Balancing the Protection for Intellectual Property Rights of Copyright Holders against the Constitutional Right to Freedom of Expression: A Comparison of The South African Approach and The United States of America's Approach

BY

BANELE MHLONGO

(214511933)

Mini-Dissertation Submitted in the Partial Fulfilment of the Academic Requirements for the Degree of

Master of Laws (Business Law)

At the

School of Law

College of Law and Management Studies

University of KwaZulu-Natal

Pietermaritzburg

Supervisor:

Ms Sheetal Soni

December 2018

DECLARATION

I, Banele Mhlongo declare that,

i. The research reported in this thesis, except where otherwise indicated, is my original work.
ii. The thesis has not been submitted for any degree or examination at any other university.
iii. This thesis does not contain other persons' data, pictures, graphs or other information, unless specifically acknowledged as being sourced from other persons.
iv. This thesis does not contain other persons' writings unless specifically acknowledged as being sourced from other researchers. Where other written sources have been quoted,
    (a) Their words have been re-written, but the general information attributed to them has been referenced;
    (b) Where exact words have been used, their writing has been placed inside quotation marks and referenced.
v. This thesis does not contain text, graphics or tables copied and pasted from the internet unless specifically acknowledged and the source being detailed in the thesis and in the reference sections.

Candidate: Banele Mhlongo

Signed:……Date:…….

Supervisor: Ms. S. Soni

Signed:……Date:…….

DEDICATION

This thesis is dedicated to my family for their love and support during the year of my study.

ACKNOWLEDGEMENTS

Although my efforts have contributed to the content of this work, I could not have completed this dissertation without the help of many others. I would like to acknowledge all of the people who have supported me during this challenging period. These people have contributed immensely to the completion of this dissertation.

Firstly, I would like to thank God for blessing me with the capabilities required for undertaking the task of writing this dissertation. I am humbled by the fact that I have been able to pursue my dreams with the abilities that have been granted to me. This research project is a reflection of the amazing gift of life that God has given to me.

Secondly, I would like to express my gratitude to my supervisor Ms Sheetal Soni for the advice, direction, suggestions and guidance she has given to me. The process has been long, and I am thankful for the patience she has had towards me during the writing process. She has been both a wise and firm mentor. I am grateful for the way she has supervised this Masters Dissertation.

Lastly, I am very grateful to my family for supporting me throughout the research and drafting period. I would like to thank Mr Dumisani Mhlongo, Mrs Thabile Mhlongo, Mr Siyabonga Mhlongo and Ms Zenani Mhlongo for being my support system.

LIST OF ABBREVIATIONS

SA	South Africa.
USA	United States of America.
EU	European Union.
UK	United Kingdom.
WTO	World Trade Organization;
WIPO	World Intellectual Property Organization.
TRIPS	Agreement on Trade Related Aspects of Intellectual Property.
DMCA	Digital Millennium Copyright Act.

TABLE OF CONTENTS

TABLE OF CASES AND STATUTES

LEGISLATION

SOUTH AFRICA

Constitution of the Republic of South Africa, 1996

Copyright Act 98 of 1978

Copyright Regulation, 1978 in GN R1211in GG 9775 of 7 June 1985 as amended by GN 1375 in GG 9807 of 28 June 1985

Copyright Amendment Bill [B13B-2017]

Draft National Policy on Intellectual Property 2013 in GN No 918 of 2013 Government Gazette (4 September 2013)

ENGLAND

The Statute of Anne of 1710

Copyright, Designs and Patents Act 1988

UNITED STATES OF AMERICA

Constitution of United States of America

Copyright Act of 1790 as amended in 1802, 1870, 1909 & 1976

Digital Millennium Copyright Act of 1998

CASE LAW

SOUTH AFRICA

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

Galago Publishers (Pty) Ltd and Another v Erasmus 1989 (1) SA 276 (A).

Haupt t/a Softcopy v Brewers Marketing Intelligence (Pty) Ltd 2006 JOL 17063 (SCA).

Laugh it Off Promotions CC v The South African Breweries International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae) 2006 (1) SA 144 (CC).

Marwick Wholesalers (Pty) Ltd v Hallmark Hemdon (Pty) Ltd 1999 JOC 707.

Moneyweb (Pty) Ltd v Media 24 Ltd 2016 3 All SA 193 (GJ).

National Soccer League t/a Premier Soccer League v Gidani (Pty) Ltd (2014) Case No: 10/48519.

Performing Right Society Ltd v Berman and Another 1966 (2) SA 355 (R).

ENGLAND

Ladbroke (Football) Ltd v William Hill (Football) 1964 1 All ER 465 (HL).

UNITED STATES OF AMERICA

Basic Books Inc. v Kinko's Graphics Corp 758 F. Supp. 1522 (S.D.N.Y 1991).

Fourth Estate Public Benefit Corporation v Wall-stress.com LLC S.Ct No 17-571.

Gray v Russell 10 F. Cas. 1035 (C.C.D. Mass. 1839) (No. 5728)

Harper and Row Publishers v Nation Enterprises 471 U.S. 539, 558 (1985).

Holmes v Hurst 174 U.S. 82 (1899)

New York Times Co. v. Roxbury Data Interface Inc 434 F. Supp. 217 (D.NJ. 1977).

Sony Corp of America v Universal City Studios 464 U.S. 417 (1984) 451.

TABLE OF BOOKS AND ARTICLES

BOOKS AND CHAPTERS IN BOOKS

Dean OH Handbook of South African Copyright Law (Kenwyn: Juta, 2006)

Joyce C Copyright Law (Porthsmouth: Matthew Bender & Co, 2003)

Leaffer MA Understanding Copyright Law (Denver, Matthew Bender & Co 2011)

Ramsden PA A Guide to Intellectual Property Law (Cape Town: Juta Law, 2011)

JOURNALS

Cardin TW 'Remedies of Copyright Infringement' (1969) 23 Ark. L. Rev. 466.

Conroy M 'Access to works protected by copyright: Right or privilege?' (2006) SA Merc LJ 413-.

Birnhack MD 'Acknowledging the Conflict between Copyright Law and Freedom of Expression under the Human Rights Act' (2003) ENT. L. Rev. 24 11-12.

Denicola RC ‘Copyright and Free Speech: Constitutional Limitations on the Protection of Expression’ (1979) 67 Calif. L. Rev. 293.

Du Bois M ‘Intellectual property as a Constitutional Property Right: The South African approach’ (2012) SA Merc LJ 178-

Dworkin AT ‘Originality in the Law of Copyright’ (1960) 11 Copyright L. Symp 60. 139

Geyer S ‘Copyright in Traditional Works: Unravelling the Intellectual Property Laws Amendment Act of 2013’ (2017) SA Merc LJ 43-

Gifford DJ ‘Innovation and Creativity in the Fine Arts: The relevance and irrelevance of copyright’ (2000) 18 Cardoo Arts & Ent. L.J. 657.

Holland J ‘Copyright law and freedom of expression in South Africa’ (2017) NAUJILJ 8 (2) 1-

Hughes LT ‘Copyright Infringement’ (1963) 51 Ky. L.J. 358

Karjiker S ‘Commentary on The Copyright Amendment Bill’ (2017) South African Intellectual Property Law Journal at 18 - 22.

Ncube C ‘Equitable Intellectual Property Protection of Computer Programmes in South Africa: Some Proposals for Reform’ University of Cape Town, 439-

Nimmer MB ‘Does Copyright abridge the First Amendment Guarantees of Free Speech and Press?’ (1970) 17 UCLA L. Rev. 1189. 201

Olson D ‘Copyright Originality’, (1983) 48 Mo. L. Rev. 32-

Peters M ‘The Copyright Office and the Formal Requirements of Registration of Claims to Copyright’ (1992) 17 U. Dayton L. Rev. 740-

Rogowski A ‘Can a song be copied with impunity? — A legal perspective on copyright infringement cases in respect of musical works’ (2017) Stell LR 217-

Rostoll ME ‘Copyright in News?’ (2017) TSAR 432-

Samuelson P ‘Copyright and Freedom of Expression in Historical Perspective’ (2003) 10 J. Intell. Prop. L. 319.

INTERNATIONAL ORGANISATIONS

Agreement on Trade-Related Aspects of Intellectual Property Rights, of 1995.

The Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886

THESES

Siphepho N ‘Copyright and developing countries’ (Master of laws thesis, University of KwaZulu-Natal, 2014)

Wang J ‘Copyright: Rebalancing the Public and Private Interests in the Areas of Education and Research’ (Doctor of Laws Thesis, University of Stellenbosch, 2013)

CHAPTER ONE: INTRODUCTION

1. PURPOSE OF THE STUDY

This dissertation is structured as an evaluation on the question whether the apparent failure of South African copyright law to adequately safeguard the rights of owners of those copyrights means that the current copyright legislative framework falls short of the objectives of s25 of the Constitution[1] (the right to property) and thus requires to be developed in order protect the rights of copyright owners. If so, how must the development take place in a way that also promotes the copyright user's right to freedom of expression in s16 of the Constitution?[2] In essence, the topic for discussion invariably leads to an assessment of South Africa's copyright legislative framework in developing copyrights.

The discussion will compare the South African position on copyrights with copyright protection in the United States of America. This dissertation will discuss whether South Africa's copyright law provides adequate protection for owners' copyrights against infringement by users. Any development of copyright law would need to be balanced against the copyright user's right to freedom of expression as will be articulated below.[3] The discussion is timely as South Africa is still engaged in a national copyright policy formulation.[4]

The questions above cannot be answered without an analysis of:

1. The current South African copyright legislative framework;
2. The international copyright laws, conventions and agreements that protect copyright;
3. The copyright legislative framework in the United States of America; and
4. The balance between copyright and the right to freedom of expression.

The combination of the aforementioned analysis is used to lay a foundation for an evaluation, the object of which is to discuss the development or reform of copyrights in South

[1] Constitution of the Republic of South Africa, 1996 (hereafter 'the Constitution').
[2] In terms of s16 (1) of the Constitution everyone has the right to freedom of expression
[3] M Conroy 'Access to works protected by copyright: Right or privilege?' 2006 *SA Merc LJ* 413.
[4] This research reflects the copyright legislative status quo as at November 2018.

Africa in a way that considers both the owner's and user's interest.[5] The issue is of practical significance because copyright protection is essential for persons who create eligible original works. This protection serves a broader societal interest by providing exclusive rights incentives for authors to produce economically valuable original works and contribute to the improvement of intellectual property resources.[6] It is also equally important that copyright protection promotes accessibility to information and does not infringe on the user's freedom to receive or impart information; freedom of artistic creativity; academic freedom and freedom of scientific research; or the freedom of the press and other media.[7]

2. BACKGROUND TO THE STUDY

a) Importance of copyright protection

Section 25 (1) of the Constitution states that no one may be deprived of property except in terms of a law of general application, and no law may permit arbitrary deprivation of property. Subsection (4) *(b)* states that property is not limited to land. Although the primary focus of the section is land, the inclusion of section 25 (4) *(b)* appears to be a catch-all sub-section to include property in general.[8] When the Constitutional Court had to deal with the question of whether the right to intellectual property was a fundamental right, the court in the *First Certification* case[9] held that the right to hold intellectual property was not universally accepted as a fundamental right and therefore did not require to be recognised in the Bill of Rights.[10] Whether the court's decision was justifiable has been a topic of debate.[11]

The court justified its decision by explaining that intellectual property is included under the catch-all term of 'property' covered in section 25 (4) *(b)* of the Constitution, finding that it is therefore not necessary to deal with it separately in the Bill of Rights. The

[5] 'Report on the South African Open Copyright Review' at 7, available at *http://libguides.wits.ac.za/c.php?g=145331&p=953503*, accessed on 18 July 2018.
[6] Ibid.
[7] Section 16 of the Constitution.
[8] Ibid.
[9] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC).
[10] M du Bois 'Intellectual property as a Constitutional Property Right: The South African approach' 2012 *SA Merc LJ* 178.
[11] Ibid.

court in its judgment decided that it was not a universally accepted norm to include a specific intellectual property right in a separate clause in the Constitution.[12]

The failure of the Constitution to explicitly mention the right to intellectual property does not therefore mean that the right is excluded. Du Bois makes the example that many other property rights recognised in private law are not mentioned in the Constitution and yet the rights are still recognised and protected under the property clause such as rights to tangible movables.[13] It is important to recognise from the outset that copyright protects an author's right to own their intellectual property. The right entitles them to exclusive rights which allow them to use their works to the exclusion of others. This principle is important for the purposes of discussing whether South African copyright law adequately protects authors' rights.

b) Balancing copyright protection with the freedom of expression

It is equally important from the outset to examine the relationship between copyright and freedom of expression. This is because it is important to achieve a balance between the tenets of copyright law and the Bill of Rights. The fundamental human rights in the Constitution include the right to freedom of expression which is considered to have a bearing on copyrights.

In terms of s16 (1) of the Constitution everyone has the right to freedom of expression, which includes:

(a) Freedom of the press and other media;
(b) Freedom to receive or impart information or ideas;
(c) Freedom of artistic creativity; and
(d) Academic freedom and freedom of scientific research.

Copyright law is established and developed in the public interest. The accepted obligation on copyright law arising out of the right to freedom of expression is that the public should have access to copyright works in order to develop. What this has essentially led to is

[12] Du Bois op cit note 10.
[13] Ibid at 179.

the development of certain exceptions which allow people to make use of copyright materials without permission from the copyright owner.

It is clear that copyright protection must be balanced against the equally important right to freedom of expression. In *Laugh it Off Promotions CC v The South African Breweries International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)*[14] (hereafter referred to as the 'Laugh it Off case') the Constitutional Court held that the right to freedom of expression and intellectual property rights enjoyed equal status under the Constitution.[15] Although the subject matter of the case dealt with trade marks it is important for our discussion to examine this case in dealing with the relationship between copyrights and freedom of expression.

