitly *prevents* a state-based imposition of an investigative obligation – or indeed any additional obligations greater than

those set out in art 5(2). Rather, the Agreed Statement recognises that each authorised entity will voluntarily adopt their own practices to ascertain that the work reaches beneficiary persons. The reason for leaving it to authorised entities to determine this aspect for themselves is that

> requiring additional measures would risk burdening authorised entities and inhibiting them from sharing copies across borders, thus limiting the effectiveness of the Treaty.[26]

34. This issue may be easily resolved by framing s 19D(3)(b) by drawing on the Marrakesh VIP Treaty language as follows

> A person contemplated in paragraph (a) may only so export or import provided that prior to the distribution or making available **they did not know or have reasonable grounds to know** that the accessible format copy would be **used for other than** beneficiary persons.

III.C The proposed addition of s 27(5B) must remain subject to s 28P to ensure that the constitutional rights to education, equality, dignity, culture, and freedom of expression are protected

35. We submit that the proposed addition of s 27(5B) on anti-circumvention of technological protection measures ('TPMs') must remain subject to the exceptions enumerated in the CAB. A key reason for this is that much of accessible format shifting takes place across electronic media that requires the use of circumvention measures for the sole purpose of rendering the particular work accessible to people with visual and print disabilities.

36. Section 27(5B) makes it a criminal offence for a person to 'make, import, sell, distribute, let for hire, offer or expose for sale or hire or advertise for sale or hire' or use a

[26] Laurence R. Helfer, Molly K. Land, Ruth L. Okediji, and Jerome H. Reichman, World Blind Union Guide to the Marrakesh VIP Treaty (OUP, 2014) 138, available at < https://worldblindunion.org/programs/marrakesh-treaty/wbu-guide-to-the-marrakesh-treaty-2/>

circumvention device where that person 'knows or should reasonably have known, that that device or service will or is likely to be used to infringe copyright'.

37. In this regard, we believe that the proposed amendment to s 27(5B), that explicitly states that the provision is 'subject to s 28P', is constitutionally *required* to prevent the further criminalisation of Braille and other accessible format shifting. Section 28P, after the proposed technical amendments, reads as follows

> (1) Nothing in this Act shall prevent any person from using a technological protection measure circumvention device to perform any of the following: (a) An act permitted in terms of any exception provided for in this Act; or (b) the sale, offer to sell, procurement for use, design, adaptation for use, distribution or possession of any device or data, including a computer program or a component, which is designed primarily to overcome security measures for the protection of data in order to enable the performance of any act permitted in terms of paragraph (a).
>
> (2) A person who wishes to circumvent a technological protection measure so as to perform a permitted act contemplated in subsection (1) but cannot practically do so because of such technological protection measure, may—
>
> (a) apply to the copyright owner for assistance to enable such person to circumvent such technological protection measure in order to perform such permitted act; or
>
> (b) if the copyright owner has refused such person's request or has failed to respond to it within reasonable time, engage the services of any other person for assistance to enable such person to circumvent such technological protection measure in order to perform such permitted act.
>
> (3) A person engaging the services of another person for assistance to enable such person or user to circumvent a technological measure in terms of subsection (2)(b) shall maintain a complete record of the particulars of the—
>
> (a) other person, including his or her name, address and all other relevant information necessary to identify him or her; and
>
> (b) purpose for which the services of such other person has been engaged.

38. This aspect of the proposed amendments ensures that where a person with disabilities (or a person serving a person with disabilities or an authorised entity) engages in 'mak[ing], import[ing], sell[ing], distribut[ing], let[ing] for hire, offer[ing] or expos[ing] for sale or hire or advertise for sale or hire' or using a circumvention device in order to give practical effect

to the accessible format shifting provision in s 19D, they are not criminalised for doing so. In other words, this proposed amendment must be interpreted to give effect to the rights to equality and non-discrimination, dignity, freedom of expression, education, and culture among the other rights in the Bill of Rights.

39. Moreover, this proposed amendment is in furtherance of art 7 of the Marrakesh VIP Treaty. Article 7 explicitly contemplates the restrictive impact that TPMs have on accessible format shifting for people with disabilities. In this regard, it *requires* States parties to take 'appropriate measures' to ensure that access is not prevented. It reads as follows

> Contracting Parties shall take appropriate measures, as necessary, to ensure that when they provide adequate legal protection and effective legal remedies against the circumvention of effective techno-logical measures, this legal protection does not prevent beneficiary persons from enjoying the limitations and exceptions provided for in this Treaty.

