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UNIVERSITY OF THE WITWATERSRAND, JOHANNESBURG

SCHOOL OF LAW

ACCOMMODATING PERSONS WITH SENSORY DISABILITIES IN SOUTH AFRICAN COPYRIGHT LAW

Submitted in fulfilment of the requirements of the degree of Master of Laws (LLM) (Dissertation) in the Faculty of Commerce, Law and Management at the University of the Witwatersrand, Johannesburg.

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ABSTRACT

This dissertation investigates whether the needs of persons with sensory disabilities are accommodated in South African copyright law. Of the approximately 44,8 million people in South Africa counted in Census 2001, 2,3 million were reported as disabled. Of these, 577 000 (1,3 per cent) had a visual disability, 314 000 (0,7 per cent) a hearing disability, whilst others had physical, intellectual and communication disabilities, some with multiple disabilities too. Persons with sensory disabilities, such as visual, hearing and related impairments, experience barriers to accessing information on a daily basis. The dissertation explores barriers in the copyright law and seeks ways to remedy the situation so as to facilitate access to information, particularly for educational, personal and other purposes. To contextualise this research, international and regional copyright trends are explored to establish whether intellectual property agreements allow copyright limitations and exceptions for persons with sensory disabilities in national laws. In addition, the copyright laws of a large number of countries that have already adopted appropriate limitations and exceptions nationally are reviewed. The dissertation highlights the lack of attention that the access needs of persons with sensory disabilities have been afforded in the Copyright Act 98 of 1978, as well as related inadequacies in the Electronic Communications and Transactions Act 25 of 2002. South Africa's non-compliance with certain international and national obligations relating to human rights and access to information is also highlighted within the context of copyright law. International human rights conventions, the South African Constitution and domestic anti-discriminatory laws all provide the framework for protecting the rights of persons with disabilities, yet their rights to access to knowledge have been neglected by government and the legislature. Some recommendations for further research and possible amendments to the copyright law are provided.

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DECLARATION

I, **Denise Rosemary Nicholson (nee Hamel),** declare that this Dissertation is my own, unaided work. It is submitted in fulfilment of the requirements of the degree of Master of Laws (LLM) (Dissertation) in the Faculty of Commerce, Law and Management at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

…… ……..

D.R. Nicholson Date

DEDICATION

I dedicate this Dissertation to:-

My husband Clive, my son Brendan, and daughter Lauren, for their ever-present love, encouragement, patience and support during my research.

My late parents Dan and Jean Hamel, and late sister Jennifer, for their special love, pride and confidence they had in me and for always inspiring me to reach for the stars.

My sister Theresa, for her love, encouragement and constant support. Thanks for believing in me and for always being there for me through happy and sad times.

My sister, Angela, and the rest of my family, friends and colleagues – thank you for your love and friendship.

Those courageous people with sensory disabilities, who, despite their many challenges, including problems in accessing information and knowledge, continue to persevere and strive to make this world a better place.

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LIST OF ACRONYMS

ACA2K	**African Copyright and Access to Knowledge**
ADELPHI CHARTER	**Adelphi Charter on Creativity, Innovation and Intellectual property**
BERNE CONVENTION	**Berne Convention (1886, rev. Paris 1971)**
CEDAW	**Convention on the Elimination of All Forms of Discrimination against Women**
CIPR	**Commission on Intellectual Property Rights (UK)**
COL	**Commonwealth of Learning (Canada)**
CPRD	**Convention on the Rights of Persons with Disabilities**
CTP	**Committee of Technikon Principals**
DAISY	**Digital Accessible Information System**
DALRO	**Dramatic, Artistic and Literary Rights Organisation**
DEAFSA	**Deaf Federation of South Africa**
DHET	**South African Department of Higher Education and Training**
DRMs	**Digital Rights Management Systems**
DFID	**UK Department for International Development**
DTI	**South African Department of Trade and Industry**
EIFL	**Electronic Information for Libraries**
EC	**European Community**
EPA	**Economic Partnership Agreement**
EU	**European Union**
EU COPYRIGHT DIRECTIVE	**Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society**
FTA	**Free Trade Agreement**

ICESCR	**International Covenant on Economic, Social and Cultural Rights**
IFLA	**International Federation of Libraries and Institutions**
IFRRO	**International Federation of Reprographic Rights Organizations**
IP	**Intellectual Property**
IPACT	**Intellectual Property Action Group**
L & Es	**Limitations and Exceptions**
LCA	**Library Copyright Alliance**
MOON	**Moon System of Embossed Reading**
OHCHR	**UN Office of the High Commissioner for Human Rights Non-Governmental Organisations**
PASA	**Publishers' Association of South Africa**
PCDA	**Provisional Committee on Proposals Related to a WIPO Development Agenda**
ROME CONVENTION	**International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations**
SA COPYRIGHT ACT	**South African Copyright Act 98 of 1978 (as amended)**
SACU	**South African Customs Union**
SAHRC	**South African Human Rights Commission**
SALB	**South African Library for the Blind**
SANCB	**South African National Council for the Blind**
SAUVCA	**South African Vice-Chancellors' Association**
SCCR	**Standing Committee on Copyright and Related Rights**
STATS SA	**Statistics South Africa**
TIGAR	**Trusted Intermediary Global Accessible Resources Project**
TPMs	**Technological Protection Measures**
TRIPS	**Trade Related Aspects of Intellectual Property Rights**

TVI	**Treaty for the Blind, Visually Impaired and Other Reading Disabled Persons**
UCC	**Universal Copyright Convention**
UK	**United Kingdom**
UN	**United Nations**
UNDHR	**Universal Declaration of Human Rights**
UNESCO	**United Nations, Educational, Scientific and Cultural Organization**
US / USA	**United States of America**
USAID	**U.S. Agency for International Development**
UWC	**University of the Western Cape**
VCLT	**Vienna Convention on the Law of Treaties**
WBU	**World Blind Union**
WFD	**World Federation for the Deaf**
WHO	**World Health Organization**
WIPO	**World Intellectual Property Organization**
WCT	**World Intellectual Property Organization Copyright Treaty**
WPPT	**World Intellectual Property Organization Performances and Phonograms Treaty**
WSIS	**World Summit on the Information Society**
WTO	**World Trade Organization**

"The Spirit of the Lord is upon me," because he has anointed me to proclaim good news to the poor. He has sent me to proclaim liberty to the captives and recovering of sight to the blind…" (Luke 4:17-18)

CHAPTER 1: INTRODUCTION

1.1. Research Problem and Background

1.1.1. Global Demographics of Persons with Disabilities

According to the World Health Organization (WHO) about 285 million people are visually impaired worldwide: 39 million are blind and 246 have low vision, of which about 90 per cent live in developing countries.[1]

According to the World Federation for the Deaf (WFD), there are approximately 70 million Deaf and other hearing impaired people worldwide, of which about 80 per cent live in developing countries.[2] Deafness ranges from total loss of hearing to varying degrees of impairment. The majority of these people lack formal education, experience learning difficulties and/or are illiterate, resulting in high levels of unemployment.

1.1.2. Demographics of Persons with Disabilities in South Africa

The 2001 South African Census indicates the percentage of persons with disabilities as follows:

> Of the approximately 44,8 million people in South Africa counted in Census 2001, 2,3 million were reported as disabled. Of these, 577 000 (1,3%) had a visual disability, 558 000 (1,2%) a physical, 314 000 (0,7%) a hearing, 269 000 (0,6%) an emotional, 206 000 (0,5%) an intellectual, and 75 000 (0,2%) a communication disability. In addition, 257 000 people (0,6%) had multiple disabilities.[3]

According to Walters & Isaacs, '51% of the South African population is below the age of 25'.[4]

> Of the approximately 17,5 million youth counted in Census 2001, 620 000 (3,5%) were reported as being disabled. Of these, 140 000 (22,6%) had a visual disability, 92 000 (14,8%) a hearing, 25 000 (4,0%) a communication, 123 000 (19,9%) a physical, 86 000 (13,9%) an intellectual and 90 000 (14,6%) an emotional disability, while 63 000 (10,2%) had multiple disabilities.[5]

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[1] World Health Organization (WHO) 'Visual Impairment and Blindness.Fact Sheet' N°282 (October 2011).

[2] World Federation of the Deaf (WFD) <http://www.wfdeaf.org>.

[3] Statistics South Africa 'Census 2001: Stages in the Life Cycle of South Africans' (2001). Census 2011 is not available at this stage. It will be published at the end of October 2012. .

[4] S Walters & S Isaacs 'National Qualifications Framework: Insights from South Africa' (2009) 4 <http://www.saqa.org.za/docs/events/2009/eqf_paper.pdf>.

[5] Statistics South Africa (note 3 above) 104.

The above figures include persons with visual and hearing disabilities, as well as deafblind persons. As life expectancy increases due to better healthcare and living conditions, the number of South Africans with visual and hearing disabilities also increases, particularly amongst the elderly. The demand for access to information, especially for educational purposes, is on the increase, as more people with visual and hearing disabilities require access to information in alternative formats.

1.1.3. Visually Impaired Persons and the "Book Famine"

In recent years, internationally and regionally, blind persons have raised concern about the extremely low number of books that are available to them in accessible formats, even in the richest countries. Only some five per cent of published books are ever made accessible in richer countries, and less than one per cent in poorer ones.[6] This "book famine" is amplified by the fact that because copyright exceptions are territorial in scope and cross-border sharing is prohibited, there is unnecessary duplication, expenses and delays in creating works in alternate formats.

The current situation is that books and other works are being transcribed into Braille by several specialised organisations in different countries, even though they may share the same language. If it were not for prohibitive copyright laws, the large collections in the United States of America (USA), Canada, the United Kingdom (UK), Australia and New Zealand could be accessed by millions of print disabled readers in the other 60 countries (including South Africa) where English is either spoken as the first or second choice language. Similarly, copyright prevents organisations for the blind in Spain and Argentina from sharing and exchanging their approximately 150 000 titles in accessible formats with visually impaired readers in 19 Spanish speaking countries across Latin America.[7]

Blind persons have to depend on assistive technologies to access material, whether it is for conversion from text to audio, text to speech on a computer, or into Braille, the Moon System of Embossed Reading (Moon) or Digital Accessible Information System (DAISY) formats.[8] It is almost impossible for them to exercise their 'fair dealing' rights or any other rights in terms of copyright law, as converting material involves making a reproduction and an adaptation of the original work. Since these are exclusive rights of the copyright owner, permission has to be obtained prior to making the conversion into an accessible format.[9]

Papadopoulou points out that –

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[6] 'European Parliament Book Famine Event: EBU Calls for EU Council to Back Book Treaty' (2011) <http://www.euroblind.org/.../EBU_press_release_13april_2011_GB.doc>.

[7] C Friend 'Meeting the Needs of the Visually Impaired Persons: What Challenges for IP?' [Presentation at meeting hosted by WIPO in Geneva on 13th July 2009]. <http://www.wipo.int/meetings/en/2009/vip_ge/presentations/chris_friend.html>.

[8] D Peterson 'What are the Different Types of Alternative Formats?' <http://duskpeterson.com/types.htm>.

[9] D R Nicholson 'Copyright: Are People with Sensory Disabilities Getting a Fair Deal?' in D H Charbonneau (ed) *Global Information Inequalities: Bridging The Information Gap* (2008) 141.

> [t]he different distribution methods for getting accessible copies to the print disabled either as physical copies or by electronic delivery online could implicate acts controlled by the rights of distribution and communication to the public. All these acts, the reproduction, the adaptation, the distribution and the communication to the public, are restricted by copyright…[10]

1.1.4. Deaf and Other Hearing Impaired Persons and Access Issues

Most countries provide access to education, government services and equal citizenship, but there is a general lack of bilingual education and sign-interpreting services for Deaf persons. Generally, sign language is not recognised as the main means of communication of Deaf persons and if they cannot communicate verbally, they are often treated as mentally challenged or unintelligent or referred to as 'deaf and dumb'. Lack of awareness and knowledge about their situation and culture often deprives Deaf persons from fully participating in society. Often they are side-lined or their basic human rights are compromised out of ignorance rather than malice.[11] Not always being able to make their needs known to people who can hear, often results in frustration and inadequate or incorrect information.

The main barriers for Deaf and other hearing impaired persons lie in the lack of accessible information, whether this information comes through direct interaction with other people who do not use sign language, or from other sources such as documents and mass media. These issues will be discussed in more detail later on in this dissertation.

To enable Deaf persons to make free and informed decisions, they need to be able to access official documents, court proceedings, mass media and other information in sign language or sign language translations. Deaf persons have difficulty with language in general as the majority of them have sign language as a first language.

For the Deaf, learning English or any other language is tantamount to learning a foreign language and it takes a lot longer to learn to read and write. To assist Deaf and other hearing impaired persons, material has to be converted into more visual formats (adapted to include short sentences and passages) and more visual images

[10] M D Papadopoulou 'Copyright Exceptions and Limitations for Persons with Print Disabilities: The Innovative Greek Legal Framework Against the Background of the International and European Developments' (2010) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1874620>.

[11] See H Haualand & C Allen 'Deaf People and Human Rights' (2009) <http://www.wfdeaf.org/wp-content/uploads/2011/06/Deaf-People-and-Human-Rights-Report.pdf>.

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to explain words and themes. They also need conversion from audio to text and captioning on films, videos, DVDs and TV broadcasts.

Deaf and other hearing impaired persons also need material translated into other languages, depending on what their first or second language is. For example, if sign language is the first language and Zulu their second language, Deaf persons would need whole textbooks and other learning material to be translated from English into Zulu to be able to understand the content, or vice versa, depending on the language of instruction.

Conversion of a work into an alternative format or translation of a work into another language is an adaptation. This, in terms of copyright law, is an exclusive right of the author or creator. Copyright clearance is therefore necessary before making an adaptation of a work. This is discussed in more detail in Chapter Four.

1.1.5. Focus on Access Issues for Persons with Sensory Disabilities

Article 13 of the World Summit on the Information Society (WSIS)[12] Declaration of Principles includes persons with disabilities as marginalised or vulnerable groups needing specific attention as follows:-

> In building the Information Society, we shall pay particular attention to the special needs of marginalized and vulnerable groups of society, including migrants, internally displaced persons and refugees, unemployed and underprivileged people, minorities and nomadic people. We shall also recognize the special needs of older persons and persons with disabilities.[13]

Persons with disabilities also receive mention in Article 30 of the abovementioned Declaration of Principles as follows:-

> The use of ICTs in all stages of education, training and human resource development should be promoted, taking into account the special needs of persons with disabilities and disadvantaged and vulnerable groups.[14]

Although copyright law has been in existence for a few centuries, the needs of persons with sensory disabilities within the copyright framework have been ignored. Only in the past few years have blind persons received reasonable attention. This has mainly been through a strong international campaign by the World Blind Union (WBU), which resulted in a proposal for a Treaty for the Blind, Visually Impaired and Other Reading Disabled Persons (TVI) being tabled at WIPO in Geneva in 2009.[15]

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[12] The World Summit on the Information Society (WSIS) is an initiative of the UN specialised agency, International Telecommunications Union (ITU), which is responsible for information and communication technologies.

[13] WSIS 'Declaration of Principles: Building the Information Society: a Global Challenge in the New Millennium' (2003) <http://www.itu.int/wsis/docs/geneva/official/dop.html>.

[14] Ibid.

[15] WIPO 'Proposal on an International Instrument on Limitations and Exceptions for Persons with Print Disabilities' (2011) <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=188547>.

This proposal has now been consolidated with proposals from the USA, the European Union (EU) and the African Group which has included provisions for education, libraries and archives in its proposal. These draft treaties are briefly discussed in Chapter Three as they may offer possible options for amendment to the South African copyright law, or impact more broadly on the South African copyright agenda.

In a number of countries, mostly developed, barriers to accessing information have received legislative attention by governments who have taken the needs of disabled persons seriously. Those attempts are impressive insofar as they reflect a public commitment to resolve matters, but they have not always given rise to perfect solutions. A lot more work needs to be done to reach a satisfactory dispensation for the majority of users,[16] particularly in developing countries where the need for access to information is far greater.

To date, there is no court jurisprudence regarding the interpretation of constitutional rights in the specific context of the Deaf and other hearing impairments in the justice system in South Africa.[17] Neither the WFD nor the Deaf Federation of South Africa (DEAFSA) has initiated any public debate or discussions on copyright and access issues affecting Deaf and other hearing impaired persons. In a previous paper, I stated that -

> Our Copyright Act needs to be amended to facilitate, *not restrict*, access to knowledge; to encourage innovation, research and resource-sharing; to allow conversions into accessible formats and cross-border exchange in all formats. In the process, this will enhance access to knowledge and help South Africa meet its Development Goals.[18]

Since 1998, however, the library and tertiary sectors in South Africa have been campaigning for amendments to the copyright law, together with provisions for persons with sensory disabilities, but the Copyright Act still has not been amended to address their needs. Although supportive of the WIPO Development Agenda and the TVI at the international level, South Africa has not yet transposed that support into practical public commitment by amending its national copyright laws accordingly.

1.2. Aim and Purpose of this Research

Various research studies on copyright limitations and exceptions have been conducted in developed and developing countries and by the World Intellectual Property Organization (WIPO) in an attempt to seek balance in the copyright system. Some of these studies have focused on persons with sensory disabilities in general, or on blind persons, though peripheral in nature. Only one study appears to have been conducted on the access needs of Deaf or other hearing impaired persons,

[16] J W Roos 'Copyright Protection as Access Barrier for People who Read Differently: The Case for an International Approach' (2005) 31 *IFLA J* 52, 55.

[17] H Dagut & R Morgan 'Barriers to Justice: Violations of the Rights of Deaf and Hard-of-Hearing People in the South African Justice System' 2003 19(1) *SAJHR* 37.

[18] D R Nicholson 'Copyright – Are Deaf Persons Getting a Fair Deal?' (2012) 56(1) *The Cape Librarian* 16.

although incidental in approach. In 1982, a study by Wanda Noel and commissioned by UNESCO/WIPO[19], looked at access issues relating to the 'visually and auditory handicapped', but its main focus was on visually impaired persons. Her draft model provisions[20] provide recommended exceptions for visually impaired persons, but none for Deaf or other hearing impaired persons.

Noel's model provisions for 'visually impaired' persons were endorsed in the 1982 report of the UNESCO/WIPO Working Group on Access by the Visually and Auditory Handicapped to Material Reproducing Works Protected by Copyright.[21]. Provisions for 'auditory handicapped' persons were, however, excluded. The Working Group's opinion was that the making of captions for 'auditory handicapped' persons in the case of films and other audio-visual works was an adaptation and would therefore be 'incompatible with both the national legislation of the majority of countries and the international copyright conventions to provide for any kind of exceptions or non-voluntary licensing in respect of such use.'[22]

Another study, commissioned by WIPO and conducted by Sullivan in 2006,[23] focused specifically on persons with visual impairments with no attention given to Deaf or other hearing impaired persons. The dearth of research relating to access issues specifically for Deaf and other hearing impaired persons indicates that internationally and regionally, little, if any, attention has been given to the impact of copyright law on these information users.

In South Africa and some developing countries, research has been done on copyright and its impact on access to information and educational materials. Where persons with disabilities have been mentioned, the reference has mainly been to blind, visually impaired, reading-disabled and/or print-handicapped persons. Rather than mainstream research, it has generally been more incidental or peripheral in nature. With regard to Deaf and other hearing impaired persons, no research (apart from the peripheral study by Noel as mentioned above) has been conducted to consider how to accommodate their needs in copyright law in general, and more particularly in the South African Copyright Act 98 of 1978 (hereinafter called 'the Copyright Act').

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[19] W Noel 'Application of the Berne Convention for the Protection of Literary and Artistic Property and the Universal Copyright Convention to Material for the Visually and Auditory Handicapped' (1982) UNESCO/WIPO/WGH/I/2) <http://unesdoc.unesco.org/images/0005/000507/050758eb.pdf>.

[20] W Noel 'Application of the Berne Convention for the Protection of Literary and Artistic Property and the Universal Copyright Convention to Material for the Visually and Auditory Handicapped' - Alternatives A and B – Annex 1 (1982) UNESCO/WIPO/WGH/I/2) <http://unesdoc.unesco.org/images/0005/000507/050758eb.pdf>.

[21] UNESCO/WIPO 'Working Group on Access by the Visually and Auditory Handicapped to Material Reproducing Works Protected by Copyright: Report' (1982) UNESCO/WIPO/WGH/I/3 Annex 1 <http://www.keionline.org/misc-docs/tvi/1982_report.pdf>.

[22] Ibid 3.

[23] J Sullivan 'WIPO Study on Copyright Limitations and Exceptions for the Visually Impaired' (2006) <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=75696>.

The main aim and purpose of this research is to investigate how the current copyright law impacts on access to information for persons with sensory disabilities, particularly Deaf and other hearing impaired persons, and also blind persons, since they generally experience barriers to accessing information on a daily basis too. The South African situation and its effect on access to information for these information users is examined in the wider context of international and regional copyright and human rights frameworks. In addition, the aim and purpose is to find possible solutions to address access issues for persons with sensory disabilities in South African copyright law.

For consistency in this dissertation, I use the umbrella term “persons with sensory disabilities” for blind, Deaf and other hearing impaired persons. When referring to either one of these groups with disabilities, I refer to “blind”, which includes visual impairments and other reading disabilities; or “hearing impaired persons” which also includes deaf (lower case’d)’ and perceptually-impaired persons. When I refer specifically to persons using sign language, I use the Deaf (capital ‘D’) as explained below:-

The World Federation for the Deaf has decided to use the term ‘’deaf’’ for all persons with hearing loss or impairments. There, however, is a strong feeling, particularly in South Africa, that it would be more appropriate to maintain the use of the capital ‘‘D’’ and lower case ‘‘d’’, to indicate the differences, as follows:–

- “Deaf”’ – refers to certain persons whose own experience of hearing loss is such that they require SASL as their language of learning and teaching to be able to learn. Users of SASL form a distinct cultural and linguistic group in South Africa. Their experience of the world is also particularly shaped by the fact that their communication is expressed by their bodies and perceived visually.

- “deaf”- refers to an adjective that refers to hearing loss from a medical point of view. Different degrees of hearing loss can be measured, but the same measure of hearing loss can be experienced differently by individuals.

- “hearing impaired” - this term, when used by persons to describe themselves, and used by persons who supply such individuals with services, means that while they have varying degrees of hearing loss they choose (and are able) to use spoken languages and lip-reading as means of communication and learning.

The term 'visually impaired persons' (or VIPs) refers to blind or partially sighted people. The term 'print disabilities' covers a wide range of issues beyond visual disabilities.[24]

1.3. Research Objectives

The objectives of this research are to assess appropriate limitations and exceptions for persons with visual and hearing disabilities, within the context of South African copyright law. This is done with a view to informing policy development in this area and providing recommendations for amendments to the Copyright Act.

This dissertation provides a background of the meaning, genesis and application of copyright limitations and exceptions from a historical and international context and discusses some of the findings of relevant research conducted in this regard. The study includes a review of limitations and exceptions for persons with sensory disabilities currently enacted in jurisdictions in a large number of developed and developing countries, with a view to providing appropriate models or examples to accommodate persons with sensory disabilities in South African copyright law.

1.4. Relevance of this Research

This research is relevant as it adds to the existing body of knowledge by providing insight into copyright and access challenges faced by persons with sensory disabilities, particularly Deaf and other hearing impaired persons, who have not enjoyed attention in this regard before. It focuses on the needs of Deaf and other hearing impaired persons, as well as blind persons, specifically in the context of South African copyright law. As the literature review below indicates, there is no study that specifically addresses the relationship between copyright and access issues for hearing impaired persons in the international or national literature.

Similar research relating to blind persons in the context of South African copyright law is limited or incidental. In addition to a literature survey, outlined in Chapter Two of this dissertation, I engaged in personal communications in 2010 and 2011 with a number of blind persons who are active members of the World Blind Union (WBU), namely, Mr Chris Friend, Chair: Global Right to Read Campaign, UK, Dr William Rowland , former President of WBU, Mr Jace Nair, National Executive Director of the SANCB and Chairman of the SANCB Coalition, and Dr Johan Roos, former Director of the SA National Library for the Blind. They indicated that most of the known international and regional studies about copyright limitations and exceptions relate to broader issues and that issues relating to blind persons have

[24] N Janse Van Vuuren [Personal communication] (2010). The large majority of people regarded as having a print disability are included in the category of visual disabilities because of greater or lesser degree of visual impairment (Dakin and Wijesena, 2005, Annex II of IGC, 1985). Reading or print disabled people are all those who due to an impairment that may be physical, sensory or other, cannot read standard print. For instance, a person without sight, a person whose sight is severely impaired, a person unable to focus or move his/her eyes. It also applies to those who have a perceptual or cognitive disability which prevents them from reading standard print. Nevertheless, the term does not apply to all disabled people. For instance, a wheelchair user who has no impairment preventing him or her from reading standard print is not 'print disabled'. (SCCR/19/13/Corr., Friend, 2009). See discussion at <http://ssrn.com/abstract=1874620>.

generally been more incidental or peripheral in nature. Similarly, communications with hearing impaired persons and people working with Deaf and other hearing impaired persons confirmed the absence of any research that has focused particularly on copyright and Deaf and other hearing impaired persons internationally or nationally. Persons I communicated with during 2011 were Mr Bruno Druchen, National Director of DEAFSA, Prof Claudine Storbeck, Director: Wits Centre for Deaf Studies, Prof Lucas Magongwa, Head: Wits Deaf Education, Dr Guy McIlroy and Ms Elizabeth Walton, lecturers at the Wits Centre for the Deaf, and Ms Naomi Janse van Vuuren, lecturer at Wits Deaf Culture Studies. In addition, in response to my query about relevant research in China, Ms Lu Haiyan confirmed that a comprehensive search of their National Library of China's resources had not revealed any similar research. Mr Prakash, lawyer and Programme Manager: Centre for Internet and Society in India also confirmed that he could not find any similar research having been done in India, although its Government has attempted to address the needs of persons with sensory disabilities in its new copyright legislation. Matthew Rimmer, Association Profession of Intellectual Property and Climate Change at the Australian National University, confirmed that no similar research was available in Australia, but referred me to the Australian Copyright Council's Fact Sheet 'People with a Disability: Copyright Issues'.