In the High Court Sabmarks sought and obtained an interdict against Laugh It Off Promotions CC (Laugh It Off) in terms of s34 (1) *(c)* of the Trade Marks Act[16], the anti-dilution clause, which prohibits the use of a well-known trade mark where its use would be detrimental to or take unfair advantage of the distinctive character or repute of the mark.[17] The trade mark in question was held by Sabmark International which is licensed to South African Breweries (SAB) for use on their beer bottles. The trade mark states: 'America's lusty, lively beer Carling Black Label Beer Brewed in South Africa'. It had come to Sabmark's attention that Laugh It Off was producing T-shirts for sale that publicly criticised the trade mark by stating: 'Africa's lusty, lively exploitation since 1652 White Black Labour Guilt No regard given worldwide'.[18]

Laugh It Off appealed the High Court's interdict to the Supreme Court of Appeal. The SCA found in favour of SAB and held that the mark used on the T-shirts by Laugh It Off conveyed a message that Sabmark was guilty of exploiting black labour and for racial discrimination. The SCA found that use of the mark was likely to take unfair advantage or cause detriment to Sabmark's trade mark. The SCA held that Laugh It Off essentially fed off the trade mark's reputation in order to sell T-shirts. The SCA held further that there were

[14] *Laugh it Off Promotions CC v The South African Breweries International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC).
[15] O H Dean 'Intellectual Property and the Constitution', available at *http://blogs.sun.ac.za/iplaw/2015/07/14/intellectual-property-and-the-constitution/*, accessed on 18 July 2018.
[16] Act 194 of 1993.
[17] Du Bois op cit note 10 at 189.
[18] *Laugh It Off* supra note 14 para 16.

other ways that Laugh It Off could have expressed itself without harming the trade mark. The SCA upheld the interdict.[19]

Laugh It Off applied for leave to appeal the SCA decision. Its argument was that the mark on the T-shirt they produced criticises the way SAB markets its beer by targeting black workers, or critiques the exploitation of blacks by whites. It relied on the right to freedom of expression and contended that the right protects both of their expressions, and therefore that an interpretation of s34 (1) *(c)* of the Trade Marks Act does not allow Sabmark to obtain an interdict, except where it is shown that economic harm would likely occur.[20]

Sabmark opposed the application on the basis that the right to freedom of expression does not protect Laugh It Off's use of the 'Carling Black Label' mark and that it is not necessary for it to present evidence to show the likelihood of economic harm to obtain an interdict in terms of s34 (1) *(c)* for use of the mark by Laugh It Off.[21] The Constitutional Court admitted the Freedom of Expression Institute (hereafter referred to as 'the FXI'), which made common cause with Laugh It Off, as amicus curiae. The FXI's argument was that the protection of trade marks must be interpreted in light of the fundamental right to freedom of expression and allow parody by way of 'fair use' that does not violate anti-dilution provisions.[22]

In the decision Moseneke J found that Sabmark failed to prove that Laugh It Off had infringed their trademark right in s34 (1) *(c)* because 'likelihood of taking advantage of, or being detrimental to, the distinctive character or repute of the marks' had not been established.[23] More importantly Moseneke found that the rights of a person to express themselves cannot be lightly limited. The right to freedom of expression can be limited where the harm to the trade mark holder is material which is an internal limitation of s34 (1) *(c).* In addition to the harm being material Moseneke further found that the interpretation of the section has to conform to the Constitution and the society envisioned in it which requires one relying on the protection of the section or Act to show a real likelihood or probability of

[19] *Laugh It Off* supra note 14 para 25.
[20] Ibid para 51.
[21] Ibid.
[22] Ibid para 6.
[23] Ibid para 73.

harm. The harm must be economic in nature because the aim of the section is to protect the trade mark's selling power rather than its dignity.[24]

The court found that the Constitution does not exclude or afford special protection to any expression but the ones falling under s 16 (1).[25] Freedom of expression must be balanced against other rights, of which the right to property (including intellectual property) is one. Placing the onus on the trade mark holder to present evidence to prove the likelihood of substantial economic harm is an appropriate balance of these rights.[26] Laugh It Off was not selling beer in competition with Sabmark but was instead involved in selling an abstract brand criticism and the T-shirts were merely a medium of doing so.[27] The expressive conduct was thus acceptable in terms of the Constitution. It was not an infringement of the trade mark because SAB had failed to prove likelihood of economic harm. The court therefore granted leave to appeal and set aside the decision of the SCA.[28]

c) Basis for arguments for copyright reform and development

There are two diverging views. The one side argues in favour of limiting the 'restrictive copyright laws' in South Africa. Copyrights can present technical difficulties to those engaged in a development analysis of the law and its impacts. They argue that strengthening the position of copyright owners would invariably lead to near-impermeable monopolies and thereby stifle accessibility to important works which would help develop society. Essentially, they argue that in a developing country like South Africa this would have an adverse impact by preventing users from accessing important educational material.[29]

The diverging view of the opposing side argues that the important goal of copyrights is to effectively encourage persons to author original works by providing a reward and stimulus to authors through affording them exclusive rights over their work.[30] For this reason

[24] Ibid para 102.
[25] '*Laugh It Off Promotions CC v South African Breweries International (Finance) B.V. t/a Sabmark International* CCT 42/04 at 2', available at *http://www.saflii.org/za/cases/ZACC/2005/7.html* accessed on 18 July 2018.
[26] Ibid.
[27] Ibid.
[28] Ibid.
[29] Nomvuyo Siphepho *Copyright and Developing Countries* (unpublished LLM thesis, University of KwaZulu-Natal, 2014) 7.
[30] Ibid.

they argue further that strengthening the position of copyright owners is for the benefit of the economy which positively impacts society.

d) International protection of copyright

The more advanced regions of the world began to embrace the importance of protecting copyrights in the 1700s. As far back as 1709 the first copyright law, formally known as the Statute of Anne, was enacted in England. This Act introduced the exclusive right of an author over a book for a period of twenty years for work already published, and fourteen years for work published subsequently. Thereafter enactments of legislation protecting intellectual property rights began to spread across the European Union region and the United States of America. The United States Copyright Act was enacted in 1790. During this period intellectual property legislation was uncoordinated at an international level until the 19th century.[31]

International coordination of copyright protection began formally when the Berne Convention for Protection of Literary and Artistic Works (hereafter referred to as 'The Berne Convention') was introduced in 1886 to provide mutual recognition of copyrights between countries.[32] The Berne Convention is the oldest and one of the most important multilateral copyright treaties. It states that copyright is an automatic right, that the author or creator obtains as soon as the work created has been fixed, for example that the work has been recorded or written down.[33] The convention makes further provision for international reciprocation for copyright works, meaning that when an original work is created in one country it will be automatically protected by copyright in any other country that is also signatory. South Africa became a member of the Berne Convention in 1928 and the United States of America adopted the treaty in 1988.[34]

An international organisation for intellectual property rights known as the World Intellectual Property Organisation (WIPO) was established with the introduction of 'the Convention Establishing the WIPO' in 1967.[35] WIPO is a specialised agency of the United Nations (UN) that promotes intellectual property protection and ensures administrative

[31] Intellectual Property Rights Office 'A Brief History of Copyright' available at *http://www.iprightsoffice.org/copyright_history/* , accessed on 15 September 2018.
[32] Peter Ramsden *A Guide to Intellectual Property Law* (2011) 11.
[33] Ibid.
[34] Ibid at 12.
[35] Ibid.

cooperation amongst intellectual property unions established by treaties which WIPO administers. The World Trade Organisation's (WTO) Agreement on Trade-Related Aspects of Intellectual property rights (TRIPS) was signed in 1995. The WTO is an international organisation with the mandate of dealing with international rules of trade.[36] A part of the TRIPS agreement is based on the Berne Convention. South Africa is bound by the TRIPS agreement and has been adhering to it since 1994.[37]

The WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) of 1996 were signed in Geneva, Switzerland with the intention to update and supplement the existing international treaties on copyrights (WCT) and neighbouring rights (WPPT). This was done in order to give an adequate response on the level of international copyright legislation to the challenges raised for copyright by digitising and the internet, particularly with regard to the dissemination of copyright protected material.[38] South Africa is signatory to all of the above mentioned international treaties, however South Africa may only accede to the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) when the Copyright Act has been redrafted to address digital technology and such related issues.[39]

3. OVERVIEW OF THE DISSERTATION

Chapter one comprises a broad outline of the purpose of the present study. The topics that follow thereafter provide a background to the study. Among these topics is the status of intellectual property as a constitutional right and an explanation of freedom of expression in the context of copyrights. The chapter moves on to discuss the basis for arguments for copyright reform and development. The topic further looks at international protection of copyrights. The chapter then concludes with the structure of the dissertation.

The second chapter comprises an examination of the copyright legislative framework and jurisprudence. It particularly deals with the Copyright Act 98 of 1978 on the following topics: categories of works eligible for copyright, duration of copyright, identifying the author, requirement for works to be eligible for copyright, infringement of copyright, and

[36] Ramsden op cit note 32.
[37] Ibid at 13.
[38] Ibid.
[39] Ibid.

remedies for copyright infringement, general copyright exceptions and limitations with emphasis on the doctrine of 'fair dealing'. The chapter then moves on to discuss the Copyright Regulations 1978, the Intellectual Property Amendment Act 28 of 2013, and the Copyright Amendment Bill [B13B-2017]. The chapter concludes with a discussion on the relationship between copyright and freedom of expression.

The third chapter examines the current US copyright legislative framework. It particularly deals with the US Copyright Act 1976 by examining the following topics: categories of works eligible for copyright, duration of copyright, identifying the author, requirement for works to be eligible for copyright, registration of copyright, infringement of copyright, remedies for copyright infringement, general copyright exceptions and limitations with emphasis on the doctrine of 'fair use'. The chapter will also include a discussion on the relationship between copyright and freedom of expression under the United States of America's law. The chapter concludes with a discussion on the Digital Millennium Copyright Act of 1998.

The final chapter concludes the discussion and sets out recommendations for the reform of South African law. These recommendations are then consolidated and weighed with the view to conclude on how South Africa's copyright laws can adequately protect owner's copyrights and how to improve the balance of copyright protection and freedom of expression.

CHAPTER TWO

THE SOUTH AFRICAN COPYRIGHT LAW FRAMEWORK

1. INTRODUCTION

The South African market is flooded with unauthorized use of copyrighted works. Contraventions of the rights of copyright owners have almost become normal in our society. For example, if you are walking in the Pietermaritzburg/Durban CBD today you will find a number of vendors selling unlawfully copied South African/International movies, series, music albums, and books. With the advent of the internet, copyrights have been subject to infringement on an even larger scale. Contraventions of copyright are rampant in our society, and they occur in different ways which will be discussed below. Normalizing such contraventions works to the detriment of creativity.

These contraventions are damaging to the copyright owner's right to the material which they have produced using their own skill and labour. It also has a very negative effect on the economic success of their goods or products. If, for example, well-known authors, artists, or companies can have their copyrights so easily infringed it poses a serious threat to the social and economic viability of being an author in South Africa.[40] In the context of high rates of copyright infringements in our society, the crucial question arises whether copyright law currently serves its purpose to adequately protect the rights of copyright owners.

2. THE COPYRIGHT LEGISLATIVE FRAMEWORK

a) The Copyright Act

i. Categories of works eligible for copyright

The South African Copyright Act 98 of 1978 (hereafter referred to as 'the Act') is designed to protect an author against exploitation of their copyrights. The Act is largely based on British copyright legislation.[41] In terms of the Act the following works, if they are original, are eligible for copyright: literary works, musical works, artistic works, sound recordings,

[40] Ramsden op cit note 32 at 5.
[41] Siphepho op cit note 29 at 8.

cinematograph films, sound and television broadcasts, programme-carrying signals, published editions, and computer programs.[42] Each category of these works contains a variety of works. Literary works include novels, textbooks, dictionaries, plays, letters, poetic works, television and film scripts, song lyrics, reports, speeches, sermons and lectures.[43] Musical works include music only and the actual words of a song may be copyrighted separately as a literary work as well as the recording of the song.[44] Artistic works include paintings, sculptures, drawings, photographs, engravings, pottery, architecture works and artisanal works.[45]

Sound recordings which are neither music nor lyric are listed separately. Cinematography films include celluloid films as well as any videotapes, DVD's, laser discs and microchips that may have film recorded on them.[46] Sound and television, broadcasts defined as the actual broadcast, made up of electromagnetic waves, not the content of the broadcast, is subject to copyright.[47] The content of the broadcast, such as music, could be subject to copyright under another category such as sound recordings.[48]

ii. Duration of a copyright

A copyright subsists in a work for a period of 50 years from the end of the year that the author died for literary, musical, and artistic works, and 50 years from the date that the work was published, performed or broadcasted for other works. Where a literary, musical or artistic work was first published, performed, broadcasted or offered for sale after the death of the author, then the copyright subsists for 50 years from that later date.[49] The Berne Convention for the Protection of Literary and Artistic Works (1886) provides for a minimum duration of protection. The Berne Convention generally grants protection for a term of 50 years after the work was made. The Berne Convention requires that copyright in photographs subsist for

[42] Report on the South African' 2008 Open Copyright Review at 8, available at *http://libguides.wits.ac.za/c.php?g=145331&p=953503*, accessed on 18 July 2018.
[43] Section 1 of the Copyright Act.
[44] Ibid.
[45] Ibid.
[46] Ibid.
[47] Section 1 and 2 of the Copyright Act.
[48] Ibid.
[49] Ramsden op cit note 32 at 29.

only 25 years and that copyright for works made public after the author's death should subsist for 50 years after the author's death.[50]

iii. Identifying the author

The Copyright Act provides guidelines for identifying a person who qualifies as the author of a copyright. For literary works, musical works, and artistic works the author is the person who first creates the work.[51] For photographs, the author is the person who is responsible for the composition of the photograph.[52] The first broadcaster is the copyright owner for a broadcast and the publisher is the copyright holder for a published edition.[53] For sound recordings, the author is the person who made arrangements for the making of the film or recording. The person who emits the signal to a satellite is the copyright owner of a programme-carrying signal.[54]

The person who exercised control over the making of the programme is considered to be the author of the computer programme. There are however exceptions in the Act to these definitions of the author.[55] If a person commissions a photograph, painting, film, sound recording or drawing of a painting, then the person who commissioned the work is entitled to the authorship of that work.[56] If a literary work is created by an author who is employed by a magazine, newspaper, or a publication of a similar kind, the authorship vests in the publisher. Works that are created in the course of an author's employment ultimately belong to the employer.[57]

The exclusive right conferred upon the author of a copyright gives that author the entitlement to prohibit or allow other persons to make a reproduction of the work, to distribute the work, and to adapt the intellectual creation in exchange for money or some other benefit.[58] The benefit behind this protection is to give the creator the right to exclude others from using their work and the principle behind this is that other persons should not be

[50] Report on the South African' 2008 Open Copyright Review at 5, available at *http://libguides.wits.ac.za/c.php?g=145331&p=953503*, accessed on 18 July 2018.
[51] Section 1 of the Copyright Act.
[52] Ibid.
[53] Ibid.
[54] Ibid.
[55] Ibid.
[56] Report on the South African' 2008 Open Copyright Review at 10, available at *http://libguides.wits.ac.za/c.php?g=145331&p=953503*, accessed on 18 July 2018.
[57] Ibid.
[58] Conroy op cit note 3 at 413.

able to reap the benefits arising from what the copyright owner has created. Section 3 of the Act deals with copyright by virtue of nationality, domicile or residence, and duration of copyright.