40. We submit that s 28P and the proposed addition to s 27(5B) 'subject to s 28P' are such appropriate measures. The proposed amendment should be interpreted as follows: that the use of a circumvention device in furtherance of any of the exceptions in the CAB including and, for the purposes of the rights of people with disabilities, s 19D and the other associated provisions facilitating accessible format shifting, must *not* be considered an infringement of copyright.

41. We therefore submit that the clause 'subject to s 28P' is a crucial part of s 27(5B) and is constitutionally required to give effect to rights in the Bill of Rights and ensure that unfair discrimination against people with disabilities does not, once again, arise. It is also necessary to ensure that South Africa is aligned with the Marrakesh VIP Treaty in advance of its accession to it, given that this is one of the stated purposes of the proposed amendments.

42. Although our submissions on this issue focus on the rights of people with disabilities, this proposed amendment also gives effect to *everyone's* right of access to educational and cultural materials under the Constitution.

IV. Submissions concerning access to educational materials

43. At the outset, we submit that the CAB prior to the proposed amendments, could reasonably be interpreted to be compatible with the Berne Convention, World Intellectual Property Organisation ('WIPO') Copyright Treaties, Trade-Related Aspects of Intellectual Property Rights ('TRIPS') Agreement as well as the International Covenant on Economic Social and Cultural Rights ('ICESCR') and UNCRPD.

44. We submit that some of the proposed amendments are in fact restrictive and in practice, lead to violations of the constitutional rights to education and culture. We discuss them in this section.

IV.A The proposed definition of 'lawfully acquired' in s 1 is restrictive, retrogressive, and limits rights in the Bill of Rights

45. The proposed definition of 'lawfully acquired' in s 1 of the CAB reads as follows

> a copy which has been purchased, obtained by way of a gift, or acquired by means of a download resulting from a purchase or a gift and does not include a copy which has been borrowed, rented, broadcast or streamed, or a copy which has been obtained by means of a download enabling no more than temporary access to the copy.

46. The phrase 'lawfully acquired' has been used in s 12B(1)(i), which provides for personal, non-commercial use of works under copyright as well as, crucially, time and device shifting. Section 12B(1)(i) states that

> Copyright in a work shall not be infringed by any of the following acts: the making of a personal copy of such work by a natural person for their personal use, including the use of a lawful copy of the work at a different time or with a different device owned by that natural person, and made for ends which are not commercial:

Provided that the work was lawfully acquired and that such personal use shall be compatible with fair practice.

47. We submit that the definition of lawfully acquired as including only 'a copyright [that] has been purchased, obtained by way of a gift, or acquired by means of a download resulting from a purchase or a gift' is underinclusive. Crucially, it excludes 'a copy which has been borrowed, rented, broadcast or streamed'. The implications of this are wide-ranging in the context of s 12B(1)(i). For instance, this would mean that a broadcast cannot be recorded for the purpose of time-shifting or device-shifting, something that s 12B(1)(i) explicitly *permits*. In the particular context of online education in covid-19 this proposed definition prevents asynchronous viewing of lectures and therefore negatively affects the right to education.

48. Further, this proposed definition limits access to materials from libraries and archives for students with and without disabilities. For instance, if a blind student requires access to a particular book chapter from their university library during the pandemic, and the librarian scans and emails the chapter to the student, the definition of 'lawfully acquired' would prevent the student from transferring this scan to a different device such as an e-book reader to actually access the work, given that they would be transferring the scan ('device shifting') rather than directly receiving the scan on the device itself. Device shifting is explicitly contemplated under s 12B(1)(i). But, the definition of 'lawfully acquired' creates an absurd situation that threatens to render s 19D ineffective in circumstances such as the global pandemic that has lasted over two years.

49. Further, although the current apartheid-era Copyright Act 1978 suffers from several other constitutional defects, it does not limit access to library works per se in the manner contemplated by the inclusion of 'lawfully acquired'. Moreover, the Constitution obliges the State to take steps to respect, protect, promote and fulfil everyone's equal right to access educational materials – even and *particularly* in circumstances of crisis, such as the

global pandemic. Including the proposed restrictive definition of 'lawfully acquired' is a step backwards and reduces the protection of the right to education.

