UNIVERSITY OF KWAZULU NATAL

COPYRIGHT AND DEVELOPING COUNTRIES

A CRITICAL EXAMINATION OF RECENT DEVELOPMENTS IN COPYRIGHT LAW WITH PARTICULAR REFERENCE TO THE IMPACT ON DEVELOPING COUNTRIES AND ACCESS TO EDUCATIONAL MATERIALS

2014

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DECLARATION

I hereby declare that this dissertation is my own, original work, and that all my sources of information have been acknowledged. To my knowledge, neither the substance of this dissertation, nor any part thereof, is being submitted for any degree in any other University.

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DALRO: The Dramatic, Artistic and Literary Rights Organisation.

DMCA: Digital Millennium Copyright Act.

DTI: Department of Trade and Industry.

FAIFE: Freedom of Access to Information and Freedom of Expression.

IFLA: International Federation of Library Associations and Institutions.

IP: Intellectual Property.

IPRs: Intellectual Property Rights.

NORM: National Organisation for Reproduction Rights in Music.

SAMRO: Southern African Music Rights Organisation.

SC: Stationers Company.

TRIPS: The Agreement on Trade Related Aspects of Intellectual Property.

UK: United Kingdom.

USA: United States of America.

WIPO: World International Property Organisation.

WTO: World Trade Organisation.

WWII: World War II.

CHAPTER 1

1 INTRODUCTION

1.1 Background and research problem

Writers write in order to convey information and ideas to the general public. How the general public then uses that information may be restricted by the law of copyright. Copyright is the law that gives authors of original works an exclusive right over the material that they produce by using their own skill and labour.[1] This protection is granted to the author only for a limited period of time. During that time no one else may exploit the author"s work.[2] Copyright over a work is protected in order to reward creators and to encourage them to produce more works and also to allow them to recoup the costs of producing those works.[3] This will be discussed in more detail in chapter three of this dissertation, but the problem is that this protection may prevent society from accessing educational materials. The protection of copyright may therefore have an important impact on a society"s ability to develop both culturally and economically. An important goal of copyright law is to encourage people to be creative so that there is more creativity. It is important therefore that in developing the law, the law does not become a means of stifling creativity. It has emerged that, due to developments in copyright law and because rights holders are becoming more protective of their rights, access to important works which should be used to encourage creativity such as educational materials is becoming more restricted. These developments in the law of copyright brings to the fore the issue of whether, and to what extent, the delicate balance between the rights of the copyright owner and the public interest to have access to educational materials is being upset and, whether authorities are actually losing sight of the real purpose behind the protection of copyright in the first place. Copyright law had at its inception the purpose to provide a reward and stimulus to creators, and to encourage and improve learning and the progress of the arts and sciences.[4] This proposition is supported by the first framers of copyright law in the United States of America (USA).[5] The drafters of copyright law were of the view that providing copyright protection to authors for a limited time would encourage

[1] P Ramsden *A Guide to Intellectual Property Law* (2011) 7.
[2] Ibid 7.
[3] K Idris *Intellectual Property; A Power Tool for Economic Growth* 2ed (2003) 3.
[4] See the earliest versions of copyright law: The Statute of Anne adopted in England in 1710 and the United States Constitution Article 1 Section 8, Clause 1 available at http://usgovinfo.about.com/od/usconstitution/a/a1s8.htm (accessed on 13 May 2014).
[5] Ibid.

and promote learning and progress and thus ultimately be for the public good.[6] This necessarily means that, a balance is struck between the interests of the individual author and the public interest.[7] Davies also emphasises that "copyright is a just and proper concept, established and developed in the public interest."[8] Therefore, it is argued that, the public interest should remain the central theme of copyright protection.

Recently the Department of Trade and Industry (DTI) proposed a draft policy[9] that aims at investigating ways of eliminating "the many perverse outcomes of Intellectual Property (IP) protection which are detrimental to the broader society."[10] These include, "the imbalance between the strengths of the position of developed societies and developing countries."[11] This policy has highlighted two fundamental points which are worth noting for the purposes of accessing educational materials in developing countries. The draft policy has firstly recognised that South Africa is a developing state[12] and secondly that there is a need to revise South African copyright law.[13] These two points are important because South African copyright law is strongly based on British Copyright Law. This will be discussed in detail in chapter four of this dissertation. Modern copyright law in South Africa dates back from the 1970s, and so it is seriously out of date and it was introduced at a time before the technological age came into being. Moreover, it was introduced at a time when South Africa did not accept that it was a developing state and it simply relied on a first world copyright law. The question that ought to be asked is: was this what South Africa needed and did the law take into consideration specific South African needs? The South African government has recognized that it should not simply accept what is accepted in other jurisdictions where their needs might be different to South Africa"s needs and so there is a recognition of the need to develop a specific South African law. The purpose of this dissertation is therefore to examine copyright law with specific reference to the fact that South Africa is a developing country with a special need regarding access to educational material.

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[6] G Davies *Copyright and the Public Interest* (2002) 5.
[7] OH Dean *Handbook of South African Copyright Law* 2ed (2006) 1-2.
[8] Davies (note 6 above) 3.
[9] Draft National Policy on Intellectual Property 2013 in GN No 918 of 2013 *Government Gazette* 4 September 2013 available at www.gpwonline.co.za (accessed on the 8 April 2014).
[10] Ibid 4.
[11] Quoted by T Woker "Intellectual Property Law" chapter to be published in C*ommercial Law* to be published by Oxford Publishers July (2014) 7.
[12] Draft National Policy (note 9 above) 8.
[13] Ibid 8.

1.2 Purpose of the dissertation and research questions

In light of the fact that the government is in the process of re-thinking its IP protection policies, the purpose of this dissertation is to examine the problem areas which exist within the law of copyright, particularly when it comes to the issue of access to information and educational materials. In particular the purpose of this dissertation is to examine to what extent the rights of the author or copyright owner against the rights of the public to have access to educational materials are appropriately balanced or can be balanced? In order to achieve this purpose this dissertation seeks to answer the following key questions:

- 1. How did the current laws protecting copyright come into existence?
- 1.1 How did the law relating to copyright develop and why?
- 1.2 To what extent are the developments in copyright law still in line with the reason why copyright law was first created?
- 2. Why have there been changes to copyright law?
- 2.2 What is the driving force behind better and stronger copyright protection?
- 2.3 What are the results of stronger copyright protection?
- 3. What challenges are posed by copyright law for third world countries in particular South Africa with regard to access to educational materials?
- 4. What are the recommendations that could be proposed in order to ensure that the delicate balance between the rights of the author and the rights of the public to have access to educational materials is maintained?

1.3 Methodology

The methodology that will be employed in undertaking this research will be desk top research limited to available primary and secondary sources. The main sources of data collection will emanate from reported cases, policy documents and published textbooks and articles pertinent to the issue of access to educational materials. Reference will also be made to certain organisations regulating copyright protection at both an international and national level.

1.4 An overview of the dissertation

This dissertation consists of eight chapters.

Chapter one has presented the background to the problem question which this dissertation seeks to deal with. It focuses on the purpose of this dissertation and the research questions that will be undertaken in order to achieve the purpose. It also lays out the methodology that will be employed in undertaking the study as well as the structure of the dissertation.

Chapter two provides the overview of copyright law. The aim of this chapter is to trace how the law relating to copyright developed. This is where the foundational basis and historical development of copyright law will be set out. The various laws and conventions that are behind copyright protection will be identified. A more detailed explanation will be engaged in subsequent chapters in particular focusing on how copyright law affects the rights of the public to make use of educational materials.

Chapter three focuses on the different theories behind copyright protection. It aims to explain, explore, justify and criticize the rationale behind the protection of copyright. An analysis of the different reasons for protecting copyright will provide a basis for analysing the manner in which the law has developed in order to evaluate whether the law has deviated too far from what copyright law was intended to achieve.

Chapter four deals with the current copyright law in South Africa. It traces the historical development of South African copyright law. This chapter aims to highlight certain important provisions of the South African Copyright Act.[14] It also identifies the established societies which are there in order to facilitate the granting of permission to use copyright materials. South Africa has four copyright societies, namely the Southern African Music Rights Organization (SAMRO), the Dramatic, Artistic and Literary Rights Organization (DALRO) that is directly affiliated with SAMRO, and the National Organization for Reproduction Rights in Music (NORM) and the Recording Industry of South Africa. For purposes of this dissertation, the focus will be on DALRO, which is a multi-purpose copyright society representing authors, publishers and performers.[15]

The issue of public interest has always been central to the notion of copyright protection. There is a recognition that the needs of rights holders and the public need to be balanced.

[14] Copyright Act 98 of 1978.
[15] http://www.dalro.co.za/ (acessed on 12 May 2014).

Chapter five focuses on the provisions dealing with copyright limitations and exceptions relating to access to educational materials which are embodied in the international as well as national framework. It is in the public interest to use these copyright limitations and exceptions in order to encourage creativity in authors and also to promote learning and access to educational materials.

Chapter six comprises an analysis of the developments that have taken place in the area of copyright law and most importantly this chapter seeks to ascertain whether these developments are still in line with the reasons why copyright is protected and whether sufficient consideration is being given to the public good.

Having ascertained the developments that have evolved in the law of copyright, chapter seven stresses the need for education in third world countries. It critically evaluates the different challenges that are faced by third world countries in accessing educational materials, in particular the needs of South Africa as a developing country.

Chapter eight of this dissertation is the concluding chapter which summarises the findings of the study and also proposes recommendations that could be employed in order to ensure a proper balance between the protection of copyright against the public to have access to educational materials in developing countries.

CHAPTER 2

2 AN OVERVIEW OF COPYRIGHT LAW

2.1 Introduction

This chapter sets out the historical background to and development of copyright law. This historical background is important because it takes into account important international agreements which provide the basis for copyright law in various jurisdictions. The two most important conventions are the Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886 (the Berne Convention) and The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). It is important to understand where copyright law comes from and its importance in the international community. By virtue of the fact that South Africa is part of the international community, it must conform to certain obligations which come from being part of the international community. However, as will be pointed out in the discussion of the TRIPS agreement, international agreements do recognise that individual countries have their own needs and they are entitled to craft their laws in a way that will enable them to take these needs into consideration. The history of how copyright developed is also important because it sheds light into the reasons why there was a need to protect copyright. The theories which underlie the protection of copyright will be discussed in chapter three of this dissertation. In particular, this history will also enable a better understanding of how trade relations between countries developed after the outbreak of the Second World War (WWII).

2.2 Definition of copyright

The protection of copyright is part of intellectual property law.[16] By modern definition intellectual property law is the law that protects creations of the mind.[17] Creations of the mind include inventions (which are protected by the law of patents), trade marks, designs and artistic works. According to the World Intellectual Property Organization (WIPO) copyright is actually a bundle of rights which are given to authors such as writers, artists and

[16] C Colston & K Middleto *Modern Intellectual Property Law* 2ed (2005) 3.
[17] G Dutfield & U Suthersanen *Global Intellectual Property Law* (2008) 12. See also G Taliashvili *Copyright Works* (2008) 3.

performers over the works that they create.[18] Copyright law is that area of intellectual property law which has been developed in order to protect authors‟ copyright over the works which they have created. Copyright law provides authors of works with a limited monopoly over their work to enable them to exploit those works.[19] This is to compensate and reward authors for the effort, time and creativity which they have employed in order to create their works.[20] Copyright protects the expression of an idea rather than the idea itself.[21] A simple means of explaining this is as follows: if you can see a work, hear a work or touch a work, then that work can be protected. For example, an essay which has been published on paper or recorded on a tape will be protected, provided certain other requirements have also been satisfied.

Copyright protects a number of different types of works[22] but for the purpose of this dissertation the focus is on access to educational materials such as books and articles. For this reason the focus will be on literary works.

2.2 Early beginnings

The principle that an inventor must be granted protection over his works was first recognised in the 15th century in the city of Venice when the first patent was granted.[23] This protection was then extended to other creations of the mind in the form of copyright. The need for a law to protect copyright began when the printing press was developed at the end of the fifteenth century.[24] This printing press was invented by a man called, Johannes Gutenberg[25], and introduced in England by William Caxton.[26] After the introduction of the printing press in England, competition grew among book publishers, as books were easier to copy and affordable to the common man.[27] The ability to print books easily and cheaply raised the issue of piracy. As the number of presses grew, so did the piracy of books. The English Government sought to control the publication of books by granting printers a near monopoly

[18] World Intellectual Property Organization available at http://www.wipo.int/about-ip/en (accessed on 10 October 2013).
[19] Dutfield & Suthersanen (note 17 above) 77.
[20] Idris (note 3 above) 3.
[21] Taliashvili (note 17 above) 4.
[22] The Copyright Act 98 of 1978 ; sec 2 (a)- (i).
[23] K Sunsil & R Evenson „Does Intellectual Property Spur Technological Change?‟(2003) 55 (2) *Oxford Economic Papers* 235.
[24] J Braithworth & P Drahos *Information Feudalism* (2002) 30.
[25] Ibid 29.
[26] SC Masterson „Copyright: History and Development‟ (1940) 28 (5) *California Law Review* 627.
[27] Ramsden (note 1 above) 3.

on publishing in England.[28] The English Government then in 1534 saw a need to pass the Licensing Act of 1662[29] which required those who wished to publish a written work to first obtain a license. The Licensing Act aimed at "preventing the frequent abuses in printing seditious, treasonable and unlicensed books and pamphlets; and for the regulating of printing and printing presses."[30] This Licensing Act was administered by a group of English printers known as the Stationers Company (SC).[31] The SC was given powers by the government to seize illegal printing presses and books.[32] This Act was introduced by the government in order to protect the stationers" right. In terms of the Licensing Act, authors were allowed to sell their written works to the SC members for a one-time payment without any royalties.[33] The stationers, who are known as publishers today, were awarded an exclusive right to print by the government. This was the right to reproduce a work for selling purposes.[34] This meant that the stationer"s right was limited in scope, as they could only publish a work, and no more. During that period, a person who wished to print a book had to be a member of the SC.[35] This meant that the stationer"s copyright gave a particular member of the company of stationers the right to copy a particular work, which was awarded and enforced by the company.[36] The basic purpose of this right, as explained by Patterson, was to maintain order in the book trade by establishing a method that would enable publishers to have the exclusive right to publish a work without competition as to that work, and also to protect the property of its members.[37] From this it can be seen that, the SC served two purposes. First, it provided effective control over the printing and dissemination of books throughout England, and second, it helped to eliminate piracy.[38]

From this brief outline of the origins of copyright law it can be seen that, with the SC in control, copyright protection was granted against rival publishers and not against authors.[39] This was because authors were not members of the company, so authors could not hold the

[28] http://www.ipo.gov.uk/types/copy/c-about/c-history.htm (accessed on 16 May 2014).
[29] The Licensing Act of 1662.
[30] M Rose *Authors and Owners: the Invention of Copyright* (2002) 31.
[31] http://www.ipo.gov.uk/types/copy/c-about/c-history.htm (accessed on 16 May 2014).
[32] Rose (note 30 above) 31.
[33] http://www.arl.org/focus-areas/copyright-ip/2486-copyright-timeline#20C (accessed on 14 May 2014).
[34] J Ewing „Copyright and Authors" (2003) 8 (10) available at http://firstmonday.org/issues/issue8_10/index.html (accessed on 25 November 2013).
[35] Braithworth & Drahos (note 24 above) 30.
[36] Ewing (note 34 above) 3.
[37] LR Patterson *Copyright in Historical Perspective* (1968) 78.
[38] E Samuels *The Illustrated Story of Copyrights* (2002) 30.
[39] Patterson (note 37 above) 78.

copyright.[40] Two important points emerge from the way in which the SC operated. First, the stationer‟s rights emanated from a governmentally decreed statute (The Licensing Act) and not from the natural right of authors.[41] Second, publishers were granted a monopoly, which simply meant that they could set a price of a book without considering market pressures.[42] On 3 May 1695 the Stationers‟ Licensing Act expired and the SC started having competition from new printers who published cheaper, often pirated, versions of books.[43] It was for this reason that the SC lobbied for the Licensing Act to be re-introduced but they were unsuccessful.[44] Failure to renew the Stationers‟ Licensing Act meant that anyone was free to use printed material. Faced with this failure, the stationers decided to emphasise the benefits of licensing to authors rather than publishers. The stationers came up with a strategy in terms of which they argued that authors do not have the means to distribute their own works as distributing a book required amongst other things a printing press.[45] This meant that authors will always need a publisher who will make their work generally available to the public. The stationers then went before Parliament and presented the argument that "authors had a natural and inherent right of ownership in what they wrote, and that furthermore, such ownership could be transferred to other parties by contract, like any other form of property."[46] Their argument succeeded in persuading Parliament to consider a new bill. However, the stationers knew that this argument would work to their advantage, because although the new copyrights would originate with the author, authors would have little choice but to sign those rights back over to a publisher for distribution.[47] Finally, the stationers succeeded in securing new legislation from Parliament in the form of the Statute of Anne[48] which was passed in 1710 to protect published works.