It states that copyright is automatically conferred in every work, eligible for copyright, of which the author or, in the case of a work of joint authorship, any one of the authors is at the time the work or a substantial part thereof is made, a qualified person, that is in the case of an individual, a person who is a South African citizen or is domiciled or resident in the Republic; or in the case of a juristic person, a body incorporated under the laws of the Republic: provided that a work of architecture erected in the Republic or any other artistic work incorporated in a building or any other permanent structure in the Republic, shall be eligible for copyright, whether or not the author was a qualified person.[59] Essentially this means that where the author or one of the joint authors are domiciled, citizen, or resident in South Africa the copyright automatically subsists in the work they have authored.[60]

In terms of s4, which deals with copyright by reference to country of origin, a copyright is conferred on eligible works whereby the copyright was first published, or broadcasted, or made in South Africa or work which is omitted to a satellite from a place in South Africa.[61]

iv. Requirement for works to be eligible for copyrights

In terms of s2 the requirements for copyright in a work are:

1. 'The work must be one of the types of works that are eligible;
2. The work must be an original ('the originality' requirement)[62]; and
3. The work (except a broadcast or programme-carrying signal), must have been written down, recorded, or represented in digital data or signals or otherwise reduced to a material form. A broadcast or a programme-carrying signal must, in the case of a broadcast, have been broadcasted and, in the case of a programme carrying signal, have been transmitted by a satellite ('Materiality' requirement).'[63]

[59] Section 3 (1) of the Copyright Act.
[60] Ramsden op cit note 32 at 18.
[61] Section 4 of the Copyright Act.
[62] Section 2(1) of the Copyright Act.
[63] Section 2(1) of the Copyright Act.

In terms of s2 (1) of the Copyright Act, copyrights protect any person who by his own skill and labour creates an original of work.[64] An original work is a work that is not copied from another work. It requires that the work must have originated from the author.[65] An objective test is applied in assessing whether a work is indeed an original. Novelty in an authored work is not a requirement for originality. However, the work must emanate from the author and not be copied from another work. A degree of the authors own labour and skill must be shown.[66]

In terms of the *Haupt t/a Soft Copy v Brewers Marketing Intelligence and Others*[67] the amount of labour, skill or judgment which is required is a question of fact and degree in every case. A work that is eligible for copyright may be subject to improvement or refinement by another author. Even if the improvement or refinement involved an infringement of the copyright in the original work, as long as the actual improvement or refinement of the original work is the subsequent author's original and substantial work it will be eligible for copyright.[68] Where there are features of a previously authored work within a subsequent work this does not necessarily mean that the work is an infringement of a copyright and therefore does not qualify for copyright protection.[69]

A copyright can exist in a work even where all the features of the work existed before its creation so long as the requisite degree of skill and labour went into its creation. In *Marwick Wholesalers v Hallmark Hemdon*[70] the court found that originality as a requirement for the vesting of a copyright does not require that the work be unique or inventive. Instead what is required is that the work must be a product of the author's own labour and skill and not a copy of another work.

In terms of the Copyright Act a copyright does not subsist in the idea, instead a copyright subsists in the work reduced to a material form (see s2(2) and 2(2A)). This means that whilst an idea of a work exists in a person's mind there can be no copyright in it. For example, an idea of a literary work can only be subject to copyright once it has been written

[64] Section 2(1) of the Copyright Act.
[65] Ramsden op cit note 32 at 25.
[66] C Ncube *Equitable Intellectual Property Protection of Computer Programmes in South Africa: Some Proposals for Reform* (unpublished thesis, University of Cape Town) 439.
[67] *Haupt t/a Soft Copy v Brewers Marketing Intelligence and Others* 2006 (4) SA 458.
[68] Section 2(3) of the Copyright Act
[69] Ramsden op cit note 32 at 27.
[70] *Marwick Wholesalers (Pty) Ltd v Hallmark Hemdon (Pty) Ltd* 1999 JOC 707.

down. Publication of the work is not a requirement of 'material form'.[71] Ncube states that 'the requirement of material form in s 2(2) has been viewed as flowing from the 'idea-expression dichotomy' which seeks to limit copyright protection to the expression and not a mere idea or functionality of works.[72] This position is legislated in the United States of America.[73]

It has also been adopted in the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) and the World Intellectual Property Organisation (WIPO) Copyright Treaty.[74] The idea-expression dichotomy is criticized as being both simplistic and inadequate because a situation may arise where it is not possible to separate an idea from an expression.[75] This is at times the case when dealing with computer programmes. The Copyright Act does not provide for the use of the idea-expression dichotomy, however courts have acknowledged it.[76] The court in *Sure Travel Ltd v Excel Travel (Pty) Ltd*[77] found that it is the mode of expression that is protected in a literary work and not any functional features.[78]

v. The Infringement of copyrights

As stated above copyrights subsist in original works automatically. In other words, an author does not need to register their copyright. Once the work has been created and an automatic copyright subsists, s23 (1) of the Act provides that:

'a copyright shall be infringed by any person, not being the owner of a copyright, who does or causes any other person to do, in the Republic, any act which the owner has the exclusive rights to do or to authorise, such as:

i. Reproduce the work if the work is a literary work, musical work, artistic work, or cinematograph films;
ii. Adapt the work if the work is a literary work, including, in the case of a non-dramatic work, a version of the work in which it is converted into a dramatic work;
iii. Publish the work if it has not yet been published;
iv. Perform the work in public;
v. Broadcast the work; or

[71] Ramsden op cit note 32 at 27.
[72] Ncube op cit note 66 at 440.
[73] Section 102 *(b)* of the US Copyright Act 1976 17 USC.
[74] Ncube op cit note 66 at 440.
[75] Ibid.
[76] Ibid.
[77] *Sure Travel Ltd v Excel Travel (Pty) Ltd* 2004 BIP 275 (W).
[78] Ncube op cit note 66 at 440.

vi. Cause the work to be transmitted in a diffusion service.'[79]

Although different terms may be used to refer to these infringing acts with regard to a particular category of work, the definition of infringing acts will amount to the acts referred to above. These infringing actions ultimately refer to the unlawful copying, modification, using and exploiting of copyright works and is the particular focus of this discussion.[80] Section 23 (2) states that:

'a copyright shall be infringed by any person who, without the licence of the copyright owner, at a time when copyright subsist does the following:

1. imports an article into the Republic for a purpose other than for his private and domestic use:
2. sells, lets, or by way of trade offers or exposes for sale or hire in the Republic any article;
3. distributes in the Republic any article for the purposes of trade, or for any other purpose, to such an extent that the owner of the copyright in question is prejudicially affected; or
4. acquires an article relating to a computer program in the Republic, if to his knowledge the making of that article constituted an infringement of that copyright or would have constituted such an infringement if the article had been made in the Republic.'[81]

Section 23(3) provides that the copyright in a literary or musical work shall be infringed by any person who permits a place of public entertainment to be used for a performance in public of the work, where the performance constitutes an infringement of the copyright in the work: Provided that this subsection shall not apply in a case where the person permitting the place of public entertainment to be so used was not aware and had no reasonable grounds for suspecting that the performance would be an infringement of the copyright.[82]

The reference to 'any act' in subsection 23 (1) refers to an adaptation, broadcast, copying, performing, rebroadcasting, or reproduction or a work. These acts are all defined in section 1 of the Act. Section 1(2A) of the Act provides that it is sufficient to show copyright infringement if a 'substantial part' of an owner's copyright work has been reproduced, copied, published, performed or broadcast.[83] Section 1(2A) of the Act and s 16 of the United

[79] 'Report on the South African Open Copyright Review' at 11, available at *http://libguides.wits.ac.za/c.php?g=145331&p=953503*, accessed on 18 July 2018.
[80] Ibid.
[81] Section 23(1) of the Copyright Act.
[82] Section 23 of the Copyright Act.
[83] Ramsden op cit note 32 at 54.

Kingdom's Copyright, Designs and Patents Act of 1988 (The UK Copyright Act) are almost identical in wording. The use of the term 'substantial part' in legislation first appeared in the 1911 UK Copyright Act and early English jurisprudence which has set the yardstick for the copyright infringement test.[84]

The test to determine whether a 'substantial part' of a work has been copied requires a qualitative enquiry as to whether the substance of that particular work has been copied. In applying the copyright infringement test, the court looks at the quality of what was taken in an infringing work more than at the quantity of what was taken.[85] In *Ladbroke (Football) Ltd v William Hill (Football)*[86] *Ltd* the court found that the question whether a person has copied a substantial part depends much more on the quality than the quantity of what he has taken. The wording of section 1(2A) supports the orientation towards a qualitative assessment. Use of the word 'any' allows the court to consider any part taken, big or small.[87] The part taken must have substance in content that contributes to the originality of the work. The qualitative assessment requires a look at the nature, character, and original features of a work which give it a distinctive or unique character.[88]

The emphasis on a qualitative approach does not however mean that a quantitative assessment of how much of the work was taken is irrelevant. Both assessments are considered in a court's decision however the qualitative assessment has more weight. The quantitative assessment is a more arithmetic consideration. The rationale in the courts favouring the qualitative assessment is that a small part of an original work may be taken which may embody the characteristic which makes the work identifiable and gives it character. For example, in *Haupt t/a Softcopy v Brewers Marketing Intelligence (Pty) Ltd*[89] the court found that the conduct amounted to a reproduction of a substantial part where only 63 lines of source code, out of multiple thousands, were copied. The court found that the 63 lines copied were considered to be the ingredient of the programme.[90] The qualitative

[84] A Rogowski 'Can a song be copied with impunity? — A legal perspective on copyright infringement cases in respect of musical works' 2017 *Stell LR* 217.
[85] Ibid.
[86] *Ladbroke (Football) Ltd v William Hill (Football)* 1964 1 All ER 465 (HL).
[87] Rogowski op cit note 84 at 217.
[88] Ibid.
[89] *Haupt t/a Softcopy v Brewers Marketing Intelligence (Pty) Ltd* 2006 JOL 17063 (SCA) para 45.
[90] Ibid.

assessment gives rise to the question of what constitutes an important characteristic, or original part of a work.[91]

In *Galago Publishers (Pty) Ltd & another v Erasmus*[92] it was held that for a copyright infringement to have occurred it must be shown that:

1. 'There is sufficient objective similarity between the alleged infringing work and the original work, or a 'substantial part' thereof, for the former to be described as a reproduction or copy of the latter; and
2. The original work was the source from which the alleged infringing work was derived. There must be a direct or indirect causal connection between the original work and the alleged infringing work. The enquiry must be whether the defendant copied the plaintiffs' work, or is it an independent work'.[93]

If either of these tests is not met, then no copying of a substantial part of the protected work has taken place and there will been no infringement. Copyright infringement does not occur where a work that is very similar to or even identical to another work was created but the creator produced the second work independently and without reference to the other work.[94] The subject of 'substantial part' should be considered with caution where the subject of the work is common. For example, research conducted into the Copyright Act would be the subject of many works and would be common property to all who write on it. Regardless of the category of work protected by copyright, the infringement test remains the same.[95]

Indirect infringement of a work which occurs by reproducing a reproduction of an original work has also been found to be an infringement of copyright. Section 1(1) of the Act includes a definition of a reproduction in a work, as the' reproduction of the reproduction'. Indirect infringement takes place when certain acts are done without the authority of the copyright owner in connection with direct infringements of a copyright. There are two forms of indirect infringement of copyright:

1. Unauthorised dealing with infringing copies of a work; and

[91] Ibid.
[92] *Galago Publishers (Pty) Ltd & another v Erasmus* 1989 (1) SA 276 (A).
[93] Ramsden op cit note 32 at 58.
[94] H Blignaut 'Copyright litigation in South Africa: Overview' at 8, available at *https://uk.practicallaw.thomsonreuters.com/w-0121995?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1* , accessed on 22 October 2018.
[95] Ibid.

2. Permitting an infringing public performance of a work to take place.[96]

vi. Remedies for copyright infringements

A copyright can only be enforced in the South African High Courts. There are no specialised copyright courts. This means that the presiding officer's expertise on copyrights may differ on a case-by-case basis.[97] Copyright litigation occurs in accordance with civil procedure. The copyright owner who seeks relief for infringement is known as the plaintiff or claimant and the alleged infringing person is referred to as the defendant.[98] In the case of joint ownership of a copyright a co-author may not sue for damages resulting from infringement of the copyright without joining the other co-author(s) or making a case for entitlement to sue alone (see *Feldman NO v EMI Music Publishing SA (Pty)* Ltd 2010 (1) SA 1 (SCA).[99]

Section 24 (1) of the Copyright Act states that an infringement of a copyright is actionable. The copyright owner is entitled to any action for such infringement by way of relief in damages, interdict, delivery of infringing copies or plates used or intended to be used for infringing copies or otherwise shall be available to the plaintiff as is available in any corresponding proceedings in respect of infringements of other proprietary rights.

The following remedies are available for copyright infringement in terms of the Act -

I. An Interdict

In the *Performing Right Society Ltd v Berman & another case*[100] it was held that an interdict is granted as a remedy where:

i. 'The plaintiff's copyright and the breach of it is clearly established;
ii. The defendant claims no right to do what he has done without permission or a license from the plaintiff and the payment of a royalty;
iii. The defendant has not given an undertaking to not repeat the infringement; and
iv. Provided that the circumstances are not such that there is no likelihood of a future infringement occurring'[101].

[96] Ramsden op cit 32 at 59.
[97] Blignaut op cit note 94 at 2.
[98] Ibid.
[99] Ramsden op cit 32 at 69
[100] *Performing Right Society Ltd v Berman & another* 1966 (2) SA 355 (R).

Ramsden states that in determining whether a court should grant an interdict pending the outcome of a court action, the court must consider 'balance of fairness'.[102] The court must strike a balance between the prospects of the copyright owner being successful in the main action and, as per the case of *Harnischfeger Corporation & another v Appleton & another*[103] where the court considered the-

i. 'Prospects of each party suffering harm as a result of the courts interference or not granting the interim relief;
ii. The seriousness and irreparability of the harm;
iii. The difficulties of proving the extent of any harm; and
iv. The risk of not recovering the amount of damages caused by the harm'.[104]

Where it is not possible to guarantee that the defendant will not commit the infringing action in the future, the plaintiff should be granted an interdict (see *South African Music Rights Organisation Ltd v Trust Butchers* (Pty) Ltd 1978 (1) SA 1052 (E)).[105]

II. Damages

Damages compensate the plaintiff for loss or injury. The amount of the damages must as far as possible be that amount of money which will put the plaintiff in the same position he would have been in had he not sustained the wrong that occurred as a result of the infringement.[106] Damages may also include license fees that the defendant would have had to pay during the subsistence of the copyright infringement as well as the amount spent by the plaintiff in establishing the infringement of the copyright.[107]

The quantum of damages may be difficult to determine. The Act provides a solution in this regard in s25 (1A) of the Copyright Act which provides for the court to award royalties in lieu of damages. Section 25 (1A) provides that a reasonable royalty is in lieu of damages and creates a substantive remedy which does not require proof of damages to calculate the royalty. In *Performing Right Society Ltd v Butcher and Others*[108] once the plaintiff had proved its copyright ownership of musical works and that the defendant had

[101] *Performing Right Society* supra note 100.
[102] Ramsden op cit 32 at 66.
[103] (495/92) [1994] ZASCA 141
[104] Ramsden op cit 32 at 67.
[105] Ibid.
[106] Ibid at 69.
[107] Ibid.
[108] *Performing Right Society* supra note 100.

infringed its right the amount of royalties which the plaintiff was entitled to was 2% of the entire takings (amount) that the infringing performance or the work had received.[109]

Section 24 (3) provides for 'additional damages'. The court in this instance has to consider the material facts such as:

(a) 'The flagrancy of the infringement;
(b) Any benefit shown to have accrued to the defendant by reason of the infringement; and
(c) The court is satisfied that effective relief would not otherwise be available to the plaintiff'.