50. We submit that this step backwards is in violation of the principle of non-retrogression in respect of the realisation of rights in the Bill of Rights. Although this principle arises out of South Africa's obligations under the ICESCR, the South African Constitutional Court has embraced it and applied it to several rights in the Bill of Rights.[27]

51. We submit, in the alternative, that the proposed definition of 'lawfully acquired' be jettisoned. It is unnecessary and rights-restrictive. Rather, given that the phrase 'lawful access' has been employed throughout the CAB (for instance in ss 19D(1)(a) and 19C(3)) as well as the Marrakesh VIP Treaty (for instance in arts 2(a)(i) and 2(b)), we submit that it be substituted in s 12B(1)(i). As for its definition, given that the word 'access' is qualified by 'lawful', it is trite that *unlawful* means of accessing a particular work would be excluded.

IV.B The proposed deletion of ss 12A(a)(i) and (iv) risks limiting the freedom of research and education and limits the scope of time and device shifting

52. Section 12A(a)(i) reads as follows

> In addition to uses specifically authorised, fair use in respect of a work or the performance of that work, for purposes such as the following, does not infringe copyright in that work:
>
> (i) Research, private study or personal use, including the use of a lawful copy of the work at a different time or with a different device.

[27] Most recently *in Law Society of South Africa and Others v President of the Republic of South Africa and Others* [2018] ZACC 51. See, for its first articulation, *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19. See also, Sanya Samtani, 'International Law, Access to Courts and Non-Retrogression : Law Society v President of the Republic of South Africa' [2020] Constitutional Court Review 197.

53. We submit that the proposed deletion of s 12A(a)(i) risks limiting the constitutional right of academic freedom and the freedom to conduct and participate in scientific research guaranteed to everyone without discrimination.[28] The stated purpose of deleting these subsections is that of redundancy and repetition. However, we submit that there is no particular exception that guarantees the right to research, a right that is guaranteed in s 16(1)(d) of the Constitution.

54. Although researchers affiliated with educational institutions may employ the educational exceptions in s 12D to access materials that they require, the deletion of s 12A(a)(i) entails that those researchers who are unaffiliated with educational institutions are excluded. It also excludes those who are engaged in 'lifelong learning' outside of educational institutions.[29] South Africa is bound by its international obligations under the ICESCR to progressively realise the right to lifelong learning.

55. Moreover, the deletion of this provision is accompanied by the relocation of the time and device shifting provision away from 'Research, private study or personal use' to s 12B(1)(i) where it applies only to 'personal use'. This entails that researchers seeking to access library collections during the global pandemic, including researchers with visual and print disabilities, would not be able to access these materials asynchronously or through devices different from the devices on which these materials are hosted.

56. While we understand that the open-ended nature of the list in s 12A(a) entails that researchers and those utilising materials under copyright for private study may indeed make use of the open-ended list to do so, we submit that the *deletion* of this provision creates an adverse presumption against them doing so in the minds of policy-makers.

[28] Constitution s 16. See also, ICESCR art 15(1)(c).

[29] CESCR, General Comment No 11: Plans of Action for Primary Education (art 14) (1999) E/1992/23 [44].

57. Therefore, we submit that s 12A(a)(i) be retained as it is. If the Committee is convinced that it is a repetition, we submit that it becomes imperative for the Committee to clarify in no uncertain terms that its removal does not constitute evidence of legislative intent that these acts be excluded from the interpretation of the provision – rather that they have been deleted for repetition as the section continues to contemplate these particular acts being carried out under it. It would be helpful for the Committee to specify which alternative section it considers already contemplating it as well.

58. With regard to s 12A(a)(iv), we submit that the deletion of 'scholarship, teaching and education' impairs the realisation of the constitutional right to education. The PC's stated purpose for deletion is repetition, however we submit that there is an important distinction in the phrasing used to denote uses under s 12A(a) and uses under s 12D.

59. Section 12A(a) covers all types of 'fair uses'. It is not limited to any particular type of use. It includes translation, distribution, broadcast, adaptation, reproduction amongst other uses. On the other hand, s 12D refers only to 'reproduction' for educational and academic activities. This entails that s 12D only deals with reproductive uses. Therefore, those educational and academic activities that require uses *outside* of reproduction are covered by s 12A(a)(iv). For instance, the broadcast of a lecture on an online platform is not a reproductive use, and would rather fall within s 12A(a)(iv).