The importance of understanding the Statute of Anne lies with the fact that its provisions were the foundation upon which the concept of the modern international copyright system is built. The Statute of Anne adopted a utilitarian view of copyright with particular emphasis on

[40] Ewing (note 34 above) 3.
[41] S Vaidhyanathan *Copyright and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* (2001) 38.
[42] Ibid 38.
[43] Rose (note 30 above) 33.
[44] Samuels (note 38 above) 6.
[45] K Fogel „The Promise of a Post- Copyright World‟ 2004 a report available at http://eprints.rclis.org/5741/ (accessed on 16 May 2014).
[46] Ibid 6.
[47] Ibid 7-8.
[48] The Statute of Anne of 1710.The statute was enacted in the calendar year 1709 and became effective in April 1710. An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times therein mentioned.

the public interest.[49] This it did by protecting the rights of authors rather than publishers of books.[50] The Statute of Anne introduced two new concepts. These concepts were that the author is the owner of copyright and the principle that there should be a fixed term for the protection of published works.[51] Moreover, the Statute of Anne also established two levels of copyright protection. Firstly, it extended the stationer's copyright for a non-renewable twenty one years for previously published works.[52] At the second level, it gave authors control over the printing and publishing of their work for fourteen years with the option of a fourteen year renewal.[53] Limiting the term of copyright meant that books could become available to anyone as long as they complied with the provisions of the Act.[54] This meant that the Statute of Anne posed a threat to the unlimited monopoly of the stationers by limiting copyright to a term of years. This was a radical change for the stationers, who until then had enjoyed perpetual copyright.[55] With the introduction of the Statute of Anne, copyright was established as a formal legal concept. Therefore, it can be said that, the establishment of the Statute of Anne was an attempt to restore order to the book trade.[56]

While the Statute of Anne restored order to the book trade, it also fundamentally changed the nature of the stationers‟ monopoly. Booksellers who had a monopoly, based on the stationer‟s copyrights of old work, then tried to convince the courts to realise a common law copyright apart from the statutory copyright, which would exist in perpetuity.[57] The issue then was, was copyright a product of a statute, and therefore limited to statutory term, or was it a right secured by the common law?[58] Their line of reasoning was that copyright existed in the author. By virtue of the fact that an author created the work, he had a perpetual common law copyright in his work.[59] This was the issue in contention in the case of *Millar v Taylor.* [60] In this case, the court supported the argument advanced by the stationers and in handing out its judgement, treated copyright as an author‟s right.[61] This meant that the author had a common law copyright in perpetuity. This simply meant that the stationer‟s copyright could last for an

[49] Jia Wang „Copyright; Rebalancing the Public and Private Interests in the Areas of Education and Research‟ (2013) 31. Published Thesis.
[50] Samuels (note 38 above) 6.
[51] http://www.ipo.gov.uk/types/copy/c-about/c-history/c-history-anne.htm (accessed on 16 May 2014).
[52] Vaidhyanathan (note 41 above) 40.
[53] Ibid 40.
[54] LR Patterson „The Statute of Anne; Copyright Misconstrued‟ (1965-1966) 3 *Harv. L.J on Legis*.225.
[55] Ewing (note 34 above) 4.
[56] Ibid 4.
[57] Patterson (note 54 above) 226.
[58] Vaidhyanathan (note 41 above) 41.
[59] Patterson (note 37 above) 14.
[60] *Millar v Taylor* 4 Burr. 2303, 98 Eng. Rep. 201 (K.B. 1769).
[61] Patterson (note 54 above) 225.

unlimited time which is what the stationers argued so as to continue their monopoly. However, the decision reached in the *Millar* case was ultimately rejected in the case of *Donaldson v Beckett*[62] where the courts finally decided that copyright was a state granted privilege that should last for a limited time, governed entirely by legislation.

The USA followed closely the English approach. The USA in its Constitution explicitly states in the copyright clause that Congress was authorised:

> "To promote the progress of science by securing for limited times of authors the exclusive right to their respective writings and discoveries."[63]

The first Copyright Act in 1790[64] embodied the same fundamental ideas that prevailed in the Statute of Anne. When it enacted this section the aim of the American Congress was to stimulate learning and an author's reward was a secondary consideration.[65]

During the 18th and 19th centuries there was an increased demand for printed works in Europe due to the cultural, social and economic developments which were taking place.[66] There was an enormous increase in the level of literacy and this meant that the market for books and other printed matter grew.[67] As a result, piracy of printed works became widespread.[68] Countries such as the USA and England were beginning to grant copyright protection to their citizens but it is important to note that such protection only operated in the specific country in which the author was granted that protection. So authors from the USA had protection in the USA and English authors had protection in England but an author from the USA did not have protection from piracy in England and likewise an English author did not have protection in the USA. It soon became clear that the principle of national protection of copyright was not enough. Authors began to see that there was a need to protect their works at an international level.[69] English writers such as Charles Dickens, realised that the absence of a treaty which would offer protection at an international level meant that publishers from the USA could pirate English authors and produce cheap editions without paying royalties.[70] Moreover, as time went by writers from the USA who were led by Mark Twain together with other

[62] *Donaldson v Beckett* (1774) 2 Broc. P.C 129; (1994)17 Hansard Parl. Hist. 953.
[63] Article 1 s 8 clause 8 of the US Constitution.
[64] Copyright Act of 1790.
[65] *Eldred v Ashcroft* 537 US 186 (2003) 245-248.
[66] T Pistorious „Copyright Law" in A Van Der Merwe *Law of Intellectual Property in South Africa* (2011) 150.
[67] Ibid 150.
[68] Ibid 150.
[69] Ibid 150.
[70] Braithworth & Drahos (note 24 above) 22.

publishers began to express their desires for international copyright protection as well.[71] The USA was the country most affected by piracy because it was the world‟s largest producer of copyright-protected works. Mark Twain pressed for the increase of the duration of copyright for the life of the author plus fifty years but he was unsuccessful. However, in 1909 the scope of protection was broadened from fourteen years to twenty eight years.[72] As time went by, eventually, the scope of protection was lengthened to the life of the author plus fifty years.[73]

It is a well established principle that copyright is territorial in nature.[74] This means that protection under a given copyright law is available only in the country where that law applies. Thus, for works to be protected outside the country of origin, it is necessary for the country to conclude bilateral agreements with countries where the works are used. The failure to protect authors from different jurisdictions was due to the absence of an international copyright agreement.[75] France took the lead in addressing the problem and issued a decree in 1852 where France extended copyright protection to all works despite their origin.[76] In addition, France was able to negotiate and conclude more than twenty bilateral treaties for the reciprocal copyright protection of French authors, which led other nations to follow suit and similar treaties were entered into.[77] Nevertheless, these bilateral treaties proved to be inadequate and nations saw the need to develop some form of international copyright protection.[78] Bilateral agreements were then replaced by multilateral agreements which were entered into by different countries.[79] As a result of the need for a uniform system of protection, the Berne Convention became the first main international agreement to administer copyright at an international level.[80] A number of other such agreements were introduced which have been amended over time. The most important one in recent times is the TRIPS agreement which deals with various aspects of intellectual property law including copyright. These two agreements (TRIPS Agreement and the Berne Convention) form the pillars of the

[71] Vaidhyanathan (note 41 above) 53-54.
[72] JC Ginsburg „Tale of Two Copyrights; Literary Property in Revolutionary France and America‟ (1990) 64 (5) *Tulane Law Review* 1001.
[73] I Boldrin & D Levine *Against Intellectual Monopoly* (2008) 99.
[74] Ramsden (note1 above) 5.
[75] Dutfield & Suthersanen (note 17 above) 72.
[76] Braithworth & Drahos (note 24 above)31.
[77] T Aplin, WR Cornish & D Llewelyn *Intellectual Property:Patents, Copyrights, Trademarks & Allied Rights* 8 ed (2013) ch 6.
[78] Pistorious (note 66 above) 150.
[79] Colombet C Major Principles of Copyright and Neighbouring Countries in the World: A Comparative Law Approach 5 available at http://unesdoc.unesco.org/images/0007/000750/075056eo.pdf (accessed on 13 April 2014).
[80] Berne Convention Article 11 (1) (i).

intellectual property regime in particular when dealing with copyright. South Africa is a signatory to these agreements and therefore they will now be discussed.

2.3 The Berne Convention

The Berne Convention, which protects literary and artistic works was first adopted in 1886.[81] It is administered by the World Intellectual Property Organization (WIPO). Since its adoption in 1886 the Berne Convention has been revised several times. The last revision took place in Paris in 1971.[82] This Convention is the most important treaty that governs the area of copyright.[83] It was signed in Berne, Switzerland.[84] It is called the Berne Convention because that is where it was signed. The initial signatories to this Convention were representatives from the ten states of Britain, Germany, Belgium, Spain, France, Haiti, Italy, Liberia, Switzerland and Tunisia.[85] Britain and France benefited the most from this international treaty[86] because their authors had been subjected to large-scale copying in countries that did not protect the works created by foreigners.[87] The USA only became a party to the Berne Convention in 1989.[88] South Africa became a signatory to the Berne Convention in 1928.[89]

The Berne Convention is an agreement in terms of which the rights of all authors, who are nationals of countries that were a party to the Convention, will be respected.[90] The Berne Convention was aimed primarily at developing an international system which was designed to stop piracy.[91] But it was over time expanded to provide other core forms of protection.[92] This Convention introduced the notion of national treatment. In terms of this notion, each

[81] The Convention was signed on the 9 September 1886.
[82] A Tejan Cole „International Copyright Law Part1: The Berne Convention for the Protection of Literary and Artistic Works, 1886." Page 1 available at http://www.belipo.bz/wpcontent/uploads/2011/12/copyrightlaw.pdf (accessed on 17 May 2014).
[83] Ibid 1.
[84] S Ricketson „The Berne Convention for The Protection of Literary and Artistic Works; The Birth of the Berne Union." (1986) 11 (9) *Colum. VLA J.L.& Arts* 8.
[85] L Bentely & B Sherman „Great Britain and the Singing of the Berne Convention in 1886." (2000-2001) 48 *Journal Copyright Society of the U.S.A* 312.
[86] RG Barbosa „Revisiting International Copyright Law" (2007) *Barry .L. Rev.* 43 (8) 46.
[87] Colston & Middleto (see note 16 above) 9.
[88] The USA publishing industry did manage to avail itself of the Berne Convention protection and its qualification requirements by publishing in Canada; This attempt to take advantage of the first publication rules under the Convention was effectively stemmed by Article 6(1) of the Berne Convention.
[89] Pistorious (see note 66 above)151.
[90] http://www.copyrightservice.co.uk/copyright/p08_berne_convention (accessed on 16 May 2014).
[91] A Kur & V Mizaras *The Structure of Intellectual Property Law: Can One Size Fit All?* (2011) 12.
[92] Ibid 12.

member state was required to give nationals of other member states the same level of copyright protection which it gave to its own citizens.[93] This means that a work of a United States national that is first generated in the USA would receive the same protection in other Berne Union countries as those countries accord their own citizens or nationals.[94] This Convention also imposes substantive copyright standards by insisting that all literary and artistic works are to be protected, through certain exclusive rights granted for a minimum duration of time.[95] These substantive obligations have been carried over to the TRIPS regime.[96] For the duration of the copyright, authors of literary and artistic works enjoy the following exclusive rights:[97]

- The right to make and authorize translations of their work;[98]
- The exclusive right to reproduce the work[99] (though some provisions are made under national laws which typically allow limited private and educational use without infringement. In the South African Copyright Act, this is permissible in terms of section 12 which is known as fair dealing);
- The exclusive right to adapt or alter the work.[100]

The author also enjoys the following moral rights:

- The right to claim authorship.[101]
- The right to object to any treatment of the work which would be prejudicial to his honour or reputation.[102]

Article 7 establishes the minimum term of protection, which is the life of the author plus 50 years after his death.[103]

[93] Article 5 (1) of the Berne Convention.
[94] B Shamnad „Turning Trips on its Head: an „IP Cross Retaliation Model for Developing Countries the Law and Development Review" (2009) 2(1) 178 available at ssrn http:ssrn.com/abstract=109328 (accessed on 23 August 2013).
[95] http://www.copyrightservice.co.uk/copyright/p08_berne_convention(accessed on 14 May 2014).
[96] Shamnad (note 94 above) 178.
[97] Berne Convention ,Article 8, 9 12.
[98] Berne Convention ,Article 8.
[99] Berne Convention, Article 9.
[100] Berne Convention, Article 12.
[101] Berne Convention, Article 6*bis*.
[102] Berne Convention, Article 6*bis*
[103] Berne Convention ,Article 7(2).

As has been state above, copyright laws are not only aimed at establishing individual rights for the benefit of authors, they also take into account the needs of users and of society at large. In order to maintain a fair balance between the conflicting interests, copyright protection is subject to a number of exceptions and limitations which are expressed in terms of Article 9 of the Berne Convention.[104] These limitations and exceptions are very important to ensure that copyright law remains just and balanced.[105] The limitations and exceptions are sometimes referred to as the „three-step test" which also appears in the TRIPS agreement.[106] The test sets limits to exclusive rights[107]

a) in certain special cases;
b) that do not conflict with the normal exploitation of the work; and
c) that do not unreasonably prejudice the legitimate interests of the author.[108]

When the Berne Convention was adopted states were not pressured to adopt rules above national standards. However, on 1 January 1995 this was all dramatically changed when the World Trade Organisation (WTO) was established.[109] The WTO is an international organisation that deals with the global rules of trade between nations.[110] As many countries acceded to the Berne Convention, copyright protection began to form a crucial part of the global trading system. Both developed and developing countries were concerned to provide stronger protection to intellectual property rights in order to participate in the benefits of international trade. The WTO was set to promote world trade and to remove trade barriers between countries.[111] Members of the WTO, including South Africa, were required by international treaty to adopt high standards of protection and enforcement. This then led to the adoption of the TRIPS agreement which is administered by the WTO.[112]

[104] Berne Convention Article 9 (2).
[105] L Guibault *Copyright Limitations and Contracts, an Analysis of the Contractual Overridability of Limitations on Copyright* (2002) 28.
[106] In terms of Article 13 of the TRIPS Agreement.
[107] M Senftleben *Copyright, Limitations and the Three-StepTest* (2004) 5.
[108] Berne Convention Article 9 (2).
[109] EG Jones & CAP Braga „The Multilateral Trading System: Mid- Flight Turbulence or Systems Failure?" in New farmer Trade, Doha and Development a window into the issues" (2006) 27-28.
[110] Ramsden (note1 above)14.
[111] A Subramanian & S Wei „ The WTO Promotes Trade, Strongly but Unevenly" (2007) 72 *IntE* 157.
[112] K Bowrey & M Handler & D Nicol *Emerging Challenges in Intellectual Property* (2011) 203.