Section 24 (3) gives the court wide discretion in awarding additional damages, however-

(i) 'The basis for additional damages must be recognised in the common law;
(ii) The additional damages must not be awarded as a 'fine'; and
(iii) The quantum of damages awarded must be fair'[110].

Section 24 (3) empowers a court to award only damages recognised in South African common law e.g. damages claimable under action resulting in derogation of personality.[111] Additional damages are damages of a kind not, but for s24 (3) recoverable either as a result of being unprovable or no cause of the recovery exists. In awarding additional damages courts must consider that the money that the defendant will be made to pay must be paid towards providing relief for the plaintiff, the defendant may not just simply be fined.[112]

vii. General copyright exceptions and limitations

A work that is copyright protected may be subject to being reproduced or used, whether in part or substantially, without a person obtaining permission from the copyright owner. The rationale for this is that it may be in the public interest to do so. The most important general exception for our purposes is known as fair dealing, which is provided for by s12 (1) of the Copyright Act for literary and musical works. It also applies to various other works by virtue of a fair dealing section applicable to it. These other works are: artistic works, cinematograph films (s 15(4)), sound recordings (s16 (1) *(b)* and *(c)*), broadcasts (s17 *(b)* and *(c)*), published

[109] Ramsden op cit note 32 at 70.
[110] Ibid.
[111] *Priority Records (Pty) Ltd v Ban-Nab Radio and TV* 1988 (2) SA 281 (D)).
[112] Ibid at 71; see also *CCP Record Co (Pty) Ltd v Avalon Record Centre* 1989 (1) SA 445 (C)).

editions (s18), computer programs (s19A). The fair dealing provision is of importance for this discussion because it relates to the right to freedom of expression.[113]

The Act does contain a number of more specific limitations and exceptions with regards to the different categories of works and kinds of works in s12. The limitations and exceptions are complex as each work may have different exceptions which apply to it.

The following exceptions are provided for in the Act: use in the context of judicial proceedings s12(2); quotations s12(3); illustrations in any publication, broadcast or sound or visual record for teaching (s12(4)); ephemeral reproductions by a broadcaster (s12(5)); reproduction in the press or broadcasting of works delivered in public for informatory purposes (s12(6)); Reproduction in the press or broadcasting of published articles on current topics (s12(7)); there is no copyright protection for official texts of a legislative, administrative or legal nature, or official translations of such texts, speeches of a political nature, speeches delivered in the course of legal proceedings, news of the day that are mere items of press information (s12(8)); and bona fide demonstration of radio or television receivers or any type of recording equipment or playback equipment (s12(12)).

Section 12(1) of the Act states:

'Copyright shall not be infringed by any fair dealing with a literary or musical work –

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

Provided that, in the case of paragraphs *(b)* and *(c)* (i), the source shall be mentioned, as well as the name of the author if it appears on the work.'[114]

The copyright owner's right will not be contravened if the source of the work is referenced. There is no clear definition within the Copyright Act of 'fair dealing' nor does it provide for how much of the copyright work may be reproduced without the permission of the copyright owner. Instead the specific wording of the provision, with regards to how much

[113] 'Report on the South African Open Copyright Review' at 13, available at *http://libguides.wits.ac.za/c.php?g=145331&p=953503*, accessed on 18 July 2018.
[114] Section 12(1) of the Copyright Act.

of the work is permitted to be copied provides for an amount that is compatible with fair practice and does not exceed the extent justified by the purpose of the reproduction or use.[115] This invariably means that the copyright user who claims reproducing or using under fair dealing must prove that the amount of the work copied was sufficient for one of the purposes listed above. Therefore, in terms of the Copyright Act as it exists there are provisions which enable usage of copyright works through fair dealing in a way that affords access to educational materials as well as uses for media and reporting.[116]

In *Moneyweb (Pty) Ltd v Media 24 Ltd*[117] the court found that due to lack of South African jurisprudence on fair dealing it would suffice to consider foreign jurisprudence to understand how it applies with necessary caution.[118] The court looked at English authority because of the shared history of copyright law between South Africa and England. The court deemed it appropriate to do so in this regard. In considering the application of fair dealing the court looked at the English court of appeal judgment in *Ashdown v Telegraph Group Ltd* 2001 4 All ER 666 (CA). The English Court of Appeal specifically focused on the test for fair dealing.[119]

The test applies as follows:

i. First, one needs to establish if the alleged fair dealing competes commercially with the proprietor's exploitation of the copyright work and if it can be a substitute for the probable purchase of authorised copies;
ii. Secondly, has the work already been published or otherwise exposed to the public; and
iii. Thirdly, consider the amount and importance of the work that has been taken.[120]

The court in the *Moneyweb (Pty) Ltd* case conceded that it is nearly impossible to formulate a clear definition for fair dealing because fairness is not a static concept, it requires a value judgment to be exercised by taking into account the unique circumstances presented

[115] Ibid at 12.
[116] Ibid.
[117] *Moneyweb (Pty) Ltd v Media 24 Ltd* 2016 3 All SA 193 (GJ).
[118] M Rostoll 'Copyright in News?' 2017 *TSAR* 432.
[119] Ibid.
[120] Ibid.

by each situation when dealing with original work.[121] The general measure of fairness of use is whether a fair minded and honest person would have dealt with the copyright in the same way in relation to the specific exception.[122] The factors that the court took into consideration in determining whether a newspaper had published a work in accordance with fair dealing were, but not limited to,-

i. The nature of the medium in which the works have been published;
ii. Whether the original work has already been published;
iii. The time lapse between the publications of the two works;
iv. The amount (quality and quantity) of the work that has been taken; and
v. The extent of the acknowledgement given to the original work.[123]

Intellectual property rights are property rights which are subject to protection by s25 of the Constitution and the Copyright Act however copyright exceptions such as fair dealing are necessary to advance human rights and freedoms such as freedom of expression in s16 of the Constitution.[124] The main goal of the doctrine of fair dealing is to encourage legitimate and social uses of copyrighted works which is socially beneficial provided that it meets the standard of fairness and requirement of intended purpose of use.[125]

b) The Copyright Regulations

The Copyright Act mandates the Minister of Economic Affairs by virtue of the powers vested in him/her in terms of s39 of the Copyright Act to make regulations (subordinate legislation).[126] Section 13 of the Copyright Act provides that in addition to reproduction which is permitted by the Act, reproductions are also permitted in terms of the copyright regulations. The permission of reproduction is on condition that the reproduction is not unreasonably prejudicial to the legitimate interests of the copyright owner and does not conflict with a normal exploitation of the work.[127] The regulations provide for circumstances when it is legally acceptable to make copies of copyright work. Section 12 (1) of the Copyright Act only permits a single copy of a reasonable portion of a work which is

[121] *Moneyweb* supra note 117 para 114.
[122] Rostoll op cit 118 at 436.
[123] *Moneyweb* supra note 117 para 113.
[124] Rostoll op cit note 118 at 433.
[125] Ibid at 434.
[126] Copyright Regulations in GN R2530 GG 6252 of 22 December 1978.
[127] Ramsden op cit note 32 at 39.

consistent with fair dealing to be made. Copies of a whole or major portion of a work are generally not permissible under the fair dealing provisions of the Act and the user is not entitled to make copies available to others.[128]

In terms of the Copyright Regulations[129] reproduction is permitted where not more than only one copy of a reasonable portion of the work is made, having regard to the totality and meaning of the work. A further limitation is that reproduction is only permitted where the cumulative effect of the reproduction does not conflict with the normal exploitation of the work to the unreasonable prejudice of the legal interests and residency rights of the author.[130]

In terms of regulation 3, subject to regulation 2, a library or archive depot or any of its employees acting within the scope of their employment may, after reproduction of a copy of a work, distribute such copy subject to certain conditions being met. The library is not permitted in any way to profit from the reproduction or distribution of the work.[131] The library must stay open to the public and also be available to researchers affiliated with the library. A librarian may only reproduce and distribute a limited amount of an unpublished work.[132] A librarian may reproduce a published work to replace an original copy only in the circumstance that the original has deteriorated or has been damaged and there is no availability of the work in the market at a reasonable price. A librarian can also reproduce and distribute a work from the library's own collection on request by the reader or for another library or archive depository.[133]

However the librarian is not permitted to copy more than one article in a periodical or more than a reasonable portion of any other copyrighted work.[134] The copy is only permitted to be used for private study or personal use.[135] On a reader's request, a librarian can reproduce and give a reader an entire work or a substantial portion of a work if it is unavailable in the

[128] Siphepho op cit note 26 at 39.
[128] Ibid at 49.
[129] The Copyright Regulations of 1978.
[130] Regulation 2 of the Copyright Regulations of 1978.
[131] Siphepho op cit note 26 at 50.
[132] Ibid.
[133] Ibid.
[134] Ibid.
[135] Regulation 3 of the Copyright Regulations of 1978.

market at a reasonable price. The reproduction of a work must have a copyright warning[136] and the library has to have a copyright warning prominently displayed on its premises.[137]

The copyright limitations and exceptions afforded to libraries and librarians entitle a librarian to make copies of copyright material on behalf of a reader for the purpose of private study. The regulations make no provision for both research and private study.[138] Regulation 7 deals with multiple copies for classroom use and is subject to regulation 2. It states that multiple copies may be made not exceeding one copy per student per course, by the teacher for use in the classroom or for discussion. Regulation 8, which is also subject to regulation 2 states that a single copy may be used by or for the teacher for research, teaching or preparation for teaching in a class. Regulation 9 *(c)* provides that notwithstanding regulation 7 and 8 the following copying may not:

i. 'Be used as a substitute for the purchase of books, publishers' reprints, or periodicals; and
ii. Be repeated in respect of the same material by the same teacher from term to term.'

This means that a teacher who only has a single copy of a particular book may not be permitted to copy that book for students as that would go beyond the bounds of fair use. If a teacher has made course material in course pack of various works for students, the teacher is not permitted to re-copy this on an annual basis for students.[139]

c) The Copyright Amendment Bill

The Copyright Amendment Bill [B13B-2017] is a complex document which aims to amend the Copyright Act. The purpose of the Bill is to modernise the outdated and inadequate copyright legislation and address the lack of protection of copyrights in the digital era. The Bill essentially aims to protect the interest of creators of works whilst widening the scope of fair use of copyrighted works.[140]

For the purposes of this research, a greater amount of focus will be placed on the provisions which deal with the broadened scope of fair use, which places significant

[136] Regulation 6 of the Copyright Regulations of 1978.
[137] Siphepho op cit note 26 at 49-50.
[138] Ibid at 50.
[139] Ibid at 49.
[140]The Copyright Amendment Bill 2017.

obligations for users of copyrighted works and for copyright owners.[141] If approved by Parliament, the provisions of the Bill would provide for a greater flexibility in accessing information in copyrighted works.[142]The Bill introduces fair use and purports to repeal section 12 (the fair dealing provision) of the Copyright Act by inserting the following sections into the Copyright Act.

Section 12A *(a)* provides that in addition to uses specifically authorised, fair use in respect of a work or the performance of that work, for the following purposes, does not infringe copyright in that work:

(i) 'Research, private study or personal use, including the use of a lawfully possessed work at a different time or with a different device;

(ii) criticism or review of that work or of another work;

(iii) reporting current events;

(iv) scholarship, teaching and education;

(v) comment, illustration, parody, satire, caricature or pastiche;

(vi) preservation of and access to the collections of libraries, archives and museums;

(vii) expanding access for underserved populations; and

(viii) ensuring proper performance of public administration.

(b) In determining whether an act done in relation to a work constitutes fair dealing or fair use, all relevant factors shall be taken into account, including but not limited to—

(i) the nature of the work in question;

(ii) the amount and substantiality of the part of the work affected by the act in relation to the whole of the work;

(iii) the purpose and character of the use, including whether—

(aa) such use serves a purpose different from that of the work affected; and

(bb) it is of a commercial nature or for non-profit research, library or educational purposes; and

(iv) the substitution effect of the act upon the potential market for the work in question.

[141] 'Copyright Amendment Bill Summary' available at https://www.michalsons.com/blog/copyright-amendment-bill summary/3082.
[142] 'Exceptions in 2017 Bill for Libraries, Education & Related Sectors' accessed at https://libguides.wits.ac.za/Copyright_and_Related_Issues/SA_Copyright_Amendment_Bill_2017.

(c) For the purposes of paragraphs *(a)* and *(b)* and to the extent reasonably practicable and appropriate, the source and the name of the author shall be mentioned'.[143]

Section 12A *(a)* and *(b)* are particularly confusing in the sense that they fail to describe the difference between 'fair dealing' and 'fair use'.[144] South Africa has currently adopted the 'fair dealing' exception, which creates an ambit within which the use of copyrighted work must fall in order to be lawful. In contrast, the United States of America has adopted the 'fair use' approach which tends to be an open-ended system of exceptions measured against a set of factors in order to determine whether a copyright has been infringed.[145] This has been explained further in chapter four of the thesis.