My research is significant and timely in view of current international copyright trends at WIPO, particularly with regard to Treaty proposals for blind, visually impaired and other reading disabled persons. It is also significant in view of South Africa's strong support for the WIPO Development Agenda[25] and its current leadership role in the African Group at WIPO, which will be discussed briefly in Chapter Three.

By exploring factors that impact on access to knowledge and finding appropriate solutions within South African copyright law, it is hoped that this research will help towards facilitating accessibility to global knowledge to a large number of persons with sensory disabilities in South Africa.

1.5. Research Questions

The following research questions are investigated and addressed in this dissertation:-

i. What are the international and national frameworks that provide protection for persons with sensory disabilities?
ii. What other countries have formally adopted copyright limitations and exceptions for persons with sensory disabilities? Could they be models for South Africa?
iii. What are South Africa's international and national human rights and copyright obligations with regard to persons with sensory disabilities?

[25] See 'WIPO Development Agenda Background' <http://www.wipo.int/ip-development/en/agenda/background.htm>.

iv. Does the current South African copyright law have any limitations and exceptions for persons with sensory disabilities, and if so, are they adequate?

v. Have any attempts been made to amend the Copyright Act, in order to accommodate persons with sensory disabilities, and if so, what were the outcomes?

1.6. Methodology

The research methodology employed in this dissertation is desktop research relying, for the most part, on a study of written texts such as literature, conventions, research reports, publications and other documents. These all relate to the topic in the context of international and local copyright and human rights agreements and trends, with particular reference to persons with sensory disabilities.

McConville and Chui's 'law in context' tradition is followed in this methodology.[26] They indicate that –

> the law itself becomes problematic both in the sense that it may be a contributor to or the cause of the social problem and in the sense that whilst law may provide a solution or part of a solution, other non-law solutions, including political and social re-arrangement, are not precluded.[27]

The above authors point out that significant transformation has occurred in legal scholarship, for instance, the 'increasingly global character of legal life'. In view of online availability of international legal resources, researchers need to take cognisance of international, regional and alternative perspectives and to consider their relevance to the domestic situation. In addition, they suggest that it is not inescapable that trans-jurisdictional instruments, such as conventions relating to human rights, increasingly penetrate domestic legal systems and stimulate those responsible for operating or interrogating national systems to have regard to wider considerations than was possible before.[28]

This line of thinking is germane to this research. It is therefore important that relevant conventions and declarations relating to human rights and access to information, particularly for persons with sensory disabilities in South Africa, are also considered in this research.

[26] M McConville & W H Chui 'Introduction and Review' in M McConville & W H Chui (eds) *Research Methods for Law* (2007) 1. The authors describe legal scholarship as 'traditionally having had two broad traditions, namely 'the black-letter law' approach which focuses heavily, if not exclusively, on the law itself as an internal self-sustaining set of principles when doing research, and the 'law in context' tradition, which emerged in the late 1960s.'

[27] Ibid 1.

[28] Ibid.

1.7. Structure of the Dissertation

Chapter One of the dissertation provides an introduction and sets out the aims, relevance and purpose of this study, together with a contextual background to access to information issues experienced by persons with disabilities in general. It also provides the conceptual framework, research questions and methodological approach adopted for this dissertation.

Chapter Two provides a comprehensive review of existing literature addressing the subject of copyright from a historical point of view, its development, the genesis of limitations and exceptions, as well as the attention given to persons with sensory disabilities internationally, regionally and nationally, within the copyright system. Some of the issues included are: access to information in light of human rights obligations, the ‘‘three- step test’’, the need for balance in copyright law and research already conducted in this subject area. This review reveals a hiatus in the existing body of research internationally, regionally and nationally, which this dissertation attempts to close.

Chapter Three investigates which countries have adopted limitations and exceptions for persons with sensory disabilities[29] in their national copyright laws. It then focuses on ten countries (Canada, Czech Republic, Denmark, Iceland, India, Ireland, Japan, Saint Lucia, Sweden and United Kingdom) to provide a basic analysis of their copyright exceptions for persons with sensory disabilities for purposes of finding appropriate provisions in the SA Copyright Act. International trends and policy issues, where relevant, are considered in the process. Current proposals for a number of Treaties at WIPO are also discussed as they are likely to have some impact on how South Africa addresses these issues in its copyright law.

Chapter Four provides a general overview of current South African law and policy issues relating to persons with sensory disabilities, with particular reference to human rights and copyright. It also provides a historical timeline of attempts to amend the SA Copyright Act since 1998 and the outcomes thereof, as well as more recent initiatives to review the copyright law by organisations serving blind and visually impaired communities.

Chapter Five presents the findings resulting from the desktop study and research questions. It provides some recommendations for amendment to the Copyright Act and concludes by recommending actions that the government should take to remedy the current copyright situation, such as finalising its IP Policy Framework and urgently amending both the Copyright Act and Electronic Communications and Transactions Act (ECT) Act 25 of 2002 to accommodate the access needs of persons with sensory disabilities.

[29] Although visually and hearing impaired persons are not the only victims of discriminatory access to copyright works, the issues experienced by persons who have dyslexia or other learning problems, or who are physically and/or intellectually challenged, go beyond the ambit of this study. However, in as much as their problems, as well as those of deaf-blind persons, are similar to those experienced by blind, Deaf and other hearing impaired persons per se, they are addressed in this study.

And when He comes, he will open the eyes of the blind and unplug the ears of the deaf." (Isaiah 35:5)

CHAPTER 2: LITERATURE REVIEW

2.1. Access to Information is a Human Right

Access to information is critical to human existence, development and quality of life. It is so fundamentally important that it is accepted as a basic human right internationally and has been entrenched in the Universal Declaration of Human Rights (UNDHR), to which South Africa is committed as a signatory country.

> The history of the concept of "human rights" reveals its historical evolution and political and social use from the Second World War until the Universal Declaration of Human Rights (1948). Since then the international instruments protecting human rights have broadened and developed, including at the regional level. The universality, indivisibility, interdependence and interrelation of all human rights and fundamental freedoms are universally accepted. Disability is a new area of action in the protection of human rights.[30]

Access to information is the lifeline for persons with sensory disabilities to be able to function, exercise and enjoy their human rights, and participate fully in an equal and democratic society.

> Human rights protection is not just linked to respect for individual freedoms but also to the social and cultural construction of inclusive societies, in which prejudices and barriers are eliminated and all can live without social, legal or practical stigma.[31]

Okediji points out that there is a taxonomy of different types of access and states that -

> access . . . encompasses the unencumbered right to utilize a creative work (uncompensated creative access); privately negotiated terms of use between owners and users (negotiated access); qualified opportunities to utilize certain types of works through compulsory licensing (mandatory compensated access); as well as the opportunity to purchase and own the physical embodiment of the protected content (bulk compensated access).[32]

The importance of access to information and equal opportunity for persons with disabilities is recognised in other human rights documents such as the UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities of 1993. Although not legally binding, these Rules 'represent a strong moral and

[30] G Griffo & F Ortali (eds) *Training Manual on the Human Rights of Persons with Disabilities* (2007) 15 <http://www.aifo.it/english/resources/online/books/cbr/manual_human_rights-disability-eng07.pdf>.

[31] Ibid para 4.25.

[32] R L Okediji 'Sustainable Access to Copyrighted Digital Information Works in Developing Countries' in K E Maskus & J H Reichman (eds) *International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime* (2005) 142, 148.

political commitment of Governments to take action to attain equalization of opportunities for persons with disabilities'.[33] The purpose of the Convention on the Rights of Persons with Disabilities (CPRD) of 2008 is 'to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity'.[34]

On 5 July 2012, the UN Human Rights Council adopted resolution (A/HRC/20/L.13) regarding the promotion, protection and enjoyment of human rights on the Internet. The Council affirmed 'that the same rights that people have offline must also be protected online, in particular freedom of expression' and called upon all States to promote and facilitate access to the Internet…'[35] This resolution extends to all users of information, including persons with sensory disabilities, but it will take time for countries to adopt and implement this resolution into their national policies and legislation.

From getting an education to finding their way around a food store, applying for a job to building a career, socialising with others to consulting a doctor, visiting the library to accessing the Internet, filling out tax or bank forms to completing a job application, assisting a child with homework to reading a health pamphlet, persons with disabilities encounter far more challenges on a daily basis than their fellow citizens who do not have disabilities. Coping with general day to day activities and accessing information in these circumstances is an on-going hurdle for them.

The majority of people with disabilities can and want to live independent and productive lives, but to achieve this, they need access to opportunities, resources, environments, and assistive and digital technologies that will facilitate and allow them independence, dignity, self-sufficiency and responsibility.[36]

Persons with sensory disabilities should enjoy the same benefits as any other users of information. International and local discussions and research on limitations and exceptions should include the access needs of persons with sensory disabilities, but seldom do they receive the attention they deserve in these deliberations or in any legislative processes. 'If we understand the ways in which people with disabilities are denied their rights, then attitudes and practices can change, and barriers can fall.'[37]

Devlin and Pothier argue that 'charity and welfarism' responses (despite their well-intentioned nature) have failed to adequately respond to the needs of persons with disabilities and may in fact have exacerbated their problems. They suggest that this has resulted in 'a system of deep structural economic, social, political, legal and

[33] 'Standard Rules on the Equalization of Opportunities for Persons with Disabilities' (2003) para 1 <http://www.un.org/disabilities/default.asp?id=26>.

[34] Convention on the Rights of Persons with Disabilities and its Protocol (2008) Art 1. <http://www.un.org/disabilities/convention/conventionfull.shtml>.

[35] UN Human Rights Council 'Human Rights Council Concludes Twentieth Regular Session' <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12329&LangID=E>.

[36] F Kinghorn 'Towards a Barrier-Free Society' (2002) *SAHRC Report* 1, 6.

[37] Ibid 5.

cultural inequality in which persons with disabilities experience unequal citizenship, a regime of dis-citizenship'.[38]

Disability is often a topic not thought about or addressed in every day legal issues. In most cases, it is an issue inadvertently or even purposely omitted from legal agenda as it may complicate matters. People without disabilities tend to look at the world from their perspective, without considering the needs and aspirations of persons with sensory disabilities. The lack of a disability perspective can therefore lead to errors or omissions in our legal analysis and application and creates a special problem when it comes to intellectual property law.[39]

Johnson states that '[i]ntellectual property has value and meaning only insofar as it is capable of being seen, heard, or otherwise understood'.[40] He argues that in specific instances, courts have got the law wrong because of a failure to consider the perspective of persons with disabilities.[41]

Helfer and Austin favour more engagement amongst policymakers, lawmakers and other stakeholders so that the intersection between human rights and intellectual property can be addressed. 'Because law is shaped by human agency', the way in which these regimes intersect 'is not an inevitable or predetermined process'.[42] Those responsible for engaging with the legal and social policy issues relevant to human rights and intellectual property issues 'have a large measure of discretion in determining the character of this interaction'.[43] The authors want to 'urge governments, before revising the status quo, to first determine whether and to what extent intellectual property – as opposed to other factors – impedes or enhances the attainment of desired human rights outcomes'.[44]

Sun suggests that 'human rights law provides an excellent framework within which rights talk concerning intellectual products could be animated in a way to bring about a more lucid and intimate understanding of the nature of competing rights enjoyed by creators and users'.[45] He argues strongly in favour of user rights rather than mere limitations and exceptions to exclusive rights of authors or creators.

Johnson acknowledges that even though intellectual property rights are 'justified by moral imperatives and personal rights', the rights of intellectual property

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[38] R. Devlin & D Pothier 'Introduction: Towards a Critical Theory of Dis-Citizenship' in D Pothier & R Devlin (eds) *Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law* (2006) 1, 1.

[39] E E Johnson 'Intellectual Property's Need For A Disability Perspective' (2010) 20(2) *George Mason Univ CRLJ* 181 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1667099>.

[40] Ibid.

[41] Ibid.

[42] L R Helfer & G W Austin *Human Rights and Intellectual Property: Mapping the Global Interface* (2011) 512.

[43] Ibid.

[44] Ibid.

[45] H Sun 'Overcoming the Achilles Heel of Copyright Law' (2007) 5(2) *Northwestern J of Technology & Intellectual Property* 265, 312.

holders 'cannot be construed so as to deny the personal rights of persons with disabilities to express themselves and comprehend the world around them''.[46] He warns that –

> [as] intellectual property doctrines evolve and become memorialized in written opinions without taking into account a disability perspective, the law proceeds to shape society in a way that denies people with disabilities the right to experience it as fully as people without disabilities. This course is wrong and should be reversed.[47]

Johnson also strongly opines that -

> …regardless of whether one believes that intellectual property law will be unduly burdened by being disability neutral, and regardless of what theoretical justifications one does or does not find availing, there is one conclusion that is beyond dispute. Bringing a disability perspective to intellectual property jurisprudence and lawmaking brings an honesty that is otherwise missing.[48]

Ayoubi claims that -

> the main clash of human rights and intellectual property in general and copyright in particular manifest itself in the inconsistencies between the moral and material interests of the author being the owner of the copyright and the benefits of members of public as they claim their rights in enjoying the results of cultural literary and scientific progress of the society as a whole.[49]

These tensions will constantly pull in opposite directions – rights owners striving for more protection and control of their works, whilst users of information endeavour to exercise their access to information rights afforded to them constitutionally and in national legislation.

'Equality for the disabled involves removing barriers to opportunities, eradicating discrimination and providing positive measures to accommodate and include them'.[50] Equality and dignity must be met through appropriate legislation, whether new or amended, as well as monitoring of constitutional and legislative provisions and adequate enforcement measures to ensure that people with sensory disabilities enjoy the benefits of fair and equal legislation. To compete fairly and equally with other citizens who do not have disabilities, persons with sensory disabilities have to be able to access and enjoy the same quality, quantity and huge range of information that is available locally and globally, at the same time and at

[46] Johnson (note 39 above) 207.

[47] Ibid 182.

[48] Ibid 207.

[49] L Ayoubi 'Human Rights, Copyright and Visually Impaired Persons: Setting the Stage' (2011) 9 [Thesis].

[50] C Albertyn & B Goldblatt 'Equality' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 35 (2009, 2nd ed) 1, 70.

least in alternative, accessible formats that are comparatively priced with the original works.

To contextualise this research in the South African copyright framework, it is important to look at the historical background of copyright and limitations and exceptions to exclusive rights of authors and creators, as well as trends and developments at the international and regional levels. These all impact directly on access to information by South Africans, including persons with sensory disabilities, through formal agreements and treaties, and/or indirectly, through pressure through 'harmonisation' initiatives and bilateral agreements such as the EU Economic Partnership Agreements (EPAs) and US Free Trade Agreements (FTAs) which attempt (and have succeeded in at least one country in Africa (ie Morocco) to strengthen copyright through TRIPs-Plus provisions.

A previously published work of mine highlights the negative impact of the IP Chapter in US FTAs on developing countries and access to information, and recommends that countries should reject the TRIPs-Plus IP Chapter.[51]

2.2. Historical Overview of Copyright

Copyright law has long emphasised that copyright protection does not exist for its own sake but rather to serve the greater public interest or public good.[52] Some would argue that a form of copyright regulation dates back to ancient Roman times, and others, that there were attempts to 'regulate' printers and the production of literary works in various countries of Europe after the birth of the printing press.

The first official copyright law accepted as the 'birth of copyright' was the '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 (commonly known as "The Statute of Anne") promulgated in Great Britain in 1710'.[53]

The Statute of Anne: '... transformed the stationers' copyright - which had been used as a device of monopoly and an instrument of censorship - into a trade-regulation concept to promote learning and to curtail the monopoly of publishers....'[54] It was introduced to protect the author and to give formal recognition to the legal right of authorship. In the process, its objective was to encourage learning. The Statute was not well drafted and only after court cases and further legislation, was the meaning of some of its provisions settled.[55]

The main purpose of the 1710 Statute was to encourage learned men to write books and to give them a guaranteed but non-permanent right of control to print and

[51] D R Nicholson 'Intellectual Property: Benefit or Burden for Africa?' (2006) 32(4) *IFLA Journal,* 210, 320.

[52] International Federation of Libraries & Institutions (IFLA) 'Limitations and Exceptions to Copyright and Neighbouring Rights in the Digital Environment: An International Library Perspective' (2004) <http://www.ifla.org/en/publications/limitations-and-exceptions-to-copyright-and-neighbouring-rights-in-the-digital-environm>.

[53] L R Patterson & S W Lindberg *The Nature of Copyright: A Law of Users' Rights* (1991) 28.

[54] Ibid.

[55] J Hofman *Introducing Copyright: A Plain Language Guide to Copyright (*2008) 9.

reprint their works. In this way, the legislators succeeded in striking a 'culturally significant societal bargain or trade-off involving the author, the bookseller and the reading public'.[56]

The central focus of the Statute Anne was the 'free market of ideas', not the marketplace of the bookseller'.[57] In essence, the statute was concerned with the 'reading public, the continued production of useful literature, and the advancement and spread of education'.[58] It was the first time that booksellers were denied perpetual rights and their monopoly over copyright. It limited the exclusive right to printing new books registered with the Stationers' Company to a 14 year period and gave the copyright proprietors on existing books the sole right to print for 21 years. It essentially deregulated ownership from monopolistic entities and enabled anyone to hold the copyright in a new work, i.e. 'printers, bakers, cobblers, and even authors'.[59]

The Statute of Anne and the US Constitution (1787) both encouraged the promotion of knowledge by giving authors and creators exclusive rights for a limited period. The US Constitution declares that the purpose of copyright in that country is 'to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries'.[60] The USA promulgated their first Copyright Act in 1790, followed by France, and then various other countries followed suit.

The notion of granting legal flexibilities or limitations and exceptions to these exclusive rights for users of those works was not a consideration until 1886, when the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention)[61] was passed. This Convention was the first international intellectual property agreement that was open to all countries and set the tone for all future copyright and related rights.[62] It was an agreement to honour the rights of all authors who were nationals of countries that were party to the Convention. It was initiated through WIPO, which still administers it today. The current version of the Convention is the Paris Act of 1971. The Convention lays down minimum protection standards for member countries to include in their national laws, but does not prescribe against maximum protection standards which members may want to adopt in their national laws.[63]

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[56] R Deazley 'The Myth of Copyright at Common Law' (2003) 62(1) *Cambridge LJ* 1st 106, 108,

[57] R Deazley *On the Origin of the Right to Copy: Charting the Movement of Copyright Law* (2004) 46.

[58] R *Deazley Rethinking Copyright: History, Theory, Language* (2006) 13.

[59] P A David 'The Evolution of Intellectual Property Institutions and the Panda's Thumb' (1992) 18 [unpublished paper] <http://www.history.ox.ac.uk/ecohist/readings/ip/david1.doc>.

[60] See Constitution of the United States of America (1787).

[61] Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886.

[62] Hofman (note 55 above) 21.

[63] Ibid 22.

2.3. Definition and Purpose of Copyright

As copyright has developed over the centuries, it has been given many and varied definitions. One general definition is that copyright is a 'bundle' or 'suite' of exclusive rights given to authors and creators to protect their original works for a certain period of time. It is a statutory monopoly granted to them to enable them to have total control over their works.

Dean defines copyright as -

> the exclusive right in relation to work embodying intellectual content (i.e. the product of the intellect) to do or to authorize others to do certain acts in relation to that work, which acts represent in the case of each type of work the manners in which that work can be exploited for personal gain or profit. [64]

This statutory monopoly is limited in scope and in duration. The scope of copyright is limited by 'fair use' or 'fair dealing' and general exceptions for different types of works. In South Africa, the model in place and inherited through colonial rule from Great Britain is 'fair dealing', which is found in Section 12 of the SA Copyright Act. There are general exceptions for each category of work and the Regulations in Section 13 of the SA Copyright Act include limited exceptions for libraries and education.

Rens and Lessig affirm that the scope of copyright is limited to the rights listed in the statute, so there are other uses of the work that are not regulated and can be freely used by anyone. No one requires permission to read a book, or to read a book aloud, or to underline or make annotations in the margins of her own book, or even to tear or burn her own book.[65]

Most copyright laws state that the author or rights owner has the right to authorise, restrict or prevent certain acts in relation to a work. The rights owner of a work can prohibit or authorise the following:

- Its reproduction in various forms, such as printed publications or sound recordings;
- the distribution of copies;
- its public performance;
- its broadcasting or other communication to the public;
- its translation into other languages;
- its adaptation, such as a novel into a screenplay.

The exclusive rights, however, apply only to acts done to the whole or a substantial part of a work. For instance, 'any copying that is of less than a substantial

[64] O H Dean *Handbook of South African Copyright Law* (1987), Service 14, 2012, 1-1.

[65] A Rens & L Lessig 'Forever Minus a Day: A Consideration of Copyright Term Extension in South Africa' (2006) 7 *SAJIC,* 22, 24.

part of a work is not an infringement. It does not require a 'fair dealing' exception. It is simply free'.[66]

The main purpose of copyright is that the greater public interest is served by giving authors an incentive to create and by encouraging the dissemination of new knowledge. Commonwealth countries provide authors and creators with two separate rights in copyright law, i.e. economic rights which enable them to exploit their works commercially and to gain some compensation for their efforts; and non-transferable moral rights which give them the 'right of paternity' or right to claim authorship of the work, as well as the right to object to any distortion, modification or mutilation of the work, or any defamatory or derogatory action in relation to the work.[67]

Moral rights were not part of the 1886 version of the Berne Convention and were only included in article 6bis of the Rome Act of the Berne Convention in 1928. The United States, however, still has no general moral rights legislation, although their Visual Artists Rights Act, 1990 introduced some form of moral rights protection for authors of works of visual art.[68]

The United Nations Educational, Scientific and Cultural Organization (UNESCO) provides four elements of moral rights, namely: right of attribution; right of integrity; right of disclosure and right of withdrawal.[69] Protection of moral rights comes into play particularly when copyright material is adapted, modified or translated, as would be necessary in cases where material is converted into accessible formats for persons with sensory disabilities. Changing the context of the work in translation, or modifying by cropping, colouring or excluding some images or sections of the work in the process of conversion could affect or infringe the authors' or creators' moral rights.

Were rights owners to have total control over their works, information would be 'locked up' and totally inaccessible to others, making the goals of copyright intangible. Authors and creators themselves need a rich and vibrant public domain to inspire innovation and new creations. 'Research and scholarship rely on the public domain as a building block to the creation of new knowledge; education is promoted through the spread of ideas and information; access to cultural heritage is enabled through symphonies, ancient texts, among others…'[70]

It was therefore necessary and important for the copyright system to limit the exclusive rights of authors and creators in such a way as to create a balance

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[66] Rens & Lessig (note 65 above).

[67] World Intellectual Property Organization (WIPO). Understanding Copyright and Related Rights, para 'Moral Rights' <http://www.wipo.int/freepublications/en/intproperty/909/wipo_pub_909.html#moral_rights>.

[68] Hofman (note 55 above) 52. Also see Timeline of Copyright in U.S. <http://www.arl.org/pp/ppcopyright/copyresources/copytimeline.shtml>.

[69] P Totcharova & E Glélé *ABC of Copyright (*2010) 30 <http://www.unesco.org/fileadmin/MULTIMEDIA/HQ/CLT/diversity/pdf/WAPO/ABC_Copyright_en.pdf>.

[70] J Cheverie 'Copyright, the Public Domain, and the Value to Higher Education' (2011) para 1 <http://www.educause.edu/blog/cheverij/CopyrightthePublicDomainandthe/238644>.

between those exclusive rights and the just demands of users needing access to that information.

2.4. Genesis of Limitations and Exceptions in Copyright Law

One of the most important and practical ways of creating and maintaining a balance between copyright owners' interests in receiving fair compensation for their efforts, and users' interests in receiving fair access to copyright works, is the implementation of limitations and exceptions to the exclusive rights of copyright owners. Copyright also imposes other limits, such as duration of copyright, limited suite of rights and subject matter restrictions but these are weakened in the digital environment.[71]

Since copyright law provides authors and creators with a statutory monopoly over their creations, limitations and exceptions are critical for any equal distribution of rights to occur. Copyright law aims to facilitate sufficient access to copyright protected works to encourage innovation, research and new creativity, but the balance has become skewed, particularly in the digital environment. Ironically, it is the digital environment that should provide more accessibility and opportunities for persons with sensory disabilities, but copyright has exacerbated the situation for them.

Heins opines that -

> [t]oday, public policy has stretched "the attribute of property" too far, and as a result has skewed the "difficult balance" of copyright law. Increasingly, readers, writers, artists, librarians, scholars, and many other citizens are recognizing what is at stake.[72]

Throughout the history of copyright, not all literary works have enjoyed copyright protection. Works of an objectionable nature, such as obscene or seditious material have not been afforded protection in copyright law. In other circumstances, it has been recognised that in order for the purpose of copyright to be effectively realised, certain limitations or exceptions should apply to the exercise or scope of established exclusive rights of authors or creators.