2.4 The Agreement on Trade Related Aspects of Intellectual Property Rights

The impact of the Second World War (WWII) left most countries with uncertainty about the future of multilateral trading.[113] The war resulted in serious political and economic unrest and instability among European countries. This uncertainty posed a serious threat to the world economy because the trading relationship between countries was disturbed.[114] There was a need to form an organisation with well defined rules which would ensure equality and uniformity among countries. In an effort to alleviate the problems that the world was facing regarding trade relations, multilateral agreements were then negotiated. It is beyond the scope of this dissertation to go into detail regarding these multilateral agreements which were concluded between states after the WWII. It is sufficient to state that the most important agreement for the purpose of this dissertation was the TRIPS agreement which was concluded at Marrakesh, Morocco on 15 April 1994[115] and which came into force on the 1 January 1995.[116] The motivation behind the implementation of TRIPS was entirely economic.[117] Brown explains that this motivation was driven by the concerns of western industrialised countries, in particular the USA which was particularly concerned about the trade in counterfeit goods which had developed over the years, despite the fact that there was the Berne Convention.[118] Brown further observes that the Berne Convention had not attracted universal support and many of the countries where counterfeit goods were prevalent were not signatories to the Berne Convention.[119] It was felt that due to inadequate standards of protection and the ineffective enforcement of IPRs holders of IP rights were being unfairly deprived of the benefits of the work that they created.[120] This also meant that the legitimate interests of their respective countries were being prejudiced.[121] The solution was then to implement a regime through trade, which would bring offending states under control because in the modern age no state can develop without international trade.[122] This was the inspiration

[113] RM Stern „The Multilateral Trading System" Discussion Paper No. 569 2 April available at *www.firdschool.umich.edu/rsie/workingpapers/Papers551.../r569.pdf* (accessed on 5 December2013) 3.
[114] Ibid 3.
[115] T Cottier & P Veron *Concise International and European IP Law* 2ed (2011) 193.
[116] C Van Wyke „Access to Affordable HIV Medicines in South Africa: Patents, Parallel Importation, Generics and Medical Schemes" (2006) 39 (1) *De Jure* 2.
[117] Cottier & Veron (see note 115 above) 193.
[118] A Brown et el... *Contemporary Intellectual Property Law and Policy* 3ed (2014) 25.
[119] Ibid 25.
[120] A Otten & H Wager „Compliance with TRIPS; The Emerging World View" (1996) 29 *Vand. J Transnat'l L.* 393.
[121] Ibid 393.
[122] Brown (note 118 above) 25.

behind negotiators who were advocating for multilateral trade agreements rather than bilateral ones.[123]

The TRIPS agreement establishes international minimum standards for IP protection.[124] There is now an obligation to WTO members to "adequately" and "effectively" protect IPRs.[125] Previous international agreements contained provisions which dealt with enforcement but this has been strengthened under TRIPS.[126] Because of this strengthened dispute settlement mechanism, countries needed to make changes to bring their laws and enforcement systems into compliance with TRIPS.[127] Members accept the principle of national treatment for the protection and enforcement of IPRs.[128]

The TRIPS agreement sets out minimum standards of protection to be provided by copyright law.[129] This protection is achieved in two ways. Firstly, the obligations of the main conventions which were already in place at the time the TRIPS agreement was negotiated were incorporated.[130] Secondly, the TRIPS agreement included its own substantive obligations which were there in addition to those already provided by the Berne Convention.[131] The following provisions of TRIPS outline copyright standards which are pertinent to the issue of access to educational materials:

- Its main objective is to protect and enforce IPRs which will contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.[132]
- In terms of the general obligation, there must be compliance with articles 1 to 21 of the Berne Convention.[133] These articles refer to the substantive provisions of the Berne Convention.

[123] Ibid 25-26.
[124] PK Yu „Why are the Trips Enforcement Provisions Ineffective?" available at http://www.peteryu.com/torremans2.pdf (accessed on 01 December 2013.
[125] Section III, Articles 41-61 of TRIPS.
[126] http://www.iipa.com/rbi/2004_Oct19_TRIPS.pdf (accessed on 03 December 2013).
[127] http://www.iipa.com/rbi/2004_Oct19_TRIPS.pdf (accessed on 03 December 2013).
[128] Article 3 and 4 of TRIPS.
[129] A Basharat „Is TRIPs Friendly to Development?" (July 10, 2012) available at *ssrn: http//ssrn.com/abstract=2103319* (accessed on 24 August 2013)6.
[130] Ibid 8.
[131] Ibid 8.
[132] Article 7 of TRIPS.
[133] Article 9 of TRIPS.

- The Agreement also contains a provision stating the well known principle that copyright protection extends to expressions, not to ideas.[134] This principle will be discussed in detail in chapter five of this dissertation.
- The term of protection must be no less than 50 years from the end of the calendar year of authorized publication.[135]
- Members must confine limitations or exceptions to exclusive rights to certain special cases which are not in conflict with a normal exploitation of the work and which do not unreasonably prejudice the legitimate interests of the right holder. [136]

Although the TRIPS agreement sets out certain minimum standards, it also recognises that different countries are at different levels of development and therefore there is a need to adopt these countries laws in order to suit their needs. Therefore it makes provision for certain flexibilities. These flexibilities, as expressed in the TRIPS agreement in terms of Article 13, are particularly important in order to promote the public interest of access to educational materials. What is important from a South African perspective is that South Africa must make full use of these flexibilities. This is highlighted in the South African Draft Policy where the government has acknowledged that South Africa must consider carefully whether or not to be a signatory to international conventions.[137] It is also important because, as will be discussed in chapter four, South African copyright law is largely based on British law and, to a large extent, South Africa simply adopted British law. However, it must be accepted that South Africa and Britain are at very different levels of development therefore South Africa should be careful of simply adopting a law which was developed for another country and must make sure that it formulates a law which is more suited to its (South Africa‟s) level of development, something which the draft policy has acknowledged.

[134] Article 9 (2) of TRIPS.
[135] Article 12 of TRIPS.
[136] Article 13 of TRIPS.
[137] Draft National Policy (note 9 above) 5-6.

2.5 Conclusion

The earliest origins of copyright law indicate that copyright was there to protect rival publishers and not authors. But with the introduction of the Statute of Anne, copyright law aimed at protecting the rights of authors together with the public so that the public may benefit from such protection. Most importantly, the Statute of Anne‟s main objective was to promote the encouragement of learning, an incentive given to authors in order to produce more books which will benefit both the author and the public. With the introduction of the TRIPS agreement, however, the protection of IPRs moved to the centre of trade negotiations. Enforcement of copyright then became a matter of global importance. With the advent of technological inventions, which will be discussed in chapter six of this dissertation, copyright issues have become even more important because it is so easy to copy information. On the one hand this means that access to information on a global basis has become so much easier and information is far more readily accessible but this raises critical issues when it comes to protecting copyright. This dissertation does not promote the argument that copyright law must be done away with completely as there are important reasons why the rights of authors need to be protected. But what is being argued in this dissertation is that South African law needs to be adapted for the needs of South Africa. Before focussing on South African law in particular, it is necessary to consider the theories which underlie the protection of copyright. These theories have developed in order to explain why copyright law has been developed and it is necessary to consider them when considering developments in South African copyright law.

CHAPTER 3

3 THEORIES OF COPYRIGHT LAW

3.1 Introduction

Overtime theories have been developed in order to explain why copyright is protected. The purpose of this chapter is to examine those theories because they make some important points which remain relevant today and therefore those points should be taken into consideration when amendments to the law are considered. However, it must be pointed out that these theories are also subject to criticisms. These criticisms also need to be considered because if there is an over emphasis on one theory as opposed to the other, then this may lead to the over protection of the rights of the author to the prejudice of the rights of the public to have access to information.

As explained at the outset, the two main reasons that are always given for the protection of copyright are to reward creators in order to encourage them to produce more works and to allow them to recoup the costs of producing those works.[138] The reasoning as explained by Boyle[139] is as follows: when an author writes a book, he invests a lot time and energy in order to come up with this creation, therefore he is entitled to be rewarded for his work, especially taking into account the costs of publishing a book. Boyle further explains that those who argue for copyright protection ask the question, how are authors and publishers to make money if their products can be undercut by copies that do not have to pay the research costs? [140] In addition, if authors cannot make this money, then how does the public induce people to be authors or to be inventors who put money into the publishing industry? The theories underlying the reasons for protecting copyright are the natural rights theory and the economic theory.

[138] Idris (note 3 above) 3.
[139] J Boyle *The Public Domain* (2008) 3.
[140] Ibid 3.

3.2 Natural rights theory

The natural rights theory asserts the view that the author is entitled to all the fruits of his labour and copyright law is there in order to protect the author from unauthorised interference with his rights.[141] The author should be protected from the appropriation of this property by others who have not made his investment in it.[142] For example, in terms of this theory a book belongs to an author because he created it, not because society or the law gives the author a period of exclusivity. This theory is based on John Locke‟s property justification,[143] which holds the view that the proceeds which are generated through the exploitation of an author‟s work belong to the author.[144] Hurt explains that;

> "The natural property right theory in its traditional form asserts a pre existing and perpetual absolute right of control over the benefits from a created work, to be parcelled out at the discretion of the author." [145]

3.2.1 Criticisms of the natural rights theory

The argument that authors are entitled to the results of their labour because this is in accordance with natural rights has been vastly criticised. It is argued that not all the value of copyright work or product is due to the author‟s labour, nor the value of copyright is due to the work of a single labourer, or any small group. Hence the reason that copyright is considered to be a social product.[146] What this means is that if a person writes a book for instance, it would not have been possible for the book to be written without lots of earlier work from other people.[147] These include teachers and parents and also earlier authors who provided the foundation for that person‟s contribution. Hettinger notes that if a person has a natural right to something it does not mean that, that particular individual deserves it.[148] If that particular individual worked hard to create a masterpiece, then he might have a natural

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[141] B Tyerman „Economic Rationale for Copyright Protection for Published Books; A Reply to Professor Breyer‟ (1970-1971) 18 *UCLA Law Review* 1101.
[142] SN Light „Parody, Burlesque, and the Economic Rationale for Copyright‟ (1979) 11 (4) *Connecticut Law Review* 619.
[143] Boyle (note 139 above) 28.
[144] T Dreier A Kur & M Planck *European Intellectual Property Law'; Text Cases and Materials* (2013) 242.
[145] RM Hurt & RM Schuchman „The American Economic Review‟ (1966) 56 (1/2) *JUSTOR* available at url: http://www.jstor.org/stable/1821305 (accessed on the 1 October 2013) 423.
[146] B Martin *Information Liberation* (1998) 37.
[147] Ibid 38.
[148] EC Hettinger „Justifying Intellectual Property‟ (1989) 18 *JUSTOR* 36.

right to it but might not deserve the entire market share.[149] If that particular individual did not work hard or make sacrifices, he should get less than the market value.[150] It seems that by employing the natural rights theory, it means that almost anyone can constitute an author as long as there is some form of labour that has been exerted in producing the work. The criticisms of the natural law theory indicate that it is perhaps unfair to give a person a monopoly over a work when there may be many other people who have also contributed, albeit in a more indirect manner, towards his ability to be able to create that work.

3.3 Economic theory

The economic justification of copyright lies with the premise that this protection provides incentives to authors to produce new creations.[151] When people are given a property right over their creations they receive an incentive to undertake the expense and time to invent new products or develop new ideas.[152] If IPRs are removed, the argument goes, then there will be no incentive to produce intellectual objects because people will be free to copy the object without compensating the creator.[153] This simply means that if competitors can copy books, movies, and take one another's inventions there would be no incentive to spend the vast amounts of time, energy, and money necessary to develop these products. In order to avoid this disastrous result, IPRs must continue to be granted.

This rationale simply explains that if authors do not have a monopoly over their works they will not benefit financially and so will not be encouraged to produce further works. [154] So the purpose of copyright law is to ensure that authors obtain a fair return for their work which will encourage them to produce further creative works which is for the general public good.[155] In this way copyright laws provide the incentive for authorship and the creation of more works, which will benefit society.[156]

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[149] Ibid 36.
[150] Ibid 36-37.
[151] J Hughes „The Philosophy of Intellectual Property" (1988) 77 *Geo.L.J.* 287.
[152] RL Ostergard „Intellectual Property: A Universal Human Right" (1999) 21 *Human Rights Quartely* 163.
[153] Ibid 163.
[154] H Demsetz „Information and Efficiency: Another Viewpoint" (1969) 12 (1) *J.L.& Econ*. 12-13.
[155] U.S. Constitution, Article 1 Clause 8.
[156] Ibid 573.

3.3.1 Criticisms for the economic theory

It is argued that copyright needs to be protected because authors and owners need to benefit economically from their works that they produce and therefore they are encouraged to produce further and better works. However, this approach has also been subjected to criticism. This approach has been criticised because it might in fact result in less works being produced because other people, who would have been allowed to use the author‟s works are denied such use.[157] Those who criticise this approach argue that there are other and better ways of achieving the same development without relying on the protection of copyright.[158] The question is not whether copyrights provide incentives for the production of original works of authorship: this is accepted. Rather, the following questions ought to be asked: does copyright increase the availability and use of intellectual products more than they restrict this availability and use? If they do, it is important that it is asked whether they increase the availability and use of intellectual products more than any alternative mechanism would? For example, could better overall results be achieved by shortening the length of copyright. This means that the justification for extending copyright protection is not economic and therefore the justification is weak.[159] Instead, other methods of rewarding authors could be employed such as tax exemptions for royalties or payment of cash bounties for literary creation.[160] This also begs the question as to what would happen were copyright protection to be abolished? Plant argues that in the 19th century, writers were able to sell their books even though there was no copyright protection, provided there was a market.[161] He gives the example of English authors who in the 19th century were paid by USA publishers in spite of the fact that their works were unprotected there.[162] In fact, English authors sometimes received more from the sale of their books by USA publishers, where they had no copyright, than from royalties in the UK. [163] Publishers paid because they wanted to be the first to publish a new book.[164]

These arguments indicate that although the economic theory has been proposed as a means of justifying the existence of copyright protection, history has demonstrated that creative people

[157] Hettinger (note 148 above) 48.
[158] Ibid 48.
[159] Light (note 142 above) 621.
[160] Hurt & Schuchman (note 145 above) 424.
[161] A Plant „The Economic Aspects of Copyright in Books“ *Economica n.s.* (1934) 167.
[162] Ibid 167.
[163] Ibid 167-169.
[164] Ibid 167.

do not necessarily create simply because they have copyright over their works. There may be other reasons why they create.