60. By deleting s 12A(a)(iv), we submit that the scope of activities covered by the CAB in respect of educational uses is significantly limited and potentially limits the realisation of the right to education under the Constitution. We therefore submit that s 12A(a)(iv) be retained in the CAB.

IV.C The proposed addition of the three-step test makes s 12D impracticable

61. Section 12D concerns educational and academic activities. We therefore focus on this provision. We submit that the proposed additions to ss 12D(1)(c)-(d) (three-step test) potentially renders s 12D impracticable for policy-makers on the basis that it is subject to not one, but *two* different tests for uses under it to be considered exempt from copyright infringement. This is particularly problematic as an infringement of copyright carries potential criminal penalties and so the exception must be clear so as to avoid irrational and unjustifiable criminalisation of constitutionally guaranteed activities.

62. The proposed ss 12D(1)(a)-(d) reads as follows

> Subject to subsection (3), a person may make a reproduction of a work, including the use of a lawful copy of the work at a different time or with a different device owned by that person, or may broadcast it, for the purposes of educational and academic activities: Provided that—
>
> (a) the extent of the reproduction or the portion of the broadcast shall be compatible with fair practice;
> (b) a reproduction may only be made in the cases stipulated in this section;
> (c) the reproduction does not conflict with the normal exploitation of the copyright work; and
> (d) the reproduction does not unreasonably prejudice the legitimate interests of the copyright owner flowing from their copyright in that work.

63. Read together, we submit that the educational and academic activities are subject to two tests under s 12D(1): the 'three-step test' set out in ss 12D(1)(c)-(d) and 'fair practice' set out in s 12D(1)(a) and once again in s 12D(8)(b) which states that 'The use of the work as contemplated in subsections (1) to (6) shall be compatible with fair practice'.

64. We submit that at international law, each of these tests has a distinct meaning. The application of *both* tests at the same time leads to uncertainty and importantly the impracticability of the provision. This potentially contravenes the principle of legality under s 1(c) of the Constitution.

65. We submit that the appropriate test for educational exceptions is present in the Berne Convention, to which South Africa is party.[30] It provides for three elements: that the particular purpose of 'l'enseignement'[31] or education be fulfilled; that the particular use is 'fair practice' and third, to the 'extent justified by the purpose'. Each of these elements has specific content.[32] In particular, 'extent justified by the purpose' includes a proportionality standard which requires the analysis to include how much of a particular work is used and whether the educational purpose justifies that extent. 'Fair practice' requires an analysis of all relevant contextual factors including the particular interests of the author, the purchasing power and meaningful access gained by the user, the role of the intermediary in publishing the work and marketing it including its pricing, the socio-economic conditions of the particular jurisdiction in which this analysis is taking place, and importantly the constitutional framework of that jurisdiction, among other things.[33] The 'fair use' factors have commonly been understood as a subset of 'fair practice' and therefore its factors are *already* included once 'fair practice' has been included.

66. We therefore submit that the three-step test (ss 12D(1)(c)-(d)) is an inappropriate standard for educational exceptions.[34] It applies to exceptions *outside* of the specific exceptions for

[30] Berne Convention, art 10(2).

[31] The French version of the text of the treaty is the authoritative version of the text. See Berne Convention, art 37(1)(c) stating that 'In case of differences of opinion on the interpretation of the various texts, the French text shall prevail.'

[32] See, in the context of the quotations exception, Tanya Aplin and Lionel Bently, *Global Mandatory Fair Use: The Nature and Scope of the Right to Quote Copyright Works* (CUP 2020).

[33] See, for a full analysis, Sanya Samtani, 'The right of access to educational materials and copyright: international and domestic law' (Magdalen College, University of Oxford DPhil Thesis, 2021) < https://solo.bodleian.ox.ac.uk/permalink/f/89vilt/ORA888a946e-2ee1-4c78-9259-b5d3be8a8d01>.