There is no definition in the international or regional instruments clearly indicating the difference between 'limitations' and 'exceptions'. In fact, according to Sirinelli -

> The term "exception" is not to be found in all legal systems. It appears, for example, in Belgium and in the proposal for a Community Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society (Article 5). But the same concept has another name in other countries. For example, the word "limit" is used in Germany and Spain, while the similar term "limitations" is used in Sweden, Greece and the United States. Switzerland refers to "restrictions", while the United Kingdom uses "authorized acts" and Portugal "free use". The legal ingenuity of French law-makers has allowed them not

[71] IFLA (note 52 above) 18.

[72] M Heins *The Progress of Science and Useful Arts: Why Copyright Today Threatens Intellectual Freedom - A Public Policy Report* (2003) 46 <http://www.fepproject.org/policyreports/copyright2d.pdf>.

> to use the term at all (circumlocutions are employed¨ Art. L. 122-5 of the French Intellectual Property Code (IPC) "Once a work has been disclosed, the author may not prohibit …")!![73]

Although 'limitations' and 'exceptions' are often used interchangeably, there are in fact differences or two distinct categories, namely, exceptions that include 'authorisation-free' and 'remuneration-free' use of a work, or full exemption of a work from copyright protection, and 'limitations' that require authorisation from rights holders and compulsory or statutory licences that are generally accompanied by the payment of a royalty.[74] The earliest version of limitations on copyright can be found in the 1886 text of the Berne Convention.

Historically, the international copyright system has not stressed the central importance of limitations and exceptions to fulfil copyright goals, ie to promote the public interest. Although the UK Statute of Anne and other laws later introduced in various countries enshrined rights for authors, there was no general rule covering all cases in which countries could institute permitted limitations and exceptions to the exclusive rights of rights owners. Basically it was left to the discretion of national legislators to decide whether legal flexibilities were necessary and if so, which ones were appropriate for inclusion in national copyright laws. In the Berne Convention and TRIPS Agreement, authors' rights were specifically identified, articulated and mandated, whilst limitations to these rights were general, ambiguous and discretionary, without any real force in the absence of state action.[75] Okediji also makes reference to the 1952 Universal Copyright Convention, stating that -

> even this so-called "development friendly" international copyright agreement did not contain explicit access principles. Like the Berne Convention, the UCC deferred to domestic legislation to develop limitations to copyrighted works. Article IVbis(2) of the UCC requires that any such domestic legislation that provides exceptions to the authors' rights should not conflict with the "spirit and provisions" of the Convention and shall "nevertheless accord a reasonable degree of effective protection to each of the rights to which exception has been made.[76]

There has always been a broad consensus that the exclusive rights of copyright-holders in their works should not be unlimited. In fact, a strong set of limitations and exceptions is deemed necessary to safeguard fundamental rights and freedoms of users, to regulate competition and industry practice, to promote the

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[73] P Sirinelli 'Exceptions and Limits to Copyright and Neighbouring Rights' (1999) 2 <http://www.wipo.int/edocs/mdocs/copyright/en/wct_wppt_imp/wct_wppt_imp_1.pdf>.

[74] L Ayoubi 'Human Rights Perspectives on Access of the Blind, Visually Impaired and Other Reading Disabled Persons to Copyrighted Materials' (2011) [Thesis] 12.

[75] R K Okediji 'The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries' (2006) 15 *UNCTAD - ICTSD Project on IPRs and Sustainable Development Series* 8.

[76] R Okediji 'Fostering Access to Education, Research and Dissemination of Knowledge through Copyright' (2004) [Draft Paper for UNCTAD-ICTSD Dialogue on Moving the pro-development IP agenda forward: Preserving Public Goods in Health, Education and Learning, Bellagio, Nov/Dec.] <http://www.iprsonline.org/unctadictsd/bellagio/docs/Okideiji_Bellagio4.pdf>.

dissemination of information, and to alleviate the symptoms of market failure.[77] For example, where limitations and exceptions are adopted in favour of education, libraries, museums and archives and persons with disabilities, this reflects the government's belief that it is more beneficial to society for certain uses to take place, under certain circumstances, without authorisation from rights owners, than to maintain too strict control over copyright works. This is not to say that every use should be free. Compensation to rights owners can be made through licences.[78]

Restrictions on statutory copyrights may not always emanate from copyright law. They may be as a result of the application of other laws or principles, such as constitutional provisions on freedom of expression, international instruments concerning human rights, rules of competition or even contractual arrangements, under which entitlement to use protected material without the permission of the rights owner may be claimed. National laws may also have general rules or prohibitions regarding the misuse or abuse of rights.

The following international treaties and agreements contain provisions regarding copyright limitations and exceptions to the exclusive monopoly rights of authors:

- The Berne Convention
- The Universal Copyright Convention (UCC)
- The Rome Convention
- Trade Related Aspects of Intellectual Property Rights Agreement (TRIPS)
- The WIPO Copyright Treaty (WCT)
- The WIPO Performances and Phonograms Treaty (PPT)

Okediji advocates that '[t]he important role of limitations and exceptions to copyright's fundamental purpose should become a more central part of the structure and operation of the international copyright system'.[79]

2.5. 'Three-Step Test' on Limitations and Exceptions

Before the Stockholm revision of the Berne Convention in 1967, various provisions had been introduced allowing member or Union countries to introduce limitations and exceptions to the rights established under the Convention, eg those concerning quotations, illustration for teaching purposes and reporting of current events. Some of these limitations and exceptions were subject to certain conditions, for example, the source had to be acknowledged.

[77] L Guibault *Copyright Limitations and Contracts - An Analysis of the Contractual Overridability of Limitations on Copyright (*2002) 28.

[78] L Guibault 'The Nature and Scope of Limitations and Exceptions to Copyright and Neighbouring Rights with regard to General Interest Missions for the Transmission of Knowledge: Prospects for their Adaptation to the Digital Environment '(2003) *e-Copyright Bulletin,* 1,10. <http://unesdoc.unesco.org/images/0013/001396/139671e.pdf>.

[79] Okediji (note 75 above) xi.

It was only when an exclusive right to reproduce works was formally recognised in Article 9 (1) of the Stockholm Act of the Berne Convention, that the need was recognised for countries to introduce restrictions on the way in which the right was to be exercised, and to protect authors against the introduction of restrictions which could affect the exercise of the reproduction right to an unacceptable degree. As a result, Article 9(2) of the Stockholm Act of the Convention introduced the 'three-step test' which declared three conditions that had to be observed before any limitations and exceptions to the reproduction right could be introduced, namely –

> It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.[80]

> The application of the "three-step test" for the specific limitations and exceptions allowed by the Berne Convention is an interpretation tool: it guarantees the appropriate interpretation and application of those limitations and exceptions.[81]

In 1995, the three-step test was incorporated into Clause 13 of the TRIPS Agreement, administered by the World Trade Organization (WTO),[82] thus imposing its conditions on all signatories of the said Agreement, regardless of whether they were signatories to the Berne Convention or not.

In 1996, WIPO set the framework for world digital copyright regimes in its two Internet Treaties, namely, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

The WCT extended the scope of Article 9(2) of the Berne Convention, making it applicable not only to reproduction rights, but to all authors' rights. The agreed statement concerning Article 10 states –

> Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.
>
> It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.[83]

[80] Berne Convention (note 61 above).

[81] WIPO Division for Certain Countries in Europe and Asia 'Adaptation of the Copyright Laws of Countries in Transition to New Technologies; Accession to, and Implementation of, the WIPO "Internet Treaties"' Version 1, 16 <http://www.wipo.int/export/sites/www/dcea/en/pdf/tool_2_1.pdf>.

[82] See Text of the TRIPS Agreement <http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm>.

[83] WIPO Copyright Treaty (1996) Art 10.

The WPPT also applied the same principles to related rights, including limitations and exceptions in the digital environment.

> The agreed statement concerning Article 10 (on Limitations and Exceptions) of the WIPO Copyright Treaty is applicable *mutatis mutandis* also to Article 16 (on Limitations and Exceptions) of the WIPO Performances and Phonograms Treaty.[84]

The three-step test is also recognised in the EU Copyright Directive, which provides an exhaustive list of permissible but non-mandatory exceptions (except for one covering 'temporary, transient or incidental acts of reproduction'), but they are all subject to full compliance with the three-step test.[85]

Despite its incorporation in the above treaties and EU Copyright Directive, no considerable degree of agreement exists as to the actual meaning of the test since none of the treaties defines itself [in] any of the significant terms used in the test.[86]

Research conducted by WIPO's Division for Certain Countries in Europe and Asia does not define the test but highlights its importance and stresses the need for 'due accordance with the test', even when doing private copying.[87] It focuses on the basic conditions of the application of limitations and exceptions as provided in the three-step test and particularly those relating to the digital environment. It also discusses problems and possible solutions for countries in transition in the process of implementing the WIPO Internet Treaties. People with disabilities are mentioned in Article 70 of this paper, which reads as follows –

> Although the "three-step test" may serve as a guarantee for appropriate application of the specific exceptions and limitations provided in national laws of "transition countries," it is also important that the provisions on such exceptions and limitations themselves contain appropriate conditions to guarantee due accordance with the test. This also applies to such important exceptions and limitations as those provided for the purpose of education, library services, public information or use for people living with disabilities. However, it is particularly important to emphasize this in respect of exceptions and limitations for private copying, since their regulation and application raise a number of questions in view of the relevant provisions of the national laws of "transition countries". [88]

The three-step test is significant in national copyright law as it has to be considered before any limitations and exceptions can be adopted. It has been generally accepted that persons with sensory disabilities would fall into the category of 'certain special cases', which is the second criteria of this test.

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[84] WIPO Performances and Phonograms Treaty (WPPT) (1996), Art 16.

[85] Directive 2001/29/EC of the European Union and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society.

[86] J Oliver 'Panel Discussion: Copyright in the WTO: The Panel Decision on the Three-Step Test' (2002), 25 *Columbia J Law & the Arts* 119, 134 in: T Schönwetter 'The Three-Step Test Within the Copyright System' (2006) para. 5 [Conference paper] <http://pcf4.dec.uwi.edu/viewpaper.php?id=58>.

[87] WIPO Division (note 81 above) Art 71, 17.

[88] Ibid 15.

Kushalnagar states that -

> it seems clear that the benefit of blind readers – indeed of all persons whose ability to enjoy protected works is hindered because of copyright protection – is a so-called special case, precisely because the work, as published, is inaccessible to them. Making a previously inaccessible work accessible seems, moreover, to be perfectly consistent with the normal exploitation of that work.[89]

He suggests that statutory exceptions for all persons with disabilities would be permissible under the Berne Convention, as long as they ensure that such reproductions do not unreasonably prejudice the interests of the copyright holders.[90]

Okediji strongly advocates reform of the three-step test, to 'ensure that public interest values are considered within the application of the test'.[91]

Sun argues strongly against the current form of the three-step test as it is applied to limitations and exceptions for users. He opines that ''the three-step test' has become the catalyst for the continued strengthening of copyright protection at the international, regional and national levels.' He feels expansion of this test –

> has been premised on the rhetoric that the unprecedented convenience of having access to and making use of works afforded by digital technology, would necessarily mean that the copyright protection should be beefed up by significantly narrowing down the scope of the limitations on copyright.[92]

He further argues for the recognition of users' rights within the framework of human rights and goes so far as to suggest 'it is highly time for us to create a revolutionary earthquake to break down the very foundation on which the three-step test is founded'.[93]

Geiger claims that 'the adaptation of the system of exceptions to the imperatives of the information society remains a great challenge at the global, European and national levels'[94] and that 'the freedom of national legislators has been strongly reduced by the rules of the three-step test'.[95] He remarks that 'what seems shocking i[s] that there has been no debate over the true scope of this legal instrument, whose dangerous potentialities have gradually appeared'.[96]

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[89] R S Kushalnagar 'Balancing Perceptually Disabled Consumers' Rights Against Copyright Holders' Rights' (2009) 23 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1475449>.

[90] Ibid.

[91] Okediji (note 75 above) xi.

[92] Sun (note 45 above) 329.

[93] Ibid 330.

[94] C Geiger 'The Role of the Three-Step Test in the Adaptation of Copyright Law to the Information Society' (2007) *e-Copyright Bulletin,* 21 <http://portal.unesco.org/culture/en/files/34481/11883823381test_trois_etapes_en.pdf/test_trois_etapes_en.pdf>.

[95] Ibid.

[96] Ibid.

There are other researchers who feel differently about the three-step test. Schönwetter, for instance, opines that the three-step test was formulated independently from technological advances and will therefore continue to play a decisive role in international copyright law, particularly in the digital environment. He recognises it as a suitable instrument 'to safeguard a fair balance between the often diametrically opposed interests of the users and the public on the one hand and the copyright-holders on the other hand'.[97]

2.6. Need for Balance in Copyright Law

The need for balance was formalised in the Stockholm Act of the Berne Convention but can also be seen in various other international declarations, treaties and research reports, eg UDHR[98] and International Covenant on Economic, Social and Cultural Rights (ICESCR),[99] which recognise both sides of the equation as vital to humanity.

The Berne Convention recognises the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information. This emphasis on balance is also entrenched in the preambles of the WCT and WPPT.

The protection of the labour of authors is guaranteed by Article 27(2) of the UDHR and Article 15(c) of the ICESCR - 'Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author'.[100] The right of all to share in the cultural and scientific output of humanity is similarly guaranteed by Article 27(1) of the UDHR: 'Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits'.[101]

Apart from the Treaties mentioned above, the following directives, research reports, commissions, projects and proposals all recognize the need to 'maintain a balance between the rights of authors and the larger public interest, particularly for education, research and access to information' –

- The Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (EU Copyright Directive)
- The Commission of Intellectual Property Rights (UK) (CIPR) - Integrating Intellectual Property Rights and Development Policy - Final Report (2002)
- The World Summit Declaration of Principles (2003)
- Adelphi Charter on creativity, innovation and intellectual property (2005)

[97] T Schönwetter 'The Three-Step Test Within the Copyright System' (2006) final para [Conference paper] <http://pcf4.dec.uwi.edu/viewpaper.php?id=58>.

[98] See <http://www.un.org/en/documents/udhr/index.shtml#a27>.

[99] See <http://www2.ohchr.org/english/law/cescr.htm>

[100] (Notes 98 & 99 above).

[101] (Note 98 above).

- The CopySouth Dossier (2006)
- The Gowers Report on Intellectual Property(2006)
- Proposal by Brazil, Ecuador and Paraguay, Relating to Limitations and Exceptions: Treaty Proposed by WBU (2009)
- The Hargreaves Report (UK) (2011)
- The WIPO Development Agenda
- African Copyright and Access to Knowledge Project (ACA2K)

Schönwetter and I affirm that -

> Legitimate interests of users are primarily safeguarded by way of so-called copyright exceptions and limitations to the exclusive rights of authors and creators. These help to ensure a balance between the rights of authors and creators and the just demands of users of information.[102]

Most researchers in intellectual property allude to a balance in copyright, yet the constant pressure from rights holders to strengthen copyright protection with additional protections such as restrictive licensing and digital rights management systems (DRMs) with technological protection measures (TPMs) in the digital environment makes the hope of true balance in the copyright system ever intangible. It is important that this balance be restored and maintained, and in the process, persons with sensory disabilities will begin to enjoy the same benefits as any other users of information.

Sirinelli acknowledges the importance of balance and says -

> To speak of the information society does not mean considering works of the mind as common merchandise and only envisaging copyright and related rights in the future in the light of consumers' interests alone. Intellectual property rights have always and everywhere provided a balance among conflicting interests: authors, creation auxiliaries, investors or disseminators, the public, enriching mankind's heritage …. This balance must be maintained.[103]

He claims that the historical, sociological and philosophical traditions of each country have influenced the way balance in copyright has been sought. This is 'why a new structure that would attempt to find common solutions, or at least, attenua[t]e the differences'[104] is necessary within the WIPO framework, but he does not provide practical suggestions on how this could be achieved.

Boyle declares that 'our intellectual property system would be better if we paid more attention to the negative externalities produced by the grant and exercise of each new property right, instead of focusing monomaniacal on the problems posed by public goods….'[105]

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[102] D R Nicholson & T Schönwetter 'Copyright Limitations and Exceptions - Why They are Important for Access to Knowledge' (2008) para 6 <http://www.aca2k.org/index.php?option=com_idoblog&task=viewpost&id=79&Itemid=69>.

[103] Sirinelli (note 73 above) 40.

[104] Ibid.

[105] J Boyle 'A Politics of Intellectual Property: Environmentalism for the Net?' (1997) 47 *Duke LJ* 87, 115.

Gross stresses that 'both sides of the copyright bargain deserve respect'. She states that it is –

> simply not fair for one side to take all the benefit and accept none of the responsibility of the copyright bargain…. The public must ensure that authors are economically rewarded for their creative gifts, and authors must ensure that the public is able to retain its rights and abilities to use and access creative expression.[106]

Rikowski argues that there are not one but three parts to the balance in copyright and that without achieving all three parts, balance is virtually impossible.[107] She explains as follows:

> So, we have the main balance – the balance between the rights of creators of works and copyright holders and the free flow of information and the two halves of the balance – making 3 parts to the balance altogether. One half is the aim to balance the rights for creators of works and copyright holders (i.e. their moral and economic rights …) and the other half is the aim to balance various aspects of the free flow of information. … four seem to me to be particularly important – free access to information, intellectual freedom, freedom of expression and freedom of information.[108]

Lessig[109] and James Boyle[110] both have compelling arguments for balance in copyright law and the importance of protecting the public domain - 'the commons'. Existing socio-economic divides are exacerbated because copyright limitations and exceptions are being eroded through lobbying and undesirable technological regulation at the expense of users of information.[111]

Boyle expresses concern about the strengthening of intellectual property laws and the shrinking domain which is causing an imbalance in favour of rights holders in copyright law. He claims 'there are systematic errors in contemporary intellectual property policy' and it is the responsibility of WIPO to help rectify the situation. He discusses how this imbalance endangers the public domain and access to knowledge –

> As intellectual property protection has expanded exponentially in breadth, scope and term over the last 30 years, the fundamental principle of balance between the public domain and the realm of property seems to have been lost. The potential costs of this loss of balance are just as worrisome as the costs of piracy that so dominate discussion in international policy making. Where the traditional idea of intellectual property wound a thin layer of rights around

[106] R D Gross 'Copyright Zealotry in a Digital World: Can Freedom of Speech Survive?' in A Thierer & W Crews (eds) *Copyfights: The Future of Intellectual Property in the Information Age* (2002) 1, 191.

[107] R Rikowski 'Rethinking the 'Balance in Copyright': 3 Parts to the Balance, Not Just One!' (2004) 1, 2. <http://libr.org/isc/articles/21/8.pdf>.

[108] Ibid 3.

[109] L Lessig *How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity (*2004) 1-352.

[110] J Boyle *Public Domain: Enclosing the Commons of the Mind* (2008) 1-315.

[111] L R Okediji 'Development in the Information Age: Issues in the Regulation of Intellectual Property Rights, Computer Software and Electronic Commerce' (2004) *Intellectual Property Rights and Sustainable Development* Issue Paper 9, 11 <http://www.iprsonline.org/unctadictsd/docs/CS_Okediji.pdf>.

> a carefully preserved public domain, the contemporary attitude seems to be that the public domain should be eliminated wherever possible.[112]

Akester feels strongly that '[t]he recent alliance between copyright law and two tools to safeguard the interests of copyright owners online, contract and technology, has affected the "metaphor of balance" traditionally enshrined in the copyright system'.[113]

In October 2005, the Royal Society for the Encouragement of Arts, Manufactures & Commerce (RSA) launched the Adelphi Charter on creativity, innovation and intellectual property ('Adelphi Charter'), which is based on 'the recognition that the vital balance between the public domain and private rights, between encouraging creativity and protecting private ownership and control of information, has tipped too far in favour of rights-owners'.[114]

> The Adelphi Charter on Creativity, Innovation and Intellectual Property is a global statement of principles for a fair, user-friendly and efficient way of regulating creativity and intellectual property.
>
> It responds to one of the most profound challenges of the 21st century: How to ensure that everyone has access to ideas and knowledge, while being justly rewarded, and that intellectual property laws do not become too restrictive.
> It calls on governments to apply a new public interest test of IP laws.[115]

Two recent studies in the UK on intellectual property by Gowers and Hargreaves support the 2001 CIPR's emphasis on balance and flexibility in copyright.[116] Gowers recommends 'greater balance and flexibility of IP rights to allow individuals, businesses and institutions to use information and ideas in ways consistent with the digital age.'[117] Hargreaves reaffirms the need for balance, particularly in the digital environment, and that copyright itself involves a necessary balancing of divergent interests and that when opportunities arise, particularly in education, research and everyday consumer behaviour, the law sometimes needs to change or adapt to ensure the right balance is maintained.[118]

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[112] J Boyle 'A Manifesto on WIPO and the Future of Intellectual Property' (2004) 9 *Duke L & Tech Rev* 1,9.

[113] P Akester 'The New Challenges of Striking the Right Balance Between Copyright Protection and Access to Knowledge, Information and Culture' (2010) UNESCO IGC (1971) XIV/4, 12.

[114] 'Adelphi Charter on Creativity Innovation and Intellectual property' (2005) <http://www.thersa.org/__data/assets/pdf_file/0008/126539/adelphi_charter.pdf>.

[115] 'The Adelphi Charter' <http://www.creativeeconomy.com/adelphi.htm>.

[116] Commission on Intellectual Property Rights 'Integrating Intellectual Property and Development Policy. Final Report' (2002) <http://www.iprcommission.org>. Although persons with sensory disabilities are not specifically mentioned in this report, their needs are indirectly discussed in issues relating to access to education and development purposes in developing countries.

[117] A Gowers 'Gowers Review on Intellectual Property' (2006) para 7.2.

[118] I Hargreaves 'Digital Opportunity A Review of Intellectual Property and Growth' (2011) 1, 41.

Pistorius is of the opinion that implementation of the WCT and anti-circumvention provisions in developed countries have disturbed the copyright balance. She raises issues about technological protection measures which have the potential to lock up information indefinitely.

> Content owners have gained the right to control both access to and use of copyright works in digital form through technological means. Encryption and the use of various digital locks effectively protect copyright owners against the piracy of their digital works. However, technology is blind and cannot distinguish between fair use for the purpose of research or private study and unfair use for commercial gain: all forms of unauthorised uses are barred. This has upset the delicate equilibrium between private and public rights.[119]

Although there has been wide disagreement amongst stakeholders as to where the balance in copyright should be struck, Yu suggests that the 'future standards are likely to fall somewhere in the middle - between what developed countries desire and what less developed can afford'. He believes that disagreement over how to restore the balance in the intellectual system is not necessarily a bad thing. Active and constructive disagreement will only make the debate more vibrant. An 'uninhibited, robust and wide-open' debate may provide the impetus for policymakers to review the current copyright system, without focusing unduly on past decisions and vested interests of certain stakeholder groups.[120]

The influence of human rights may also have an impact on how copyright agreements are drafted in the future. Loundy argues that '[a]uthors should be provided with the incentive to create, but not at a usurious cost to society'.[121] Human rights considerations must be at the forefront of all decisions when drafting copyright legislation, agreements and policies.

The aforementioned researchers and other scholars realise how crucial it is to have and maintain a balance between the rights of authors and creators and the just demands for access by users of information. Limitations and exceptions are the 'tools' whereby users, including persons with sensory disabilities, can access copyright works for personal, research, recreational, educational and other purposes.

Without users of information having equal statutory rights to authors in the copyright system, the urgent need for and importance of limitations and exceptions cannot be over-stressed. They are the catalysts which can bring about balance and practical resolution to ensure access to information is protected 'for the public good'. Over and above the general limitations and exceptions required by users of information, additional and specific limitations and exceptions are required to provide equal access to persons with sensory disabilities. These are discussed later on in this dissertation.

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[119] T Pistorius 'Developing Countries and Copyright in the Information Age. The Functional Equivalent Implementation of the WCT' (2006) 9(2) *PER/PELJ* 149/197-166/197.

[120] P Yu 'The Global Intellectual Property Order and its Undetermined Future' (2009) 1 *WIPO J* 1, 15.

[121] D J Loundy 'Revising the Copyright Law for Electronic Publishing' (2000) 46 <http://www.loundy.com/Revising-HyperT.html>.

The EU Copyright Directive, although enforcing stronger copyright laws, recognised the need to balance and harmonise copyright in member states, but only introduced one compulsory limitation for member countries, ie transient copies in the digital process. All other limitations and exceptions are left up to member countries to adopt on a voluntary basis. Provisions for persons with disabilities are referred to in section 43 of the Preamble and Article 4, Section 3(b).[122] Some member states have voluntarily introduced some exceptions for disabled persons, but since they are not compulsory, there is no obligation on their part or any other member state to adopt any of them.