3.4 Conclusion

There are two theories which attempt to provide a rational basis for the protection of copyright and both have their supporters and their critics. However, what must be born in mind is that whatever theory is used, any revision of copyright law must take into consideration the reasons why copyright is protected and these revisions must have a rational basis. Otherwise, copyright protection becomes copyright protection for protection sake and not because it is in fact seeking to achieve something. Whatever law South Africa decides on must be rational when it comes to supporting these reasons for protecting copyright as outlined above. The purpose of this chapter is not to pick one theory over the other, but simply to highlight the two theories because they both make important points which might give insight into why copyright should or is protected. It is acknowledged that authors who create works should be entitled to benefit from their works and it is not suggested that they should not. Their rights must however be balanced against the rights of others to make use of those works. The next chapter will consider the current copyright framework in South Africa.

CHAPTER 4

4 COPYRIGHT LAW IN SOUTH AFRICA

4.1 Introduction

The purpose of this chapter is to highlight the historical development of copyright law in South Africa. In particular this chapter will highlight the fact that South African copyright law is largely derived from British law. It is argued that simply adopting British law is problematic, because this seems to have been done without taking into consideration South Africa‟s specific needs as a developing country. The Draft Policy[165] recognises the need to take into account the specific needs of South Africa when developing copyright law. Certain important provisions of copyright will also be highlighted and cases of relevance pertinent to the issue of access to educational materials will be discussed.

In South Africa copyright law is a creature of statute.[166] This means that all matters relating to copyright are regulated by the Copyright Act[167] and the additional Regulations made under authority of the Act.[168] It is, therefore, necessary to consult the statute whenever issues of copyright arise, especially when dealing with important aspects such as ownership of copyright, originality, duration of copyright and important exceptions.

4.2 A short history of the development of copyright law in South Africa

South Africa inherited its IP system from its colonial rulers, Great Britain.[169] This means that the current copyright system stems from the British Copyright Act of 1911.[170] After South Africa became a Union in 1910, the Union Parliament passed the Copyright Act No 9 of 1916.[171] The 1916 Act declared that the British Copyright Act of 1911 regulated the law of

[165] Draft National Policy (note 9 above).
[166] Dean (note 7 above) 1-3.
[167] Act 98 of 1978.
[168] Copyright Regulation, 1978 in GN R1211in GG 9775 of 7 June 1985 as amended by GN 1375 in GG 9807 of 28 June 1985.
[169] R Kahn & A Rens & „Access to Knowledge in South Africa‟ (2009) available at http:/www.yalesisp.org/wp-content/uloads/2009/10/A2K-in –SA.pdf (accessed on 05 December 2013).
[170] Pistorious (see note 66 above) 149.
[171] OH Dean *The Application of the Copyright Act, 1978, to Works Made Prior to 1979*. (published thesis) 1988, 8.

copyright in South Africa.[172] The Copyright Act of 1916 was then repealed by the Copyright Act No 63 of 1965 after South Africa became a Republic in 1961.[173] The 1965 Act was closely based on the British Act of 1956 which repealed the British Act of 1911.[174] The 1965 Act was eventually repealed by the Copyright Act 98 of 1978 which came into force on 1 January 1979[175] and is still in force even today. The 1978 Copyright Act[176] is influenced by the British copyright legislation and largely derives from the Berne Convention as well.[177] The 1978 Act has undergone several amendments[178] to form the law that currently regulates copyright in South Africa today. This means that all copyright legislation which was previously applicable in South Africa has been repealed.

4.3 The Copyright Act 98 of 1978

The following provides a basic guide to copyright as stipulated in the Act. Various sections are summarised below with particular reference to issues pertinent to access to educational materials.

4.3.1 Works protected by copyright

The Act[179] defines nine classes of work that are eligible for copyright. These are the following;

- Literary works;[180]
- Musical works;[181]
- Artistic works;[182]
- Sound recordings;[183]
- Cinematograph films;[184]
- Sound and television broadcasts;[185]

[172] Dean (note 7 above) 1-3.
[173] Ibid 1-3.
[174] Ibid 1-3.
[175] Dean (note 171 above)10.
[176] Act 98 of 1978.
[177] B William et el...„Model language for Exceptions and Limitations to Copyright Concerning Access to Learning Materials in South Africa" (2006) 7 *The Southern African Journal of Information and Communication* 83.
[178] This Act has been amended by Act 56 of 1980, Act 66 of 1983, Act 52 of 1984, Act 39 of 1986, Act 13 of 1988, Act 125 of 1992 and Act 38 of 1997.
[179] Act 98 of 1978 sec 2.
[180] Ibid sec 2 (1) (a).
[181] Ibid sec 2 (1) (b).
[182] Ibid sec 2 (1) (c).
[183] Ibid sec 2 (1) (d).
[184] Ibid sec 2 (1) (e).

- Programme-carrying signals;[186]
- Published editions;[187]
- Computer programs.[188]

As stated above, for the purposes of this dissertation, literary works are the most important. Article 2 of the Berne Convention explains that the expression „literary work" refers to:

> "Every production in the literary, scientific and artistic domain, whatever the mode of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature."[189]

Literary work as defined by the South African Act[190] constitutes the following works:

- Novels, stories and poetical works;
- Dramatic works, stage directions, cinematograph film scenarios and broadcasting scripts;
- Textbooks, treatises, histories, biographies, essays and articles;
- Encyclopaedias and dictionaries;
- Letters, reports and memoranda;
- Lectures, speeches and sermons; and
- Tables and compilations, including tables and compilations of data stored or embodied in a computer or a medium used in conjunction with a computer, but shall not include a computer program.

It must be noted that the work is protected irrespective of literary quality and in whatever mode or form that the work is expressed.

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[185] Ibid sec 2 (1) (f).
[186] Ibid sec 2 (1) (g).
[187] Ibid sec 2 (1) (h).
[188] Ibid sec 2 (1) (i).
[189] Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, Article 2.
[190] Act 98 of 1978; as defined by literary works in the definition section.

4.3.2 Ownership of copyright

The South African Copyright Act[191] clearly sets out who is considered to be an author of a copyright work. It is important to identify the author because the first ownership of the copyright in a work vests in the author.[192] In the case of literary and artistic works, the author is the person who first makes or creates the work.[193] An author must be a qualified person in order to obtain copyright protection. In terms of the Act a qualified person is:[194]

a) In the case of an individual, a person who is a South African citizen or who is domiciled or resident in the Republic of South Africa.
b) In the case of a juristic person, a body incorporated under the laws of the Republic of South Africa.

It must be noted that the owner of the work is different from an author. This distinction is of paramount importance when it comes to developing textbooks and notes and writing articles which are published in journals. As has been noted above, the author is usually the first owner of the work, but if an author has assigned his copyright to another person, for instance a publisher, he ceases to be the owner of that work.[195] This means that he no longer owns the copyright in that particular work and cannot use the work again without permission from the copyright owner.[196] Likewise, where someone has produced a work in the course and scope of his employment, the employer becomes the owner of the work.[197] The case of *King v South African Weather Service*[198] illustrates the rule that copyright of works created in the course of employment vests in the employer. The facts of the case were as follows. *King* was employed by the *South African Weather Service (SAWS)* for more than thirty years. He was initially appointed as a meteorological technician and he later became in charge of the Weather Bureaus Upington office.[199] *King* had created a number of computer programs between the period 1980-2002.[200] He was of the view that the programs were created in his own time, at his own home, and that the creation of these programs was not an essential part

[191] Ibid.
[192] Ibid sec 21 (1) (a).
[193] Ibid sec 21.
[194] Ibid sec 3(1).
[195] Ramsden (note 1 above) 50.
[196] Ibid 50.
[197] Ibid 50.
[198] *King v South African Weather Service* 2009 (3) SA 13 (SCA).
[199] Supra par 2.
[200] Ibid par 4.

of his contract of service.[201] He claimed that this was done in order to assist him in the performance of his duties as an employee. The programs that he created became extensively used by the *SAWS*. When his employment contract was terminated *King* insisted that *SAWS* stop using his programs. He argued that the programs were not created in the course and scope of his employment therefore ownership of the copyright in the programs vested with him and not his employer.[202] He eventually sued for copyright infringement and damages. The issue in contention before the court was whether the computer programs were created in the course of *King*'s employment, as both parties claimed ownership over the programs. The court held that ownership of the copyright in the computer programs vested in the *SAWS* because they were created in the course of his employment with the institution.[203] In reaching its decision the court accepted that "one would not ordinarily include computer programming as part of the duties of a meteorologist,"[204] however, the court went on to point out that, this was not the full picture. As a meteorologist *King* had to collect and collate meteorological data and transmit it to head office for analysis and storing. It was for this reason that he developed his programs. He did it to make his own job easier but he also did it because of his employment with the Bureau.[205] The court concluded that there was a "close causal connection between his employment and the creation of the programs. In other words, his employment was the *causa causans* of the programs."[206]

A number of people may collaborate to create a particular work which means that there may be an issue of joint ownership. This was illustrated in the case of *Peter-Ross v Ramesar and Another.*[207] In this case the court was faced with the question of deciding who owns a copyright in a research article written by two academics of the University of Cape Town. *Peter-Ross* and *Ramesar* worked together to develop an idea concerning biopolar disorders. *Peter Ross* then prepared an initial article in 2004 in which both academics were cited as its authors. Two years later, *Peter Ross* informed *Ramesar* that she had written and submitted the article for publication to *Molecular Psychiatry* and that she (Peter- Ross) was cited as the sole author of the article. *Ramesar* then informed the publication that he was a joint author of

[201] Ibid par 4.
[202] Ibid par 4.
[203] Ibid par 19.
[204] Ibid par 19.
[205] Ibid par 19.
[206] Ibid par 20.
[207] *Peter-Ross v Ramesar and Another* 2008 (4) SA 168 (C).

the publication and the publisher stopped the publication. *Peter-Ross* then sought a declaratory order that she was the sole copyright owner of the article which *Ramesar* opposed. In handing out its judgement the court held that:

> "In between these two situations are a variety of scenarios where it would be unwise to focus exclusively on contributions to the physical expression of the work. One such case is where two persons agree they will research and co-author an article. The ideas are quite obviously more important to the collaborators if the article is on a scientific topic. If they research and settle on the ideas to be recorded and it is left to one of them to produce a draft, there seems to be no reason why they should not be recognised as having jointly "made" or "created" the draft."[208]

The court held further that:

> "..if it is accepted that the Draft is a "literary work" and the reproduced text in the Article is simply a copying thereof, it is sufficient to preserve the first respondent's [Ramesar] status as co-author of the reproduced text....the Article was the end product of the collaboration to which the parties had committed themselves in their agreement."[209]

The two authors were considered to be co-authors of the article finally produced by *Peter-Ross.*

4.3.3 Requirements for the subsistence of copyright

The Copyright Act does not make provision for any form of registration for the subsistence of copyright.[210] This means that copyright arises automatically. There are two general requirements which a work must meet in order to enjoy copyright, firstly the work must be original[211] and it must also be reduced to material form.[212] Originality requires that the work must not be copied from another work but it must have originated from the author.[213] However, the concept of originality has a special meaning in copyright law. The work does

[208] Ibid par 18.
[209] Ibid par 20.
[210] As provided by the Berne Convention, by virtue of the fact that South Africa is a signatory to the Berne Convention.
[211] Act 98 of 1978 sec (2).
[212] Ibid sec 2 (2).
[213] T Pistorius in R Hilty & S Nerisson *Balancing Copyright-A Survey of National Approaches* (2012) 906. See also *Pan African Engineers (Pty) Ltd v Hydro Tube (Pty) Ltd and Another* 1972 (1) SA 470 (W).

not have to be created from scratch and a person may draw inspiration from existing works provided he puts his own skill and labour into developing the work.[214] This means that copying from another person‟s work is to a certain extent permissible and one may use the work of another as inspiration in order to create a new work provided the final product that is produced is produced through the "the author‟s own skill and labour, and the author is not simply taking the labour of another and passing it off as his or her own."[215] The amount of labour, skill or judgement required for a work to be original is a question of fact and degree in every case.[216] It was pointed out in the case of *Klep valves Pty Ltd v Saunders Valve Co Ltd* [217] that:

> "The requirement that a work should emanate from the author himself and not be copied must not be interpreted as meaning that a work will be regarded as original only where it is made without reference to existing subject matter. Indeed, was this so the great majority of works would be denied the benefit of copyright protection. It is perfectly possible for an author to make use of existing material and still achieve originality in respect of the work that he produces. In that event, the work must be more than simply a slavish copy; it must in some measure to be due to the application of the author‟s own skill or labour. Precisely how much skill and labour he need to contribute is difficult to say for much will depend on the facts of each particular case."[218]

It must be noted that if someone simply copy from another‟s work, they are not producing a work which is entitled to copyright protection and in fact will probably be guilty of copyright infringement (or plagiarism). However, even if a person uses someone else‟s work to produce their own work, provided they put sufficient skill and labour into that work, they will be entitled to copyright protection for the work they produce. How much skill and labour is required depends on the facts of each case which is what the *Klep valves* case points out.

[214] *Haup t/a Softcopy v Brewers Marketing Intelligence (Pty) Ltd* 2006 (4) SA 458 (SCA).
[215] T Woker „Principles of Copyright in Intellectual Property Law; An Overview Critical Arts; South –North Cultural and Media Studies‟(2006) 20 (1) 40.
[216] 2006 4 SA 458 (SCA) 473 A-B.
[217] *Klep valves Pty Ltd v Saunders Valve Co Ltd* 1987 2 SA 1 (A).
[218] Ibid par 27-28.

Sometimes a number of works may be similar because they have been developed from a similar source. However the fact that they emanate from a similar source does not necessarily mean that there has been copyright infringement.[219] The case of *Galago Publishers Pty Ltd and Another v Erasmus* [220] dealt with such an issue. This case involved two books which told the same story of the Rhodesian Selous Scouts. The first book was known as *Top Secret War.* The second book titled the *Selous Scouts: A Pictorial Account,* was based on pictures of the events which were discussed in *Top Secret War*. The applicants had obtained rights to publish *Top Secret War*. However, the copyright of *Top Secret War* had been assigned to the respondent (Erasmus). Thus, *Erasmus* claimed copyright infringement against *Galago Publishers*. He alleged *Pictorial Account* was a reproduction/ publication of the *Top Secret War*, or a substantial part thereof. It was common cause that the applicants did not have a licence to reproduce or publish or make an adaptation of *Top Secret War*. Therefore, all that needed to be proved was whether in producing and publishing *Pictorial Account*, the applicants reproduced *Top Secret War*. The court in handing out its decision it found that the similarities were far too acute; much of the language was the same and the same episodes were described, leading the court to conclude that the author of the second book wrote it with the first book "at his elbow".[221] Therefore the court found that there was copyright infringement.

Not only must the work be original but it must also exist in material form.[222] For copyright purposes, a work does not come into existence until it is reduced to a material form.[223] This simply means that, "there can be no copyright in a story while it still exist in the author‟s mind but copyright can vest once the story has been written down in the form of a literary work."[224] It is a maxim in copyright law that there is no copyright in ideas. It is the expression of the idea which is protected. This simply means that it is not the idea or fact which is protected but it is the manner in which the idea or fact is expressed that is protected.[225] In other words someone is permitted to use another person‟s idea, without infringing someone else‟s copyright, provided that that idea is expressed in their own way.