It is not entirely clear whether the proposal of s12A would amount to a system of fair dealing or fair use.[146] The language used would cause confusion. However, the broadening of the fair-dealing doctrine proposed should be welcomed so as to promote the fair use of copyrighted works for information, educational and non-profit purposes.[147]

The Bill further introduces s12B which provides that certain acts regarding the use of copyrighted works will not infringe copyrights so long as these acts fall within the ambit of fair use in s12A. These acts include the following:

a) 'Any quotation in the form of a summary of the original work;

b) a teaching or any illustration in a publication, broadcast, sound or visual record;

c) the reproduction of such work by a broadcaster intended exclusively for lawful broadcasts and destroyed before the expiration of a period of six months immediately following the date of the making of the reproduction;

d) the reproduction in the press or by broadcasting of a lecture;

e) reproduction by the press, in a broadcast, transmission or other communication to the public of an article published in a newspaper or periodical on current economic, political, religious topics, current events, a political speech or speech delivered in a legal proceeding;

[143] Section 12 A of Copyright Amendment Bill 2017.
[144] S Karjiker 'Commentary on The Copyright Amendment Bill' (2017) *South African Intellectual Property Law Journal* at 18.
[145] Ibid.
[146] Ibid 19.
[147] Ibid.

f) the translation of such work by a person giving or receiving instruction: Provided that the translation is not for commercial purposes and is used for personal, educational, teaching, judicial proceedings, research and professional advice purposes;

g) the use of such work in a bona fide demonstration of electronic equipment;

h) the use of such work is for the purposes of judicial proceedings;

i) the reasonable use of such work for the purposes of cartoon, parody, satire, pastiche, tribute or homage;

j) the making of a copy of such work by an individual of his own work or another person's work for personal use.'[148]

Section 12C provides for temporary reproduction and adaptation which allows a person to make transient and incidental copies of a work to enable transmission of the work in a network between 3rd parties by an intermediary or any other lawful use of that work.[149] It also permits adaptation of work to allow for use on other devices, such as mobile devices.[150]

Section 12D permits reproduction for educational purposes and academic activities where the copying does not exceed the extent justified by the purpose of education and research.[151]Given the fair use provision proposed in section 12A, the addition of section 12D appears to serve as a reinforcement to section 12A. [152]

Section 19C provides general exceptions regarding protection of copyright work for libraries, archives, museums and galleries.[153] A library, archive, museum or gallery may without the authorisation of the copyright owner, use a copyright work to the extent of its educational and research activities if the work is not for commercial purposes.[154] There is need for clarity in section 19C on whether a for-profit archiving facility is entitled to rely on this exception.[155]

Section 19D provides that any person may make an accessible format copy for a disabled person without the authorisation of the author.[156] This can be done through non-

[148] Section 12B of the Copyright Amendment Bill 2017.
[149] Section 12C of the Copyright Amendment Bill 2017.
[150] Ibid.
[151] Section 12D of the Copyright Amendment Bill 2017.
[152] S Karjiker op cit note 144 at 21.
[153] Section 19C of the Copyright Amendment Bill 2017.
[154] Ibid.
[155] S Karjiker op cit note 144 at 33.
[156] Section 19D of the Copyright Amendment Bill 2017.

commercial lending or by electronic communication or wireless means, and the undertaking of intermediate steps to achieve these objectives if certain conditions are met.[157] The introduction of a general exception for persons with disabilities has been widely welcomed in order to promote access to information for people with disabilities.[158]

Section 39B provides that to the extent that a contractual term does not permit the doing of an act which is by virtue of the Copyright Act lawful, or which attempts to renounce a right afforded by the Copyright Act, such a contractual term shall be unenforceable.[159]

Given the complexity and nature of the Copyright Amendment Bill it raises a lot of concerns particularly relating to the distinction between fair use and fair dealing.[160] The legislation does not consider well established principles of copyright law, especially considering that doctrines such as fair use, fair purpose and fair dealing are used interchangeably.[161]

In this sense, this research opines that the Amendment falls short of its intended purpose of modernising current existing copyright legislation. Considering the ambiguity and lack of clarity in the use of significant language such as 'fair dealing' and 'fair use', it would prove difficult to clearly interpret the meaning of such language used. However, the overlap present in sections 12A and 12D highlights a potential for the broad and inclusive interpretation of the language used. This overlap is also indicative of the fact that the Bill leans into the fair use approach more than it does the fair dealing approach. Overall, while this Bill is a progressive step, it could benefit from providing clear definitions of the two approaches, 'fair dealing' and 'fair use', and could also be beneficial in classifying instances which would require either approach. The concluding chapter of this research will provide a more detailed analysis of the Amendment Bill, its short comings, as well as its criticisms.

[157] Ibid.
[158] S Karjiker op cit note 144 at 34.
[159] Section 39B of the Copyright Amendment Bill 2017.
[160]S Karjiker op cit note 144 at 2.
[161] Ibid.

d) The Intellectual Property Laws Amendment Act

The Intellectual Property Amendment Act 28 of 2013 (herein referred to as 'the Amendment Act') amends the Designs Act, Trade Marks Act, Performers Protection Act and the Copyright Act. The Amendment Act has been drafted to attempt to protect traditional knowledge through the existing intellectual property system.[162] Section 4 of the Amendment Act inserts Chapter 2A into the Copyright Act after s28 of the Act, which essentially attempts to add two works into the existing list of works eligible for copyrights, these two works are:

i. Traditional works; and
ii. Indigenous cultural expressions or knowledge.[163]

The Amendment Act seems to be problematic with regard to how it changes the Copyright Act. Instead of amending specific sections of the Copyright Act to deal with traditional knowledge, the amendments are instead put together separately in chapter 2A to be inserted into the Copyright Act after s28. This highlights the need to provide a sui generis system to protect tradition and indigenous works.[164]

Dean argues that the rational way to protect traditional knowledge is to create a separate Act, one that is sui generis, because customised legislation addresses the peculiarities of a special kind of work such as traditional knowledge.

3. COPYRIGHT AND THE RIGHT TO FREEDOM OF EXPRESSION

An obvious tension exists between copyright law and freedom of expression. Copyright inherently imposes restrictions on freedom of expression. The conflict arises out of the exclusive rights in original works given to the author to the exclusion of users and their freedom to access and use information which puts individual liberty and the public good at

[162] S Geyer 'Copyright in traditional works: Unravelling the Intellectual Property Laws Amendment Act of 2013' 2017 *SA Merc LJ* 43.
[163] The implementation of the Amendment Act has not yet come into effect. This seems to be as a result of the publication by the Department of Science and Technology of its Protection, Promotion, Development and Management of Indigenous Knowledge Systems Bill (hereafter referred to as 'the Bill') which seeks to establish a sui generis system for the protection of traditional and indigenous knowledge.
[164] Geyer op cit note 162 at 46.

risk.[165] The courts apply the available statutory and common law principles when reconciling the rights arising from copyright ownership and freedom of expression.[166] Holland states that research has shown that copyright legislation including both the Copyright Act as well as the regulations made under the Act, has been deficient in enabling access to knowledge.

He argues that some restrictions on access to knowledge in copyright legislation disregard the right to freedom of expression. This has led to an erosion of the right of the public to disseminate information in favour of copyrights. As a result, private monopolies on information have limited the right to freedom of expression. Dean states that in light of the Constitutional Court decision in the *Laugh It Off* case a defendant cannot rely on the right to freedom of expression unless there is a possibility of interpreting the relevant provisions of the Copyright Act pertaining to the claim in a constitutionally friendly manner that enables a reliance on the constitutional defence to be advanced.[167]

Some scholars argue that because a copyright protects the expression of ideas and not the ideas themselves this means that copyright is not a barrier to the right to freedom of expression. They argue that a copyright does not prevent a person from repeating or making use of the ideas or information contained in a copyright protected work, but merely prevents a person from copying the form of expression used in the work.[168] It has also been concluded by scholars that a proper application of the fair dealing defence in the Copyright Act can be used as a mechanism to balance the interests of copyright owners and users because it permits the unauthorised appropriation of protected expressions.[169]

The defence provides that in certain limited circumstances, the unauthorized exploitation of an author's work will not constitute a copyright infringement. Therefore, the defence is aimed at advancing the public interest of freedom of expression. Persons in society can rely on the defence in order to access and use copyrighted works for the purpose of criticising or reviewing original works.[170] Although fair dealing has allowed for the fair use of copyright works, in certain cases the courts have pointed out that the defence is limited in

[165] Jacob Holland 'Copyright law and freedom of expression in South Africa' (2017) 8 (2) *NAUJILJ* 1.
[166] Ibid at 2.
[167] OH Dean 'Intellectual Property and the Constitution' available at *http://blogs.sun.ac.za/iplaw/2015/07/14/intellectual-property-and-the-constitution/,* accessed on 18 November 2018.
[168] Ibid at 1.
[169] Ibid.
[170] Ibid at 6.

its ambit and ability to afford sufficient access to works. In many instances the defence does not suffice.[171] It is therefore of importance to assess the shortcomings of the defence in order to determine how it can be developed to improve access to information and contribute to an appropriate balance between copyright and the right to freedom of expression.[172]

It is important to consider two cases in which the court dealt with the fair dealing defence in advancing the right to freedom of expression namely the case of *National Soccer League t/a Premier Soccer League v Gidani (Pty) Ltd*[173] and *Moneyweb (PTY) Limited v Media24 Limited & another*[174]. When copyrights conflict with the public interest, the courts tend to attempt to strike a balance between maintaining public access to protected work and maintaining the authors right to the work. When relying on the fair dealing defence the defendant must prove that the work was used for one of the recognised purposes in s 12 (1) of the Copyright Act and that the work was dealt with fairly.

In *Soccer League t/a Premier Soccer League v Gidani (Pty) Ltd* the defendant argued that its unauthorised use of the copyright works (soccer fixture lists) was excused in terms of the fair dealing defence by reliance on the right to freedom to receive or impart information or ideas.[175] The court decided to dismiss the defendant's claim of fair dealing of the work because the defendant was engaged in a commercial mission, rather than just imparting information.[176] In determining the matter the High Court adopted the approach of the Constitutional Court in *Laugh It Off v SAB* that the provisions of the Copyright Act must be interpreted in light of the Constitution in a manner that does not unduly infringe the defendant's right to freedom of expression.[177]

The court however found that an infringement with no purpose other than to generate commercial gain cannot be defended by the right to freedom of expression. It is noted that the court's decision was based on the fact that the infringement was motivated by profit and that therefore the fair dealing defence was held not to be available to the defendant.[178] Holland is of the opinion that this should not be how courts assess fairness, and that different factors

[171] Ibid
[172] Ibid.
[173] *National Soccer League t/a Premier Soccer League v Gidani (PTY) LTD* (2014) Unreported case no: 10/48519.
[174] *Moneyweb* supra note 117 at 72.
[175] Dean op cit note 167.
[176] Holland op cit note 145 at 10.
[177] Dean op cit note 167.
[178] Holland op cit note 165 at 10.

should be considered as a whole.[179] Holland states further that the courts must clarify the correct approach to fair dealing for it to apply in a way that deals with the balance between copyright and freedom of expression adequately.[180]

In the case of *Laugh It Off v SAB* judge Sachs stated something of importance with regards to the use of copyright works for commercial purposes. Judge Sachs found that it is of more significance to consider whether the activity of use is primarily communicative in character or primarily commercial. Some degree of commerce should not exclude the use of a copyright work from free speech, however there should be an element of social criticism.[181]

In *Moneyweb (PTY) Limited v Media24 Limited & another* the court had to consider a copyright infringement matter between two competing online news-publishing companies. The case is of importance for this discussion because it was the first time that the fair dealing defence was considered by a South African court in terms of s12 (1) *(c)* of the Copyright Act. The constitutional mandate of the media to report news unrestrictedly and to inform the public makes it necessary to consider the effects of the existing copyright regime on this mandate.[182]

Moneyweb (the applicant) and Media24 (the first respondent) are in the industry of online publishing of articles on the internet and other digital platforms. Moneyweb sought a declaratory order against Media24, under the banner of Fin24, for unlawful publication of seven articles.[183] Moneyweb had published seven articles on its website which Fin24 republished, although not in verbatim. Moneyweb contended that the articles were unlawfully copied.[184] The court had to decide three aspects of the matter: first, whether Moneyweb's articles were original; secondly, once originality was proved, whether Media24 had reproduced a substantial part of the relevant article; and, thirdly, whether Media24's reproduction of the Moneyweb articles falls within the ambit of the defence of fair dealing in s12 (1) *(c)* (i) and the exception in 12 (8) *(a)* which excludes mere items of press information from copyright protection.[185]

[179] Ibid.
[180] Ibid.
[181] Ibid.
[182] Rostoll op cit note 118 at 425.
[183] Ibid at 426.
[184] Ibid.
[185] Ibid.

The court set out the context within which the fair dealing test should be interpreted, namely against the values, principles and fundamental rights enshrined in the Constitution. The court indicated that the exclusive rights of the author and the right to freedom of expression will not clash with each other, as the enquiry should start by reading s 6 of the Act (the exclusive rights of an author) and s 12 (1) of the Act (the fair dealing provision) together and then interpreting s 12 (1) in a manner that would be in line with the right to freedom of expression. The court stated that the infringing act must be considered only once it is shown that a substantial part of the copyright work was reproduced. Thereafter the court recommended that the test for fair dealing laid out in the *Ashdown* case above should be used to determine whether in fact the defendant can rely on the fair dealing defence. The court found that Fin24 could not rely on the defence because, amongst other factors, a substantial portion of Moneyweb's work was copied in verbatim without any reason why Fin24 did not contribute more of its own work to the article.

To adequately balance copyright and the right to freedom of expression it is clear that the courts must adopt strategies of striking the balance. Scholars argue that a more adequate approach to fair dealing can be achieved by removing artificial limitations to the defence, and that there would be a need to take a broader and all-encompassing approach to assessing fairness.[186] This would give courts more discretion to make an informed decision based on the facts whether a particular dealing is fair in a case. The current ambit of the fair dealing defence is inadequate because of how entire classes of use have been found to automatically fall outside of the ambit of the defence.

4. CONCLUSION

The Copyright Act was enacted back in 1978 before the modern technological age. Copyright law needs to be modified in a way that takes into consideration the rampant copyright infringement that occurs on a day to day basis in South Africa. The development of the copyright law needs to protect the legitimate private property rights of the copyright owner. Given that South Africa is a constitutional democracy, the fundamental values in the Bill of Rights have to be considered when reforming legislation. In this regard there is a need to determine whether copyright law meets the needs of the right to freedom of expression. The public interest of accessing and using information needs to be considered and the best

[186] Ibid.

approach in determining the ambit and application of the fair dealing provision needs to be developed. In pursuit of these objectives the next chapter will consider the copyright legislation in the United States of America.

CHAPTER THREE: THE LEGAL FRAMEWORK FOR COPYRIGHT PROTECTION IN THE UNITED STATES OF AMERICA

1. INTRODUCTION

In the United States of America (herein referred to as USA), where society has transformed from being an industrial to an information and service-based society, the importance of protecting copyright has been realised. The post-industrial era is marked by rapid technical change in which the ability to reproduce and receive information has grown exponentially.[187] Individuals have become increasingly linked by digital networks, including the internet.[188] The value of communicative expression has grown. The legal structure that governs ownership of creative expression has had to keep up with all these developments.