The means of furthering the public interest are frequently under tension between those that control copyright of the works and those who want to use the works for research, educational, recreational and other purposes. It is only by consciously and properly finding that correct balance that 'a copyright regime will maximise both the creation and communication of new knowledge and ideas'. [123]

Okediji states that '[w]ithout the appropriate balance between protection and access, the international copyright system not only impoverishes the global public but, ultimately, it undermines its own ability to sustain and reward the creative enterprise for the long-term future'.[124]

Hugenholtz and Okediji concur that '[t]he task of developing a global approach to limitations and exceptions ("L & E's") is one of the major challenges facing the international copyright system today.'[125] 'Copyright's internal balance' is under pressure from new technologies and globalization and it is no longer possible to address these issues at the national level. They stress the necessity for a multilateral instrument to resolve these issues.[126]

Franz also stresses the importance of a multilateral approach with strengthened, harmonized limitations and exceptions to rebalance the current copyright regime. She states that 'one could even argue that a strong regime of limitations and exceptions is a sine qua non for any new intellectual property enforcement regime and would in turn make any intellectual property enforcement agenda more acceptable'.[127]

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[122] Full title: Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (also known as the Information Society Directive or the Info Soc Directive).

[123] IFLA (note 52 above) para 4.

[124] Okediji (note 75 above) xii.

[125] P B Hugenholtz & R L Okediji 'Conceiving an International Instrument on Limitations and Exceptions to Copyright. Final Report (2008) 1, 3 <http://www.ivir.nl/publicaties/hugenholtz/finalreport2008.pdf>.

[126] Ibid.

[127] V Franz 'Back to Balance: Limitations and Exceptions to Copyright' in G Krikorian & A Kapczynski (eds) *Access to Knowledge in the Age of Intellectual Property* (2010) 517, 526.

2.7. International Research on Limitations and Exceptions

Many authors have penned articles about limitations and exceptions but the following research is particularly germane to this review.

In 1985, the Executive Committee for the Berne Convention and the Intergovernmental Committee of the UCC[128] published a UNESCO/WIPO commissioned report by Wanda Noel on access issues affecting handicapped persons, including 'the visually and auditory handicapped'. Noel's report confirms that two problems exist for persons with sensory disabilities, namely, production of material and distribution of material in alternative formats. She recommends 'an entirely new international instrument' or legal mechanism for sharing materials and services for persons with disabilities around the world.[129]

In his study of limitations and exceptions of copyright and related rights in the digital environment, Ricketson considers the needs of visually impaired persons and weighs these needs against the criteria of the Berne three-step test. Regarding the question of unreasonable prejudice, he suggests that the answer may be a remuneration-based solution rather than free use of works to provide appropriate access. He contemplates the Australian model and the EU Copyright Directive as providing some solutions although they are considerably different, but the underlying test for these options would be whether or not they comply with the three-step test.[130]

International library and intellectual property experts contributed to the compilation of the Electronic Information for Libraries' Intellectual Property (eIFL-IP) Draft Law on Copyright Including Model Exceptions and Limitations for Libraries and Consumers in 2005.[131] This model law amends and improves upon WIPO's Draft Law on Copyright and Related Rights for developing countries. The latter was removed from WIPO's website in 2006, after strong criticism from the Consumers' International, which in 2005, had conducted a study[132] of the copyright laws of 11 countries in the Asia Pacific region. The research findings reveal that WIPO, when providing technical assistance, was not informing these countries of the benefits of limitations and exceptions for development purposes. The conclusion was that not one of the study countries had availed itself of all the legal flexibilities available to it. Conversely, the majority of the countries had enacted stricter provisions when they

[128] See UCC <http://portal.unesco.org/en/ev.php-URL_ID=15381&URL_DO=DO_TOPIC&URL_SECTION=201.html>.

[129] W Noel 'Problems Experienced by the Handicapped in Obtaining Access to Protected Works, Taking Into Account, In Particular, the Different Categories of Handicapped Persons' (1985) IGC(197I)/VI/II - B/EC/XXIV/10 Annex II 3, 25-6 <http://keionline.org/sites/default/files/noel_wipo_unesco_85_readable.pdf>.

[130] S Ricketson 'WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment' (2003) 1, 76 <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=16805>.

[131] 'eIFL-IP Draft Law on Copyright Including Model Exceptions and Limitations for Libraries and Consumers' 16 (2009) 7 <http://www.eifl.net/eifl-draft-law-copyright>.

[132] See 'Copyright and Access to Knowledge. Policy Recommendations on Flexibilities in Copyright Laws' (2006) <http://www.consumersinternational.org/media/303356/copyright%20and%20access%20to%20knowledge%20-%20full%20report%20(pdf).pdf>.

amended their national laws. This research provides useful information for South Africa to ensure that this does not happen when amending its copyright legislation. Although persons with sensory disabilities were not mentioned specifically in the said report, the limitations and exceptions under investigation in the research applied to all users of information, including persons with sensory disabilities.

The purpose of the draft law was to rectify anomalies and to promote the basic, minimum limitations and exceptions covering free uses permitted by law, including provisions for persons with disabilities. These are not comprehensive or all-encompassing exceptions but are examined in this dissertation for purposes of finding appropriate exceptions for persons with sensory disabilities for inclusion in the SA Copyright Act.

It provides a model for 'free use' exceptions and limitations for blind and Deaf and other hearing impaired persons for developed and developing countries. Article 17 provides the following exceptions:-'

(1) It shall be permitted without the authorization of the author or other owner of copyright to make an accessible format of a work for the benefit of a person with a disability, to supply that accessible format, or copies of that accessible format to persons with a disability by any means, including by non-commercial lending or by electronic communication by wire or wireless means, and undertake any intermediate steps to achieve these objectives, when all of the following conditions are met:

1. the person or organisation wishing to undertake any activity under this provision has lawful access to that work or a copy of that work;

2. the work is converted to an accessible format, which may include any means needed to navigate information in the accessible format, but does not introduce changes other than those needed to make the work accessible to a person with a disability;

3. the activity is under taken on a non-profit basis.

(2) A person with a disability to whom the work is communicated by wire or wireless means as a result of activity under subsection 1 shall be permitted without the authorisation of the owner of copyright to reproduce the work for personal use. This provision is without prejudice to any other limitations or exceptions that such person is able to enjoy.

(3) It shall be permitted without the authorization of the author or other owner of copyright to export to, or import from another country, copies of an accessible format of a work referred to in subsection 17 (1), to or by a person with a disability or an organisation that serves persons with a disability, as long as such activity is undertaken on a non-profit basis by that person or organization.

(4) For the purposes of this article, accessible format means in such a format as may be required to address the needs created by the specific disability of a person with a disability in order to access and use a work to substantially the same degree as a person without a disability.

(5) For the purposes of this article, a person with a disability means a person that requires an accessible format in order to access and use a work to substantially the same degree as a person without a disability.

(6) This exception is subject to the obligations of indicating the source and the name of the author on the copy as far as practicable.[133]

Chapter Two of the draft law provides the objectives, rationale, examples and effects of such provisions for persons with sensory disabilities.[134] Article 17 could serve as a useful clause for incorporation in the SA Copyright Act, but I believe that specific sub-clauses should be included to address blind, visually impaired and persons with reading disabilities, as well as Deaf and other hearing impaired persons, as the application of the law and their access needs differ quite considerably.[135]

Also pertinent to this review are the research findings of the CIPR[136], the CopySouth Dossier[137] and the Commonwealth of Learning (COL)'s Document for Commonwealth Countries on Copyright Matters in Education[138], which all make a case for more appropriate copyright laws for developing countries, as well as considerations for persons with disabilities in national copyright laws.

Lung stresses the importance of copyright limitations and exceptions in the context of the visually impaired and the need for careful balance between the rights of authors and needs of information users.[139] Garnett examines disability in the context of the three-step test and limitations and exceptions and discusses some of the technical issues necessary to make works accessible to blind and visually impaired persons, but Deaf and other hearing impaired persons are not included in his study.[140]

Gowers claims that 'exceptions to copyright exist to rectify two problems', namely transaction costs and equity. He states that '[c]opyright prevents the copying and communication of literary works. In the absence of exceptions, copying a text into Braille would be infringing copyright'.[141] He confirms that 'fair dealing' legislation

[133] EIFL-IP (note 131 above) 19-20.

[134] Ibid 23-32.

[135] Also see P Hely's 'Notes: A Model Copyright Exemption to Serve the Visually Impaired: An Alternative to the Treaty Proposals Before WIPO' (2010) *Vanderbilt J of Transnational Law* 43(5) 1369.

[136] CIPR (note 116 above)

[137] 'CopySouth Dossier' (2006). Although not a report of empirical research findings, the CopySouth Dossier, compiled by an international research team in 2006, provides accounts, anecdotes and case studies from countries of the South, including South Africa, to highlight many serious issues relating to copyright and access to information in countries of the South. It shows how copyright has become a barrier for people in developing countries, including those with sensory disabilities. Section 4.10 highlights the dire problems of accessing material in alternative formats and the need for accommodation of visually impaired persons in national laws.

[138] J Hofman, D Kawooya, D Nicholson et al 'Document for Commonwealth Countries on Copyright Matters in Education' (2005) <http://www.col.org/SiteCollectionDocuments/Copyright%20Document.pdf>.

[139] G Lung 'Copyright Exceptions for the Visually Impaired - International Perspective' (2004) para 1. <http://archive.ifla.org/IV/ifla70/papers/177e-Lung.htm>.

[140] N Garnett 'Automated Rights Management Systems and Copyright Limitations and Exceptions' (2006) <http://www.wipo.int/edocs/mdocs/copyright/en/sccr_14/sccr_14_5.pdf>.

[141] Gowers (note 117 above) 14.

in the UK 'creates a space' in which copying of a text into Braille is permissible under the exemptions.[142] He also states that DRMs prevent the visually impaired from exercising their rights to reproduce material in accordance with the exceptions introduced by the UK Copyright (Visually Impaired Persons) Act 2002. He believes that such exceptions 'ought to be respected by technology'.[143]

Gowers recommends the introduction of a limited private copying exception for format shifting for works published after the date that the new law comes into effect.[144] One of his key recommendations is, however, the need for 'balanced and flexible rights'.[145] Although not mentioned in his report, Deaf and other hearing impaired persons would undoubtedly benefit from his suggested format shifting exceptions to enable them to convert older or obsolescent media formats into new formats, or to convert into more visual formats for accessibility.

Sullivan approaches her study on copyright limitations and exceptions by concentrating specifically on the relationship between copyright and visually impaired persons. She provides a comprehensive study of how member states address copyright with regard to visually impaired persons. The study looks at various solutions to ensure a balance between the needs of rights holders and those of visually impaired persons and attempts to provide recommendations where possible, to solve copyright problems identified in the study.[146] She briefly mentions mentally handicapped persons and recognises the existence of copyright barriers for 'deaf' people with regard to multimedia material and subtitles for audio-visual material. She suggests that 'deaf people do not really have a print disability as they can access the written word'. In view of Deaf and other hearing impaired persons not falling within the ambit of her study, she does not venture to investigate what access problems are in fact encountered by Deaf and other hearing impaired persons, nor does she provide any solutions.

The majority of Deaf persons have sign language as a first language, so learning and reading written languages create many problems for them, particularly in the learning process. Deaf and many hearing impaired learners, often need information converted into more visual formats or displayed in short sections at time. Generally, because of their disability, their learning skills are not as advanced as hearing persons and they often need material adapted or converted into a different format, eg speech to text, written text to images, or translated from sign language into English or another language or written text translated from one language to another, before they can understand the concepts and meaning of the lesson.

[142] Gowers (note 117 above) 14.

[143] Ibid 73.

[144] Ibid 6.

[145] Ibid 4.

[146] Sullivan (note 23 above).

Copyright laws prohibit these activities unless prior permission is obtained from the rights owners.

Sullivan's findings show that less than half of the WIPO member states had adopted copyright exceptions for the benefit of visually impaired people into their national law. She discovered wide variations in the scope of these exceptions and that such exceptions seemed to be less common in developing countries than developed countries.[147] In order to comply with the Standard Rules and draft UN Convention on the Rights of Persons with Disabilities (CRPD) at that time, she suggested that countries might need to consider addressing copyright issues for all disabled persons, not just the visually impaired.[148] She does not elaborate as to what categories of disabled persons she is referring to, but by implication, it can be assumed that Deaf and other hearing impaired persons, physically and intellectually challenged persons and persons with learning and other disabilities would all be included.

The mobilisation of developing countries and civil societies seeking a different approach to developing countries culminated in a proposal by Argentina and Brazil being tabled at WIPO at its 2004 General Assembly in Geneva. The proposal was for the establishment of a development agenda for WIPO (document WO/GA/31/11) and was later supported by 12 other developing countries, including South Africa.[149] Much debate and many meetings have been held in recent years at WIPO through its Provisional Committee on Proposals Related to a WIPO Development Agenda (PCDA) and Standing Committee on Copyright and Related Issues (SCCR).

In May 2005, experts from the US, Serbia, South Africa, the UK and various other countries met in London and drafted a consolidated version of a Treaty on Access to Knowledge (A2K). It was made available to NGOs, educational institutions and other consumer organisations for comment and discussion.[150] Although the intentions of the Treaty were noble, it never progressed to WIPO's agenda as it was seemingly over-ambitious at the time, since the civil society movement which participates at WIPO meetings today had not yet consolidated into a strong stakeholder base. It did, however, provide the impetus for civil societies to get more involved in WIPO discussions and in particular, in discussions around a Development Agenda for WIPO. The draft Treaty suggested provisions for persons with disabilities in Article 3.3, as follows:-

> ***Article 3-3 - The Rights of Persons with Disabilities***
>
> (a) Members recognize the importance of accessibility in the process of the equalization of opportunities in all spheres of society, and the right of equitable

[147] J Sullivan 'WIPO Study on Copyright Limitations and Exceptions for the Visually Impaired' [PPT presentation] <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=111453>.

[148] Sullivan (note 23 above) 132.

[149] See <http://www.wipo.int/ip-development/en/agenda/background.html> and WIPO Development Agenda: Background (2004-2007) <http://www.wipo.int/ip-development/en/agenda/background.html>.

[150] N Helberger 'A2K: Access to Knowledge – Make It Happen' para 3 http://www.indicare.org/tiki-read_article.php?articleId=102.

> access to knowledge irrespective of disability. This requires:
> 1. A right to access knowledge through a diversity of formats to meet the individual's specific needs,
> 2. A right to transcend national frontiers,
> 3. A functional definition of accessibility, and
> 4. A functional definition of disability.
>
> (b) Libraries, education institutions, or other institutions or organizations duly designated shall have the authority to convert material from one format to another to make it accessible to persons with disabilities.
>
> (c) The dissemination of works in formats that enable access by disabled persons shall be permitted to any country that duly authorizes the non-voluntary use of such works.
>
> (d) Inclusive design principles to promote accessibility shall apply to government web pages and other public documents.
>
> (e) National legislation to protect copyrighted or non-copyrighted works using digital rights management or technological protection measures shall provide for appropriate exceptions that are necessary to ensure access by persons with disabilities.[151]

In October 2007, when formally establishing the Development Agenda, the WIPO General Assembly adopted a set of 45 recommendations to enhance the development dimension of WIPO's activities. This Agenda provides the space for developing countries to table their specific needs at WIPO and ultimately benefit through appropriate Treaties, e.g. the Treaty for blind, visually impaired persons and other reading disabled persons (TVI). Unfortunately, issues specifically relating to Deaf and other hearing impaired persons and other disabled persons have not been included in the international agenda.[152]

Crews' extensive research brief by WIPO in 2008 focuses on copyright limitations and exceptions relating to libraries and archives. The scope of his research does not extend to the specific needs of persons with disabilities, mainly because of Sullivan's comprehensive study in 2006. The only mention Crews gives blind persons is that libraries are sometimes authorised to make and retain formats of works that serve this particular group of library users.[153] All the discussions Crews engages in with regard to limitations and exceptions for libraries and archives pertain to non-disabled and disabled persons alike, except that blind users would require additional exceptions for accessibility in alternative formats.

In their individual geographical regions Fometeu[154], Rodriguez[155], Nabhan[156],

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[151] 'Treaty on Access to Knowledge' (2005) 7-8 <http://www.cptech.org/a2k/a2k_treaty_may9.pdf>.

[152] See <http://www.wipo.int/ip-development/en/agenda>.

[153] K Crews 'Study on Copyright Limitations and Exceptions for Libraries and Archives' (2008) <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=10919>.

[154] J Fometeu 'Study on Limitations and Exceptions for Copyright and Related Rights for Teaching in Africa' (2009) <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=130241>.

[155] J C M Rodriguez 'Study on the Limitations and Exceptions to Copyright and Related Rights for the Purposes of Educational and Research Activities in Latin America and the Caribbean' (2009) <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=130303>.

[156] V Nabhan 'Study on Copyright Limitations and Exceptions for Copyright for Educational Purposes in the Arab Countries' (2009) <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=130302>.

Seng[157], and Xalabarder[158] each focus their research on educational and teaching activities and their relationship to copyright, which would also apply to persons with sensory disabilities. None of them, however, give significant attention to the needs of persons with sensory disabilities.

These studies provide extensive and valuable information about member countries' copyright systems and what relevant limitations and exceptions have or have not been adopted into national laws. They also show WIPO's commitment to address some of these difficult issues and to provide empirical evidence to enable member states to make more informed decisions and policy changes at the national level.

Although Hargreaves[159] makes several recommendations for improvement of the IP system in the UK, he does not give special mention to persons with sensory disabilities. Like Gowers, his recommendations regarding format shifting, however, would certainly benefit Deaf and other hearing impaired persons, and his recommendations for parallel importation (currently prohibited in the SA Copyright Act) would be particularly useful to blind persons.

All these research reports provide useful evidence and information for the South African Government and give some examples which could be adapted for persons with sensory disabilities in our national copyright law. In addition, they provide some useful 'building blocks' on which further research about persons with sensory disabilities can be directed.

Hugenholtz and Okediji[160] conceive an international, multilateral approach rather than bilateral approaches on limitations and exceptions as a possible solution to facilitate better access to information for all countries. In considering various clusters of limitations and exceptions, they suggest that a 'cluster of L&E's' could address needs of discrete, vulnerable members of society, such as those who are visually impaired.[161] They state that –

> … it is helpful to identify typologies of L&E's, both to more precisely tailor L&E's to deal with specific problems and to provide a metric for assessing explicit public interest objectives and concerns that have been accounted for in the system.[162]

[157] D Seng 'WIPO Study on the Copyright Exceptions for the Benefit of Educational Activities for Asia and Australia' (2009) <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=130249>.

[158] R. Xalabarder 'Study on Copyright Limitations and Exceptions for Educational Activities in North America, Europe, Caucasus, Central Asia and Israel' (2009) <http://www.int/meetings/en/docu_details.jsp?doc_id=130393>.

[159] Hargreaves (note 118 above).

[160] Hugenholtz (note 125 above) 5.

[161] Ibid 43.

[162] Ibid.

2.8. Regional Research on Limitations and Exceptions

The Tunis Model Law on Copyright was drafted in 1976 in an attempt to harmonise copyright in African countries. The two basic features of this model law are that provisions should be compatible with the 1971 Paris Act of the Berne Convention and the UCC as revised in 1971; and that they allow for the Anglo-Saxon or the Roman Legal approach of the countries for which it is intended.[163] This model law does not provide any limitations and exceptions for persons with sensory disabilities. It does, however, address translations and other aspects of accessing information, which in some instances, may be applied to persons with sensory disabilities.

Rufus addresses some of the barriers that the current copyright regime creates for education and research in developing countries, particularly in South Africa. She discusses selected issues around the lack of access to knowledge in Sub-Saharan Africa, such as digital technologies, the lack of translation rights and the absence of provisions for the benefit of the disabled. She concludes as follows:-

> (a) suppressing knowledge into the straitjacket of a Western world intellectual property system is a wrongdoing of developed Nations, and that
> (b) the profit oriented approach currently followed with regard to intellectual property needs to be modified.[164]

Although she raises pertinent issues such as the lack of translation rights and the absence of provisions for the benefit of the disabled, particularly in South Africa, she provides no practical recommendations or legal remedies to improve the situation.

Lawrence highlights the issues affecting sensory disabled persons in Uganda, and the responsibility of librarians to provide equitable access to these users. He discusses the various pieces of legislation that impact on disabled persons and confirms that the Ugandan Copyright (Visually Impaired Persons Act) 2003 has some provisions for alternative formats to be made by libraries for disabled users. He suggests that persons with hearing impairments do not have any special difficulties using the general library services and facilities.[165] He does, however, agree that many hearing impaired persons still do face difficulties. His paper focuses more on the problems experienced in libraries, rather than copyright issues, hence he does not attempt to find practical solutions relating to persons with sensory disabilities. He concludes with the recommendation that 'authors, designers,

[163] 'Tunis Model Law on Copyright for Developing Countries' (1976) <http://portal.unesco.org/culture/en/files/31318/11866635053tunis_model_law_en-web.pdf/tunis_model_law_en-web.pdf>.

[164] T Rufus 'Sub-Saharan Africa, Education and the Knowledge Divide: Copyright Law a Barrier to Information' (2005) *ACA2K Country Report, South Africa,* 32.

[165] E Lawrence 'Impact of Copyright on Delivery of Special Needs Education' (2005) [Unpublished paper presented at the African Copyright Forum, Kampala, Uganda 28 November 2005] 4.

manufacturers should provide for the extent of the modification and adaption in the copyright law'.[166]

Since Lawrence presented his aforementioned paper, the Ugandan Copyright and Neighbouring Rights Act of 2006 has been passed, providing provisions for conversion into Braille or sign language for educational purposes.[167] Uganda is one of the few African countries that have addressed persons with sensory disabilities in their copyright law.

Rens, Prabhala and Kawooya found that copyright was indeed a barrier to learning materials in Southern Africa, and more specifically in accessible formats. Their example of students striking about the unavailability of learning materials in Braille at the Filadelfia School for the Blind in Soshanguve, South Africa, in 2005, highlights some of the access issues and frustrations of blind students. Because of lack of copyright exceptions to enable conversions into alternative formats, such as text to audio or text to Braille, and the excessive processing costs involved, schools cannot provide adequate learning materials to their students. Distance learning institutions find that the high cost of copyright licences restricts their curriculum design for blind students and the number of students that they can accommodate in their study programmes.[168] The said research does not consider the needs of Deaf and other hearing impaired persons but emphasises the monopoly that rights owners have over information, which in turn, affects access.

> Information has value for rights-owners, but what about its value for the individual, for communities, society at large? There is no balance. Copyright has become a tollgate on the information super-highway.
>
> Developing countries *need* the information. Developed countries *control* the information. The knowledge and digital divides between the North and the South continue to widen.[169]

The International Federation of Library Associations and Institutions (IFLA) stresses that 'overprotection of copyright could threaten democratic traditions, and impact on social justice principles … If copyright protection is too strong, competition and innovation is restricted, and creativity stifled'.[170]

In a previous publication, I question whether copyright is a benefit or burden for Africa and recommend that -

> International and national intellectual property laws need to be reviewed, liberalized and harmonized, to facilitate, not restrict, access to knowledge; …to accelerate development; and

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[166] Lawrence (note 165 above).

[167] See Section 15(1) (k) of Ugandan Copyright and Neighbouring Rights Act of 2006 <http://www.wipo.int/wipolex/en/text.jsp?file_id=141975>.

[168] A Rens, A Prabhala & D Kawooya 'Intellectual Property, Education and Access to Knowledge in Southern Africa' (2006) 15 <http://www.iprsonline.org/unctadictsd/docs/06%2005%2031%20tralac%20amended-pdf.pdf>.

[169] Nicholson (note 51 above) 313.

[170] 'The IFLA position on Copyright in the Digital Environment' (2000) para 5 <http://www.ifla.org/en/publications/the-ifla-position-on-copyright-in-the-digital-environment>.

> to enable cross-border exchange of information. In this way, the balance between the just demands of rights-owners and consumers would be restored.[171]

Research on the state of disabled peoples' rights in Kenya was conducted in 2007, and states that 'in terms of barriers experienced, ….deaf as well as blind people are more likely to experience barriers in terms of access – results that are statistically significant …..'[172] The report concludes that -

> … there is need to promote equal enjoyment of human rights for disabled persons and to respond to their economic, socio-cultural and political needs through various mechanisms. These include the mainstreaming of disabled people rights concerns in public programmes, promoting the equal participation of disabled people and development of national legislation and policy, legal support and arbitration, and advocacy.[173]

Although recommendations are not made as to how to address access issues for persons with sensory disabilities, the above research recognises the human rights dimension and states the need for attention by legislators and policy-makers to address these rights holistically.

A large team of researchers in eight African countries, namely, Egypt, Ghana, Kenya, Morocco, Mozambique, Senegal, South Africa and Uganda, engaged in empirical research as part of the ACA2K Project (2007-2010).[174] The researchers were not the first to recognise the problem of the lack of evidence for copyright policymaking or the urgency for a better understanding of the impacts of copyright laws, policies and regulations on everyday life issues, such as access to educational materials, which affect all users of information, including persons with sensory disabilities. They were, however, the first to engage in 'on-the-ground empirical evidence on the impact of copyright on the educational sector' across the eight study countries in Africa.[175]

This project conducted research to probe the relationship between national copyright environments and access to learning materials in the study countries. It researched 'this relationship within an access to knowledge (A2K) framework -- a framework which regards the protection/promotion of user access as one of the central objectives of copyright law'.[176] Its research teams investigated legislation, policies and practical application of copyright law, with a view to providing empirical evidence and recommendations for amendment of copyright laws in the study countries, including South Africa.

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[171] Nicholson (note 51 above) 321.

[172] 'State of Disabled Peoples Rights in Kenya Report' (2007) 12 <http://www.yorku.ca/drpi/files/KenyaReport07.pdf>.

[173] Ibid.