[219] Woker (note 215 above) 41.
[220] *Galago Publishers Pty Ltd and Another v Erasmus* 1989 1 SA 276 (A).
[221] 1989 1 SA 276 (A) par 29.
[222] Acts 98 of 1978; S 2 (2).
[223] Dean (note 171 above) 23.
[224] Ramsden (note 1 above) 27.
[225] AC Yen „A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work‟s Total Concept and Feel‟ (1989) 38 *Emory LJ* 393,395.

This will be discussed in more detail in chapter five of this dissertation which deals with aspects of public interest and copyright.

4.3.4 Duration of copyright

The length of time for which a work is protected varies depending on the type of work. For most types of works copyright lasts for the duration of the life of the author and fifty years after the author"s death.[226] This remains one of the central issues of this dissertation. Although copyright protection is limited it actually extends for a fairly lengthy period of time, especially in this day and age where information is evolving and changing very quickly.

For the purposes of this dissertation the issue of how long copyright lasts is an important issue. This is because as long as a work is protected by copyright, others such as students and teachers are unable to use the work freely. This has important implications especially when a work is no longer in print or has become an orphan work that is, the author is not readily available and so it is not possible to get permission to use the work. Despite the fact that an author or copyright owner cannot be traced, others may not be prepared to use the work freely for fear of being accused at a later stage of copyright infringement. The issue of the duration of copyright and, in particular, its effect on developing countries is discussed further in chapter six.

4.3.5 Use of a work subject to copyright

Once a work has been created it is usually illegal for anyone to do any of the following without the author"s permission:[227]

- Reproduce the work;
- Publish the work if it has not been published before;
- Perform the work in public;
- Broadcast the work;
- Adapt the work; or
- Cause the work to be transmitted in a diffusion service.

These acts are called restricted acts and while the details of the law may differ slightly for different categories of work, in essence they amount to the same. There are restrictions on copying the work or modifying of the work or commercially exploiting the work by charging

[226] Act 98 of 1978 sec (3) (2) (a).
[227] Ibid sec 6(a)-(f).

for it. This means that for a person to make use of a work which is subject to copyright he must get permission to use the work.[228] Permission may involve the granting of a license to use the work or copyright may be assigned to that particular individual.[229] Getting permission to use a work may involve the payment of royalties which may make it quite expensive to use that work. Even if a work is available on the internet or in a library, a person is not simply entitled to make a copy of that work. This could amount to copyright infringement unless the use falls within one of the recognised defences such as fair use or fair dealing as it is known in South Africa.[230] The issue of using another‟s work is central to the issue of copyright protection and it is central to the issue of this dissertation. When people learn, they learn by referring to the works of others. As Drahos has observed, copying and imitation are central to the process of learning and the acquisition of skills[231] and without copying and imitation a lot of valuable information would not be transmitted or learned.[232] In addition, the person who is creating information is always borrowing ideas from others.[233] But now, copyright puts a price on the costs of borrowing. The question is then, how will information be handed down from one generation to the next if people cannot copy from one another? This raises the whole issue of the public interest in accessing educational materials which will be discussed in chapter five.

4.4 Organisations protecting authors copyright

South Africa has various organisations that exist which act for copyright owners in licensing their content and enforcing their copyright.[234] These include DALRO which is part of (SAMRO). SAMRO‟s main objective is to protect the intellectual property of composers and authors and also to make sure that composers and authors receive proper credit both locally and internationally when the works that they create are being used.[235] DARLO‟s main aim is to protect various aspects of copyright on behalf of authors, artists and publishers.[236]

[228] Dean (note 171 above) 76.
[229] Act 98 of 1978 sec 22.
[230] Ibid sec 12.
[231] Braithworth & Drahos (note 24 above) 2.
[232] Ibid 2.
[233] Ibid 2.
[234] ES Nwauche „Open Access and the Public Interest in Copyright‟ (2010) 18 (1&2) *Africa Media Review* 107.
[235] http://www.samro.org.za/sites/all/themes/corporateclean/images/newsletters/samroNotes/50thSpecialEdition/samroNotes-50thSpecialEdition.pdf (accessed 4 April 2014).
[236] http://artmap.co.za/569/dramatic+artistic+and+literray+organisation+dalro/ (accessed on 4 April 2014).

4.5 Conclusion

From a modern South African perspective, copyright law dates back to 1978 when the present law which regulates copyright was enacted. As has been argued above, this was a long time before the modern technological age. Given the advances in modern technology and because South Africa is a developing state, there is a need to consider whether the law meets the needs of the public interest in accessing educational materials. The next chapter will therefore focus on copyright and the public interest.

CHAPTER 5

5 THE PUBLIC INTEREST

5.1 Introduction

As pointed out above, copyright is a concept established and developed in the public interest.[237] It is generally accepted that the public needs access to educational materials and other materials in order to develop. This has led to the development of certain exceptions which allow people to make use of copyright materials without permission. In discussing the issue of public interest, emphasis will be placed on two important principles in this chapter which are particularly relevant to this dissertation. These are, firstly, the principle that copyright does not protect ideas but only the form in which those ideas are expressed and secondly that people are entitled to make fair use of another person‟s work. The doctrine of fair use will be discussed under three parts. The first part will consider TRIPS and its interpretation of fair use. The second part will look at the USA interpretation of the fair use doctrine, where the four factors regulating fair use will be evaluated. In particular how this doctrine is interpreted in USA when it comes to libraries, teachers and students making copies for educational purposes, will be considered. Finally the fair use doctrine will be considered from a South African perspective. This will be done by discussing the Act[238] and its Regulations.[239] The Regulations are also important for purposes of this dissertation because they set out in detail when it is permissible to make copies of work which is protected by copyright.

5.2 There is no copyright in ideas

In dealing with the issue of copying, the principle that copyright only subsists in the expression of the idea and not the idea itself remains of fundamental importance.[240] Abina Sankar describes an idea as "a formulation of thought on a particular subject while an expression would constitute implementing the said idea."[241] To give an illustration of this concept, this means that copyright does not protect the general idea or concept that underlies

[237] Davies (note 6 above) 3.
[238] Act 98 of 1978.
[239] The 1978 Regulations.
[240] Article 9 (2) of TRIPS.
[241] KP Abina Sankar & NLR Chary „The Idea-Expression Dichotomy; Indianizing an International Debate" (2008) 3 (2) *Journal of International Commercial and Technology* 129.

a certain story, but it protects the way the idea is expressed. For example, if an author writes a book around the idea that bullying must be prevented, another author may not be prevented from writing another story about the evils of bullying, as long as he expresses this idea in a different way. As explained by Jones, the justification for protecting expressions but not ideas rests in balancing the interest of society in accessing information against the interest of authors in ensuring that their creativity is protected.[242]

5.3 Fair Use Doctrine

According to Masango, the fair dealing concept first started in 1803 as illustrated in the case of *Carg v Kearsely*[243] in which the author of *The Book of Roads* claimed infringement for the use of the same names of certain places, distance and making the same mistakes as in copyright work.[244] The judge, Lord Ellenborough said one may fairly adopt part of the work of another and the question is whether the work taken has been fairly used.[245] This then means that fair use works where only a part of a copyright work has been copied and not a whole of that work. Fair use or fair dealing is relied upon to justify copying where copying of a work might have been prohibited by law. Examples include copying for criticism, teaching or classroom use.[246] An examination of the history of the fair use exception indicates that it was developed over a period of time.[247] Thus the fair use exception is very important to this dissertation because it forms the backbone of laws which permit the making of copies of copyrighted work. Fair use promotes access to educational material by determining the amount of copying allowed per copyrighted work.[248] In this way then, fair use increases access to literary work[249] and it is used when the social benefit of the use outweighs the loss to the copyright owner.[250]

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[242] RH Jones „The Myth of the Idea/Expression Dichotomy in Copyright Law" (1990)10 (3) *Pace Law Review* 561.
[243] *Carg v Kearsely* 4 Esp. 168 1803.
[244] CA Masango „Understanding Copyright in Support of Scholarship: Some Possible Challenges to Scholars and Academic Librarians in the Digital Environment" (2009) 29 *Int J of Information Management* 232.
[245] Ibid 233.
[246] Vaidhyanathan (see note 41 above) 27.
[247] PN Leval „Nimmer Lecture: Fair Use Rescued" (1996-1997) 44 *UCLA LR* 1449, 1450.
[248] KD Crews *Copyright, Fair use and Challenge for Universities: Promoting the progress of Higher Education* (1993) 2.
[249] RDL Rogers „Increasing Access to Knowledge Through Fair Use-Analyzing the Google Litigation Unleash Developing Countries" (2007) 10 *Tul J of Technology & Intell Prop* 22.
[250] Ibid 30.

5.3.1 TRIPS and fair use

The important point to note is that when signatories to the TRIPS agreement, such as South Africa, formulate their fair use exception to be set out in their own legislation, they must take this three step test into consideration. The test provides that limitations or exceptions to exclusive rights must be confined to:

- „certain special cases";
- which do „not conflict with a normal exploitation" of the copy right material, and
- do „not unreasonably prejudice the legitimate interests" of the rights holder.[251]

This three step test was considered by the WTO Panel.[252] In interpreting the first leg of the test which refers to "certain special cases" the Panel took the view that it should be interpreted as follows;

> "In our view, the first condition of Article 13 requires that a limitation or exception in national legislation should be clearly defined and should be narrow in its scope and reach..... The wording of Article 13's first condition does not imply passing a judgement on the legitimacy by law- makers when enacting a limitation or exception may be useful from a factual perspective for making inferences about the scope of a limitation or exception or the clarity of its definition."[253]

Wang remarks that the first step implies that copying is exempt in cases where a person uses a work for his private appreciation as well as for education and research.[254] This could be interpreted that the first test may be satisfied if a person makes copies for the purposes of scholarly, quotations and uses in educational institutions including teaching. However, there have been arguments over the meaning of the term "certain special cases". The WTO Panel endorsed the view that the term "certain special cases" does not give national legislators the

[251] Article 13 of TRIPS Agreement.
[252] This is a WTO dispute resolution panel formed in 2000, established under Article 64 of TRIPS. This panel dealt with the interpretation and application of the three-step test contained in Article 13 of TRIPS and extensively analyzed each of the steps on the occasion of a dispute between the European Union and the United States of America over an exception to the right-holders' copyright in US copyright law . As it was the first and only decision by an international body concerning the three-step test in copyright law, the decision provides valuable guidance to legislatures enacting legislation to comply with the three-step test and to those interpreting existing legislation. See J Oliver „Copyright in the WTO: The Panel Decision on the Three-Step Test" (2001-2002) 25 *Columbia Journal of Law & the Arts* 170.
[253] WTO Panel on United States – Section 110(5) of the US Copyright Act, document WT/DS160/R 15 June 2000 ("WTO Panel") par 6.112.
[254] Jia Wang (note 49 above) 65.

mandate to make exceptions for any special purpose.[255] This then means that limitations and exceptions formulated in national laws should remain clearly defined.

The second step requires that a use "does not conflict with a normal exploitation of the work". This step relates to the economic interest of the author.[256] In interpreting the words „nomal exploitation" the WTO Panel expressed the view that:

> "An exception or limitation to an exclusive right in domestic legislation rises to the level of a conflict with a normal exploitation of the work…, if uses, that in principle are covered by that right but exempted under the exception or limitation, enter into economic competition with the ways that right holders normally extract economic value from that right to the work (i.e., the copyright) and thereby deprive them of significant or tangible commercial gains."[257]

This quote means that exceptions are limited to non commercial uses of the author"s work, which prevents any copies from being sold in the market place. A general understanding of "normal exploitation" is an author"s expectation of receiving some kind of revenue from a marketed work.[258]

The third step requires that a use "does not unreasonably prejudice the legitimate interests of the author". The WTO Panel had to examine the dictionary meaning of the words "interests"[259] "prejudice"[260] as well as "legitimate".[261] Thereafter, the WTO Panel had to consider which degree of prejudice should be considered as unreasonable.[262] Unreasonable is taken to mean not proportionate or within limits of reason. Prejudice means harm or damage such that the whole factor may be construed as allowing or making exceptions that are not

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[255] JC Ginsburg „Toward Supra national Copyright Law? The WTO Panel Decision and the 'Three-Step Test" 'for Copyright Exceptions" (2001) 187 *Revue Internationale du Droitd'Auteur* 5.
[256] Jia Wang (note 49 above) 66.
[257] WTO Panel par 6.183.
[258] Jia Wang (see note 49 above) 66.
[259] The Panel stated that "the ordinary meaning of the term "interests" may encompass a legal right or title to a property or to use or benefit of a property (including intellectual property). It may also refer to a concern about a potential detriment or advantage, and more generally to something that is of some importance to a natural or legal person. Accordingly, the notion of "interests" is not necessarily limited to actual or potential economic advantage or detriment." Par 6.223.
[260] The Panel noted that "ordinary meaning of „prejudice" connotes damage, harm or injury." par. 6.225
[261] The Panel noted that "The term "legitimate" has the meaning of (a) conformable to, sanctioned or authorized by, law or principle; lawful; justifiable; proper; (b) normal, regular, conformable to a recognized standard type." par. 6.224.
[262] Tobias Schonwetter „The Implications of Digitizing and the Internet for Fair Use in South Africa" published thesis (2005) 24.

proportionate or may cause harm to the rights of the copyright holder.[263] The prejudice may be substantial or material but must not be unreasonable and unreasonableness may be avoided by imposition of conditions such as payment of remuneration.[264] The Panel held in this regard that "prejudice to the legitimate interests of right holders reaches an unreasonable level if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner."[265]

In order for use to be fair, a person has to satisfy all three steps.[266] It is not sufficient to just satisfy one step such as, the use is for teaching purposes. If the use is for teaching purposes but it is prejudicial to the interests of the copyright owner because that individual has made copies of a book instead of requiring students to buy the book (usually because it is cheaper to make copies than it is to require the students to buy the book) then this act would not constitute fair use.

5.3.2 The USA interpretation of fair use

It is useful to consider the way in which the courts in the USA have interpreted the concept of fair use because it has received so much attention in the USA and because the South African concept of fair dealing is at times considered to be the same as the USA concept of fair use.