Products of the mind are protected under three branches of federal law, which is collectively known as 'intellectual property'. One of these three branches is copyright law which protects original works of authorship. Copyright, as a form of intellectual property protection, is rooted in the United States Constitution of 1787. The foundation of copyright law is found in Article 1, section 8, clause 8 of the United States Constitution which provides that:

> 'Congress shall have power to promote the progress of science and useful arts, by securing for a limited time to authors and inventors the exclusive right to their respective writings and discoveries.'[189]

The statute protecting copyrights in the United States is the Copyright Act of 1976 (herein referred to as the US Copyright Act).[190] The US Copyright Act prevents the unauthorized copying of a work of authorship. The Berne Convention Implementation Act of 1989 signifies the United States' entry into the Berne Convention. Although the US Copyright Act of 1976 and the Berne Convention Implantation Act of 1989 have been brought into effect, the US Copyright Act of 1909 (hereafter referred to as the 1909 Copyright Act) remains relevant. This is because the copyright legislation subsequent to the 1909 Act does not extend retroactive protection to domestic works.[191]Copyright in the works

[187] Craig Joyce Copyright Law 6 ed (2003) 1.
[188] Ibid.
[189] Alan T. Dworkin 'Originality in the Law of Copyright' (1960) 11 *Copyright L. Symp* 60.
[190] Ibid.
[191] Ibid.

which entered the public domain under the 1909 Act is not revived by the later Acts. The Copyright Act of 1976 specifically incorporated provisions of the prior law and retained certain standards in the 1909 Act for important issues such as originality and infringement.[192]

2. THE UNITED STATES COPYRIGHT LEGISLATIVE FRAMEWORK

a) The United States Copyright Act 1976

i. Categories of works eligible for copyright

The categories of copyrightable subject matter in the US Copyright Act includes literary works, musical works (including any accompanying words), dramatic works (including any accompanying music), pantomimes and choreographic works, pictorial, graphic and sculptural works, sound recordings, motion pictures and other audio-visual works, and architectural works.[193] Literary works include works other than audio-visual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phono records, film, tapes, disks, or cards, in which they are embodied.[194] Motion pictures are audio-visual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.[195]

Pictorial, graphic, and sculptural works include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans.[196] Sound recordings are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audio-visual work, regardless of the nature of the material objects, such as disks, tapes, or other phono-records, in which they are embodied.[197]

---

[192] Ibid at 22.
[193] Section 102 of the US Copyright Act 1976.
[194] 'Copyright Basics (Circular 1)' at 4, available at *https://www.copyright.gov/help/faq/faq-general.html*, accessed on 15 November 2018.
[195] Ibid.
[196] Ibid.
[197] Section 101 of the US Copyright Act 1976.

ii. Duration of copyright

The provisions dealing with duration of copyright in the US Copyright Act are complex. Different standards apply depending on whether a copyright was secured before, on, or after the US Copyright Act came into effect on 1 January 1978. In addition, amendments have been made since this date, thus affecting duration. For the purposes of this dissertation it is important to look at the duration of copyright works created after 1 January 1978. Copyright subsists a term of the authors life plus an additional 70 years. For joint work, copyright subsists for the life of the authors plus 70 years after the last surviving author. [198]

iii. Identifying the author

The Act provides guidelines for identifying a person who qualifies as the author of a copyright. Copyright in a work protected under the Act initially belongs to the author who created that work.[199] The authors of a joint work are co-owners of copyright in the work because when two or more authors create a single work with the intention of merging their contributions into inseparable or interdependent parts of a unitary whole, the authors are considered joint authors and have an indivisible interest in the work as a whole.[200] If multiple authors contribute to a collective work with no intention of merging their contributions, each authors' individual contribution is separate and distinct from the copyright ownership in the collective work as a whole.[201]

In the case of a work made for hire, the employer or other person for whom the work was authored is considered the author, unless the parties have expressly agreed otherwise in writing and have signed.[202] The US Copyright Act accords to the copyright owner exclusive rights to reproduce the work; to prepare derivative works from the original; to distribute copies of the protected work to the public; to perform the work; and to display the work publicly.[203]

---

[198] 'Duration of Copyright (Circular 15a)' at 1, available at *https://www.copyright.gov/circs/*, accessed on 15 November 2018.
[199] D Olson 'Copyright Originality' (1983) 48 *Mo. L. Rev.* 32.
[200] Ibid.
[201] Ibid.
[202] Section 201 of the US Copyright Act 1976.
[203] Olson op cit note 199.

Section 104 of the Copyright Act deals with copyright by virtue of nationality, domicile or residence, and duration of copyright. It states copyright of unpublished works is subject to protection under the Act without regard to the nationality or domicile of the author. With regards to published works the Act states that copyright is automatically conferred in every work, eligible for copyright, of which the author or, in the case of a work of joint authorship, any one of the authors is at the time the work is a person who is a citizen of the United States of America or is domiciled in the country.[204]

The section also deals with copyright by reference to country of origin, a copyright is conferred on eligible works whereby the copyright was first published in the United States of America or in a foreign nation that, on the date of first publication, is a Berne Convention treaty party. [205]

iv. Requirement for works to be eligible for copyrights

In terms of s102 *(a)* of the US Copyright Act copyright exists automatically in an original work of authorship once it is fixed in a tangible medium, but a copyright owner can take steps to strengthen the protection of their copyright, the most important of which is registering the work. The registration of a work is not mandatory for works originating from the United States- registration is only necessary for enforcing an exclusive right of copyright through litigation.[206] The standards of the eligibility of a copyright in the USA are therefore based on a work being one of the works eligible for copyright protection under the US Copyright Act and satisfying two fundamental criteria, namely originality and fixation in a tangible form.

The phrase 'original works of authorship' is purposely left undefined in the US Copyright Act. It is intended that the meaning of originality incorporates without changing the standard of originality established by the courts under the common law and the 1909 US

[204] Ibid.
[205] Ibid.
[206] 'Copyright Basics' at 4, available at *https://www.copyright.gov/help/faq/faq-general.html*, accessed on 15 November 2018.

Copyright Act.[207] Originality does not include novelty, ingenuity, or aesthetic merit.[208] A work is original even where the subject matter results from a process of selecting, bringing together, organizing and arranging previously existing material regardless of whether the individual items in the material have been or ever could have been subject to copyright. A work is eligible for copyright if the work is formed by the collection and assembling of pre-existing material or of data that has been arranged in such a way that the resulting work of an author as a whole constitutes an original work of authorship.[209]

Originality means that the work was independently created by the author and is not copied from other works. The work must possess a degree of creativity or 'skill on the part of a person seeking a valid copyright. Other courts refer to a degree of labour or the 'sweat of the brow' in determining whether the originality requirement is met. In the leading case of *Holmes v Hurst*[210] the court found that the right secured by copyright is not a right to use certain words, as words are the common property of society, nor is it a right to ideas alone. A copyright secures the right to an arrangement of words which the author has selected to express his ideas.[211] The most important aspect of originality is that in each case, the requisite amount of skill and labour must be determined in light of the subject matter.[212]

Justice Story articulated the requirement of originality in *Gray v Russell*[213] and established a minimal standard of originality. An objective test is applied in assessing whether a work is indeed an original. Emphasis was placed on the necessity that the work for which protection is sought be independently created. An original work is independently created, owing its origin to an author. Justice Story effectively composed a standard which permitted copyright to exist in a work which was prepared with the authors' own skill and labour, where skill and labour were viewed as equivalent. An author's skill and labour states a standard that a work is protectable if it is not copied. The work must thus contain at least a certain minimum of original creative expression.[214]

---

[207] M Peters 'The Copyright Office and the Formal Requirements of Registration of Claims to Copyright' (1992) 17 U. Dayton L. Rev. 740.
[208] Ibid
[209] Ibid.
[210] *Holmes v Hurst* 174 U.S. 82 (1899).
[211] Dworkin op cit 189 at 62.
[212] Ibid at 64.
[213] *Gray v Russell* 10 F. Cas. 1035 (C.C.D. Mass. 1839) (No. 5728).
[214] Peters op cit note 207 at 741.

The work must demonstrate a minimal amount of creative authorship. Almost any distinguishable variation of a prior work will constitute a sufficient quantity of originality. In determining whether a work meets the requirement of originality the work must be evaluated as a whole.[215] In *Emerson v Davies*[216] Justice Story stated that the question is not whether the contents of the work are entirely new. The correct approach is to determine whether the combination of ideas has been used before for the same purpose or any other purpose. If an author has borrowed materials from others, but he combination of the expression of his ideas is different from what existed before then he is entitled to a copyright in his work.[217]

The work must consist of 'expression' and not just ideas. The distinction between an idea and an expression is known as the idea-expression dichotomy. The fixation requirement is stated in two portions of the US Copyright Act. Section 102 *(a)* of the US Copyright Act states that a work must be fixed in a tangible medium of expression. Fixation also plays a role in determining whether a person has infringed a copyright. S102 *(b)* denies protection to any idea, process, system, method of operation, concept, principle, or discovery. A work satisfies the requirement of fixation if it is placed in a relatively stable and permanent embodiment. The work must therefore be recorded or written in some manner. For example, only literary works that qualify as writings may claim federal copyright protection. It is required that the work take some material form capable of identification and have some level of permanent endurance. To obtain a copyright an author must therefore ensure that the work is reduced to a relatively stable form. Only then can the author enforce a copyright over the work.[218]

v. Registration of copyright

The US Copyright Act gives authors the right to register their copyrights. Section 410 *(a)* of the US Copyright Act directs the registrar of copyrights to register any claim to a copyright which constitutes copyrightable subject matter. Copyrightable subject matter refers to works that meet the formal requirements of originality and fixation in a tangible form mentioned above. The registrar may refuse registration if the work does not constitute copyrightable

[215] Ibid.
[216] *Emerson v Davies* 8 Fed. Case 615 (No. 4,436) C.C.D. Mass. 1845.
[217] Dworkin op cit note 189 at 68.
[218] Marshall A. Leaffer *Understanding Copyright Law* 5 ed (2011) 49.

subject matter. Regardless of the nature of the work which is submitted for registration, the same standard is applied to all.[219]

The test applied by an examiner in determining whether a work is registrable is-

1. Whether the work falls within the subject matter of copyright; and
2. Whether the work represents an original work of authorship.[220]

The Copyright Office has promulgated a number of guidelines with regards to registration of original works of authorship. However during litigation, it is ultimately for a court to decide on whether a work is protected under copyright law. A certificate of registration serves an important purpose because it holds more weight in deciding matters involving copyright infringement. The function of the Copyright Office is to establish a clear, accurate and understandable public record of copyright. It also serves the function of excluding from the record any unjustified copyright claims. Section 410 *(c)* states that in any judicial proceedings the certification of a registration made before or within five years after the first publication of the work constitutes prima facie evidence of the validity of the copyright and of the facts stated in the certificate.[221]

An author does not need to register their copyright. However, for works of United States origin copyright registration is required before the copyright owner can commence a copyright infringement litigation in a court. Section 411*(a)* of the US Copyright Act provides that no civil action for infringement of a copyright in any work of United States origin shall be instituted until registration of the copyright has been made. On the issue of whether actual issuance of a registration is required or whether a completed application submitted to the Copyright Office suffices, the courts have been divided. Some courts have found that a completed application submitted to the Copyright Office suffices. The issue has been raised in the Supreme Court in the case of *Fourth Estate Public Benefit Corporation v Wall-stress.com.*[222] The Supreme Court is yet to decide the issue conclusively.[223]

[219] Peters op cit note 207 at 738.
[220] Ibid.
[221] Ibid at 740.
[222] *Fourth Estate Public Benefit Corporation v Wall-stress.com* LLC, S.Ct No 17-571.
[223] Peters op cit note 207 at 740.

vi. Infringement of copyrights

Copyright over a work gives an author certain exclusive rights with regards to that work. The Copyright Act provides that an author has exclusive rights over their works:

- To reproduce the copyrighted work;
- To prepare derivative works based on the copyrighted work;
- To distribute copies of the work to the public;
- To perform the work publicly if the work is literary, musical, dramatic, or choreographic works, pantomimes, audio-visual works and motion pictures;
- To display the work publicly if the work is literary, musical, dramatic, or choreographic works, pantomimes, and pictorial, graphic, or sculptural works;
- To perform the work publicly by means of digital audio transmission if it is a sound recording; and
- To control the importation of copyrighted works into the United States.[224]

The author's copyright is infringed if any person performs an act with regards to the copyrighted work that violates one or more of the author's exclusive rights. This is subject to certain limitations and exceptions which will be dealt with below.[225] Giving the author exclusive rights implies that other persons must not exercise the rights without the consent of the copyright owner. In the *West Publishing Co. v. Edward Thompson Co*[226] the court, when explaining the concept of copyright infringement, found that infringement consists of the violation of an exclusive right, to reproduce copies of the original production. The court stated that an infringement does not take place unless there has been a copying of the work which consists of the exact or substantial reproduction of the original.[227] In *Emerson v Davies*[228] the court found that the test for infringement is whether the defendant has in fact used the authors work as a model for his own, or whether the defendant's work is the result of his own labour and skill, and the resemblances between the works are either accidental or are due to the nature of the subject.[229]

[224] Section 106 of the US Copyright Act.
[225] Section 501 of the US Copyright Act.
[226] *West Publishing Co. v. Edward Thompson Co* 169 Fed. 833, 861 (C.C.E.D.N.Y. 1909).
[227] LT Hughes 'Copyright Infringement' (1963) 51 *Ky. L.J.* 358.
[228] *Emerson v Davies* 8 Fed. Cas. 615 (No. 4436) (C.C.D. Mass. 1845).
[229] Hughes op cit note 227 at 398.

Certain elements must be established before an infringement can be proved.[230] First, the authors work must satisfy the requirements for originality set out above. Secondly, the defendant must have had the opportunity to copy the authors work. Thirdly, there must have been a copying in some form of the copyrighted work which means that there must be a causal connection between the author's original work and the alleged infringing work. Whether copying has taken place is dependent on a comparison of the similarities between the works. Where there are substantial similarities between the works and access is not excluded by the facts there is a strong inference that the work was copied.[231]

Lastly there must be a substantial appropriation of the copyright work. Some of the most important factors to be considered are: whether the author's labour has been appropriated; the value of the part copied; the decrease in the value of the copyrighted work; and the relative value and purpose served by the part copied.[232] The test is an objective one and requires an inquiry into whether the similarities between the works in question could be recognised by the ordinary observation and not fine analysis.[233]

vii. Remedies for copyright infringements

The most important remedy offered to authors for copyright infringement is monetary recovery. The US Copyright Act provides for an award of damages for compensation to the author. Damages are awarded to prevent the infringer from obtaining an unjustified enrichment and to deter future infringement. Other remedies such as injunction, impounding, and destruction are not often used. The remedy of criminal sanctions is available to authors however it is not utilised in practice.[234] Courts have the discretion to award actual damages to an author.[235] The quantum of damages is equal to the actual damage suffered or the profits which the infringer made. The common method of calculating actual damages is in the amount of lost sales or lost profits.[236]

---

[230] Ibid at 359.
[231] Ibid at 362.
[232] Ibid at 363-364.
[233] Ibid at 164.
[234] TW Cardin 'Remedies of Copyright Infringement' (1969) 23 *Ark. L. Rev.* 466.
[235] Section 504 *(b)* of the Copyright Act.
[236] Cardin op cit note 234 at 457.