[174] African Copyright & Access to Knowledge (ACA2K) Project <http://www.aca2k.org>. This Project was funded by International Development Research Centre (Canada) and The Shuttleworth Foundation (South Africa).

[175] C Armstrong, J de Beer, D Kawooya, A Prabhala, T Schönwetter (eds). *Access to Knowledge in Africa: The Role of Copyright (*2010) xiii.

[176] ACA2K 'Welcome to ACA2K' <http://www.aca2k.org>.

The research findings show that all eight study countries are compliant with international copyright agreements. In fact, some of them have adopted stricter copyright laws than required of them in terms of these agreements. However, they found that the stricter the copyright law, the more non-compliance was evident. Apart from South Africa, 'unpunished copyright infringement (with regards to learning materials) is the main channel for access to knowledge'.[177]

They also found that only one out of the eight study countries, namely, Uganda, makes specific mention in its copyright law of the needs of persons with sensory disabilities, but these provisions are potentially restrictive and subject to a limited 'fair use' clause. The researchers express concern over the lack of accommodation of people with perceptual or other disabilities from a development perspective and concurred that this 'legal reality is feeding the growing international attention to the needs of persons with disabilities'.[178]

They suggest that some form of international harmonising instrument or declaration is not an impossibility, but 'whether and how that would have a concrete impact on national law in the study countries remains to be seen'[179] Although there are many additional barriers to accessing learning materials and other information, the ACA2K research project has revealed that 'copyright is an important and under-researched barrier'.[180]

2.9. National Research on Limitations and Exceptions

2.9.1. SA Constitution and Human Rights

The issue of the status of IP rights as a universally accepted fundamental right was addressed in the Certification of the Constitution of the Republic of South Africa case in 1996,[181] when the new SA Constitution was endorsed by the Constitutional Court. The court held that the right to hold IP rights was not a universally accepted fundamental right and should not be included in the Bill of Rights. 'The court appeared to take the view that, while the intellectual property right may be a fundamental right, it was not universally recognised as such'.[182]

In referring to the outcome of the case, Gray and Seeber report that 'the Constitutional Court has ruled that intellectual property rights are subsumed in the general property provisions of the Constitution.'[183]

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[177] ACA2K 'Research Findings from Africa in Relation to WIPO Development Agenda Priorities: Briefing Paper 1' (2009) 1.

[178] Ibid 325.

[179] Ibid.

[180] T Schönwetter, J de Beer, D Kawooya & A Prabhala 'Copyright and Education: Lessons on African Copyright and Access to Knowledge' (2009/10) 10 *African J of Information and Communication*, 50.

[181] *Certification of the Constitution of the Republic of South* Africa 1996 10 *BCLR* 1253 (CC), para 75.

[182] O Dean 'Trade-mark Dilution Laughed Off' (1996) para 3 <http://www.roylaw.co.za/home/article/trademarkdilutionlaughedoff/pageid/ip-law>.

[183] E Gray & M Seeber 'PICC Report on Intellectual Property Rights in the Print Industries Section' (2004) 42.

Although the *Laugh It Off* decision[184] has set a precedent in recognising that freedom of speech rights and IP rights have equal status before the law, it is the right of access to information, education and civil participation that is categorically entrenched in the SA Constitution. This is the supreme law of the country and may not be superseded by any other law or by any government action. South Africa's progressive and liberal Constitution 'radically foregrounds principles of human dignity and the right to freedom and equality for all'.[185]

It is therefore important that enabling legislation is developed and discriminatory legislation from the past is changed 'to ensure that the rights enshrined in the Constitution are upheld and enforced in all areas of governance and society'.[186]

The Government has made some attempts to rectify some of the discriminatory legislation of the past. Since adopting its Integrated National Disability Strategy in 1997, it has promulgated the following laws relating to disabilities and discrimination:-

- The Employment Equity Act 55 of 1998
- The Promotion of Equality & Prevention of Unfair Discrimination Act 1 of 2000
- The Social Assistance Act 13 of 2004

The Government has also shown its commitment to addressing the needs of persons with disabilities by establishing the Ministry of Women, Children and the Disabled and setting up a Division for the Disabled within the Department of Higher Education and Training (DHET).

Despite this, the SA Department of Trade and Industry (DTI) has yet to address the very important issue of access for people with disabilities through its copyright law. Without proper access to information and knowledge, all other rights are compromised.

The imperatives of the SA Constitution are also affirmed by South Africa's international obligations under binding treaties, declarations, conventions and customary international laws, which prohibit unfair discrimination and which promote freedom, social justice and equality to all citizens.

Equality and dignity must be met through appropriate legislation, whether new or amended, as well as monitoring of constitutional and legislative provisions and

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[184] *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* 2006 (1) SA 144 (CC). See Dean's comment 'Nowhere in the judgments is there any suggestion that freedom of speech is a superior right to the right to hold intellectual property. Accordingly, in effect the court equated the right to hold intellectual property with a universally accepted fundamental right, namely the right of freedom of speech'. Also see Dean (note 182 above) para 3.

[185] B Watermeyer, L Swartz, T Lorenzo, M Schneider & Priestley (eds). *Disability and Social Change: A South African Agenda (*2006) 99.

[186] Kinghorn (note 36 above) 22.

adequate enforcement measures, to ensure that people with sensory disabilities enjoy the benefits of fair and equal legislation.

2.9.2. Human Rights and Persons with Sensory Disabilities in South Africa

South Africa signed and ratified the CRPD and its Optional Protocol (OP) in 2007[187] and is obliged to adhere to the conditions of this Convention. The rights are further enshrined in the UNDHR. In addition, the UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities of 1993, although not legally binding, 'represent a strong moral and political commitment of Governments to take action to attain equalization of opportunities for persons with disabilities.' In 1995 South Africa ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[188] By accepting this Convention, South Africa committed itself to undertake a series of measures to end discrimination against women in all forms, including:

- to incorporate the principle of equality of men and women in their legal system, abolish all discriminatory laws and adopt appropriate ones prohibiting discrimination against women;
- to establish tribunals and other public institutions to ensure the effective protection of women against discrimination; and
- to ensure elimination of all acts of discrimination against women by persons, organizations or enterprises.[189]

Having ratified the Convention, South Africa is legally bound to put its provisions into practice and is committed to submit quadrennial national reports on measures taken to comply with its obligations.[190]

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[187] See <http://www.un.org/disabilities/countries.asp?id=166>.

[188] UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249 <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm>. "Ratification defines the international act whereby a state indicates its consent to be bound to a treaty if the parties intended to show their consent by such an act. In the case of bilateral treaties, ratification is usually accomplished by exchanging the requisite instruments, while in the case of multilateral treaties the usual procedure is for the depositary to collect the ratifications of all states, keeping all parties informed of the situation. The institution of ratification grants states the necessary time-frame to seek the required approval for the treaty on the domestic level and to enact the necessary legislation to give domestic effect to that treaty. [Arts.2 (1) (b), 14 (1) and 16, Vienna Convention on the Law of Treaties 1969]" see <http://untreaty.un.org/ola-internet/Assistance/Guide.htm#accession>. "Accession" is the act whereby a state accepts the offer or the opportunity to become a party to a treaty already negotiated and signed by other states. It has the same legal effect as ratification. Accession usually occurs after the treaty has entered into force. The Secretary-General of the United Nations, in his function as depositary, has also accepted accessions to some conventions before their entry into force. The conditions under which accession may occur and the procedure involved depend on the provisions of the treaty. A treaty might provide for the accession of all other states or for a limited and defined number of states. In the absence of such a provision, accession can only occur where the negotiating states were agreed or subsequently agree on it in the case of the state in question. [Arts.2 (1) (b) and 15, Vienna Convention on the Law of Treaties 1969]" see <http://untreaty.un.org/ola-internet/Assistance/Guide.htm#accession>.

[189] Ibid.

[190] Ibid.

In 1995, South Africa also ratified the Convention on the Rights of the Child (CRC).[191] The CRC is the first legally binding instrument to deal specifically with rights of children, containing 42 detailed provisions enshrining the rights of children in all facets of life. It is also the first human rights treaty which specifically refers to the issues of disability. Article 2 expressly prohibits any discrimination on the grounds of disability.[192] Article 23 is devoted specifically to the needs of disabled children 'in recognition of their vulnerability to segregation and discrimination'[193].

In 1996 South Africa ratified the African Charter on Human Rights and People's Rights, also known as the Banjul Charter, which was approved by the Organization of African Unity (OAU) in 1981 and came into force in 1986. In 2003, South Africa ratified a Protocol which established an African Court on Human and People's Rights.[194]

South Africa is therefore obliged to ensure that all its legislation is compliant with the Constitution, other national legislation and its international commitments.

'A human rights and development approach to disability focuses on the removal of barriers to equal participation and the elimination of discrimination based on disability',[195] so for South Africa to ensure that its copyright law adheres to international conventions, it needs to introduce fair and appropriate provisions that will accommodate persons with sensory disabilities.[196]

In a previous publication, I recommended the urgent incorporation of appropriate legal flexibilities for education, libraries and people with visual, auditory and other perceptual disabilities into national laws.[197]

2.9.3. SA's International Copyright Obligations

South Africa is a party[198] to the Berne Convention and the TRIPS Agreement, and a signatory to the WCT and WPPT. It has not ratified these two Internet Treaties, but 'it

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[191] UN Convention on the Rights of the Child <http://www2.ohchr.org/english/law/crc.htm>.

[192] UN Office of the High Commissioner for Human Rights (OHCHR) 'The Human Rights Dimension of Disability' 7 <http://www.aifo.it/english/resources/online/books/cbr/reviewofcbr/THE%20HUMAN%20RIGHTS%20DIMENSION%20OF%20DISABILITY%20_2_.pdf>.

[193] Ibid Art 23.

[194] See <http://www.african-court.org/en/>.

[195] 'Integrated National Disability Strategy in 1997 White Paper (Office of the President)'. <http://www.independentliving.org/docs5/SANatlDisStrat1.html>.

[196] See 'The Principles that Inform a Rights-Based Approach'. <http://unesdoc.unesco.org/images/0015/001548/154861e.pdf>.

[197] Nicholson (note 18 above) 321.

[198] The term "party" refers to a State that gives its explicit consent to be bound by the treaty. 'This explicit consent generally is in the form of an instrument of ratification, acceptance, approval, or accession. The State submits this instrument to the appropriate authoritative body for that treaty. If all the formal requirements are met and the instrument is accepted, the State officially becomes a party to the treaty. See: Inside Justice 'Legal Obligations of Signatories and Parties to Treaties' <http://www.insidejustice.com/law/index.php/intl/2010/03/15/p238>.

is still obliged to refrain from acts which would defeat the object and purpose' of such Treaties 'until it has made clear its intention not to be bound by the Treaty'. It could apply the Treaties 'provisionally', if it so wished, 'during the interim period between signature and ratification'.[199] .

These agreements both allow member countries to adopt appropriate limitations and exceptions ('legal flexibilities') into their national copyright laws, in the context of their domestic situations.

South Africa has to date not adopted limitations and exceptions for persons with sensory disabilities, particularly blind persons, and those available to Deaf and other hearing impaired persons are inadequate and not conducive to fair access to information, particularly in the digital environment.

2.9.4. Inadequacies in SA Copyright Law and Technological Barriers

For years, persons with sensory disabilities in South Africa have been disenfranchised and prejudiced by the lack of adequate exceptions and limitations in our copyright law. Digital technology has the potential to revolutionise their lives and make information accessible to them which they have never been able to access before.

Information and communication technologies encourage access and sharing of information resources. However, current copyright legislation restricts their access to information, for example, by preventing or restricting printed items from being digitised and preventing works from being converted into alternative or more accessible formats, such as Braille for blind persons or more visual or text-based formats for Deaf and other hearing impaired persons. The law also prevents or restricts digitization of material and the creation of and sharing of alternative formats. In addition, DRMs with TPMs, used by rights holders to protect their digital works, 'nullif[y] copyright exceptions, erecting a technological barrier where no legal barriers exist'.[200]

> Through DRM controls, rights owners have the power to unilaterally eliminate fair use/fair dealing rights, stifle research and block text-to-speech software for blind people or text sub-titles for deaf people. DRMs can institute differential pricing, using technological control measures, like lock-up or protection codes on electronic books, content-scrambling systems on CDs, or regional coding on DVDs. These controversial laws can also create monopolies

[199] J Dugard *International Law: A South African Perspective* (4th ed) (2012). See Articles 18 and 25 of Vienna Convention on the Law of Treaties (23 May 1969) <http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf>.
"Where the signature is subject to ratification, acceptance or approval, the signature does not establish the consent to be bound. However, it is a means of authentication and expresses the willingness of the signatory state to continue the treaty-making process. The signature qualifies the signatory state to proceed to ratification, acceptance or approval. It also creates an obligation to refrain, in good faith, from acts that would defeat the object and the purpose of the treaty.[Arts.10 and 18, Vienna Convention on the Law of Treaties 1969]" See <http://untreaty.un.org/ola-internet/Assistance/Guide.htm#accession>.

[200]. 'Digital Rights Management: A Failure in the Developed World, a Danger to the Developing world' (2005) para 6 <https://www.eff.org/wp/digital-rights-management-failure-developed-world-danger-developing-world>.

over devices and equipment that handle digital media, even domestic items, such as garage door remote controls and cartridges for printers.[201]

Rens' research investigates fundamental rights, access to knowledge issues and global copyright legislative best practice and discusses 'direct' and 'indirect' discrimination. He claims that the SA Copyright Act 'does not explicitly single out and forbid sensory-disabled persons from using copyright works, but it does indirectly discriminate against them'.[202] Because of their impairments, persons with sensory disabilities are unable to make use of many copyright works in the same way and the same time as persons who do not have such impairments do. The restrictions are not that they cannot make use of copyright works but in the way they require specialised technologies to access the works. These technologies change the work, resulting in an adaptation, which the copyright law prohibits without authorisation from rights holders. In this way, the copyright law interferes with their rights to receive and impart information, education and other rights and is arguably unconstitutional in the way it discriminates against persons with sensory disabilities.[203]

Even in exercising their fair dealing rights, blind persons are restricted because the material, no matter how small an extract, has to be adapted and converted into an alternative format.[204] Blind persons, for instance, might make use of text to speech technology in order to read a literary text or listen to an audiotape, and a person with an auditory disability might require sub-titles or captioning to view a film or DVD, or conversion to a different format to view a videotape which is no longer accessible. By their very nature, these activities would involve adaptation, reproduction and perhaps other acts reserved exclusively for copyright holders. Copyright law prohibits these activities and copyright clearance would be necessary in each situation. The constitutional rights of persons with sensory disabilities are therefore being violated, as the law itself creates a barrier to accessing information.[205]

Van der Merwe acknowledges the need for rights holders to assert their rights and claim protection without undue impediment. He also acknowledges the need for balance in the current copyright legislation and argued for amendments to the provisions of the Copyright Act and Regulations that govern 'fair dealing' of copyright

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[201] R D Gross 'IP Justice White Paper on the Draft Intellectual Property Rights Chapter in the Free Trade Area of the Americas (FTAA) Treaty "FTAA: A Threat to Freedom and Free Trade"' cited in D R Nicholson 'Digital Rights Management and Access to Information: A Developing Country's Perspective' (2009) 19 (1) *LIBRES* 6-7 <http://libres.curtin.edu.au/libres19n1/Nicholson_EssyOp.pdf>.

[202] A Rens 'Realising Human Rights in South African Copyright Legislation. Report on Fundamental Rights, and Global Copyright Legislative Best Practise for Access to Knowledge in South Africa' (2010) 29-30 <http://www.apc.org/en/system/files/Model%20Legislation_Advocacy%20for%20A2K.pdf>.

[203] Ibid.

[204] D R Nicholson 'Copyright: Are People with Sensory Disabilities Getting a Fair Deal?' in D H Charbonneau (ed) *Global Information Inequalities: Bridging The Information Gap*. (2008) Ch 9. See pages 137-145 for examples where copyright creates a barrier to accessing information. See Nicholson (note 18 above) for examples specifically affecting deaf persons.

[205] Rens (note 202 above) 29-30.

works in an educational context. He refers to Section 12(1) of the SA Copyright Act as 'the battle site'. He challenges the current provisions of Section 12(1) and suggests that the 'fair dealing' regime be broadened to include multiple copying, specifically for educational purposes. In 1999, this proposal was included in a working document entitled 'Amendments to the Copyright Act (No. 98 of 1978) proposed by SAUVCA/CTP', for discussion with PASA and other stakeholders.[206]

Van der Merwe acknowledges that rights-holders are strongly opposed to a broadening of 'fair dealing' on the basis that it would amount to an 'infringement' of South Africa's international obligations. He challenges this perception, however, and argues that the Berne Convention allows member states to permit reproduction of copyrighted works without the authorisation of the rights holder in certain "special cases", which SAUVCA believed would include educational needs in the context of a developing country.[207]

Baude, Hofman, Katz et al[208] illustrate how the current copyright law restricts access to learning materials for educational purposes. All persons with sensory disabilities are affected by these restrictions too. The authors provide recommendations for model language for exceptions and limitations to copyright particularly relating to access to learning. They suggest exceptions for visually impaired persons and aurally handicapped persons.[209]

Roos[210] highlights many challenges and disadvantages associated with requesting copyright licences for print-disabled persons, including burdensome terms, high costs, delays, student literature, mergers, take-overs and liquidations of copyright holders and magazines and newspapers, all of which would be remedied by appropriate amendments to current copyright legislation. Students are prejudiced in that they do not receive their course material at the same time as non-disabled students. Lack of availability of text- and other books in accessible formats also restrict students when making subject and course choices, and indirectly affect their career choices.

In previous publications, I provide some practical examples of how inadequate copyright laws impact on the studies and learning experiences of blind and visually impaired persons.[211] I argue that -

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[206] D Van der Merwe 'All's Fair in Love and Copyright' (2005) [Unpublished conference address]. As Chair of the SAUVCA IP Committee he represented the higher educational sector at the Access to Learning Materials in Southern African Conference in Johannesburg, in January 2005.

[207] Ibid.

[208] W Baude, J Hofman E Katz K McDaniel A Rens & C Riley. 'Model Language for Exceptions and Limitations to Copyright Concerning Access to Learning Materials in South Africa' (2006) 7 *SAJIC* 105. Also see p. 96 for full details of the authors' recommendations for translations.

[209] See Chapter Four of this dissertation for recommended clauses.

[210] J W Roos 'Libraries for the Blind as Accessible Content Publishers: Copyright and Related Issues' (2007) 55(4) *Library Trends* 879, 883-884.

[211] Nicholson (note 9 above) – see examples.

> Sensory-disabled persons should not have to seek copyright permission to transform material into accessible formats or media, unless the rights-holder is providing the appropriate accessible version at the same time and under the same terms as to sighted-persons.[212]

In an attempt to gather views and recommendations for change in the current Copyright Act, the Shuttleworth Foundation initiated the Open Review of the SA Copyright Act in 2008. The main purpose of the Review was to:

- present a section by section review of the South African Copyright Act 98 of 1978 which sets out suggested changes (in principle rather than detail) where appropriate, from a civil society point of view,
- identify those provisions which civil society participants regard as unsuitable,
- conduct an audit of Copyright law according to the methodology created under the auspices of the Commonwealth of Learning. [213]

Regarding persons with sensory disabilities, the Open Review Final Report states that:

> [p]eople with a sensory disability (such as those who are partially or wholly blind or deaf) face unusually high constraints in accessing knowledge. To some extent, new technologies create access opportunities – provided that they are regulated with foresight. A responsive system of copyright, which recognises the knowledge needs of sensory disabled people (such as format adaptation) can create the requisite access, particularly when framed within flexible, expansive and simple procedures. [214]

The Report also states that the current Act makes it impossible for certain works to be translated into another language or converted into accessible formats, for example, conversion into Braille or from text to speech or making a work more visual, without prior permission from the copyright owners. This means that many copyright works are inaccessible to South Africans.[215]

The Report claims that the current copyright exceptions 'do not cover a wide variety of situations in which exceptions are necessary for access to knowledge and resources for South African citizens'.[216] It provides a list of recommendations for various changes to the Copyright law and promotes the introduction of 'fair use' provisions, to replace current 'fair dealing' provisions in Section 12 of the Act. Recommendation two of the Report specifically calls for the introduction of exceptions and limitations for the benefit of people with a disability.[217] The Final

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[212] Nicholson (note 9 above).

[213] 'Open Review of the South African Copyright Act' <http://www.mio.co.za/article/open-review-of-the-south-african-copyright-act-2008-05-07>.

[214] Shuttleworth Foundation 'Report on the South African Open Copyright Review' 26 <http://uctipunit.files.wordpress.com/2010/07/opencopyrightreport1.pdf>.

[215] Ibid 15.

[216] Ibid 16.

[217] Ibid 5.

Report was submitted to the DTI in 2010 but to date, no action has been taken by the DTI.

The ACA2K Project found that the current SA Copyright law is lacking in many respects, particularly with regard to access to learning materials for educational purposes.[218] The findings relating to persons with disabilities in South Africa show that -

> the Copyright Act does not permit the scanning, translation, adaptation or conversion of works for the sensory-disabled without permission from the copyright-holder'. However, the Constitution of South Africa expressly provides for the right to education, which arguably places a duty on the state to facilitate access to learning material required to exercise the right to education. What is needed is an amendment of the South African Copyright Act to remove barriers to access to learning material faced by people with disabilities by for instance allowing the permission-free conversion of learning material into Braille or into audio format.[219]

Our copyright laws need to facilitate and enhance access to knowledge for all creators and users of information, in order to meet our country's development goals and to enable every citizen to participate fully in our democracy. In the process, our copyright laws should enshrine the rights of persons with sensory disabilities and 'not merely create vehicles for permission'.[220] My conclusion is that '[t]o date the needs of deaf persons have not been considered in international copyright debates. Nor are they getting a fair deal in our national copyright law!'[221]

Despite the above issues, the DTI has not amended the Copyright Act accordingly. The fact that the current Copyright law has no limitations or exceptions for blind persons, and the needs of Deaf and other hearing impaired persons are not specifically or adequately addressed, raises human rights issues. It shows there is an urgent need to accommodate persons with sensory disabilities within South African copyright law.

2.10. Conclusion

Although much has been written internationally and nationally on limitations and exceptions, and some relating to blind persons, this review and my aforementioned personal communications reveal a gap in the literature with regard to the relationship between copyright and Deaf and other hearing impaired persons, as well as research specifically relating to the accommodation of blind and Deaf and other hearing impaired persons within South African copyright law. My search of various legal e-databases did not reveal any case law in this regard. Dean claims that many

[218] See key findings in T Schönwetter, C Ncube & P Chetty 'ACA2K Executive Policy Brief: South Africa' (2009) 6 <http://www.aca2k.org/attachments/154_ACA2K%20South%20Africa%20EPB.pdf>. Also see Armstrong et al (note 175 above).

[219] Ibid 7.

[220] Ibid 145.

[221] Nicholson (note 18 above) 16.

of the decisions which South African courts have handed down in decided copyright cases have for some reason remained unreported.[222] Any previous cases, if any, may fall in the category of unreported cases. I suggest, though, that this is unlikely, based on the lack of attention given to copyright and access needs of persons with sensory disabilities, as highlighted in my research.

There is a general hiatus between conception and practice within this stream of research, which provides the background and stimulus for my research. By addressing the research questions and set objectives, this dissertation expands the area of research and provides new knowledge pertaining to South African copyright law, and more particularly, with regard to copyright and its impact on Deaf and other hearing impaired persons, a topic that has not been researched internationally or nationally.

[222] Dean (note 64 above) [Service 3, 1990] xi.

"The only thing worse than being blind is having sight but no vision" (Helen Keller)

CHAPTER 3: INTERNATIONAL AND REGIONAL COPYRIGHT TRENDS WITH PARTICULAR REFERENCE TO PERSONS WITH SENSORY DISABILITIES

3.1. Introduction and Methodological Approach

To establish whether persons with sensory disabilities in South Africa are currently accommodated in the SA Copyright Act, it is necessary to investigate what the current international and regional situation and trends are with regard to copyright and access to knowledge for persons with sensory disabilities. Key issues with special reference to persons with sensory disabilities in current international treaties, directives, and general copyright policy issues, are discussed in this chapter, as well as current proposals for a number of treaties at WIPO, within the context of the WIPO Development Agenda.

In this chapter, I also investigate copyright laws of a large number of countries that have adopted national limitations and exceptions for persons with sensory disabilities. In addition, I focus on ten countries to provide a basic analysis of their copyright exceptions for persons with sensory disabilities, with a view to providing some guidance and possible options for consideration in the South African copyright law.

To address the above topic, my research involves a three-pronged approach relating to persons with sensory disabilities, namely:-

Section A:

An overview of International and Regional Conventions, Treaties and IP Initiatives, where applicable to persons with sensory disabilities.

Section B:

A survey of copyright limitations and exceptions for persons with sensory disabilities in 125 countries (developed and developing countries).

Section C:

An in-depth study of the copyright limitations and exceptions for persons with sensory disabilities in ten countries, namely, Canada, Czech Republic, Denmark, Iceland, India, Ireland, Japan, Saint Lucia, Sweden and the United Kingdom.