This doctrine was received and eventually incorporated into the USA Copyright Act of 1976, which also provides that "the fair use of a copyrighted work . . . is not an infringement of copyright."[267] According to the USA law, a copyright holder has exclusive rights over his copyrighted work and may authorize the use of his work in four qualified ways including reproduction of copyrighted work.[268] However, another person may reproduce such work for fair use which is determined by considering four factors. 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 as a whole; and 4) the

[263] S Ricketson „The Three Step Test, Deemed Quantities, Libraries and Closed Exceptions: Centre of Copyright Studies Ltd"(2002) available at www.copyright.org.au/admin/cms.../15152925445080e3c7dea8.pdf (accessed on 26 May 2014) 39-40.
[264] Ibid.
[265] WTO Panel par 6.229.
[266] T Schonwetter „The Three- Step Test Within the Copyright System" available at http://pcf4.dec.uwi.edu/viewpaper.php?id=58&print=1 (accessed on 26 May 2014).
[267] Copyright Act (USA) of 1976 s107.
[268] Copyright Act (USA) of 1976 s106.

effect of the use upon the potential market or value of the copyrighted work.[269] These four factors will be explained below with particular reference to how they are interpreted when it comes to libraries and access to educational material. To determine whether copying is allowed under fair use, one has to apply the four factors on a case by case basis. All four provisions must be read together and not in isolation of each other.[270]

The first factor directs us to examine the purpose and character of use including whether copies are made for commercial use or non profit educational purposes.[271] This means that if copying is strictly done for non profit educational purposes such as making of course packs for students then step one of test has been satisfied. The second factor focuses on the nature of the work to be used. To illustrate this point by way of an example, it is said that it is less likely to be fair to use elements of a work that has been unpublished as opposed to work that has been published.[272] This basically means that making someone else‟s work public when they chose not to is considered to be unfair. Likewise, borrowing from a factual work is more likely to constitute fair use than borrowing from a creative one.[273] This is because copyright does not protect facts.[274] The third factor assesses how much of the original copyrighted work has been taken in the making of the new work. [275] In general, it has been said that where a less amount of work is reproduced by a teacher for a class, fair use may be relied upon but where a whole book or all the articles in a journal are copied, the defence of fair use may not be employed.[276] The last enquiry relates to the effect which the use has upon the potential market for the copyright work or the actual value of the copyright work.[277] The courts generally do not deem use to be fair, if the user will make money from the use.[278] This is so even if it does not appear to be of harm or potential harm to the rights of the owner. [279] There is no need to show actual present harm or for there to be certainty of future harm.[280] This principle was illustrated in *Basic Books Inc. v Kinko's Graphics Corp.*[281] In this case the court held that the act of copying and selling of excerpts from books by *Kinko* directly to

[269] Ibid s107.
[270] http://www.internetlegal.com/164/ (accessed on 12 June 2014).
[271] Ibid sec107(1).
[272] https://www.lib.umn.edu/copyright/fairuse (accessed on 14 June 2014).
[273] Ibid.
[274] Ibid.
[275] MR Barry „Multiple Photocopying by Educators and the Fair Use Doctrine: The Court‟s Role in Reducing Transaction Costs‟ (1994) 2 Univ *of Illinois LR* 395.
[276] Ibid 395.
[277] Copyright Act (USA) s107.
[278] *Sony Corp of America v Universal City Studios* 464 U.S. 417 (1984) 451.
[279] Ibid.
[280] Ibid.
[281] *Basic Books Inc. v Kinko's Graphics Corp* 758 F. Supp. 1522 (S.D.N.Y 1991).

students without seeking permission from *Basic Books* and without paying the required fees was not fair use because the entire chapters or substantial portions of books were copied. This caused a great deal of harm to the plaintiff‟s market.[282]

The fourth factor in the test may be compared to the third factor in the TRIPS test which states that the "exception or limitation should not unreasonably prejudice the legitimate interest of the right holder."[283] Although the two factors are worded differently and may be applied differently, their aim seems to be the same. Where the reproduction is of a small quantity such as a chapter and is not used to make a profit or to negatively affect the incentive of copyright holder, such copying may be allowed under fair use. However, where such reproduction is more than the allowed exception, this may result in a reduction of incentive for a copyright holder, fair use may not be used and a compensation for infringement of a copyright should be paid.

5.3.3 South African interpretation of fair use

As discussed in Chapter four, in South Africa making copies for educational purposes falls under the fair dealing concept which supports access to learning materials.[284] Fair dealing may be taken as a measure which supports the fundamental right to education.[285] Fair dealing, which is set out in section 12 of the Act is allowed for the purposes of research or private study, personal or private use and criticism or review of that work.[286] In addition, section 13 of the Act allows for reproduction which is not in conflict with a normal exploitation of the work and is not unreasonably prejudicial to the legitimate interests of the owner of the copyright.[287] Section 13 of the Copyright Act must be read with the Copyright Regulations.[288]

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[282] *Basic Books Inc. v Kinko's Graphics Corp* 758 F. Supp. 1522 (S.D.N.Y 1991) in Barry (note 280 above) 399.

[283] Article 13 of TRIPS.

[284] A Rens et al... „Intellectual Property, Education and Access to Knowledge in Southern Africa" published in Tralac Working Paper No 13 of August (2006) 1.

[285] Constitution of Republic of South Africa s29.

[286] Act 98 of 1978: sec12(1) reads:
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.

[287] Act 98 of 1978 s 13 „In addition to reproduction permitted in terms of a work shall also be permitted as prescribed by regulation, but in such a manner that the reproduction is not in conflict with a normal exploitation of the work and is not unreasonably prejudicial to the legitimate interests of the owners of the copyright."

The Regulations provide for when it is permissible to make copies of copyright work. Section 12 (1) of the Act allows the making of a single copy of a reasonable portion of a work, consistent with fair use for the purposes of research or private study, or for personal or private use.[289] It is generally accepted that the copying of the whole or a major portion of the work in question is not reasonable and not in accordance with the principle of fair dealing.[290] The user is not entitled to make the copy available to others.

As stated above, section 13 of the Copyright Act together with the Regulations give guidelines regarding when the reproduction of copyrighted works is authorised by the Act. The Copyright Regulations permits reproduction with two limitations.[291] Firstly a user is not allowed to make more than one copy of a reasonable portion of a work.[292] The second limitation is that the "cumulative effect" of a reproduction may not conflict with the normal exploitation of the work so that the author's legal interests and residuary rights are not unreasonably affected.[293]

The Regulations are specific about the amount of copies which can be made for classroom purposes and they limit the scope for making course packs for students. The Regulations provide that copies may not exceed one copy per student per course and may be made by or for a teacher for classroom use or discussion.[294] However, such copying may not be used as a substitute for books and may not be repeated for the same material by the same teacher every term.[295] This means that, if a teacher only has one copy of a particular book she is not allowed to copy that book for her students as this would exceed the bounds of fair use. If a teacher makes up a course pack of various materials for her students she is not allowed to re-copy this on an annual basis for her students. It seems that the Regulations are even more restrictive than TRIPS or the Copyright Act. For example, students may not have access to all the materials that they need and it may also be exorbitantly expensive to expect students to purchase lots of different books when they only need certain limited portions of each book. Therefore, it is argued that, these regulations need to be reconsidered.

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[288] The 1978 Regulations.
[289] http://www.tanyapretorius.co.za/content/writing/copyright/copyright%20in%20south%20africa.html (accessed on 12 April 2014).
[290] http://www.tanyapretorius.co.za/content/writing/copyright/copyright%20in%20south%20africa.html. (accessed on 12 April 2014).
[291] Copyright Regulations of 1978 reg 2.
[292] Supra reg 2.
[293] Copyright Regulations of 1978 reg 2.
[294] Supra reg 7.
[295] Supra reg 9.

Libraries are other constituencies that are facing serious challenges as they strive to preserve and make information available to the public. Regulation 3 lays down the conditions on which a library and its employees may reproduce and distribute a work. The regulation provides as follows:

- The library must not in any way profit from its reproduction or distribution;
- The library has to be open to the public or available to researchers affiliated with the library;
- The librarian can reproduce and distribute a limited amount of an unpublished work;
- The librarian can reproduce a published work to replace an original copy only if the original has deteriorated or is damaged and is unavailable in the market at a reasonable price;
- The librarian can reproduce and distribute a work from its own collection on a reader's request or for another library or archive depository. But the librarian is not allowed to copy more than one article in a periodical or more than a reasonable portion of any other copyrighted work. The copy only is to be used for private study or personal use;
- 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 market at a reasonable price;
- The reproduction of a work must have a copyright warning, and the library has to have a copyright warning prominently displayed on its premise.[296]

The library exceptions show that a librarian can copy materials on behalf of a reader for private study but there is no provision that allows librarians to make copies for both research and private study.[297]

The USA four factor test approach seems to be better than the South African approach of the fair use defence. This is because the USA four factor test is open ended, in the sense that it lists the criteria for assessing what constitutes fair use. It does not put such stringent limits on what can or cannot be done. The point is that one needs to consider the four factors and then make a decision on a case by case basis. This approach has, for example, allowed the courts in the USA to develop the defence of parody. In South Africa, on the other hand, there are

[296] Copyright Regulations of 1978 Reg 3.
[297] Jia Wang (note 49 above)155.

certain specified exceptions as set out in section 12. Therefore, one needs to bring the use of the work within the parameters of section 12 and if this cannot be done, then the use will not constitute fair use. This means that it is far more difficult for South Africa to develop a parody defence as the USA has been able to do.[298]

5.4 Conclusion

It is important to ensure that there is a fair balance between the interests of users and the public on the one hand and the copyright-holders on the other. South Africa is a developing country and this is an issue which must be considered especially when it comes to access to educational materials. The South African Regulations appear to be far more stringent than is required. The question then is: is South Africa as a developing country taking into consideration its own needs and developing its own approach as provided by the TRIPS Agreement, or is South Africa just blindly following other countries? South Africa needs to review its copyright law, so that its law will suit its own national needs. The needs of developing countries will be discussed in chapter seven. In order to ascertain whether sufficient consideration is being given to the public good, chapter six analyses recent developments in copyright law.

[298] A full discussion of the defence of parody is beyond the scope of this thesis (but see the case of *Laugh It Off Promotions v South African Breweries International (Finance) B.V. t/a Sabmark International* 2006 (1) SA 144 (CC). This, albeit brief, discussion of the defence of parody serves to highlight that the South African approach is more restrictive than the approach of the USA.

CHAPTER 6

6 DEVELOPMENTS IN COPYRIGHT LAW

6.1 Introduction

The purpose of this chapter is to consider the developments that have taken place in copyright law over the last century which highlight the fact that we are tending to protect the copyright owner‟s rights more than we protect the rights of the public. It is also important to consider these developments in order to evaluate the impact they are having on the rights of the public to have access to copyright material. These developments may mean that the delicate balance between the rights of the copyright holder and the public interest is being unduly disturbed in favour of the copyright owner to the detriment of the public interest.

Overtime, since the introduction of copyright, the law has changed to provide further and better protection for copyright holders these include;

- The extension of time which affects orphan works;
- The extension of works covered by copyrights, inclusion of computer programmes;
- Automatic vesting of copyright without the need for further steps; and
- In the USA the introduction of the Digital Millennium Copyright Act.[299]

6.2 The extension of time

The question of how long copyright should last has been a controversial matter since copyright law was first developed. Since the protection of copyright was introduced in the 18th century the period of protection has been expanded on a number of occasions.[300] The Statute of Anne in the United Kingdom originally provided that the maximum term of protection was 28 years. In 1814 this was extended to the term of the author‟s life.[301]In America, the term was originally 14 years which was renewable for a further 14 years which was then expanded to 28 years in 1831.[302] Finally, in 1998, the term was extended, in the USA, to 70 years after the death of the author.[303]

[299] Digital Millennium Copyright Act of 1998.
[300] Duthfield & Suthersanen (note 17 above) 97.
[301] Ibid 97.
[302] Vaidhyanathan (note 41 above) 45.
[303] See the Copyright Extension Act of 1998 which is also known as the Sono Bono Copyright Term Extension Act.

As noted above, the Berne Convention adopted the standard of the life of the author plus 50 years which was subsequently adopted in the 1994 TRIPS agreement.[304] The Copyright Act of South Africa also provides for protection of copyright for the duration of the author and fifty years after his death.[305] However, it is questionable whether this extension on copyright works has served the wider public interest to have access to educational materials.[306] There is a view that, an extension of the copyright term "impacts the date on which a work falls into the public domain and is used freely, that is without authorisation from the copyright holder or payment of royalties."[307]

Commentators who are in favour of copyright extension argue that more years of protection will spur more creative activity.[308] If the primary purpose of copyright is to encourage authors to create more works, then it must be shown that increasing the period of protection will encourage further and better works.[309] From the perspective of this dissertation, a shorter term of protection will mean that the public will have free access to educational materials much earlier.[310] Hamilton notes that there is no proof that extending the copyright term will encourage innovation.[311] Instead these developments have revealed that IP laws have the potential to interfere with, rather than encourage, artistic creativity.[312] Boyle explains that;

> "Because the copyright term is now so long, in many cases extending well over a century, most of the twentieth culture is still under copyright and still unavailable, much of this is lost culture. No one is printing the books, and in fact we may not even know who holds the copyright."[313]

Boyle explains further that the lengthening of the copyright term was done without any credible evidence that it was necessary to encourage innovation.[314] Furthermore, this extension does nothing to promote creativity, because creativity requires authors to reuse and reshape the works of other author"s works.[315] Instead, it is argued, this extension protects

[304] Article 12 of TRIPS.
[305] Section 3 (2) (a) of the Copyright Act.
[306] J Davis *Intellectual Property Law* (2001) 98.
[307] C Armstrong... et al *Access to Knowledge in Africa: The Role of Copyright* (2010) 238.
[308] MA Hamilton „Copyright Duration Extension and the Dark Heart of Copyright." (1996) *Cardozo Arts&Ent.L.J.* 14 657.
[309] Davies (note 6 above) 271.
[310] Armstrong (note 307 above) 238.
[311] Hamilton (note 308 above) 657.
[312] DJ Gifford „Innovation and Creativity in the Fine Arts; The Relevance and Irrelevance of Copyright." (2000)18 *Cardoo Arts & Ent. L.J*. 571.
[313] Boyle (note 139 above) 9.
[314] Ibid 15.
[315] Vaidhyanathan (note 41 above)186.

established works and prevents the development of new works.[316] Because protection is now for such a lengthy period owners have a virtual perpetual monopoly over creative works and the public are being starved of raw materials which are needed to create new works.[317]The point in issue here is how long should copyright last after the death of the author? Macaulay argues that "it can hardly be disputed by any rational man that this is a point which the legislature is free to determine in the way which may appear to be most conducive to the public good."[318] In other words governments should arrive at what it considers a period most conducive to the public good in shaping the modern copyright system.[319]

Some authors have claimed that they are stimulated to create by the need to provide for their dependants.[320] However this argument has been criticised because it is questionable whether authors are really inspired to create by the possibility of their grandchildren obtaining remuneration from their efforts.[321] One of the main reasons for protecting copyright is so that authors can earn an income from the works which they produce. Maybe there are some good reasons why this should also be extended to their children, however, it is seriously questionable why the further descendants of authors should benefit. They have done nothing to produce the work and it does not benefit the public domain to have the work continue to be inaccessible. Most importantly extending the term of protection exacerbates the orphan works problem, because as the term increases the practical difficulties of locating rights holders also increases.

6.2.1 Orphan works

An orphan work is a work such as a book, in which copyright exist but where the copyright owner is either not known or cannot be located.[322] The fact that the owner is unknown prevents any transaction to secure the rights in order to use the copyrighted work.[323]A large portion of existing literary material is untouchable because, if the copyright owner cannot be

[316] Ibid 186.
[317] Ibid 186.
[318] M Hansard Vol 56 (5) (1841) available at http://hansard.millbankssystems.com/commons/1841/feb/05/copyright (accessed on 4 April 2014) at par 346.
[319] Davies (note 6 above) 271.
[320] WM Landers & RA Posner „Indefinitely Renewable Copyright" (2003) *The University of Chicago Law Review* 70 (2) 471.
[321] Davies (note 6 above) 273.
[322] The U.S. Copyright Office defines "Orphan works" as works that are subject to copyright but whose copyright owners "cannot be identified and located by someone who wishes to make use of the work in a manner that requires permission of the copyright owner." u.s. copyright office, report on orphan works 1 (2006) [hereinafter, Report on Orphan Works]. http://www.copyright.gov/orphan/orphan-report-full.pdf. Page1.
[323] Ibid 1.

found to secure the permission to use the work, then no one will ultimately use the work because they risk the possibility of being accused of copyright infringement.[324] The inability to make use of such works means that educational materials become unavailable especially if they are out of print.