Courts also have the discretion of awarding statutory damages in lieu of actual damages and profits.[237] In terms of the US Copyright Act the courts must award such damages as to what the court deems just. The US Copyright Act provides a scale which the court can use to guide it. The statutory amounts apply to each copyright infringed. If multiple reproductions of a single copyright work are made they constitute a single infringement.[238] Statutory damages may be awarded where actual damages are either impossible or difficult to ascertain. In *F. W. Woolworth Co. v. Contemporary Arts, Inc*[239]the court found that in the exercise of judicial discretion a court may award statutory damages even where actual damages are proven, if it estimates that applying statutory limits is more just.[240]

In addition, the US Copyright Act provides for other remedies such as a judicial order restraining a person from beginning or continuing to infringe the copyright of the copyright order. This court order is known as an injunction (the United States version of an interdict).[241] The US Copyright Act also allows for the impounding and destruction of the infringing copies and devices within the court's discretion.[242] Impounding the infringing work is used either to ensure that the defendant complies with a court order or to secure the copies for destruction.[243] Destruction is a drastic remedy which requires the court to use its discretion.[244]

The US Copyright Act also makes wilful infringement of a copyright an act punishable by imprisonment or a fine if the infringement was committed for purposes of commercial advantage or private financial gain, by the reproduction or distribution, including by electronic means; or by the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution.[245] Criminal infringement is punishable by imprisonment or a fine.[246]

[237] Section 504 *(c)* of the Copyright Act.
[238] Cardin op cit note 234 at 469.
[239] *F. W. Woolworth Co. v. Contemporary Arts, Inc* 344 U.S. 228 (1952).
[240] Cardin op cit note 234 at 469.
[241] Section 502 of the US Copyright Act.
[242] Section 503 of the US Copyright Act.
[243] Ibid.
[244] Cardin op cit note 234 at 471.
[245] Section 506 of the US Copyright Act.
[246] Section 2319 of title 18 of the United States Code.

viii. General copyright exceptions and limitations

A work that is copyright protected under the US Copyright Act may be subject to being reproduced or used, whether in part or substantially, without a person obtaining permission from the copyright owner. The US Copyright Act does contain specific limitations and exceptions with regards to the different categories of works and kinds of works. The following exceptions are provided for in the Act: Fair use (s107); Reproduction by libraries and archives (s108); Effect of transfer of particular copy or phono-record (s109); Exemption of certain performances and displays (s110); Secondary transmissions of broadcast programming by cables (s111); Ephemeral recordings (s112).

It is useful for the purpose of this dissertation to consider the fair use exception and limitation to copyright which is the United States version of the fair dealing defence in South Africa. The way in which the United States has interpreted the concept of fair use is important in our analysis of the public interest of access to information and freedom of expression protected by exceptions to copyright.[247]

Section 107 of the US Copyright Act states that the fair use of a copyrighted work for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. The section goes on further to provide four factors to be considered in establishing whether the use that has been made of a work is a fair use of the work. The four factors are:

1. The purpose and character of the use;
2. The nature of the copyrighted work;
3. The amount and substantiality of the portion used in relation to the copyrighted work; and
4. The effect of the use upon the potential market or value of the copyrighted work.[248]

The first factor deals with the purpose and character of the use of a copyrighted work. It includes an examination of whether the copies were made for commercial (profit) use or for non-profit educational purposes. If a person uses copyrighted works for a non-profit

[247] Siphepho op cit note 29 at 46.
[248] Section 107 of the US Copyright Act of 1976.

educational purpose such as making copies for students as part of a learning experience, then the first factor is satisfied.[249] The second factor deals with the nature of the work used. It includes an examination of the form that the original work is in and how it has been expressed in tangible form. For example, if an original work is unpublished it would not be fair for another person to make that work public by making copies. Similarly using a factual work is more likely to amount to fair use than using a creative work.[250]

The third factor examines the quantity of the original copyrighted work that has been used. For example, where a lesser amount of an original work has been used or copied by a lecturer for a class the fair use exception may be relied upon. However, where the lecturer uses the whole of the original work such as a book and reproduces it for students he cannot rely on fair use.[251] In *Basic Books Inc. v Kinko's Graphics Corp.*[252] the court found that an act of copying and selling entire exact chapters or substantial portions from Basic Books copyrighted books without permission was not fair use. The last factor deals with the effects the use has on the potential market for the copyrighted work. In *Sony Corp of America v Universal City Studios*[253] the court found that fair use cannot be relied upon generally where the user will make money from the use of an original work.[254] It was found further that there is no burden on the author to prove actual harm or certainty of future harm.[255]

b) The relationship between copyright and freedom of expression

The First Amendment of the United States Constitution contains the right to freedom of expression and declares that '[c]ongress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the [g]overnment for a redress of grievances'.[256] The right to freedom of speech (including freedom of the press) protects a person's right to freely express themselves. Copyright and freedom of expression have often been considered to be harmonious and complementary concepts. For instance, in

[249] Siphepho op cit note 29 at 47.
[250] Ibid.
[251] Ibid.
[252] *Basic Books Inc. v Kinko's Graphics Corp* 758 F. Supp. 1522 (S.D.N.Y 1991).
[253] *Sony Corp of America v Universal City Studios* 464 U.S. 417 (1984) 451.
[254] Siphepho op cit note 26 at 47.
[255] Ibid.
[256] Ibid

Harper and Row Publishers v Nation Enterprises[257] the USA's Supreme Court characterized copyright law as the 'engine of free expression'.[258] However copyright by its very nature has a history of hostility against freedom of expression values as much as it has a history of being an engine of free expression.[259]

The attempt to balance copyright and the freedom of expression in the United States of America can be seen from the idea-expression dichotomy. The fact that copyright only extends to an authors' 'expression', not the 'ideas' or information that a work contains is the basic internal mechanism to accommodate copyright and free expression.[260] If copyright did extend to ideas there would certainly be an encroachment on freedom of expression. The individuals in society are generally free to express the same ideas or reuse information derived from an author's work in a subsequent work as long as he or she expresses information in a different way. This limits the potential for private censorship in copyright.[261] The idea-expression dichotomy functions effectively in situations in which the purpose of free speech is served by effectively preserving free access to ideas.[262] The 'substantial similarity' test for copyright infringement also provides a necessary limitation on the protection of copyright in favour of free speech. A copyright infringement only occurs if there has been a substantial similarity between the author's original and another work.[263]

The US Copyright Act has broadened the granting of exclusive rights given to authors whilst narrowing the scope of copyright through public interest limitations and exceptions on copyright, including fair use. The law of copyright balances copyright and freedom of expression by preventing the commercial and public uses of copyrighted works, whilst allowing private and non-commercial uses of works. This legislative approach is conceived as promoting learning and public access to knowledge, thereby achieving the societal goal of freedom of expression. The open-ended factors for determining fair use have even given rise to the defence of parody in using copyrighted work.[264] The doctrine of fair use allows for a

[257] *Harper and Row Publishers v Nation Enterprises* 471 U.S. 539, 558 (1985).
[258] P Samuelson 'Copyright and Freedom of Expression in Historical Perspective' (2003) 10 *J. Intell. Prop. L.* 319.
[259] Ibid.
[260] Melville B. Nimmer 'Does Copyright abridge the First Amendment Guarantees of Free Speech and Press?' (1970) 17 *UCLA L. Rev.* 1189.
[261] Ibid.
[262] Robert C. Denicola 'Copyright and Free Speech: Constitutional Limitations on the Protection of Expression' (1979) 67 *Calif. L. Rev.* 293.
[263] Ibid.
[264] Ibid at 294.

more extensive borrowing of copyrighted material than does the substantial similarity requirement. It operates as a defence even where there has been a substantial use of an author's work. The fair use doctrine has contributed to the balance between copyright and freedom of expression. There have been a few cases that have dealt with the relationship between copyright law and freedom of expression.[265]

In *Rosemont Enterprises v Random House Inc.*[266] the plaintiff approached the court for a preliminary injunction barring a publication and distribution of a biography of the public figure, Howard Hughes. The plaintiff argued that the biography infringed its copyright in three articles about Hughes that it had published. The articles combined contained 13 500 words and biography had about 116 000 words. The court a quo granted the injunction on the basis that the biography had quoted 265 words from the articles. The defendant also conceded that an additional 80 words had been paraphrased. The court a quo found at least twelve more instances of paraphrasing.[267] The final court (Second Circuit) rejected the finding of the court a quo and the preliminary injunction on the basis of the doctrine of fair use.

The final court rejected the findings of the court a quo that the defendant's commercial motives prevented application of the fair use doctrine. The court emphasised the social value of the biographers work and found that a preliminary injunction would deprive the public of an opportunity to learn more about the life of Hughes, who had extraordinary talents and had made substantial contributions in the fields to which he had devoted his abilities. The court found further that in balancing the conflicting interests, the public's interests should prevail over the possible damage to the copyright owner.[268] The court therefore effectively applied the fair use doctrine to promote the right to free speech.[269] The decision shows the pivotal role that the public interest of free speech can play in applying the fair use doctrine.

In *New York Times Co. v. Roxbury Data Interface Inc.*[270] the court placed emphasis on the four-factor test applied in the fair use doctrine. The case illustrates a modern application of fair use. The defendant was in the process of publishing a twenty-two-volume

---

[265] Ibid.
[266] *Rosemont Enterprises v Random House Inc.* 366 F.2d 303 (2d Cir. 1966), cert. denied, 395 US 1009 (1967).
[267] Denicola op cit note 262 at 294.
[268] Ibid at 294-295.
[269] MD Birnhack 'Acknowledging the Conflict between Copyright Law and Freedom of Expression under the Human Rights Act' (2003) 24 *Ent. L. Rev.* 11-12.
[270] *New York Times Co. v. Roxbury Data Interface Inc* 434 F. Supp. 217 (D.NJ. 1977).

personal name index to the New York Times index, which is published by the New York Times. The New York Times publishes an annual index which lists under separate headings references to pages and columns of the New York Times newspapers where information based on a topic or person appears.[271] The defendant's index consisted of personal names directly taken from the New York Times annual indices with citations to pages of the index on which references to names appear. The New York Times approached the court for a preliminary injunction, arguing that copying names from its annual index amounted to a copyright infringement.[272] Although the US Copyright Act was not yet in effect the court applied the criteria in s 107 to decide whether to allow the fair use defence.

In terms of the first factor the court considered the purpose and character of the use. The court found that the defendant's use served two purposes to attempt to turn a profit and to serve the public interest in the dissemination of information. The court held that a commercial motive is relevant to its determination. However, a commercial motive did not preclude fair use. The court found further that recognition of the public interest of dissemination of information is a relevant factor in assessing whether the purpose and character of the use permits the fair use doctrine to assist in accommodating copyright and freedom of speech.[273]

In terms of the second factor the court stated that the nature of the copyrighted work is more a product of diligence than creativity. In this case the court found that the fair use doctrine should allow for more freedom of use than it might for more original works.[274]In terms of the third factor the court found that a quantitative test was inadequate because it does not consider the importance of the appropriated material and any necessity that may arise to sue portions of copyrighted work in order to prepare the defendant's work. The court noted that the defendant could not publish its personal name index without copying the names from the New York Times Index. Denicola states that this necessity criterion represents a mechanism within the fair use doctrine for incorporating free speech values to copyright law. When a prohibition on the use of material amounts to a prohibition on the production and

[271] Denicola op cit note 262 at 295.
[272] Ibid at 296.
[273] Ibid.
[274] Ibid.

distribution of a work that would serve the public interest in dissemination of information, the fair use doctrine tends to favour permitting the use.[275]

Lastly the court dealt with the fourth factor which is the effect of the use upon the potential market for or value of the copyrighted work. The court found that the defendant's work did not compete with Times Index. The defendant's work only contained citations to the Times Index and did not serve as a substitute for the Times Index.[276]

After considering all four factors the court held that the defendant's use of the plaintiff's materials is justified by the fair use doctrine. This case illustrates how the fair use doctrine has been used to ease the conflict between copyright law and free speech. The fair use doctrine focuses on the public interest in the flow of information. At the same time, it seeks to ensure that the interests of the copyright owner are not encroached upon needlessly.[277] Another area in which the fair use doctrine has been successful is in situations involving the use of copyrighted material in parodies. The doctrine has been largely successful in balancing copyright and free speech principles in this regard.

In *Berlin v. E.C. Publications, Inc.*[278] the court found that parody and satire are deserving of substantial freedom as entertainment and as a form of social and literary criticism. The use of parody or satire has neither the intention nor effect of substituting for an original work or the demand for it. Where a parodist does not use a greater amount of the original work that is necessary to create the object of his satire, a finding of infringement would be improper.[279]

c) The Digital Millennium Copyright Act of 1998

The Digital Millennium Copyright Act (herein referred to as the DMCA) is a statute that amends the US Copyright Act and addresses the new obligations in the 1996 WIPO Copyright and Performance and Phonograms Treaties (hereafter referred to as the WIPO Copyright Treaties). These obligations are concerned with the modernisation of the copyright legislation to meet the challenges of digital creation, communication, and

[275] Ibid at 267.
[276] Ibid.
[277] Ibid.
[278] *Berlin v. E.C. Publications, Inc.* 329 F.2d 541 (2d Cir.), cert. denied, 379 U.S. 822 (1964).
[279] Denicola op cit note 262 at 298.

exploitation of copyright works. The first obligation requires contracting countries to afford adequate protection and provide effective legal remedies against circumvention of effective technological measures that are used by authors in connection with the exercise of protecting their copyrights.[280] The DMCA came into effect on the 27th of October 1998.