[34] See, recognising this dominance, Tanya Aplin and Lionel Bently, 'Displacing the Dominance of the Three-Step Test: The Role of Global Mandatory Fair Use' in Shyamkrishna Balganesh, Ng-Loy Wee Loon, and Haochen Sun (eds), *The Cambridge Handbook of Copyright Limitations and Exceptions* (1st edn, CUP 2021).

particular purposes.[35] Education is already specifically provided for in the Berne Convention. In any event, all the considerations listed in the three-step test are taken into account by the 'fair practice' standard, as well as other relevant considerations that the three-step test potentially excludes.

67. We submit that it would be consistent with the rule of law and the principle of legality for the Committee to specify a practicable standard which applies to the educational exception. We therefore submit that the Committee retain the reference to 'fair practice' under s 12D(8)(b) and delete ss 12D(1)(c)-(d).

68. Further, with regard to the relationship between 'fair use' in s 12A(d) and 'fair practice', given that 'fair practice' is the appropriate standard in the Berne Convention regarding educational purposes, and that it already includes an analysis of the 'fair use' factors, we submit that there is no real requirement for the inclusion of proposed s 12A(d). If the Committee is keen to retain s 12A(d), we submit that it must be interpreted in a manner that does not limit the scope of 'fair practice' in s 12D(1) and gives effect to the right to education.

69. In sum, we submit that the proposed additions of ss 12D(1)(c)-(d) must *not* be made, in order for the provision to be practicable and ensure that people are not criminalised for activities that are constitutionally permitted in realising their right to education.

[35] Berne Convention, art 9(2); TRIPS Agreement, arts 9(2), 2(2) and 13. See also, for an interpretation of these provisions, Carlos Maria Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary* (2nd edn, OUP 2020) 43–44.

IV.D The proposed deletion in s 19C(4) risks limiting access to educational, and cultural materials from libraries in crises such as the global pandemic and the UCT library fire of 2021

70. Section 19C(4) reads as follows

> A library, archive, museum or gallery may, for educational or research purposes, permit a user to view a whole audiovisual work, listen to a full digital video disc, compact disc or other sound recording or musical work on its premises, in an institutional classroom or lecture theatre, or view such work or listen to such digital video disc, compact disc or other sound recording or musical work by means of a secure computer network, without permission from copyright owners, but may not permit a user to make a copy or recording of the work **for commercial purposes**. (emphasis added)

71. The proposed deletion of the phrase 'for commercial purposes' from s 19C(4) is emphasised in bold above. The deletion of this phrase prohibits libraries, archives, museums, and galleries from making a copy or a recording of a work for asynchronous access.

72. There is no clear explanation for why this phrase is being deleted. The phrase, in fact, caters to market interests and the interests of intermediaries by ensuring that there is no substitution effect by those accessing materials from libraries, archives, galleries and museums.

73. We submit that this deletion risks limiting access to educational, and other materials from libraries in circumstances of crisis such as the global pandemic that has been ongoing for two years and is continuing as well as natural disasters such as the devastating fire at the African studies collection at the University of Cape Town. Access to these materials are guaranteed by the Constitution, in the Bill of Rights.

74. The emphasis on 'institutional classroom or lecture theatre' coupled with the phrase 'may not permit a user to make a copy or recording of the work' severely limits the right to

education. This entails that people may only access the collections of libraries, archives, museums and libraries when they are *in the physical spaces* of institutional classrooms or lecture theatres. This renders the provision completely impractical for ensuring access to educational materials in recent times.

75. It also significantly limits the possibility of the use of mobile data and networks which are the primary source of access to educational materials in low-income households across the country.

76. We submit that the issue may be easily resolved by reversing the deletion of 'commercial purposes'. The work that this phrase does is to ensure that copies may be made for purposes *other than* commercial purposes. This is particularly important given that in a resource-constrained country like South Africa, libraries are the key source for accessing educational and cultural materials.

V. Conclusion

77. In conclusion, we urge Parliament to consider the ongoing discriminatory impact that the apartheid-era Copyright Act 1978 continues to have on people with disabilities among other marginalised groups, and therefore expedite the finalisation of the CAB.
78. We trust that these submissions will be helpful to the Committee in its deliberations.
79. In addition to our submissions, we remain available to assist Parliament on these issues, should the need and opportunity arise.
80. For any further enquiries, please contact:

SECTION27
Demichelle Petherbridge
Attorney
petherbridge@section27.org.za

BlindSA
Jace Nair
CEO of BlindSA
ceo@blindsa.org.za