The Copyright Act of South Africa specifically provides that a person who wishes to use a protected work must seek permission from the rights holder or risk a copyright infringement suit.[325] As stated above this is problematic when the owner is unknown or cannot be located. Due to the fact that copyright need not be registered in order for it to come into existence, tracking down the holder of the copyright can be complex, especially in respect of older works.[326]As a result this means that such works may sit idle. For at least some of these works the rights holders would not necessarily object to the use of their works. Furthermore many of these works may already be in the public domain but it is not possible to establish whether the authors have died or not.

An example illustrating the orphan works problem is found in the case of *Authors Guild vs the Google Print library Projec*t.[327] This case involved a partnership between Google, Inc. and several research libraries.[328] Google Inc and several research libraries planned to make available through Google‟s searchable online, full or partial texts works in the public domain for anything that was published after 1923.[329] However, this sparked an anger amongst some commentators, who complained that Google was engaging in "large-scale infringement" because of the inclusion of partial text scans of books still under copyright, and also that Google would be guilty of copyright infringement by displaying the search result to book seeking users.[330] McGraw Hill Co Inc and Copyright holders sued Google for the creation and use of the library project. They argued that Google was using two levels of copying. The two levels of copying involved the following:

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[324] J Brito & B Dooling „An Orphan Works Affirmative Defence to Copyright Infringement Actions‟ (2005) 12 *Mich. Telecomm. Tech. L. Rev*. 76.
[325] Act 98 of 1978 sec: 23 (1) (2).
[326] Brito & Dooling (note 324 above) 77.
[327] Press Release, Google Inc., Google Checks Out Library Books (December 14, 2004) available at http:www.google.com/intl/en/pressrel/print_library.html (accessed on 17 October 2013).
[328] Press Release, Google Inc., Google Checks Out Library Books (December 14, 2004) available at http:www.google.com/intl/en/pressrel/print_library.html (accessed on 17 October 2013).
[329] Press Release, Google Inc., *supra* note 315; Google Book Search, How will library books look on Google?, https://books.google.com/support/parner/bin/answer.py?answer= 20768&topic=1047 (accessed on 17 October 2013).
[330] Brito & Dooling (note 324 above) 80.

(1) The scanning of books into digital form which involved the creation of a new copy without the copyright holders" consent;
(2) The loading of scanned works into the RAM of a new server which constitutes making a copy and display of results being reproduction for a user as well.

On the other hand, Google argued that what it was doing constituted fair use because only work that was in the public domain could be viewed in its entirety. Work which was still protected by copyright can only be viewed in parts. The presiding judge in handing down its decision, held that;

> "In my view, Google Books provides significant public benefits. It advances the progress of the arts and sciences, while maintaining respectful consideration for the rights of authors and other creative individuals, and without adversely impacting the rights of copyright holders. It has become an invaluable research tool that permits students, teachers, libraries, and others to more efficiently identify and locate books. It has given scholars the ability, for the first time, to conduct full-text searchers of tens of millions of books. It preserves books, in particular out of print and old books that have been forgotten in the bowels of libraries, and it gives them new life. It facilitates access to books for print-disabled and remote or undeserved populations. It generates new audiences and creates new sources of income for authors publishers. Indeed, all society benefits."[331]

It is argued that this situation reflects a clear example of how the important balance in the copyright system between the rights of the creator and the rights of the public to have access to works has tipped too far in favour of creators and against the object of copyright law, which is "to promote broad public availability of literature, music, and the other arts."[332] Even if the current trend of providing for a lengthy term of copyright protection is not changed, it is imperative that provision is made for providing access to orphan works. Works that the copyright owner has abandoned may not be commercially viable, but they still contain vital pieces of cultural history which should be preserved. A system that provides access to orphaned works will allow libraries to preserve them for future generations, scholars to use them in research, writers to incorporate them into their own new creations, and the public to have access to the full cultural history.

[331] http:www.google.com/intl/en/pressrel/print_library.html at par 26.
[332] Brito & Dooling (note 324 above) 81.

6.3 The extension of works covered by copyrights

The ongoing advance of technological developments has consistently opened up new dimensions to the concept of copyright.[333] From an access to education point of view the technological world presents an amazing way of getting information to masses of people at a relatively low price.[334] With the introduction of computers and access to the internet, academics are able to download materials for educational purposes from all over the world. In this way people have so much more access to so much more information. There is no doubt that the internet is an incredible educational tool. It is also relatively inexpensive to place works on the internet, so publishing costs are substantially reduced and may even be non-existent. This means that one of the major reasons for protecting copyright (i.e. the costs of publishing works) has been substantially reduced. Hence there is a need to re-think copyright protection.

However, the downside to these developments has been the far reaching provisions that have been introduced into copyright law which curtail access to educational materials. It is argued that these developments may have tipped the balance between competing rights towards copyright owners and away from the public good. An example is the 1996 World Intellectual Property Organization (WIPO) Copyright Treaty which extended copyright law to allow copyright owners to place technological measures on CDs and online works which not only prevents the reproduction and dissemination of the copied work, but also allows owners to prevent access to such works.[335]In other words, the public is no longer able to exercise its right to make fair use of the material.

As has been discussed above in chapter four that, for a work to be protected by copyright, the creation must fit within one or more of the recognized categories of subject matter provided for by the South African Copyright Act.[336] In the last two decades of the twentieth century, copyright law has been extended to cover protection of computer programmes or software.[337] Initially *Northern Office Micro Computers*[338] was authority for the view that computer programmes were eligible for copyright protection as it is recognised as a form of literary

[333] WP Callahan & T J Switzer „Technology as a Facilitator of Quality Education: A Model" available at http://www.intime.uni.edu/model/modelarticle.html (accessed on 12 June 2014).
[334] A Report by the National Advisory Committee on Creative and Cultural Education (1999) available at http://sirkenrobinson.com/pdf/allourfutures.pdf (accessed on 12 June 2014) 22.
[335] Duthfield & Suthersanen (note 17 above) 74.
[336]Act 98 of 1978 sec 2 (a)- (i).
[337] Duthfield & Suthersanen (note 17 above) 74.
[338] 1981 (4) SA 123 (C).

work. Since that case was decided, the Copyright Act has been amended to include computer programmes within the list of works which are accorded protection under the Act.[339] From this it can be seen that the law is gradually extending the number of works which can be protected by copyright. The software industry is developing rapidly and so new questions arise as to what aspects of software should be protected by copyright.

The USA Court of Appeals in *Alcatel USA Inc v DGI Technologies Inc*s held it was a misuse of copyright law to prevent software producers from copying another‟s software so that they could develop accessory products which were compatible with the original software.[340] This case has raised considerable discussion about how far copyright holders may go to legitimately protect their exclusive rights**.**[341] This raises the broader issue of what uses should be regarded as "fair" and therefore permissible even without consent.[342]

A particularly interesting question here is the economic justification for copyright protection for software. As discussed in chapter three economic theories of copyright stress that authors receive an incentive for creativity.[343]However, the modern software industry raises some doubts about the validity of these economic models,[344] because there is a developing open source industry, where the software code is given out for free. This supports the view that creativity may occur without any need for copyright incentives.[345] In other words, copyright may not necessarily be the incentive for creativity in general, or at least in the field of software.[346]

[339] Act 98 of 1978, sec 2 (1) (i); sec 11 B.
[340] 166 F 3d 772 (US Ct App (5th Cir), 1999).
[341] JC Ginsburg „Copyright and Control Over New Technologies of Dissemination.‟ (2001) 101 (7) *Columbia Law Review* 1613 available at http://www.jstor.org/stable1123809 (accessed on 18 October 2013).
[342] Act 98 of 1978;sec 19 B.
[343] W M Landers & RA Posner „An Economic Analysis of Copyright Law.‟ (1989)18 (2) *The Journal of Legal Studies* 326.
[344] One of the first to raise this issue was S Breyer „The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies and Computer Programs‟ (1970) 84 (2) *Harvard L R* 281.
[345] PK Bobko „Open-Source Software and the Demise of Copyright‟ (2001) 27 *Rutgers Computer & Tech L .J* 51.
[346] Ibid 51.

6.4 Automatic Vesting

Initially, it was a British idea that copyright will arise automatically. In the USA copyright had to be registered for it to come into existence.[347] However, the USA decided to do away with the registration formality for copyright protection after they adopted their 1976 Act.[348] To a large extent, this change was made because USA wanted to participate more fully in the international community through membership in the Berne Convention.[349] One of the requirements of the Berne Convention is that copyright should vest automatically.[350] As South Africa, is a member of the Berne Convention, it also follows the approach that copyright should be an automatic right.

The automatic vesting of copyright has a great impact on this issue of works falling into the public domain. Some authors are of the view that although copyright should arise automatically there is no reason why those who wished to retain copyright should not be made to register it shortly after the initial automatic vesting.[351] The advantage of requiring that copyright be registered or at least be registered after a short period of time is that works would fall into the public domain more quickly.[352] This is particularly important in circumstances where authors have no interest in continuing to protect their copyright and would resolve the problem of orphan works. If compulsory registration was a requirement for continued copyright protection, even if it was not a requirement for initial protection, it would probably mean that access to educational materials was actually promoted.[353]

6.5 The Digital Millennium Copyright Act

The Digital Millennium Copyright Act (herein after referred to as DMCA) is a USA statute which came into force on the 27th of October 1998.[354] This statute was introduced in order to strengthen protection of copyright in the digital environment due to the fact that information in the digital world was easily transferred from one person to the next.[355] The aim of this legislation was to prohibit any person from circumventing technological measures that

[347] S Perlumutter „Freeing Copyright from Formalities" (1994-1995) 13 *Cardozo Arts Ent.L.J*. 568.
[348] Ibid 568.
[349] Ibid 568.
[350] Armstrong (note 307 above) 235.
[351] Ibid 238.
[352] Ibid 238.
[353] Ibid 238.
[354] N Netanel „ Recent Developments in Copyright Law." (1998-1999) 7 *Tex. Intell. Prop.L.J* 331.
[355] AD Moore „Intellectual Property, Innovation, and Social Progress; the Case Against Incentive Based Arguments." (2003) 26 (3) *Hamline Law Review* 620.

control access to copyrighted works or which protect owners‟ rights.[356] In other words, it makes it illegal to circumvent high tech protection devices placed on works to shield them from unlawful copying. This is evidenced by section 1201 (a)[357] coupled with section 1201 (a) (1) (A)[358] where technological controls on unauthorised copying are embraced. Moreover, these technological controls are not only confined to a limited technological development but to a rather radically expanded coverage in an attempt to safeguard virtually all digitally stored information.[359] Although the DMCA was intended to help copyright industries protect their works against digital copying and infringement, the DMCA has also overridden some of the key principles of copyright law.[360]

Firstly, the DMCA does not allow the making of a back up copy for personal use, nor does it permit small amounts of copying which are generally permitted under the fair use doctrine.[361] This then prevents users from having access to materials which if those works were not part of the digital environment (e.g. the material was to be found in a book which they had purchased) they could be used. Secondly, the DMCA empowers the publishing and information industries to control their content in an unprecedented way. They are able to prevent access to and use of works that academics, the public and computer programmes have always have been able to enjoy.[362] In terms of copyright law a work enters the public domain after a specified period of time, however, now the DMCA trumps that because copy-protected digital content can in effect be locked up forever.[363] This means that the DMCA subverts the core purpose of copyright law which has been stressed throughout this dissertation, that is to promote the dissemination of knowledge and innovation.[364]

[356] 17 U.S.C. 1201.
[357] Provides for the circumvention of technological measures designed to control access to copyrighted works.
[358] Provides that "no person shall circumvent a technological measure that effectively controls access to a work protected under the Copyright Act."
[359] GS Lunney „The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act.‟ (2001) 87 (5) *Virginia Law Review* 828-29.
[360] D Bollier *Brand Name Bullies: The Quest to Won and Control Culture* (2005) 180.
[361] IS Ayers „The Future of Global Copyright Protection: Has Copyright Law Gone Too Far?‟ (2000) 62 *University of Pittsburg Law Review* 2.
[362] Ibid 2.
[363] Bollier (note 360 above)180.
[364] Ibid 181.

6.6 Conclusion

The question which must be asked is whether these developments mean that the rights of the author are over protected to the detriment of the public? In this dissertation, it is argued that these developments indicate how copyright law has overly encroached on rights of the public. Law makers seem to have lost sight of the reason why copyright law was created. The reason why copyright is protected is in order to encourage creativity and to ensure the development and dissemination of knowledge. Instead, it is suggested that with more and more excessive perpetual copyright protection, access to knowledge is impeded and this will and does stifle creativity. The danger of copyright protection veering too much in favour of copyright holders is that development will be stifled particularly in third world countries which are desperately in need of development.[365] The next chapter will focus on the importance of accessing educational materials and will also consider those aspects of copyright law which are particularly problematic with special focus on developing countries. The fact that issues relating to IP have now become important trade related issues brings the debate regarding copyright and developing countries to the fore.

[365] Ibid 183.

CHAPTER 7

7 COPYRIGHT IN DEVELOPING COUNTRIES

7.1 Introduction

South Africa as a developing country has specific needs particularly when it comes to accessing educational materials. This chapter will highlight specific issues relevant to developing countries and the need for education in third world countries.

7.2 The need for education in developing countries

The right to education is a fundamental right protected by the South African Constitution.[366] Section 29 of the Bill of Rights gives every South African the right to a minimum standard of education. In terms of section 29(1) all South Africans have a right to a basic education and further there is a duty on the state to progressively realise the right to further education through reasonable measures.[367]

The former South African Minister of Trade and Industry, Mr Alec Erwin, once stated that:

> "Knowledge is not a commodity, and can never be one. Knowledge is the distillation of human endeavour, and it is the most profound collective good that there is...education embrace the intellectual, cultural, political and social development of individuals, institutions and nations."[368]

Organisations such as the International Federation of Library Associations and Institutions (IFLA) and its initiative, Freedom of Access to Information Freedom of Expression (FAIFE) also point out how important it is to have access to educational materials when they state that:

> "Freedom, prosperity and the development of society depend on education, as well as on unrestricted access to knowledge, thought, culture and information. This right to intellectual freedom is essential to the creation and development of a democratic society."[369]

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[366] Constitution of the Republic of South Africa, Act 106 of 1996; sec 29.
[367] Ibid s29 (1).
[368] Languages of the world. Text Transcript of languages on the continent: Africa available at: http://www.nvtc.gov/lotw.fl ashDemo.html (accessed on 24 October 2013).
[369] IFLA/FAIFE. Libraries and Intellectual Freedom page 1 available at;http:/www.ifa.org/faife/faife/presen.htm (accessed on 22 October 2013).

Access to education is important throughout the world but it is particularly important in developing countries specifically because those countries are still developing. Many first world countries such as USA and Europe were able to obtain a substantial level of development at a time when copyright laws were non-existent or were in their infancy.[370] Now third world countries have to contend with a very developed form of copyright law especially if they want to be part of the international trade community. This then makes it very hard for those countries to access educational materials with the result that their development may be impeded.