3.2. Section A: International and Regional Conventions, Treaties and IP Initiatives

3.2.1. Berne Convention

On 23 December 1974, South Africa deposited its instrument of accession to the Berne Convention as revised at Paris on 24 July 1971, 'with the declaration provided for in Article 28(1)(b) of the said Act to the effect that this accession shall not apply to Articles 1 to 21 and the Appendix.' [223]

The Berne Convention provides for the principle of 'national treatment', which means that a member state must afford protection to works from other member states in the same manner as it provides protection to its own works. In respect of this obligation, the exceptions allowed under WIPO's pre-existing IP conventions, such as Berne, are also permitted under the TRIPS Agreement.[224] South Africa signed the TRIPS Agreement in 1995 and is therefore bound to honour this 'national treatment' commitment.[225]

3.2.2. Berne 'Three-Step Test'

Article 9(2) sets out the 'three-step test' criteria and it is widely accepted that 'special cases' may be interpreted to include persons with sensory disabilities. This article sets the framework within which limitations and exceptions may be adopted in national copyright laws.

Even though South Africa did not accede to Article 9(2) of the Berne Convention, Clause 13 of the TRIPS Agreement automatically obliges South Africa to adopt the provisions of Article 9(2).[226]

3.2.3. Berne Appendix

The Berne Appendix resulted from controversial negotiations with developing countries in 1967 on issues relating to access to learning and educational materials. It replaced the failed proposed Stockholm protocol.

The Appendix provides for translations made under certain conditions in developing countries. Such translations could benefit persons with sensory-disabilities, particularly Deaf and other hearing impaired persons.

One reason for the non-use of the Berne Appendix in many of the African countries is that the compulsory licensing provisions are useful only where the works are to be translated into indigenous languages other than widely spoken languages

[223] WIPO Berne Notification No. 64 <http://www.wipo.int/treaties/en/notifications/berne/treaty_berne_64.html>.

[224] WTO 'Overview: the TRIPS Agreement' <http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm>.

[225] Ibid.

[226] See WIPO (note 223 above).

such as French, English and Spanish.[227] The first two languages mentioned are commonly used in Francophone and Anglophone countries in Africa. The long waiting period after the works have been published before they can notify WIPO of their intention to issue a compulsory licence is problematic. It lends itself to the information becoming obsolete, or if the owners have exercised their translation rights in the interim, the developing country cannot issue a compulsory licence for translation into one of its indigenous languages.[228]

The Berne Appendix provisions (incorporated into the TRIPS Agreement as mentioned below), could be extended to Deaf and other hearing impaired persons in South Africa, who need translations from English, for instance, into one of the indigenous languages, but sign language is not accommodated in the Appendix. The conditions and time period within which countries are permitted to exercise these exceptions are, however, far too restrictive to be of any significance to persons with sensory disabilities who need immediate access to information.

3.2.4. TRIPS Agreement

The TRIPS Agreement together with the 1968 Stockholm Conference adopted the revised Berne and Paris Conventions in 1995, as well as the Berne Appendix, and is seen as 'undoubtedly the most significant milestone in the development of intellectual property in the twentieth century'.[229] Its scope is much broader than that of any previous international agreement and extends all the obligations of the Berne Convention (except moral rights) to signatory countries, even if they are not signatories to the Convention. It has been widely accepted that persons with sensory disabilities may be interpreted as 'special cases' in accordance with the three-step test, as per the Berne Convention and/or TRIPS Agreement.

3.2.5. WIPO Copyright Treaty (WCT)

The WCT's preamble recognises the 'need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention'. It also adopts the three-step test criteria, including the reference to 'certain special cases' which would include persons with disabilities.[230]

WIPO Secretariat conducted a survey amongst member states that had implemented the WCT and/or WPPT to establish what provisions had been implemented by them in their national legislation. A survey on limitations and exceptions was the largest single section in the survey and reference to

[227] Armstrong (note 175 above) 96.

[228] Article II of the Berne Appendix – see: <http://www.oup.com/uk/booksites/content/9780198259466/15550001>.

[229] D Gervais *The TRIPS Agreement: Drafting History and Analysis* (2003) 3.

[230] WIPO Copyright Treaty (1996) <http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html#P83_10885>.

handicapped persons was made in the survey and results. These results were presented to the WIPO SCCR 9 in June 2003.[231]

3.2.6. EU Copyright Directive (2001/29/EC)

The main purpose of this Directive was to harmonise copyright laws within the EU and to adapt legislation to technological developments in the information age. The Directive introduced a list of optional limitations and exceptions for member countries. The only mandatory exception that was introduced was the right of reproduction in respect of certain temporary acts of reproduction which are integral to a technological process. Limitations and exceptions for persons with sensory disabilities are therefore not mandatory and their adoption into national law is left to the discretion of individual member states.

Clause 34 of this Directive states that –

> Member States should be given the option of providing for certain exceptions or limitations for cases such as educational and scientific purposes, for the benefit of public institutions such as libraries and archives, for purposes of news reporting, for quotations, for use by people with disabilities, for public security uses and for uses in administrative and judicial proceedings.[232]

Article 43 states that –

> it is in any case important for the Member States to adopt all necessary measures to facilitate access to works by persons suffering from a disability which constitutes an obstacle to the use of the works themselves, and to pay particular attention to accessible formats.[233]

The aim of the EU's Proposal for a Council Directive in 2008 was to implement the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation beyond the labour market. It also establishes a uniform minimum level of protection with the EU for anyone who has suffered such discrimination.[234] It also supplements the existing EC legal framework under which above types of discrimination only apply to employment, occupation and vocational training.[235]

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[231] WIPO SCCR 9th Session 'Survey on Implementation Provisions of the WCT and the WPPT' (2003) <http://www.wipo.int/edocs/mdocs/copyright/en/sccr_9/sccr_9_6.pdf>.

[232] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society', *OJ L* 167 of 22.2.2001, 13

[233] Ibid 4.

[234] 'Proposal for a Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation (presented by the Commission)', COM(2008) 426 final 2008/0140 (CNS), [SEC(2008) 2180] [SEC(2008) 2181], 1.

[235] 'Directive 2000/43/EC of 29 June 2000 Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin, *OJ* L 180 of 19.7.2000', 22; and 'Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation, *OJ L* 303 of 2.12.2000', 16.

Although all EU member states have implemented exceptions into their national laws, harmonisation has not been achieved, resulting in a degree of legal uncertainty. In particular, the cross-border transfer of the already limited supply of works for blind persons is hampered by the territorial limitation of exceptions under national legislation. The only way for an organisation serving the visually impaired to export a converted work to another member state would be to purchase the rights in the destination country but the costs are prohibitive. TPMs are also an additional barrier as they prevent legally acquired digital works from being accessed or converted into accessible formats by organisations serving blind persons, or by blind persons themselves. For the above reasons, 'persons with disabilities advocate an EU-wide standardised and comprehensive mandatory copyright exception'.[236]

3.2.7. UN Convention on the Rights of Persons with Disabilities, 2006

Because some 650 million people with disabilities around the world were subject to continual human rights violations, this UN Convention was introduced. Studies indicate that previous Conventions have not given people with disabilities the protection and equal treatment they deserve and they effectively remain second-class citizens in their countries. This Convention was required to remedy the situation and explicitly recognise the human rights of all persons with disabilities.[237] Article 3 states -

> Parties shall take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.[238]

Article 4 sets out various general obligations by signatory States but the following sub-sections stand out with particular reference to States' obligations to ensure all other laws, including IP laws, are in compliance with the Convention and that discrimination of all kinds are eliminated too:-

> (a) To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention;
>
> (b) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities;
>
> (c) To take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes;

[236] 'Communication from the Commission. Copyright in the Knowledge Economy', COM(2009) 532 final, 7-8.

[237] Griffo & Ortali (note 30 above) Art. 1.3.3.

[238] Convention on the Rights of Persons with Disabilities (note 34 above).

(d) To refrain from engaging in any act or practice that is inconsistent with the present Convention and to ensure that public authorities and institutions act in conformity with the present Convention;

(e) To take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise; …[239]

This Convention therefore strongly supports measures that promote access to cultural materials for persons with disabilities and encourages national laws to include provisions to facilitate access for them. As a signatory to this Convention, South Africa is therefore obliged to be compliant and to expedite amendment of any discriminatory laws that still remain, including the copyright law.

3.2.8. Initiatives That May Impact On South Africa's Copyright Agenda

3.2.8.1. WIPO Development Agenda

In October 2004, WIPO took the historic step of agreeing to consider the impact of its decisions on developing nations, including assessing the impact of intellectual property law and policy on technological innovation, access to knowledge, and even human health.[240] It agreed to adopt a proposal offered by Argentina and Brazil, the "Proposal for the Establishment of a Development Agenda for WIPO".[241]

In October 2007, WIPO's Development Agenda was formally established and the WIPO General Assembly adopted a set of 45 recommendations to enhance the development dimension of the Organization's activities.[242]

Copyright and related rights play a part in the realisation of Millennium Goal Two, ie to achieve universal primary education by 2015.[243] WIPO's Development Agenda is a key initiative in ensuring these goals are achieved. Attention to the access needs of persons with sensory disabilities is therefore crucial for WIPO, as a UN agency, as well as for individual member States of WIPO.

3.2.8.2. WIPO Stakeholders' Platform

The WIPO SCCR 17 held in Geneva in November 2008, acknowledged -

> … the special needs of visually impaired persons and stressed the importance of dealing, without delay and with appropriate deliberation, with those needs of the blind, visually impaired, and other reading disabled persons, including discussions at the national and

[239] Convention on the Rights (note 34 above).

[240] 'Development Agenda - What Happened?' <https://www.eff.org/issues/development-agenda>.

[241] 'Proposal by Argentina and Brazil for the Establishment of a Development Agenda for WIPO' <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=31737>.

[242] 'Development Agenda for WIPO' <http://www.wipo.int/ip-development/en/agenda/>.

[243] 'Millennium Development Goal 2' <http://www.wipo.int/ip-development/en/agenda/millennium_goals/millennium_goal_2.html>.

> international level on possible ways and means facilitating and enhancing access to protected works. This should include analysis of limitations and exceptions. This should also include the possible establishment of a stakeholders' platform at WIPO, in order to facilitate arrangements to secure access for disabled persons to protected works. A number of delegations referred to a paper presented by the World Blind Union (WBU) and expressed interest in further analyzing it. [244]

During 2009, WIPO established a Stakeholders' Platform to develop practical solutions to facilitate access to copyright-protected works by the blind, visually impaired (VIP) and other reading-disabled persons.[245] In November 2010, WIPO launched a three-year pilot project called the 'Trusted Intermediary Global Accessible Resources Project' (TIGAR).[246] This would enable publishers to make their titles easily available to trusted intermediaries,[247] who in turn would provide accessible formats to blind and visually impaired persons.

Although this project was seen to be a positive, co-operative and practical move on the part of the International Publishers' Association (IPA) to make works accessible in alternative formats for participating countries, the WBU found it to be flawed, restrictive and 'erroneously portrayed by some organisations as an alternative to the underpinning legal framework needed to guarantee equal access to information promised under the United Nations Convention on the Rights of Persons with Disabilities'.[248]

In her statement announcing the WBU's suspension from the TIGAR Project dated 26 February 2011, the President of the WBU, Maryanne Diamond, stresses the need for a legal framework for international exchange. She explains that –

> [w]e have engaged in more than two years of patient, resource intensive dialogue with rights holders, and the result has been proposals for organisations that serve disabled people to sign legal frameworks that undermine existing rights and incur costs and liabilities that are completely unreasonable. This demonstrates that governments of the world must now stand up and create the clear legal framework needed to deliver the right of equality of access to published works set out in the convention.[249]

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[244] WIPO 'Conclusions of SCCR' (2008) <http://www.wipo.int/edocs/mdocs/copyright/en/sccr_17/sccr_17_www_112533.pdf>.

[245] 'Facilitating Access to Copyright Works for Visually Impaired Persons' <http://www.visionip.org/portal/en/index.html>.

[246] For more information about the TIGAR Project see <http://www.visionip.org/tigar/en/>.

[247] Trusted Intermediaries (TIs) participating in the TIGAR project are not-for-profit organizations – eg national libraries or charities serving the visually impaired community – that provide specialized services related to training, education, adaptive reading or information access for people with print disabilities. See <http://www.visionip.org/tigar/en/faq.html#trusted_intermediaries>.

[248] C Saez 'World Blind Union Won't Be Sidetracked In Quest For Treaty On Reading Access' (2011) para 3 <http://www.ip-watch.org/2011/03/10/world-blind-union-won%E2%80%99t-be-sidetracked-from-quest-for-treaty-on-reading-access>.

[249] 'WBU suspends participation in WIPO & EU Stakeholder discussions, pending agreement at WIPO on legal framework' (2011) <http://www.keionline.org/node/1082>.

The TIGAR Project restricts participation to certain organisations called 'trusted intermediaries', which essentially excludes a large group of non-governmental organisations (NGOs) and disability units in higher educational institutions that serve blind and visually impaired communities in WIPO member countries, including South Africa.

The South African National Library for the Blind (SALB), in its individual capacity, elected to participate in the TIGAR project in 2011, so as to be in a position to provide users with accessible formats without delay. For various reasons (some already mentioned), the multi-stakeholder South African National Council for the Blind Coalition (of which the SALB is a member) elected not to participate in the TIGAR Project and continues to support the WBU's decision to suspend participation in the Project and to support the proposal for a multilateral TVI at WIPO. Copyright laws are national or territorial in nature, which prohibits cross-border exchange of works in accessible formats for persons with sensory disabilities.

> [S]o far — international treaties and legal instruments have systematically aimed at globally reinforcing prohibitions, and rich countries, upholding the position of the content industry, have always opposed globalization of copyright restrictions in favor of people with disabilities, alleging that if they were officially globalized by WIPO, this would lead to further restrictions in favor of other groups.[250]

The WBU and SANCB believe that a multilateral treaty such as the TVI is the only workable solution to resolve the access problems encountered by blind, visually impaired and other reading disabled persons.

3.2.8.3. Draft Treaty for Blind, Visually Impaired and Other Reading Disabled Persons

The above draft treaty, proposed by the WBU at SCCR in 2008, was tabled for consideration at WIPO on May 25, 2009, by Brazil, Ecuador and Paraguay. In 2010, the government of Mexico joined as a co-sponsor of the treaty proposal.[251] This draft treaty relates to an international set of limitations and exceptions specifically for the benefit of visually impaired persons and other persons with reading disabilities. The underlying principles and aims that it embodies are:

- That copyright law should enshrine a culture of rights rather than one of permissions because the production of accessible copies from originals is not detrimental to the rights holders interests, provided that activity proceeds on a not-for-profit basis and that accessible copies are distributed only to those who need them;
- That it should be possible to move legally produced accessible copies of works across borders;

[250] C Almansi 'Copyright and Disability: WIPO Consensus Document' (2011) <http://etcjournal.com/2011/06/21/copyright-and-disability-wipo-consensus-document>.

[251] '2009 Proposal by Brazil, Ecuador and Paraguay, Relating to Limitations and Exceptions: Treaty Proposed by the World Blind Union' (2009) <http://keionline.org/node/29>.

- That a visually impaired person should be allowed to bypass digital rights management technology (DRM) which interferes with their assistive technology, and that preferring the rights holder's interests over the right of access for the visually impaired person in such cases is tantamount to discrimination;
- And that exceptions should not be limited to closed or specific formats and should be extended to all those who cannot handle print with an acceptable degree of comfort, not just to those whose vision falls below a certain level.[252]

The two main features of the proposed treaty are '(1) to provide a minimum standard for limitations and exceptions for the blind and visually impaired, and (2) to allow and encourage the import and export of works in accessible formats'.[253]

The basic structure of the proposal is a two-tiered set of limitations and exceptions to the exclusive rights of copyright owners. Non-profit institutions would have the right to publish and distribute works in accessible formats subject to the following four conditions:

1. The person or organization wishing to undertake any activity under this provision has lawful access to that work or a copy of that work;
2. the work is converted to an accessible format, which may include any means needed to navigate information in the accessible format, but does not introduce changes other than those needed to make the work accessible to a visually impaired person;
3. copies of the work are supplied exclusively to be used by visually impaired persons; and
4. the activity is undertaken on a non-profit basis.[254]

The Treaty proposal provides for more limited exceptions to enable commercial publishers to make works accessible to persons with visual disabilities when:

> the work or copy of the work that is to be made into an accessible format is not reasonably available in an identical or largely equivalent format enabling access for the visually impaired, and the entity providing this accessible format gives notice to the owner of copyright of such use and adequate remuneration to copyright owners is available.[255]

Such a treaty will enable member countries to 'devise relevant policies to support dissemination and equitable access to knowledge and educational materials with a view to promote human development through higher education which directly contributes to the attainment of Goal 2'.[256] The WBU's main aim is to have the TVI passed by all member countries of WIPO to ensure the widest possible access to

[252] G Whitehouse 'A New Clash Between Human Rights and Copyright: The Push for Enhanced Exceptions for the Print-Disabled' (2009) 25 *Pub Res Q* 220 (Whitehouse refers to these principles from the WBU Union advice note on copyright updated in 2007 but this document is no longer available online).

[253] KEI 'Briefing Note: World Blind Union Proposal for a WIPO Treaty for Blind, Visually Impaired and Other Reading Disabled Persons' (2008) <http://www.keionline.org/misc-docs/tvi/tvi_memo_en_pdf.pdf>.

[254] Ibid 2.

[255] Ibid 3.

[256] 'Millennium Development Goal 2' (note 243 above).

works in accessible formats and to enable cross-border exchange of those works. This treaty, however, does not address any of the access needs of Deaf and other hearing impaired persons.

As aforementioned, the WBU suspended participation in the WIPO Stakeholder Platform, as well as similar EU Stakeholder Dialogue projects, in early February 2011, 'pending agreement at WIPO on a proper binding legal framework'.[257]

WIPO SCCR 24 (July 2012) closed without any decision on convening a diplomatic conference for the TVI. This was due to continuing opposition from the USA and EU. It is expected, however, that a decision on such a conference will be made at the extraordinary session of the General Assembly in December 2012.[258] The TVI, if approved and adopted by WIPO member states, will remedy the current situation where copyright law prohibits cross-border exchange of works in accessible formats. It will facilitate resource-sharing and new cooperation amongst countries, libraries and organisations serving the needs of persons with sensory disabilities. There is also potential for a whole new market for publishers as more and more persons with sensory disabilities require reading and other material in accessible formats.

3.2.8.4. Draft Treaty on Copyright Limitations and Exceptions for Libraries and Archives

IFLA, eIFL, the International Council of Archives (ICA) and Corporacion Innovarte (Chile), after a high-level meeting of IP experts in London in 2009, decided to present a solution to address issues affecting libraries and archives at the international level. This was also in response to practical issues raised by librarians from all over the world at the IFLA Committee on Copyright and Related Matters (CLM)'s Focus Sessions that took place in Oslo in 2005 and in Milan in 2009. The solution proposed is a draft Treaty on Limitations and Exceptions for Libraries and Archives (referred to as "TLIB"), which mandates minimum limitations and exceptions for adoption into national copyright laws.

This treaty is intended as a constructive proposal to feed into the political process at WIPO, to maximise the opportunities that have been created,[259] and to help resolve some of the issues that developing countries, in particular, experience. TLIB was officially launched at the IFLA Presidential meeting in The Hague in April 2011. Version 4.1 of the treaty[260] was presented at the three-day WIPO SCCR 23

[257] J Love 'WBU Suspends Participation in WIPO & EU Stakeholder Discussions, Pending Agreement at WIPO on Legal Framework' (2011) para 1 <http://keionline.org/node/1082>.

[258] T Ravhandalala, First Secretary, Political: SA Permanent Mission in Geneva (27 July 2012) [Personal communication].

[259] IFLA 'Frequently Answered Questions' <http://www.ifla.org/en/node/5857>.

[260] IFLA 'Treaty Proposal on Limitations and Exceptions for Libraries and Archives' Version 4.1 (November 2011) <http://www.ifla.org/files/hq/topics/exceptions-limitations/documents/TLIB_v4.1.pdf>.

session for libraries and archives in Geneva in November 2011. Article 9 of updated Version 4.3 (July 2012) proposes the following limitations and exceptions for persons with sensory disabilities and/or for libraries to assist such persons with accessing information in accessible formats:-

> **Right to Use of Works and Materials Protected by Related Rights for the Benefit of Persons with Disabilities**
>
> 1) It shall be permitted for libraries and archives to adapt, transcribe, translate, reproduce, transmit, communicate and make available a work, or material protected by related rights, that is not accessible to a person with a disability, in a form that is accessible to that person, and supply the copy to that individual by any means.
>
> 2) Where a work, or material protected by related rights, has been made in an accessible form under paragraph (1), this shall not prevent further accessible forms of any type from being made for, and supplied to, any other persons with a disability by any means, including digital transmission.
>
> 3) Any accessible copy of a work, or of material protected by related rights, made under paragraphs (1) and (2), may be transferred or loaned to any other library or archive.
>
> ***Explanatory Note***
> *This Article provides exceptions to the reproduction, transcription, translation, adaptation, distribution and communication to the public rights for the purposes of serving disabled people. When taken together with Article 12 it also removes the legal uncertainty that currently surrounds cross-border transfers of accessible formats of works and materials protected by related rights that have been converted or adapted for the benefit of disabled people. With regard to the Proposal on an International Instrument on Limitations and Exceptions for Persons with Print Disabilities (SCCR/22/16), if libraries and archives are considered as 'authorised entities' in that document there is no conflict with this Article. If not, then this Article will ensure that all libraries and archives can provide good services to people with disabilities which can take full advantage of the benefits offered by advances in technology.*
> *The Article allows libraries and archives to make and distribute or communicate accessible copies from works or materials for the benefit of a disabled person and to make and distribute further copies from that copy for the use of other disabled people. The provisions apply to both the analogue and digital environment and would allow format shifting and other necessary adaptations such as subtitling and translation into sign language for deaf people or transcription into Braille for visually impaired people. It also allows the transfer or loan of an accessible copy made by one library or archive to another library or archive, including across national borders (see Article 12).* [261]

This treaty, if adopted by WIPO member states, will enhance access to information in all countries. Article 9 will supplement the WBU's TVI provisions for blind, visually impaired and other reading disabled persons, by enabling libraries and archives to convert material into accessible formats for persons with disabilities and engage in cross-border resource-sharing in accessible formats. Richer countries with accessible collections will be able to share their resources with poorer countries.

[261] IFLA 'Treaty Proposal on Limitations and Exceptions for Libraries and Archives' Version 4.3 (July 2012) Art. 9 <http://www.ifla.org/files/hq/topics/exceptions-limitations/documents/TLIB_v4.3_050712.pdf>.

3.2.8.5. Draft Treaty on Exceptions and Limitations for Persons with Disabilities, Educational and Research Institutions, Libraries and Archives (African Group)

In addition to the aforementioned Treaty Proposals, three other proposals were tabled for discussion at WIPO, namely, the Draft Proposal of the United States of America for a Consensus Instrument, the EU Joint Recommendation and the African Group Treaty on Exceptions and Limitations for Persons with Disabilities, Educational and Research Institutions, Libraries and Archives.[262]

South Africa plays a leadership role in the African Group and supports the Group's proposals, hence my focus on the Group's Treaty, tabled at WIPO SCCR 23 (2011) and SCCR 24 (2012). Persons with sensory disabilities are addressed in the draft Treaty as follows:-

> *Limitations and exceptions for persons with disabilities*
>
> *Article 5: Limitations and exceptions to exclusive rights*
>
> *It shall be permitted without the authorization of the owner of copyright to make an accessible format of a work, supply that accessible format, or copies of that format, to persons with disabilities by any means, including by non-commercial lending or electronic communication by wire or wireless means, without the authorization of the owner of copyright, and undertake any other intermediate steps to achieve these objectives, when all of the following conditions are met:*
>
> *(a) the person or organization wishing to undertake any activity under this provision has lawful access to that work or a copy of that work;*
>
> *(c) the work is converted to an accessible format, which may include any means needed to navigate information in the accessible format, but does not introduce changes other than those needed to make the work accessible to persons with disabilities;*
>
> *(c) copies of the work are supplied exclusively to be used by persons with disabilities;*
>
> *(d) the activity is undertaken on a non-profit basis; and*
>
> *(e) the owner of the right is recognized as such.*
>
> *Article 6: Personal use by persons with disabilities*
>
> *A person with a disability to whom a work is communicated by wire or wireless means as a result of activity under Article 5 of this Treaty shall be permitted without the authorization of the owner of copyright to copy the work exclusively for his or her own personal use. This*

[262] A comparison of the three proposals can be found at <http://keionline.org/sites/default/files/comparison_tvi_proposals.pdf>.

provision shall be without prejudice to any other limitations and exceptions that the person in question is able to enjoy.[263]

3.2.8.6. Intellectual Property Amendment Bill 2010

An initiative by the DTI to protect traditional knowledge in South Africa may also have an impact on the SA copyright law if promulgated. The Intellectual Property Amendment Bill 2010 passed by Parliament in November 2011 currently awaits the President's signature. The Bill proposes to add an extra category of protected works in the Copyright Act and other IP laws, without appropriate limitations and exceptions for persons with disabilities, education, research and libraries. If enacted, the public domain will shrink and less works will be accessible by persons with disabilities and other consumers of information.[264]

3.3. Section B: Survey of Copyright Limitations and Exceptions in Developed and Developing Countries

The second approach of my methodology was to examine the copyright laws of a large number of countries to establish whether they had adopted limitations and exceptions specifically for persons with sensory disabilities in their copyright legislation. To ensure a reasonable result from countries of varying economies and stages of development, I reviewed the copyright laws of 125 countries, both developed and developing countries. Some of the laws perused are outdated, whilst others have been updated within the past three years.