The DMCA was thus created to provide adequate protection against persons who circumvent access to copyright works on digital platforms and manufacturers, importers and distributors of the devices that are produced and used to circumvent access to works. The above WIPO obligations placed on contracting countries requires that legislation permits circumvention of a technological measure, that restricts copying, that would qualify as a fair use.[281] While it may be fair use to make non-profit research copies of pages from a lawfully acquired book it is not fair use to circumvent access to copyright works on digital platforms. This would amount to stealing the work in order to make copies, which is what the DMCA prevents.[282]

The new section 12(1) of the US Copyright Act now defines three new violations of copyright:

1. To circumvent technological protection measures that control access to copyrighted works
2. To manufacture, disseminate or offer devices or services that circumvent access controls to copyright work; and
3. To manufacture, disseminate, or offer devices that circumvent a technological measure that effectively protects a right of the copyright owner.[283]

These violations are distinct from copyright infringement. It is not necessary to prove that the dissemination of circumvention devices resulted in a specific infringement. The DMCA strengthens protection of copyright in the digital age. The aim and purpose of the legislation is to prohibit persons from circumventing technological measures that control access to copyrighted works.[284] Although the DMCA serves the purpose of protecting virtually all digitally stored information against copyright infringement it has encroached

[280] JC Ginsburg 'Copyright Legislation for the Digital Millennium' (1999) 23 *Colum.-VLA J.L. & Arts* 137.
[281] Ibid at 138.
[282] Ibid.
[283] Ibid.
[284] Siphepho op cit note 29 at 60.

upon certain established copyright law principles. First, the statute does not permit a copy for personal use, nor does it provide for small amounts of copying which is usually permitted under the fair use doctrine.[285] Secondly, the DMCA allows authors and publishing entities to limit or prevent access to works that the public would otherwise have access to in exercising their right to freedom of expression. This means that the DMCA fails to strike a balance between copyrights and the right to freedom of expression as has been the emphasis of this discussion. The DMCA therefore fails to permit dissemination of knowledge and education.[286]

3. CONCLUSION

The question which has to be answered is how the copyright legislative framework in the United States can be used to develop South African copyright law in a way that provides more adequate protection for the owner's copyright and balances copyright with the right to freedom of expression. In this dissertation it is argued that copyright protection needs to be developed to provide authors with sufficient protection against copyright infringement. It is of importance to consider the United States approach in providing protection for copyright. The reason for copyright protection is to encourage creativity and stimulate the development and dissemination of information and knowledge.[287]

These legitimate interests must be protected. It is also argued in this dissertation that South African copyright law does not balance copyright and the right to freedom of expression in a way that sufficiently promotes access and dissemination of information. It is suggested that a broader application of the fair dealing doctrine would be conducive to promoting the legitimate public interest of access to information. There is a danger of providing excessive protection to copyright owners in that it would encroach on the user's right to access copyright works. It is therefore necessary to develop copyright law with caution. The next chapter will draw conclusions and suggest recommendations that could be implemented in order to balance adequate protection for the author's copyright and the public interests protected by the right to freedom of expression.

[285] Ibid.
[286] Ibid.
[287] Ibid at 61.

CHAPTER FOUR: CONCLUSION AND RECOMMENDATIONS

1. INTRODUCTION

The concluding chapter recommends solutions for the weaknesses of the South African copyright legislative framework. Authors are entitled to adequate protection of their copyright and to reap the benefits from the works that they create. However, authors' copyrights have to be balanced against the rights of the public to freedom of expression. This dissertation has discussed two problems which need to be dealt with. The first issue is the high level of copyright infringement of owners' works in South Africa. The second issue faced by copyrights users is their inability to access and use works which serve the public interest. The accessibility of informative and educational work has serious implications in the development of a developing state such as South Africa, which is why development of copyright law should be done in a way that does not encroach upon the fundamental right to freedom of expression.[288]

The purpose of copyright protection is to encourage creativity by rewarding authors for their works. The result of overprotection of copyrights is that the public will be deprived of important information which would contribute to the creation of more informative and creative work.[289] Therefore, the overprotection of copyrights would stifle creativity instead of serving its obligation to encourage it. It is argued that the inability of law makers to provide efficient ways in which exceptions and limitations to copyrights can sufficiently promote dissemination of important works, amounts to lawmakers losing sight of the importance of copyright protection.[290]

Balancing the interests of copyright owners and users in the interest of public welfare is not an easy task. It is not argued that improving copyright protection should not mean that the rights of the user are encroached upon.[291] Instead protection should improve the certainty of an author's copyright. Through providing more certainty over copyright ownership, the

[288] 'Report on the South African Open Copyright Review' at 5, available at *http://libguides.wits.ac.za/c.php?g=145331&p=953503*, accessed on 18 July 2018.
[289] Siphepho op cit note 29 at 67.
[290] Ibid.
[291] Ibid.

original goal of copyright law, which is to encourage the authors to create and rewarding them for their creations, will be achieved.[292]

The South African Copyright Act came into effect in 1976. The Act is outdated because it does not consider the constitutional fundamental rights that do not coincide with its provisions. Furthermore, it does not take into consideration any technological advancements and new ways in which copyrighted works are used. Certain provisions of the Act are not in line with the modern fundamental values of South Africa's constitutional democracy. For example, the statutory exceptions and limitations in the Act and the regulations do not set out a broad ambit in which the fundamental right to freedom of expression can be considered in matters involving use of copyright work.[293]

This research suggests the following copyright reforms for consideration:

a) The introduction of a form of copyright registration;
b) Limiting the period of protection; and
c) Improving the current landscape of copyright exceptions and limitations

2. RECOMMENDATIONS

a) Introduction of copyright registration

The requirements of 'originality' and 'material form' for the substance of a copyright efficiently ensure that only a work that has intellectually originated form the author is protected. The Copyright Act promotes the interests of authors far more than the interests of individuals to access information. However, the high levels of copyright infringements in South Africa do not reflect the high level of protection for copyright that the Copyright Act gives to authors of these works. It is the view of this study that the failure of the Copyright Act to make provision for any optional form of registration of copyrights, leads to a general disregard for copyright works as a form of private property belonging to an author. Some form of optional registration should be made possible. This can be done by establishing a copyright registry. Once a copyright has been established and registered the author would then have a clear right to the work belonging to him and this would lead to better protection

[292] Ibid.
[293] Siphepho op cit note 29 at 68.

of his copyright during an application for an interdict against infringement or for a claim for copyright infringement damages.[294]

A lesson which can be learnt from the United States of America's copyright system is that registration would establish a public record of the copyright claim and the work would be indexed in the Copyright Office records, under the works title and the author's name. This would be beneficial for the protection of authors' works, as records of copyright registration would be available to the public who would be able to ascertain who owns the copyright. Finding the author would be easier and access to works would also be improved as the public would be able to determine whether a copyright has expired and vests in the public domain. Authors who have no interest in copyright protection would not register their works, where such works would more easily vest in the public domain for use.[295]

It is realistic in South Africa to have a formal registration system for copyright works. Although there is a financial and technological capacity difference between South Africa and the United States of America, our legal system itself must be progressive.[296] Copyright is a form of intellectual property, but like other forms of property it exists by virtue of its recognition by the state through legislation.[297] Laws protecting property need more than just to be written. In order to be legitimised, property laws need some form of registration of ownership.[298] There is no reason why South Africa cannot establish a Copyright Office. Establishing a Copyright Office would be a formidable task to undertake, however despite the daunting task, there is a legitimate justification for the existence of a Copyright Office, and that justification is primarily economic. The main purpose of granting authors copyright is to support a structure in which authors have the opportunity to be reworded for their works.[299] This purpose relies on some functions of copyright formalities which play a role in providing notice about the identity of the author, the work, and the exclusive rights that exist in the work.[300]

---

[294] Ibid.
[295] Ibid.
[296] S Karjker 'Justification for Copyright: The Moral Justifications' 2013 *South African Intellectual Property Law Journal* 43.
[297] Ibid.
[298] Ibid.
[299] Michael W. Carroll 'A Realist Approach to Copyright Law's Formalities' (2014) *American University Washington College of Law, Washington, D.C. PIJIP Research Paper no.* 2014-01. 1518.
[300] Ibid.

b) Limiting the period of copyright protection

While it is important to provide adequate protection for copyright owners, it is not necessary to extend exclusive rights beyond the terms and scope required by international treaties. The Berne Convention requires that copyrights in photographs subsist for 25 years. However, the Copyright Act grants copyright protection in photographs for 50 years. The Berne Convention also provides that copyright for works made public after the author's death should subsist for 50 years after the author's death.[301] The Copyright Act grants protection for much longer if the work is published after the author has died. Copyright legislation should reduce the duration of copyright with regards to these works, considering that South Africa is developing country.

The result of an extended protection of copyright in photographs is that archives and places of historical records such as museums are restricted from digitising photographs to preserve them. This results in loss or degeneration of significant historical photographs.[302] There is no rational basis for extending the protection of copyright for works published after the author's death beyond 50 years because the objective of copyright law is to give incentives for creation and the communication of that creativity.[303] The duration of copyrights should be applied more restrictively and in line with its international obligations so as to afford better access to these works. The duration of the copyright must also be balanced against the cost of that protection. The implications for South Africa as a developing country are such that extending copyright duration means that works take longer to fall into the public domain, thus stifling development.[304] The only rationale for extending copyright protection past the international requirements would be to promote the progress of science and the arts. In this regard there is no need to provide copyright protection for photographs over 25 years. There is also no need to extend copyright protection for over 50 years after the death of the author.[305]

[301] 'Report on the South African Open Copyright Review' op cit note 5.
[302] Ibid.
[303] Ibid.
[304] DJ Gifford 'Innovation and Creativity in the Fine Arts: The relevance and irrelevance of copyright' (2000) 18 *Cardoo Arts & Ent. L.J.* 657.
[305]Siphepho op cit note 29 at 69.

c) Improving the current landscape of copyright exceptions and limitations

The fair dealing provision of the Copyright Act is essential for the purpose of promoting freedom of expression. The provision supports the fundamental right to artistic creativity, freedom of the press and media, and access to information and learning material. The specified exceptions in the fair dealing provision (s12 (1) of the Copyright Act) require that a person brings the use of a copyright work within its ambit. Any use of the work that does not fall into the ambit of fair dealing amounts to a copyright infringement.[306] This places stringent limitations on the right to freedom of expression.

Copyright legislation should therefore clarify the scope of fair dealing. As previously iterated in chapter two, South Africa has made insufficient use of the flexibilities that may be contained in the fair use doctrine. A good use of the doctrine would support the overall objective of copyright law to maintain a fair balance between the legitimate interest of the copyright owners and the public interest in accessing information. It is recommended that South African copyright law must include in the Copyright Act a proper test for fairness. South Africa should borrow from the United States of America's fair use clause which contains the broad four step test for fairness.[307]

The Amendment Bill forms an instrumental part of the manner in which copyright laws will develop in South Africa going forward. It is however, needless to say that behind the backdrop of a constantly evolving and changing socio-economic atmosphere, legislators have found it increasingly difficult to remain abreast with all these legislative adaptations. It is therefore in this light that South Africa should seek to adopt useful approaches which have been used by foreign jurisdictions that are more advanced in the field of copyright law. As provided by the research, the United States provides a solid example of one such comparator.

More attention needs to be given to the language used, and assigning of specific meaning and definition to the use of significant words and phrases would be helpful in providing clarity and a strong sense of direction. It is perhaps the suggested fairness test that would benefit from being more loosely defined. This would be done to be more inclusive to a wider variety of scenarios in the fair dealing/ fair use approach. While expecting the Amendment Bill to contain within it the holy grail of South African copyright law, all in one

[306] Ibid.
[307] Ibid.

seating, is an unrealistic expectation, it would be within reason to require that certain improvements and recommendations suggested above be included first before the passing of this Bill into law.

An interesting multi-dimensional balance was discovered. Not only is the Copyright Act meant to be brought up to speed from a legislative standpoint, but this must be so done bearing the constitutional implications of its development on the other equally important existing constitutional rights of the public, public interest, as well as being mindful of South Africa's wounded historical background. How, for example, do the Copyright Regulations, through the limiting measures placed towards teachers, affect a child's right to basic education? Furthermore, since it is often the poorly funded schools that are not able to purchase copies for students and learners, what would be the long-term impact of these regulations, in relation to South Africa's past of segregation?

The lessons which can be learnt from the United States of America is that fair use seems to work better than the South African fair dealing approach. That is so because s12 of the South African Copyright Act requires that the use of an original piece of work must be brought into the specified purposes of the use it sets out. This limits how the work can be used in the public interest and restricts the right to freedom of expression. For a person to be deemed to have used the work fairly the use would have to be held to the stringent requirements of s12 of the Copyright Act.[308] The US Copyright Act is more flexible and requires the courts to consider all four of the above factors on a case by case basis. The approach of giving courts a wider discretion is that fairness can be decided more widely on the basis of the public interest of freedom of expression, and a court would not have to focus on whether the use falls within the stringent parameters of s12 of the South African Copyright Act.[309]

The Copyright Regulations also appear to be more stringent than necessary to protect copyrights. Copyright legislation should introduce a broad definition of educational institutions including archives and libraries which are permitted to reproduce works for educational purposes.[310] The exception for the benefit of teachers and teaching purposes needs to be extended to give teachers the ability to impart information without stringent

[308] Siphepho op cit note 29 at 50.
[309] Ibid.
[310] 'Report on the South African Open Copyright Review' op cit note 5.

regulations. It is further recommended that the Copyright Act must be amended to provide a broader definition of teaching in s12 (4) that includes current modes of delivery and would be flexible enough to cover future innovation.[311]

The Copyright Amendment Bill should avoid any doubt with regards to the fair use provision.[312] As previously stated, it needs to be clear about the type of exceptions regime it aims to create. It is possible to have a system of fair use, together with a list of exceptions which are provided to constitute, prima facie, fair use of copyright works. This would create an open-ended system of exceptions to copyright infringement.[313] As it stands the language of the Bill is ambiguous, unclear and confusing. It is not possible to attach an intelligible meaning to it.[314] The lesson which can be learnt from the USA copyright system is that an open-ended type of fair-use exception which the Bill purports to introduce should be preferred. However, the Bill must be clear about the type of exceptions regime it aims to create.[315]

It is also important to expand copyright exceptions and limitations to better enable access to knowledge by providing for an exception for derivative or transformative works such as parody and caricature. The Copyright Amendment Bill's proposed introduction of exceptions and limitations for the benefit of people with disabilities must be welcomed. The Copyright Amendment Bill must introduce provisions to deal with orphan works when copyright owners cannot be identified. The amendment must be sought in this respect in order to permit the use of orphan works on reasonable terms to promote access to these works.[316]

3. CONCLUSION

The question which had to be answered is whether the apparent failure of South African copyright law to adequately safeguard the rights of owners of those copyrights means that the current copyright legislative framework falls short of the objective of securing an author's property rights, and thus requires copyright law to be developed. This dissertation further set

[311] Ibid.
[312] S Karjiker op cit note 143 at 18.
[313] Ibid.
[314] C Jooste 'Commentary on The Copyright Amendment Bill' (2015) *South African Intellectual Property Law Journal* 31.
[315] Ibid.
[316] Ibid.

out to balance copyright protection with the right to freedom of expression. In this regard it is of importance to consider the South African copyright legislative approach and the United States of America's copyright legislative framework. Based on the study of both of these copyright legislative frameworks it is argued in this dissertation that copyright protection needs to be developed through the implementation of achievable recommendations by introducing copyright registration, limiting the period of copyright protection in certain instances and by improving the current landscape of copyright exceptions and limitations.