Having discussed the need for education in developing countries, it is important to highlight the challenges that are faced by developing countries in accessing educational materials which will now be discussed.

7.3 Lack of access to educational materials

Chon points out that the majority of students in the world have very limited access to basic tools for learning.[371] He is of the view that this lack of access constitutes a major crisis[372] and is caused by a number of factors. These factors include the excessive pricing of books coupled with payment of royalties or the non availability of the books at all.

Part of the students‟ learning process entails that they have access to educational materials, either in an electronic or printed form. In many cases access to these materials is very costly. This is particularly problematic for students living in rural areas in developing countries. Books are extremely expensive especially when compared to the average income within developing countries.[373] In some cases the lowest local price of a text book for secondary or tertiary institutions may be more than double than that found in developed countries.[374]An example, is *Long Walk to Freedom,* the story of Nelson Mandela. This book costs $23.70 in South Africa whereas in the USA it costs in the region of $11.60.[375] Because of the high price of books, teachers and libraries are unable to access or disseminate information contained in

[370] B Khan „An Economic History of Copyright in Europe and the United States.‟ EH.Net Encyclopedia, edited by Robert Whaples. March 16, 2008 available at http://eh.net/encyclopedia/an-economic-history-of-copyright-in-europe-and-the-united-states/ (accessed on 12 June 2014).
[371] M Chon „Intellectual Property from Below; Copyright and Capability for Education‟ (2007) 40 *University of California Davis* 820.
[372] Ibid 821.
[373] A Rens (note 284) 5.
[374] Ibid 6.
[375] Ibid 6.

copyrighted works. On the other hand, with the new technological invention in the form of computers, which facilitate easy access to educational materials, such works could be readily available. However, copyright law continues to restrict access to these works even though there are provisions that allow for fair use.

7.4 Additional barriers to access to information in South Africa

In the preceding paragraphs in this chapter, the need for education and access to educational materials in developing countries has been discussed. It has been stressed out that generally developing countries have difficulty accessing textbooks and information because of the cost involved. In addition to these problems, the South African copyright law provides further impediments because (1) it does not permit parallel importation of such materials and (2) there are restrictions in the law when it comes to translating works and this has an important impact on the rights of disabled persons to access educational materials.

7.4.1 Parallel importation

Parallel importation occurs when a person acquires copyrighted works quite legitimately in one country and then imports those works into another country without the consent of the copyright holder.[376] This is often done in order to address situations where the work is being sold at a lower price in another country.[377] So if a textbook is not available in South Africa or it is very expensive, a parallel importer may buy the book in another country and then import that book into South Africa without the consent of the copyright holder. The TRIPS Agreement does permit parallel importing in terms of Article 6 which provides that the issue of exhaustion of rights shall not be a matter of dispute settlement.[378] Hence, TRIPS leaves it to members to decide how the principle should be applied within their national territory.

However, section 28 of the South Africa Copyright Act effectively blocks parallel importation. This section provides that:

[376] D Kawooya et el... „Copyright and Education: Lessons on Africa Copyright and Access to Knowledge" (2009/2010) the *African Journal of Information and Communications* available at hhtp://link.wits.ac.za/journal/AJIC10-Schonwetter (accessed on 23 August 2013) 45.
[377] Ibid 45.
[378] Article 6 of TRIPS Agreement.

> "The owner of any published work or the exclusive licensee of a published work (who has the licensed right to import such work into South Africa), may request the Commissioner of Customs and Excise to declare any other importation of the work prohibited."[379]

There is a need for South Africa to re-consider this provision. It is suggested that South Africa must incorporate a provision into its legislation that will enable the importation of cheaper books from other countries into the country.

7.4.2 The translation of works

South African law restricts the right to translate works before obtaining copyright permission and paying royalties[380] and it does not have specific provisions that cater for disabled persons, including the blind and visually impaired. Nicholson highlights some of the problems faced by sensory disabled students in accessing educational materials.[381] These include the following:

- Copyright law prohibits a blind student from converting his textbook, or even a portion of it into a more accessible format, such as Braille.[382]
- If a disabled person attempts to download an electronic article from an electronic database to email, the licence will prevent this, so he is unable to access the information via a voice-synthesizer.[383]
- In most cases a disabled person cannot browse in a library, since there are no facilities or legal provisions which allow him to convert even a small portion to Braille. This means that copyright protection measures prevent him from exercising his fair use rights.[384]

It is important to bear in mind that section 9 of the Constitution[385] enshrines the right to equality in South Africa. Vawda points out that it is important to consider;

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[379] Act 98 of 1978, sec 28.
[380] Ibid sec 9A.
[381] DR Nicholson „Intellectual Property; Benefit or Burden for Africa?" (2006) 32 *IFLA Journal* 312.
[382] Ibid 312.
[383] Ibid 312.
[384] Ibid 312.
[385] 1996 Constitution; sec 9.

> "Whether South African intellectual property laws discriminate against disabled persons including the blind, visually impaired and other reading disabled persons by prohibiting them from converting reading materials into formats which they can use."[386]

It is thus disappointing that there is no mention in the Draft Policy discussed in chapter one of the urgent need to change South African laws to enable equal access to reading materials by the blind, visually impaired and other reading disabled persons. This basically means that people with sensory disability face additional barriers in accessing educational materials.

7.5 Conclusion

It is argued that the current copyright regime in South Africa is not inappropriate as it fails to address the legitimate needs of education in this country. This failure to address educational needs restricts access to knowledge for those who cannot afford it. As has been pointed, out access to educational materials is a key to development in any developing country. This means that copyright will not benefit the public if the rights of copyright holders are over protected. Information will then only be accessible to the elite or it may be locked up altogether. The next chapter will draw conclusions and suggest recommendations that could be employed in order to bring about the balance between the author‟s rights and the public interest.

[386] Draft Policy on Intellectual Property, 2013- comments- joint submission October 2013 available at; file:///C: /Users/User/Downloads/Vawda‟s %20comments.pdf (accessed on 8 April 2014) 5.

CHAPTER 8

8 CONCLUSION AND RECOMMENDATIONS

This concluding chapter suggests possible solutions to the weaknesses identified in the copyright frame work. As has been discussed in this dissertation, authors are entitled to benefit from the works that they create - whether this is because they are the authors (natural theory) or because this is the manner in which they earn money (economic theory). However, this must be balanced against the rights of the public to have access to the works which they create. The drafters of the early laws governing copyright were very careful to make this clear. This dissertation has discussed the problems which developing countries face when trying to make works available for educational purposes. It has been argued that many disadvantaged people will be denied access to important educational materials because it is just too expensive to make those works available to them. This has very serious implications for development of those countries. The result will be a stifling of creativity rather than the enhancement of it which then defeats the main purpose of copyright law which is to ensure that creative people create further and better works. Therefore, it is also argued that authorities are losing sight of the reasons why copyright is protected. It is further argued that the pendulum has swung too far in favour of protecting rights holders and in the process the interest of the public to have access to educational materials, is being ignored or eroded.[387] The challenge though remains the same: how do we enhance the public welfare with some balance between the interest of copyright owners and those of users.[388] Striking this balance is not easy and it is accepted that it is necessary to continue to protect copyright because the goals of copyright protection remain important.[389] It is not argued therefore that copyright law should be done away with altogether but rather that policy makers should focus on the original goals of copyright law and should ensure that the law is developed with these in mind.

It remains important to find a balanced approach and to put the development of developing countries as an integral part within the TRIPS agreement. It is fair to say that TRIPS was created out of good intention but it has had some unexpected disastrous consequences for

[387] Nicholson (note 381 above) 311.
[388] World Intellectual Property Organization , Intellectual Property on the Internet: A Survey of Issues (2002).
[389] AM Leaffer *Understanding Copyright Law* 5ed (2010) 31.

developing countries. The direct effect of TRIPS is to give too much protection to rights holders. It is accepted that every author is entitled or at least deserves to be remunerated for the work that he has done in the information era, but at the same time society should also be entitled to enjoy art and scientific achievements.[390] There is also another aspect to consider. If rights holders are over protected, those who wish to have access to materials may resort to piracy and will simply ignore those rights.[391] So achieving the correct balance will benefit everyone. Creative people will receive their deserved remuneration and they will pay tax on it (another benefit for society) and there will be less possibilities or justification for people to copy works and make money from illegally acquired works.[392] The following suggestions are proposed for possible future areas of research.

The South African Copyright Act was introduced in 1976, long before the modern technological age. It cannot be disputed therefore that it needs to be amended. The law has evolved to the point where some of the provisions in the Act no longer fit with the modern system of copyright law. For instance, the statutory exceptions and the exceptions in the regulations as discussed in chapter five are not clear and they do not meet the needs of South Africa as a developing country. A particular failing of the law is to cater for the needs of disabled persons. It is appropriate to change the South African copyright system so that it would better represent the interests and concepts of a modern society. Copyright protection needs to be updated taking into consideration both the authors‟ interests and the society‟s right to access information. A specific South African solution needs to be developed. An examination of both the interests of creators and consumers must precede any legal proposal for amendment or resolution. This can be effective by conducting an empirical research, where the views of both the public together with the authors will be ascertained. In particular it is suggested that the following reforms should be considered:

1) Re- think the period of protection
2) Incorporate some form of registration
3) Improve the current landscape of copyright exceptions and limitations

[390] I Veiksa „Is the Existing Concept of Copyright Still Justified in the Information Society‟ (2012) 7 (2) *Current Issues of Business Law* 259.
[391] Ibid 260.
[392] Ibid 260.

It is suggested that serious consideration should be given to these reforms however it is acknowledged that some of these suggestions would have to be conducted at an international level as these are issues governed by the TRIPS agreement.

8.1 Re think the period of protection

The length of time for which protection is granted must be weighed against the costs of that protection especially taking into consideration the speed at which the world is developing. The duration of copyright protection reveals no support for the many factual claims made about extensions.[393] Even though copyright has existed and continuously expanded for years, there has been little research done to test the theoretical basis for copyright expansion.[394] Extending copyright means that works take a long time to fall into the public domain which stifles development. Extending protection demonstrates that the users" interests are not being taken into account. It must be determined whether the current copyright system provides the best possible mechanisms for ensuring that works are available and accessible. The only way this extension can be justified is if it promotes the progress of science and the arts. It is seriously questionable whether there is even a need for copyright to exist for 50 years after the death of the author especially in this modern age when information and technology is changing so rapidly.[395] It is accepted that this is an issue which will have to be reconsidered on an international level as this is part of the TRIPS agreement.

8.2 Incorporate some form of registration

Although there is no requirement to register copyright, the benefits of registration are that it establishes a public record of the copyright claim. In this way it causes the work to be indexed in the Copyrights Office records under the title and the author"s name.[396] These records become open to the public and are frequently searched by persons or organisations seeking to find out whether a particular work has been registered and, if so, who currently owns the copyright.[397] This is particularly important in tracing orphan works, as it becomes easy to trace an author who is registered, than one who is unknown and in this way it makes works to be accessed easily and it also becomes easy to ascertain whether copyright has

[393] Gifford (note 312 above) 657.
[394] Y Fan, R Shin Ray Ku and J Sun „Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright"s Bounty." (2009) 62 2 *Vand. L. Rev*. 1671.
[395] Draft Policy on Intellectual Property, 2013 (note 9 above) 14.
[396] S Fishman *The Copyright Hand Book; What Every Writer Needs to Know*11ed (2011) 41.
[397] Ibid 41.

expired and has vested into the public domain or not. Again this is an issue which needs to be considered at an international level but it is suggested that some form of registration of copyright should be required. Importantly those authors who have no interest in protecting their copyright would not register their works and those works can then more easily become part of the public domain to be freely used by others.

8.3 Improve the current landscape of copyright exceptions and limitations

The DTI in its draft policy[398] has pointed out that there must be careful consideration of international treaties in the field of copyright before acceding to them. The Policy has also acknowledged that even though South Africa subscribes to international instruments such as TRIPS, these conventions do not fully cater for the needs of a country like South Africa, particularly in the area of education. It has acknowledged that until now South Africa"s domestic legislation has made insufficient use of the existing flexibilities contained in these conventions.[399] Other commentators recommend that:

> "The overall objective of copyright law must be stated clearly, i.e., to create and maintain a fair balance between the legitimate interests of rights holders and the public interest in far-reaching access opportunities. It is this overarching objective that should inform policy- and lawmaking in this field. This is especially the case since some of the technological advancements brought about by the digital age have further jeopardised the aforementioned balance of conflicting interests. What is needed urgently, therefore, is a copyright regime that takes into account the new realities and provides an appropriate and just framework for all stakeholders in the copyright arena."[400]

It is recommended that the Copyright Act be amended in order to provide a broader definition of teaching as embodied in section 12 (4) that "includes current modes of delivery and would be flexible enough to cover future innovation."[401] It is also recommended that South Africa needs some form of guidance to be included in the Copyright Act in order to establish a proper test for fairness. It may borrow from the USA fair use clause which contains the four step test in this regard.[402] It is also imperative that exceptions need to be provided to cater for the use of copyright protected works especially by visually impaired individuals.[403] Since the

[398] Draft Policy on Intellectual Property, 2013 (note 9 above).
[399] Ibid 32.
[400] Draft Policy on Intellectual Property Comments (note 386 above) 14.
[401] Ibid 15.
[402] Ibid 15.
[403] Ibid 15.

Copyright Act is silent in respect of orphan works, it is recommended that an amendment be sought in this respect in order to permit the use of orphan works on reasonable terms when copyright holders cannot be identified.[404] The difficulties in this regard are illustrated by an example give by the supervisor of this thesis[405] from her own experience. In completing a chapter for a book on commercial law she referred to a short quote from *Vosper, C. 1971.The mind benders. London: Neville Spearman.* The publishers of the book then sought to obtain permission to use this quote and after experiencing difficulty sent the following email:[406]

> "This extract is a problem because the author (Cyril Ronald Vosper, Scientologist and later a critic of Scientology: 7 June, 1935 - 4 May, 2004) is no longer alive and the publisher no longer exists. The author emigrated from UK to Australia in 1988, and it's proving difficult to find his heirs or literary executor. This means that one has to keep looking, and making enquiries, but your author may prefer to use his/her own word, and rather than the words of this author, as it may take a while to find the correct person."

My question then is - what has happened to the whole concept of fair use. In another example, my supervisor wanted to use some material that she had previously published. As she no longer owned the copyright over that material she decided to apply for permission from the copyright holders to use that material. This, even though she had to a large extent actually re-written much of the work (she simply wanted to avoid being accused of self plagiarism). The publishers initially wanted to charge £54 for the use of her own work.[407] But after the issue was discussed it was agreed that she could use the work provided she referenced where she had originally published it.

These final examples serve to highlight the view examined in this thesis that the copyright world is becoming very complicated and over controlling. On a final warning note, Ferguson, one of the world's most renowned historians and the Laurence A Tisch Professor of History at Harvard University in his book *Civilisation: The West and the Rest* argues that all the great civilisations of history died when they stifled innovation rather than ensuring that they engaged in "creative competition and communication."[408]

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[404] Ibid 16.
[405] T Woker, Phd (Rhodes) School of Law, University of KwaZulu Natal, Durban.
[406] Email received by Prof Woker from the permissions editor of Oxford Press on 4 June 2014.
[407] Information received during the supervision process.
[408] N Ferguson *Civilisation; The West and the Rest* (2011) 12.

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