Schedule A below lists 70 of the 125 countries reviewed that have copyright limitations and exceptions specifically for persons with sensory disabilities and/or other disabilities.

[263] Draft WIPO Treaty on Exceptions and Limitations for the Persons with Disabilities, Educational and Research Institutions, Libraries and Archives' SCCR/22/12 (2011) <http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=169397>,

[264] 'Intellectual Property Laws Bill' [B 8B—2010].

Schedule A

List of countries that have copyright provisions for persons with sensory disabilities[265]

No	Country	Copyright Law	Blind/ Visually Impaired Only	Blind, Deaf & Other Disabilities
1	Armenia	Law on Copyright and Related Rights, 2006, Art 22(ii)(h)	Blind	
2	Australia	Copyright Act 1968 (Cons. as of 4/3/2010). Div. 3	Print Disabled	
3	Austria	Federal Law on Copyrights on Literary and Artistic Works and Related Rights (Copyright Act), Art 42(d)(1-2)		Persons with disabilities
4	Azerbaijan (Republic of)	Law of the Republic of Azerbaijan on Copyright and Related Rights, 1996, Art 19(6)	Blind	
5	Bahamas	Copyright Act - Cap. 323, 2002, Art 96 (some articles amended 2004)		Blind & physically handicapped
6	Belarus (Republic of)	Belorussian Law on Copyright and Adjacent Rights No. 194-3 of 11/8/1998, as amended up to the Law of the Republic of Belarus No. 396-Z of 14/7/ 2008, Art 19	Blind	
7	Belize	Copyright Act - Cap. 252, Art 83(1)		Hearing impaired or physically or mentally handicapped
8	Brazil	Copyright and Neighboring Rights,) Law No. 9610 of 1998, Chapter IV, 46(d)	Visually Impaired	
9	Bulgaria	Law on Copyright and Neighboring Rights, 1993, as amended at 2011	Blind	
10	Canada	Consolidated Copyright Act R.S.C., 1985, c. C-42. s 32(1-3) and s 86 - 87 (as at Jan. 2012)		Perceptually disabled persons
11	Chile	Law No. 20.435 on Intellectual Property, 2010 (amended No. 17.336) Art 71C		Visual, hearing and other disabilities

[265] All the laws in Schedule A are accessible at http://www.wipo.int/wipolex/en/index.jsp.

12	China (Republic of)	Copyright Act of 2010, Art 22(12)	Blind persons	
13	Croatia	Croatian Copyright and Related Rights Act (O.G. 167/2003), Art 86		Persons with a disability
14	Czech Republic	Consolidated Version of Act No. 121/2000 Coll., on Copyright and Rights Related to Copyright and on Amendment to Certain Acts (the Copyright Act), as amended by Act No. 81/2005 Coll., Act No. 61/2006 Coll. & Act No. 216/2006 Coll., Art 38		Persons with disabilities and visually impaired
15	Denmark	Consolidated Act on Copyright No. 202 of 2010, s 17		Visual and hearing impaired
16	Dominican Republic	Copyright Law Act No. 65-00 of 2000 (as amended), s 44(3)		Visually impaired & other physical disabilities
17	El Salvador	Law on the Promotion and Protection of Intellectual Property Rights (Legislative Decree No. 604 of 1993, as amended, Art 4(d)		Blind & handicapped persons
18	Estonia	Copyright Act of November 1992 (last amended by Act 2006), Art 19 & 27	Blind	
19	Fiji	Copyright Act, 1999, s 81		Deaf or hard of hearing or physically or mentally disabled
20	Finland	Copyright Act 404 of 1961, amendments up to 307/2010 included, s 17		Visually impaired and deaf and hearing impaired
21	France	Copyright Law No. 961 of 2006, Art 7		Motor function, physical, sensory, mental, cognitive or mental disabilities
22	Georgia	Georgian Law on Copyright and Neighbouring Rights of 22 June 1999, as amended on 5 December 2000, Art 23	Blind	
23	Germany	Law on Copyright and Related Rights (as amended 17 December 2008) Art 45(1)a		Persons with a disability and visual impairments
24	Greece	Greek Law on Copyright, Related Rights and Cultural Matters No. 2121/1993 as last amended by Law No. 3057/2002 and by Law 3207/2003 Art 28A		Blind and Deaf-mute

25	Hungary	Hungarian Act No LXXVI of 1999 on Copyright as consolidated in January 2007, rt. 41 in Ch. 5		Disabled persons
26	Iceland	Copyright Act No. 73, 1972. Art 18(1)		Blind & Hearing Impaired
27	India	Copyright (Amendment) Bill, 2012, Bill No. XXIV-C of 2010, passed May 2012, s 51(1)(zb) & 31B		Persons with Disabilities
28	Indonesia (Republic of)	Copyright Act No. 19, 2002, Art 15(d)	Blind	
29	Ireland (Republic of)	Copyright and Related Rights Act No. 28 of 2000, s 104		Persons with physical or mental disabilities
30	Italy	Law No. 633 of April 22, 1941 Protection of Copyright & Related Rights (as amended in 2008) Art 71bis.		Disabilities; Handicapped persons
31	Japan	Copyright Act (Act No. 48 of May 6, 1970, as last amended by Act No. 65 of December 3, 2010) Art 33bis & 37		Visual and aurally handicapped
32	Kazakhstan	Law on Copyright and Neighboring Rights, 1996, Art 19(6)	Blind	
33	Korea (Republic of)	Copyright Act of 1995, Art 30	Visually Impaired	
34	Kyrgyzstan (Republic of)	Law of the Kyrgyz Republic on Copyright and Related Rights, 2008 version, Art 19(6)	Blind	
35	Lao People's Democratic Republic	Intellectual Property Laws, 2007, s 96: 1.9	Blind	
36	Latvia	Copyright Law, as amended, 2007, Ch. V, s 22		Visual & hearing impaired
37	Liechtenstein	Law on Copyright and Neighboring Rights (Copyright Law), Art. 26c		Sensory and other disabilities
38	Lithuania	Lithuanian law on Copyright and Related rights was adopted in 1999 (last amended in 2011), s 20(2), 25		Persons with disabilities
39	Macao	Copyright Decree-Law No. 43/99/M, 1999 Art 65	Blind	
40	Malaysia	Laws of Malaysia Act 332 Copyright Act 1987 (Reprinted 2001) incorporating latest amendment – Act A1139, 2002, s 16A, 3(c)(ii)		Visual, aural, intellectual and print disabilities

41	Moldova	Law on Copyright and Related Rights (No. 139 of 2010)	Visually Impaired	
42	Mongolia	Law of Mongolia on Copyright and Related Rights, 2006. Art 24.1.7		Visually and hearing impaired
43	Montenegro	Copyright and Related Rights Act enacted by the 24th convocation of The Parliament of Montenegro at the tenth session of its first regular (Spring) sitting in 2011, Art 48		People with a disability
44	New Zealand	Copyright Act No. 143 of 1994 (as of 7 October 2011), Public Act, Pt. 3, s 69(1); amended on 31/10/2008 by s 40 of the Copyright (New Technologies) Amendment Act No. 27 of 2008	Blind and visually impaired	
45	Nicaragua	Law on Copyright and Neighboring Rights, No. 312 (as amended), Art 32(2)	Blind	
46	Nigeria	Copyright Act (Cap. 68, Laws of the Federation of Nigeria, 1990 as amended by the Copyright Amendment Decree No. 98 of 1992 and the Copyright (Amendment) Decree 1999), s 2(s)	Blind	
47	Norway	Copyright Act No. 2 of 1961, relating to Copyright in Literary, Scientific & Artistic Works, as last amended by Law No. 27, 1995, s 17		Visually impaired and deaf and hearing impaired
48	Panama	Law No. 15 of August 8, 1994 on Copyright and Neighboring Rights and Enacting Other Provisions, Art 47(4)		Blind and other handicapped persons
49	Paraguay	Copyright and Related Rights Act No. 1328/98, Ch 1, Art 38(6)	Blind and visually handi-capped	
50	Peru	Law No. 27861 of October 24, 2002 para (g) added to Art 43 of Legislative Decree No. 822 of April 23, 1996	Blind	
51	Poland (Republic of)	Law of February 4, 1994, on Copyright and Neighboring Rights, 1994 (as amended at 2010), Art 33(i)		Handicapped persons
52	Portugal	Code of Copyright and Neighboring Rights, 2008, Art 75 & 80		People with a disability/blind

53	Romania	Law No. 8, 1996 on Copyright & Neighboring Rights, Art 33(2)(e)		People with disabilities
54	Russian Federation	The Civil Code of the Russian Federation (Part 4), adopted on 24 November 2006 and in force since 1 January 2008; Art 1274(6)	Blind	
55	Rwanda	Law No. 31/2009 of 26/10/2009 on the Protection of Intellectual Property, Art 215	Blind	
56	Saint Lucia	Copyright Act 1995, s 86(1)		Deaf or hard of hearing or physical or mental disabilities
57	Saint Vincent & the Grenadines	Copyright Act, 2003, s 80(1)		Deaf or hard of hearing or physical or mental disabilities
58	Serbia	Law on Copyright and Related Rights, 2009, Art 54		Persons with disabilities - 'invalidity'
59	Singapore	Copyright Act (Chapter 63), 2006, Div. 7, 54		Blind, intellectually & perceptually disabled
60	Slovakia	Slovak Copyright Act 618/2003 of 4 2003, s 29		Disabled persons
61	Slovenia	Copyright and Related Rights Act, 1995 as last amended in 2006 (as in force from Jan. 2007) Art 47a		Persons who are handicapped
62	Sweden	Copyright in Literary and Artistic Works Act, 1960:729 (as amended up to 1.4.2009), s 17		Deaf/ hearing impaired & persons with disabilities
63	Tajikistan (Republic of)	Law of the Republic of Tajikistan on Copyright and Related Rights November 1998 (last amendment 2009) Art 20(6)	Blind	
64	The Netherlands	Article II, section E, of the reparation III Justice (Stb. 2008, 85), the Copyright Act 1912 w.e.f. March 2008 with a new official title, reading: Copyright Act. (text as in force from 14.1.2012)		People with a disability
65	Uganda	Copyright & Neighbouring Rights Act 2006, Art 15(K)		Persons with disabilities
66	Ukraine	Law on Copyright and Related Rights, 2003, Art 21(6)	Blind	

67	United Kingdom	Copyright (Visually Impaired Persons) Act 2002 Ch 33	Visually impaired	
68	United States of America	Copyright Law Amendment 1996 – Chafee Amendment PL-104-197		Blind and other persons with disabilities
69	Uzbekistan	Law of the Republic of Uzbekistan on Copyright and Related Rights, 2006, Art 27	Blind	
70	Vietnam	Law of Intellectual Property (No. 50/2005/QH11) Art 25(1)	Blind	

The majority of the above countries[266] have provisions for visually and hearing impaired persons, either specifically mentioned, or covered under terms such as 'handicapped', 'physical or other disabilities', or 'persons with perceptual disabilities'.[267] The terminology used differs from one country to another, but essentially the variances include the same groups of people. 28 countries[268] have provisions for blind or visually impaired persons only.

Of the African countries reviewed, only four have included some provisions for persons with sensory disabilities into their national copyright law. Cameroon, Nigeria and Rwanda have exceptions for blind persons only. Malawi's proposed Copyright Amendment Bill (2010) provides for blind persons but it has not yet been passed. Uganda has made provision for both groups, ie transcription of Braille for blind persons and sign language for Deaf persons in its Copyright legislation.

Schedule B below lists the remaining 55 countries reviewed that do not have any specific copyright limitations and exceptions for persons with sensory disabilities. Some of these countries do, however, have limitations relating to 'fair use' or 'fair dealing', or exceptions relating to certain permitted acts, such as private reproduction, translation (mainly through licensing options), adaptation, arrangement and/or other transformation of a work, or parallel importation, which could possibly be applied to persons with sensory disabilities too. They may also have other laws or regulations that influence or impact upon their copyright legislation. The context, circumstances and merits of each situation would, however, need to be examined before a visually or hearing impaired person could engage in any of these abovementioned acts.

As confirmed above, all member countries of the Berne Convention and the TRIPS Agreement are permitted to adopt limitations and exceptions in their national copyright legislation, as long as they meet the criteria of the three-step test. The

[266] 42 countries - see Column 5 in Schedule A

[267] The Canadian Copyright Act uses the term 'perceptual disabilities' which includes visually and hearing impaired persons.

[268] 28 countries - see Column 4 in Schedule A

countries listed in Schedule A have all acknowledged the benefit of such limitations and exceptions for persons with sensory disabilities in their national laws, whilst South Africa and those countries listed in Schedule B have yet to do so. The principles have been established internationally and many countries have embraced them practically in their national laws.

Limitations and exceptions facilitate access to knowledge and encourage creativity, and in the process, contribute towards development and socio-economic growth, particularly in developing countries. There are no policies, obligations, barriers or other reasons that prevent member countries, including South Africa, from adopting limitations and exceptions for persons with sensory disabilities into their national laws.

Schedule B

List of countries without copyright provisions for persons with sensory disabilities[269]

No.	Country	Copyright Law
1	Albania	Law No. 9380 of April 28, 2005 on Copyright & Related Rights
2	Andorra	Law on Copyright and Neighboring Rights 1999
3	Afghanistan	Law Supporting the Rights of Authors, Composers, Artists and Researchers (Copyright Law) 21 July 2008
4	Algeria	Ordinance No. 03-05 of 19 Joumada El Oula 1424 corresponding to July 19, 2003 on Copyright and Related Rights
5	Antigua and Barbuda	Copyright Act 2003
6	Angola	Law on Author's Rights (No. 4/90 of 10 March 1990)
7	Argentine	Law No. 11.723 of September 28, 1933 - Legal Intellectual Property Regime
8	Barbados	Copyright Act, Cap. 300, 1998
9	Benin	Law No. 2005-30 of April 5, 2006 relating to Copyright and Related Rights of the Republic of Benin
10	Bolivia (Plurinational State)	Law No.1322 of April 13, 1992 on Copyright
11	Botswana	Copyright & Neighboring Rights Act, 2000
12	Burkina Faso	Law No. 032-99/AN of December 22, 1999 on the Protection of Literary and Artistic Property
13	Burundi	Law No. 1/021 of December 30, 2005 on the Protection of Copyright and Related Rights in Burundi
14	Bhutan (Kingdom)	Copyright Act of the Kingdom of Bhutan, 2001
15	Cambodia	Law on Copyright and Related Rights
16	Chad	Law No. 005/PR/2003 of May 2nd, 2003 on the Protection of Copyright, Neighboring rights and Expressions of Folklore

[269] All the laws in Schedule B are accessible at http://www.wipo.int/wipolex/en/index.jsp.

17	Comoros	Law of 11 March 1957 on Literary and Artistic Property
18	Costa Rico	Law No. 6683 on Copyright and Related Rights (as last amended by Law No. 8834 of May 3, 2010)
19	Cote d'Ivoire	Law No. 96-564 of July 25, 1996 on the Protection of Intellectual Works and the Rights of Authors, Performers and Phonogram and Videogram Producers
20	Democratic Republic of Congo	Ordinance-Law No. 86-033 of April 5, 1986 on the Protection of Copyright and Neighboring Rights
21	Djibouti	Law No. 154/AN/06 of 23 July 2006 on the Protection of Copyright and Neighboring Rights
22	Egypt	Law on the Protection of Intellectual Property Rights, Law No. 82, 2002
23	Ethiopia	Copyright and Neighboring Rights Protection Proclamation No. 410/2004
24	Ghana	Copyright Act, 2005, No. 690 (as amended)
25	Jamaica	Copyright (Amendment) Act, 1999
26	Kenya	Chapter 130 - The Copyright Act 2001
27	Lebanon	Law No. 75 of 1999 on the Protection of Literary and Artistic Property
28	Lesotho	Copyright Order, 1989
29	Libya	Law No. 9 for 1968 Issuing the Copyright Protection Law
30	Madagascar	Law No. 6683 on Copyright and Related Rights (as last amended by Law No. 8834 of May 3, 2010)
31	Malawi	Copyright Act, 1989 (No. 9 of April 26, 1989) (as amended) (*new proposed Bill (2010) has some proposals for the blind)*
32	Mali (Republic of)	Law No. 08-024 of July 23, 2008 laying down the Regime of Literary and Artistic Property in the Republic of Mali
33	Mauritius	Copyright Act 1997
34	Mexico	Federal Law on Copyright 2012
35	Morocco	Decree No. 2-64-406 of 8 March 1965 (5 kaada 1384) establishing the Moroccan Copyright Office
36	Mozambique	Law No. 4/2001 of 27 February 2001 (Copyright Law)
37	Myanmar	The Copyright Act of 1911

38	Namibia	Copyright and Neighbouring Rights Protection Act 6 of 1994
39	Niger	Decree No. 93-027 of March 30, 1993 on Copyright, Neighbouring Rights and Folklore
40	Papua New Guinea	Copyright and Neighbouring Rights Act 2000
41	Qatar	Law No. 7 of 2002 on the Protection of Copyright and Related Rights
42	Saudi Arabia	Copyright Law 2003
43	Senegal	Law No. 2008-09 of January 25, 2008 on Copyright and Related Rights
44	Seychelles	Copyright Act, Chapter 51, 1991
45	Swaziland	Copyright Act, 1912
46	Tanzania (United Republic of)	Copyright and Neighbouring Rights Act, 1999 and The Zanzibar Copyright Act, 2003
47	Thailand	Copyright Act of B.E. 2537 (1994)
48	The Gambia	Copyright Act, 2004
49	Tonga	The Copyright Act No. 12 of 2002
50	Togo	Law No. 91-12 of June 10, 1991 on the protection of Copyright, of Folklore and Neighboring Rights
51	Tunisia	Law No. 91-12 of June 10, 1991 on the protection of Copyright, of Folklore and Neighboring Rights
52	Vietnam	Decree No. 100/2006/ND-CP of September 21, 2006, Detailing and Guiding the Implementation of a Number of Articles of the Civil Code and the Intellectual Property Law Regarding the Copyright and Related Rights
53	Yemen	Presidential Decree No. 19 of 1994 in respect of Intellectual Property
54	Zambia	Copyright and Performance Rights (Amendment) Act, 2010 (Act No. 25 of 2010)
55	Zimbabwe	Copyright and Neighboring Rights Act (Chapter 26:05)

3.4. Section C: Study of Limitations and Exceptions for Persons with Sensory Disabilities in Ten Countries

Based on my research and findings in Section B above, I selected the following countries for a more in-depth review of their limitations and exceptions for persons with sensory disabilities. My selection was based on their copyright laws being very recent (eg Canada and India), or relevant, practical, and abreast of international developments and human rights commitments. It also takes into account large and small countries at different stages of development to examine how they have accommodated persons with sensory disabilities in their national copyright laws. The purpose of this review was to find suitable examples or possible models which may, with some modification, be considered by the SA Government when amending the Copyright Act.

No individual country that I reviewed provides the 'ideal or comprehensive model' for adoption in the South African copyright law. I therefore considered examples of limitations and exceptions for persons with sensory disabilities in the following countries:-

- Canada
- Czech Republic
- Denmark
- Iceland
- India
- Ireland
- Japan
- Saint Lucia
- Sweden
- United Kingdom

All the above-mentioned countries' copyright limitations and exceptions have useful clauses relating to persons with sensory disabilities which may, with appropriate modifications, offer some solutions for the SA copyright law.

Although the US has limitations and exceptions for visually impaired persons, in terms of the Chafee Amendment[270], I have not included them in this review, as their 'fair use' provisions are unique to that country and the provisions for conversion into more accessible formats are 'format-specific', which narrows the scope of accessibility.

[270] Copyright Law Amendment of 1996 – The Chafee Amendment (17 U.S.C. § 121). 'The amendment enables certain authorized entities to reproduce or distribute copies of a broad range of previously published literary works in specialized formats such as Braille, audio or digital text, exclusively for use by blind or other persons with disabilities.' See <http://studentaffairs.stanford.edu/oae/laws/chafee>.

3.4.1. Canada

Canada has a more inclusive approach than the US in providing access to persons with sensory disabilities. The Copyright Act of Canada, R.S.C. 1985, c. C-42, s 80[271] uses the term 'perceptual disabilities' which suggests a broader category of users, including various levels or degrees of visual and hearing impairment. It does not specify formats for accessibility, which broadens the options for persons with sensory disabilities and/or non-profit organisations servicing their needs.

Clause 32 provides the following exceptions for reproduction in alternate formats:-

> 32.(1) It is not an infringement of copyright for a person, at the request of a person with a perceptual disability, or for a non-profit organization acting for his or her benefit, to –
>
> *(a)* make a copy or sound recording of a literary, musical, artistic or dramatic work, other than a cinematographic work, in a format specially designed for persons with a perceptual disability;
>
> (*b*) translate, adapt or reproduce in sign language a literary or dramatic work, other than a cinematographic work, in a format specially designed for persons with a perceptual disability; or
>
> (*c*) perform in public a literary or dramatic work, other than a cinematographic work, in sign language, either live or in a format specially designed for persons with a perceptual disability.
>
> Marginal note: Limitation
>
> (2) Subsection (1) does not authorize the making of a large print book.
>
> Marginal note: Limitation
>
> (3) Subsection (1) does not apply where the work or sound recording is commercially available in a format specially designed to meet the needs of any person referred to in that subsection, within the meaning of paragraph (*a*) of the definition "commercially available".[272]

[271] This Act is being amended by Bill C-11, 2012, which awaits enactment. 'Clauses 36 and 37 of the bill add exceptions for persons with perceptual disabilities (sections 32 and 32.01 of the Act). Clause 37 introduces an exception for non-profit organizations acting for the benefit of persons with a print disability to make a copy of a work in a format specifically designed for persons with a print disability, and to send a copy of the work to similar organizations abroad (as long as the work being adapted is by a Canadian author or a national from the country to which the adapted work is being exported). Clause 37 was amended at committee stage in order to limit the liability of a non-profit organization that makes a good faith mistake regarding an author's nationality.' (M Geist, person communication 27.7.2012). See Bill <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=5697419&File=57>.

[272] See <http://laws-lois.justice.gc.ca/eng/acts/C-42/FullText.html>. Bill C-11, 2012, when passed, will introduce new amendments – see note 271 above and also: http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=5697419&File=57.

3.4.2. Czech Republic

Article 38 of the Czech Republic's Consolidated Version of Act No. 121/2000 provides the following provisions for people with disability, including vision disability:-

> Licence for Disabled
> (1) Copyright is not infringed by anybody who:
> a) exclusively for the benefit of people with disability and not for the purpose of direct or indirect economic or commercial advantage, makes a reproduction or has a reproduction made of a published work to the extent required by the specific disability; a reproduction so made may also be distributed and communicated by the same person, unless this is done for the purpose of direct or indirect economic or commercial advantage;
> b) exclusively for the benefit of people with vision disability and not for the purpose of direct or indirect economic or commercial advantage, provides the verbal expression of the visual component and adds it to the audio component of an audiovisual recording of an audiovisual work; the audio component of the audiovisual recording of an audiovisual work may also be reproduced, distributed and communicated bythe same person, unless this is done for the purpose of direct or indirect economic or commercial advantage.
> (2) Copyright is not infringed by the person referred to in Article 37 (1), if the originals or reproductions of published works are lent to meet the needs of people with disability in connection with their disability.
> (3) Provisions of Article 30 (5) shall apply mutatis mutandis.[273]

3.4.3. Denmark

Section 17-(1) of the Denmark Copyright Law Consolidated Act on Copyright No. 2023 of 2010 provides for visually and hearing handicapped persons as follows:-

> 17.−(1) is permitted to use and distribute copies of published works if the use and the distributed copies are specifically intended for the blind, visually impaired, the deaf and sufferers from speech impediments, as well as persons who on account of handicap are unable to read printed text. The provision of the first sentence does not apply to the use or distribution of copies for commercial purposes.
> (2) The provision of subsection (1) does not apply to sound recordings of literary works or use that consists solely of sound recordings of musical works.
> (3) Sound recordings of published literary works may be used and distributed for use by visually impaired persons and backward readers if this is not done for commercial purposes. The author is entitled to remuneration. If agreement can not [sic] be made on the size of remuneration, each party is entitled to bring the dispute be-fore the Copyright License Tribunal, cf. § 47.
> (4) Government or municipal institutions and other social or non-profit institutions may, for the use of visually handicapped and hearing impaired persons, by means of sound or visual recording produce copies of works broadcast on the radio or television, provided the requirements regarding the extended collective license according to section 50 have

[273] Act's full name: Consolidated Version of Act No. 121/2000 Coll., on Copyright and Rights Related to Copyright and on Amendment to Certain Acts (the Copyright Act), as amended by Act No. 81/2005 Coll., Act No. 61/2006 Coll. and Act No. 216/2006 Coll.

been met. Such recording may only be used for the purpose of activities covered by the agreement presumed in section 50. [274]

3.4.4. Iceland

Article 18(1) of the Iceland Copyright Act No. 73, 1972 provides the following provisions for blind and hearing impaired persons:-

1. Braille editions of published literary or musical works may be printed and published. The works may also be photographed for use in schools for persons with speech and hearing impediments. [275]

3.4.5. India

The Indian Copyright (Amendment) Bill of 2012[276], passed by both Houses of Parliament in May 2012, is the most recent country to amend its copyright law. According to Prakash, 'India now has amongst the most progressive exception for persons with disabilities …' Under the amendments, sections 51(1)(zb) and 31B carve out exceptions and limitations for persons with disabilities'. Section 51(1)(zb) reads as follows:-

> "(*zb*) the adaptation, reproduction, issue of copies or communication to the public of any work in any accessible format, by—
> (*i*) any person to facilitate persons with disability to access to works including sharing with any person with disability of such accessible format for private or personal use, educational purpose or research; or
> (*ii*) any organisation working for the benefit of the persons with disabilities in case the normal format prevents the enjoyment of such works by such persons:
> Provided that the copies of the works in such accessible format are made available to the persons with disabilities on a non-profit basis but to recover only the cost of production:
> Provided further that the organization shall ensure that the copies of works in such accessible format are used only by persons with disabilities and takes reasonable steps to prevent its entry into ordinary channels of business.
> *Explanation*.—For the purposes of the sub-clause, "any organization" includes and organization registered under section 12A of the Income-tax Act, 1961 and working for the benefit of persons with disability or recognized under Chapter X of the Persons with Disabilities (Equal Opportunities, Protection or Rights and full Participation) Act, 1995 or receiving grants from the government for facilitating access to persons with disabilities or an educational institution or library or archives recognized by the Government.".
> *(zc)* the importation of copies of any literary or artistic work, such as

[274] See <http://www.wipo.int/wipolex/en/text.jsp?file_id=191420>.

[275] See <http://www.wipo.int/wipolex/en/text.jsp?file_id=128157#LinkTarget_1121>.

[276] See <http://164.100.24.219/BillsTexts/RSBillTexts/PassedRajyaSabha/copy-E.pdf>.

labels, company logos or promotional or explanatory material, that is purely incidental to other goods or products being imported lawfully."

Section 31B reads as follows:

"31B. *(1)* Any person working for the benefit of persons with disability on a profit basis or for business may apply to the Copyright Board, in such form and manner and accompanied by such fee as may be prescribed, for a compulsory licence to publish any work in which copyright subsists for the benefit of such persons, in a case to which clause (*zb*) of sub-section (*1*) of section 52 does not apply and the Copyright Board shall dispose of such application as expeditiously as possible and endeavour shall be made to dispose of such application within a period of two months from the date of receipt of the application.
(2) The Copyright Board may, on receipt of an application under sub-section (*1*), inquire, or direct such inquiry as it considers necessary to establish the credentials of the applicant and satisfy itself that the application has been made in good faith.
(3) If the Copyright Board is satisfied, after giving to the owners of rights in the work a reasonable opportunity of being heard and after holding such inquiry as it may deem necessary, that a compulsory licence needs to be issued to make the work available to the disabled, it may direct the Registrar of Copyrights to grant to the applicant such a licence to publish the work.
(4) Every compulsory licence issued under this section shall specify the means and format of publication, the period during which the compulsory licence may be exercised and, in the case of issue of copies, the number of copies that may be issued including the rate or royalty:
Provided that where the Copyright Board has issued such a compulsory licence it may, on a further application and after giving reasonable opportunity to the owners of rights, extend the period of such compulsory licence and allow the issue of more copies as it may deem fit. [277]

3.4.6. Ireland

Article 104.-(1) of the Republic of Ireland's Copyright and Related Rights Act No. 28 of 2000 provides for modifications of works as follows:-

104.—(1) A designated body may—
(a) make a copy of a work for the purpose of modifying that copy to meet the special needs of a person who has a physical or mental disability, and
(b) supply that modified copy to that person, without infringing the copyright in that work.
(2) Where a copy which would otherwise be an infringing copy is made under this section, but is subsequently sold, rented or lent, or offered or exposed for sale, rental or loan, or otherwise made available to the public, it shall be treated as an infringing copy for those purposes and for all subsequent purposes.
(3) In this section, "designated body" means a body designated for the purposes of this section by order of the Minister who shall not designate a body unless he or she is satisfied that the body is not established or conducted for profit. [278]

[277] P Prakash 'Analysis of the Copyright (Amendment) Bill 2012' (2012) para 4 <http://cis-india.org/a2k/blog/analysis-copyright-amendment-bill-2012>.

[278] See <http://www.wipo.int/wipolex/en/text.jsp?file_id=128034>.

3.4.7. Japan

Copyright Act (Act No. 48 of May 6, 1970, as last amended by Act No. 65 of December 3, 2010) has provisions for visually and hearing (aurally) impaired persons as follows:-

> (Reproduction for preparing a textbook in large print)
>
> Article 33bis. (1) It shall be permissible to reproduce works already reproduced in a school textbook, by means of the enlargement of print letters, illustrations, etc. used in that textbook or by means of other systems required for the use of such works by children or pupils who have difficulty in using such works because of their visual, developmental or other handicaps, for the purpose of study use by such handicapped children or pupils.
>
> (2) A person who intends to prepare a textbook or other copies reproducing such works (only such textbook as reproducing all of or a considerable part of such works excluding such textbook or copies reproduced in Braille; hereinafter in this paragraph referred to as "textbook in large print, etc.") shall inform in advance the publisher of the former textbook thereof and, in the case of distributing copies of such textbook in large print for profit-making purposes, pay to the copyright owners concerned compensation, the amount of which is fixed each year by the Commissioner of the Agency for Cultural Affairs in proportion to the amount of compensation mentioned in paragraph (2) of the preceding Article.
>
> (3) The Commissioner of the Agency for Cultural Affairs shall announce in the Official Gazette the amount of compensation fixed in accordance with the provisions of the preceding paragraph.
>
> (4) A person who makes an offer of electro-magnetic records of works reproduced in a textbook, under with the provisions of Article 5, paragraph (1) or (2) of the Law for the Promotion, etc. of the spread of Specific Textbooks, etc. for the Use by Handicapped Children and Pupils (Law No. 81, of 2008), may exploit such works, to the extent deemed necessary for the purpose of such offer.
>
> (Reproduction, etc. for the visually handicapped, etc.)
>
> Article 37. (1) It shall be permissible to reproduce in braille a work already made public.
>
> (2) It shall be permissible to record on a memory, or to make the public transmission (excluding the broadcasting or wire diffusion, and including the making transmittable in the case of the interactive transmission) of, a work already made public, by means of a braille processing system using a computer.
>
> (3) For a person, designated by Cabinet Order, who does activities for the welfare of the visually handicapped and others having a handicap in perceiving visual expressions (hereinafter in this paragraph and in Article 102, paragraph (4) referred to as "the visually handicapped, etc."), it shall be permissible to reproduce, or make the interactive transmission (including the making transmittable) of, a word, already made public, which has been offered or made available to the public by means for perceiving visually (including means for perceiving visually and by other perception) its expression (including another work which has been reproduced in the former work or which has been offered or made available to the public in a body united with the former work; hereinafter in this paragraph and in Article 102, paragraph (4) referred to as "visual work"), by means of converting written words of such visual work into oral words or by other means necessary for the use by such visually handicapped, etc., and to the extent deemed necessary for the use exclusively by the visually

handicapped, etc. having a difficulty in using such visual work by the former means. However, an exception is made in the case where such visual work has been offered or made available to the public by such means, by the copyright owner or with his authorization or by a person in favour of whom the right of publication mentioned in Article 79 has been established.

(Reproduction, etc. for the aurally handicapped)

Article 37bis. For a person, designated by Cabinet Order according to the types of exploitations mentioned in the following items, who does activities for the welfare of the aurally handicapped and others having a handicap in perceiving aural expressions (hereinafter in this Article and in paragraph (5) of next Article referred to as "aurally handicapped, etc."), it shall be permissible to make the exploitations, mentioned in the following items, of a work, already made public, which has been offered or made available to the public by means for perceiving aurally (including means for perceiving aurally and by other perception) its expression (including another work which has been reproduced in the former work or which has been offered or made available to the public in a body united with the former work; hereinafter in this Article referred to as "aural work"), to the extent deemed necessary for the use exclusively by the aurally handicapped, etc. having a difficulty in using such aural work by the former means. However, an exception is made in the case where such aural work has been offered or made available to the public, by means necessary for the use by such aurally handicapped, etc., by the copyright owner or with his authorization, or by a person in favor of whom the right of publication mentioned in Article 79 has been established.

(i) reproduction or making of the interactive transmission (including the making transmittable) of aural words of such aural work, by means of converting such aural words into written words or by other means necessary for the use by such aurally handicapped, etc. ;

(ii) reproduction of such aural work exclusively for the purpose of lending it for the use by the aurally handicapped, etc. (only such reproduction as made together with that of aural words of such aural work by means of converting such aural words into written words or by other means necessary for the use by such aurally handicapped, etc.). [279]

3.4.8. Saint Lucia

Section 86(1) of the Saint Lucia Copyright Act No. Copyright Act 1995 has the following exceptions for persons who are deaf or hard of hearing, or physically or mentally handicapped persons:-

86.-(1) A designated body may, for the purpose of providing people who are deaf or hard of hearing, or physically or mentally handicapped in other ways, copies which are sub-titled or otherwise modified for their special needs, make copies of television broadcasts or cable programmes and issue copies to the public, without infringing any copyright in the broadcasts or cable programmes or works included in them.
[Margin Provision of subtitled copies of broadcast or cable programme]
(2) A "designated body" means a body designated for the purposes of this section by order of the Minister, who shall not designate a body unless he is satisfied that it is not established or conducted for profit.

[279] See <http://www.cric.or.jp/cric_e/clj/index.html>.

[Margin- Recording for purposes of time shifting]. [280]

3.4.9. Sweden

Section 17 of the Swedish Copyright Act (2005:359) provides the following exceptions for 'persons with a disability' and for libraries and organisations providing services to 'persons with a disability':-

> **On the Making of Copies, etc. for Persons with a Disability**
> 17. Anyone is entitled to make, by means other than recording of sounds, such copies of literary and musical works which have been made public and of works of visual art which have been made public, that persons with a disability need in order to be able to enjoy the works. The copies may also be distributed to those persons.
> Libraries and organizations as decided by the Government in specific cases may also
> 1. communicate copies of the works that are referred to in the first Paragraph to persons with a disability who need the copies in order to be able to enjoy the work,
> 2. by means of sound recording make such copies of literary works that have been made public which persons with a disability need in order to be able to enjoy the works, and to distribute and communicate such sound recordings to those persons, and
> 3. make such copies of works transmitted on sound radio or television, and of cinematographic works, that deaf or hearing-impaired persons need in order to be able to enjoy the works, and to distribute and communicate copies of the works to those persons.
>
> The making of copies, the distribution and the communication to the public pursuant to this Article must not be carried out for commercial purposes, nor must the copies be used for purposes other than those mentioned in the Article.
> When libraries and organisations distribute or communicate copies of works to persons with a disability in such a way that those persons may keep a copy of the work, the author has a right to remuneration. The same applies if anyone, pursuant to the first Paragraph, second sentence, transmits more than a few copies to persons with a disability. [281]

3.4.10. United Kingdom

The UK Copyright (Visually Impaired Persons) Act 2002 amends Copyright Act, Designs and Patents Act 1988 (c.48) to include Section 31A which has provisions for visually impaired persons, but none for Deaf or other hearing impaired persons. The provisions for accessible copies of copyright work for visually impaired persons read as follows:-

> **1. Accessible copies of copyright work for visually impaired persons**
>
> In the Copyright, Designs and Patents Act 1988 (c. 48), after section 31 insert—
>
> *"Visual impairment*
>
> **31A Making a single accessible copy for personal use**

[280] See <http://www.wipo.int/wipolex/en/text.jsp?file_id=128487>.

[281] Sweden Act (2005:359) of May 26, 2005, amending the Act (1960:729) on Copyright in Literary and Artistic Works <http://www.wipo.int/wipolex/en/text.jsp?file_id=129605>.

(1) If a visually impaired person has lawful possession or lawful use of a copy ("the master copy") of the whole or part of—

(a) a literary, dramatic, musical or artistic work; or

(b) a published edition,

which is not accessible to him because of the impairment, it is not an infringement of copyright in the work, or in the typographical arrangement of the published edition, for an accessible copy of the master copy to be made for his personal use.

(2) Subsection (1) does not apply -

(a) if the master copy is of a musical work, or part of a musical work, and the making of an accessible copy would involve recording a performance of the work or part of it; or

(b) if the master copy is of a database, or part of a database, and the making of an accessible copy would infringe copyright in the database.

(3) Subsection (1) does not apply in relation to the making of an accessible copy for a particular visually impaired person if, or to the extent that, copies of the copyright work are commercially available, by or with the authority of the copyright owner, in a form that is accessible to that person.

(4) An accessible copy made under this section must be accompanied by -

(a) a statement that it is made under this section; and

(b) a sufficient acknowledgement.

(5) If a person makes an accessible copy on behalf of a visually impaired person under this section and charges for it, the sum charged must not exceed the cost of making and supplying the copy.

(6) If a person holds an accessible copy made under subsection (1) when he is not entitled to have it made under that subsection, the copy is to be treated as an infringing copy, unless he is a person falling within subsection (7)(b).

(7) A person who holds an accessible copy made under subsection (1) may transfer it to—

(a) a visually impaired person entitled to have the accessible copy made under subsection (1); or

(b) a person who has lawful possession of the master copy and intends to transfer the accessible copy to a person falling within paragraph (a).

(8) The transfer by a person ("V") of an accessible copy made under subsection (1) to another person ("T") is an infringement of copyright by V unless V has reasonable grounds for believing that T is a person falling within subsection (7)(a) or (b).

(9) If an accessible copy which would be an infringing copy but for this section is subsequently dealt with—

(a) it is to be treated as an infringing copy for the purposes of that dealing; and

(b) if that dealing infringes copyright, is to be treated as an infringing copy for all subsequent purposes.

(10) In subsection (9), "dealt with" means sold or let for hire or offered or exposed for sale or hire or included in a broadcast or cable programme service."

2. Multiple copies for visually impaired persons

In the Copyright, Designs and Patents Act 1988 (c. 48), after section 31A insert—

"31B Multiple copies for visually impaired persons

(1) If an approved body has lawful possession of a copy ("the master copy") of the whole or part of -

(a) a commercially published literary, dramatic, musical or artistic work; or

(b) a commercially published edition,

it is not an infringement of copyright in the work, or in the typographical arrangement of the published edition, for the body to make, or supply, accessible copies for the personal use of visually impaired persons to whom the master copy is not accessible because of their impairment.

(2) Subsection (1) does not apply -

(a) if the master copy is of a musical work, or part of a musical work, and the making of an accessible copy would involve recording a performance of the work or part of it; or

(b) if the master copy is of a database, or part of a database, and the making of an accessible copy would infringe copyright in the database.

(3) Subsection (1) does not apply in relation to the making of an accessible copy if, or to the extent that, copies of the copyright work are commercially available, by or with the authority of the copyright owner, in a form that is accessible to the same or substantially the same degree.

(4) Subsection (1) does not apply in relation to the supply of an accessible copy to a particular visually impaired person if, or to the extent that, copies of the copyright work are commercially available, by or with the authority of the copyright owner, in a form that is accessible to that person.

(5) An accessible copy made under this section must be accompanied by —.

(a) a statement that it is made under this section; and

(b) a sufficient acknowledgement.

(6) If an approved body charges for supplying a copy made under this section, the sum charged must not exceed the cost of making and supplying the copy.

(7) An approved body making copies under this section must, if it is an educational establishment, ensure that the copies will be used only for its educational purposes.

(8) If the master copy is in copy-protected electronic form, any accessible copy made of it under this section must, so far as it is reasonably practicable to do so, incorporate the

same, or equally effective, copy protection (unless the copyright owner agrees otherwise).

(9) If an approved body continues to hold an accessible copy made under subsection (1) when it would no longer be entitled to make or supply such a copy under that subsection, the copy is to be treated as an infringing copy.

(10) If an accessible copy which would be an infringing copy but for this section is subsequently dealt with -

(a) it is to be treated as an infringing copy for the purposes of that dealing; and

(b) if that dealing infringes copyright, is to be treated as an infringing copy for all subsequent purposes.

(11) In subsection (10), "dealt with" means sold or let for hire or offered or exposed for sale or hire or included in a broadcast or cable programme service.

(12) "Approved body" means an educational establishment or a body that is not conducted for profit.

(13) "Supplying" includes lending."

3. Intermediate copies and records.

In the Copyright, Designs and Patents Act 1988 (c. 48), after section 31B insert –

"31C Intermediate copies and records

(1) An approved body entitled to make accessible copies under section 31B may hold an intermediate copy of the master copy which is necessarily created during the production of the accessible copies, but only -

(a) if and so long as the approved body continues to be entitled to make accessible copies of that master copy; and

(b) for the purposes of the production of further accessible copies. .

(2) An intermediate copy which is held in breach of subsection (1) is to be treated as an infringing copy.

(3) An approved body may lend or transfer the intermediate copy to another approved body which is entitled to make accessible copies of the work or published edition under section 31B.

(4) The loan or transfer by an approved body ("A") of an intermediate copy to another person ("B") is an infringement of copyright by A unless A has reasonable grounds for believing that B—

(a) is another approved body which is entitled to make accessible copies of the work or published edition under section 31B; and

(b) will use the intermediate copy only for the purposes of the production of further accessible copies.

(5) If an approved body charges for lending or transferring the intermediate copy, the sum charged must not exceed the cost of the loan or transfer.

(6) An approved body must -

(a) keep records of accessible copies made under section 31B and of the persons to whom they are supplied;

(b) keep records of any intermediate copy lent or transferred under this section and of the persons to whom it is lent or transferred; and

(c) allow the copyright owner or a person acting for him, on giving reasonable notice, to inspect the records at any reasonable time.

(7) Within a reasonable time of making an accessible copy under section 31B, or lending or transferring an intermediate copy under this section, the approved body must–

(a) notify each relevant representative body; or

(b) if there is no such body, notify the copyright owner.

(8) A relevant representative body is a body which—

(a) represents particular copyright owners, or owners of copyright in the type of copyright work concerned; and

(b) has given notice to the Secretary of State of the copyright owners, or the classes of copyright owner, represented by it.

(9) The requirement to notify the copyright owner under subsection (7)(b) does not apply if it is not reasonably possible for the approved body to ascertain the name and address of the copyright owner."

4. **Licensing schemes.**

In the Copyright, Designs and Patents Act 1988 (c. 48), after section 31C insert –

"31D Licensing schemes

(1) Section 31B does not apply to the making of an accessible copy in a particular form if -

(a) a licensing scheme operated by a licensing body is in force under which licences may be granted by the licensing body permitting the making and supply of copies of the copyright work in that form; .

(b) the scheme is not unreasonably restrictive; and

(c) the scheme and any modification made to it have been notified to the Secretary of State by the licensing body.

(2) A scheme is unreasonably restrictive if it includes a term or condition which -

(a) purports to prevent or limit the steps that may be taken under section 31B or 31C;

or

(b) has that effect.

(3) But subsection (2) does not apply if —

(a) the copyright work is no longer published by or with the authority of the copyright owner; and

(b) there are reasonable grounds for preventing or restricting the making of accessible copies of the work. (4) If section 31B or 31C is displaced by a licensing scheme, sections 119 to 122 apply in relation to the scheme as if it were one to which those sections applied as a result of section 117."

There are no limitations or exceptions in the above UK Act for Deaf or other hearing impaired persons.

5. Limitations, etc. following infringement of copyright.

In the Copyright, Patents & Designs Act 1988 (c.48) after Section 31D insert –

"31E Limitations, etc. following infringement of copyright

(1) The Secretary of State may make an order under this section if it appears to him that the making of copies—

(a) under section 31B; or

(b) under a licence granted under a licensing scheme that has been notified under section 31D,

has led to infringement of copyright on a scale which, in the Secretary of State's opinion, would not have occurred if section 31B had not been in force, or the licence had not been granted.

(2)The order may prohibit one or more named approved bodies, or one or more specified categories of approved body, from—

(a) acting under section 31B; or

(b) acting under a licence of a description specified in the order.

(3)The order may disapply—

(a) the provisions of section 31B; or

(b) the provisions of a licence, or a licensing scheme, of a description specified in the order,

in respect of the making of copies of a description so specified.

(4) If the Secretary of State proposes to make an order he must, before making it, consult—

(a) such bodies representing copyright owners as he thinks fit; and

(b) such bodies representing visually impaired persons as he thinks fit.

(5) If the Secretary of State proposes to make an order which includes a prohibition he must, before making it, consult—

(a) if the proposed order is to apply to one or more named approved bodies, that body or those bodies;

(b) if it is to apply to one or more specified categories of approved body, to such bodies representing approved bodies of that category or those categories as he thinks fit.

(6) An approved body which is prohibited by an order from acting under a licence may not apply to the Copyright Tribunal under section 121(1) in respect of a refusal or failure by a licensing body to grant such a licence.

6. Interpretation

"**Definitions and other supplementary provision for sections 31A to 31E**

(1) This section supplements sections 31A to 31E and includes definitions.

(2) A copy of a copyright work (other than an accessible copy made under section 31A or 31B) is to be taken to be accessible to a visually impaired person only if it is as accessible to him as it would be if he were not visually impaired.

(3) "Accessible copy", in relation to a copyright work, means a version which provides for a visually impaired person improved access to the work.

(4) An accessible copy may include facilities for navigating around the version of the copyright work but may not include—

(a) changes that are not necessary to overcome problems caused by visual impairment; or

(b) changes which infringe the right (provided by section 80) not to have the work subjected to derogatory treatment.

(5) "Approved body" has the meaning given in section 31B(12).

(6) "Lending", in relation to a copy, means making it available for use, otherwise than for direct or indirect economic or commercial advantage, on terms that it will or may be returned.

(7) For the purposes of subsection (6), a loan is not to be treated as being for direct or indirect economic or commercial advantage if a charge is made for the loan which does not exceed the cost of making and supplying the copy.

(8)The definition of "lending" in section 18A does not apply for the purposes of sections 31B and 31C.

(9) "Visually impaired person" means a person—

(a) who is blind;

(b) who has an impairment of visual function which cannot be improved, by the use of corrective lenses, to a level that would normally be acceptable for reading without a special level or kind of light;

(c) who is unable, through physical disability, to hold or manipulate a book; or .

(d) who is unable, through physical disability, to focus or move his eyes to the extent that would normally be acceptable for reading.

(10)The Secretary of State may by regulations prescribe—

(a) the form in which; or

(b) the procedure in accordance with which, any notice required under section 31C(7) or (8), or 31D(1), must be given.

(11) Any power to make regulations or orders is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament. [282]

3.5. Conclusion

Individually, none of the above countries provides the 'ideal model' or 'all in one' solution, but together their copyright provisions for persons with sensory disabilities offer a variety of practical options for consideration by the SA Government. Cognizance must be taken, however, that the above quoted clauses may not be 'stand-alone' clauses within the context of their own copyright laws. They may be restricted by or conditional upon other clauses or related laws. They would therefore need adaptation, contextualisation and re-drafting before being considered for inclusion in the SA Copyright Act.

[282] See <http://www.wipo.int/wipolex/en/text.jsp?file_id=180552>.

"You shall not curse the deaf, nor put a stumbling block before the blind, but shall fear your God: I am the LORD. (Leviticus 19:14)

CHAPTER 4: COPYRIGHT IN SOUTH AFRICA

4.1. Introduction

This chapter is divided into 3 Sections:

Section A provides a general overview of South Africa's current international and national copyright commitments, as well as policy issues, relating to persons with sensory disabilities within a human rights framework.

Section B investigates whether persons with sensory disabilities are accommodated at all in the current copyright law.

Section C provides a timeline since 1998 of attempts to amend the SA Copyright Act and its Section 13 Regulations, with particular reference to education and persons with sensory disabilities. It also discusses other stakeholder initiatives to review the current copyright law, their outcomes and inherent problems.

4.2. Section A: General Overview of the Current International and National Copyright Commitments and Policy Issues

4.2.1. International Commitments and Anti-Discriminatory Laws

As discussed in earlier chapters, South Africa is obliged to extend the conditions of international IP Treaties and Declarations relating to persons with disabilities to its national legislation. Its current anti-discriminatory policies and relevant laws, such as Employment Equity Act, 1998, Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 and Social Assistance Act, 2004, all provide the framework for fair and equitable treatment of persons with disabilities.

Dagut and Morgan claim that 'apart from the Constitution, South African law offers little protection to deaf people in general.' There is even less protection when it comes to their interactions with the justice system, particularly in the use of sign language and interpreters. They claim that 'the specific needs of deaf and hard-of-hearing people are all but ignored in the extensive collection of statutes, case law, rules and practice in respect of South African court procedure.'[283] This extends to the Copyright Act as well, which is not in accordance with the obligations of the abovementioned laws, and does not extend to Deaf and other hearing impaired persons, nor blind persons. Recognizing that the basis of the rights of persons with sensory disabilities is constitutional rather than statutory would afford them the best possible protection.[284]

4.2.2. The South African Constitution

The Constitution is the supreme law of South Africa and the guiding law for every other law in South Africa. As discussed in Chapter Two of this dissertation, it provides the fundamental framework for all other legislation and entrenches civil rights which include access to information, education and socio-economic development for all citizens. It protects the rights of persons with disabilities in general, although there is no express mention of visually or hearing impaired persons, except for a reference to sign language for Deaf persons in Section 65(a)(iii).[285]

Section 9(3) of the Bill of Rights in chapter two of the Constitution requires that the State may not discriminate against anyone on the grounds of disability. Section 9(5) provides that discrimination on the grounds of disability is 'unfair unless it is established that the discrimination is fair'. South Africa is bound to incorporate the principles of the Bill of Rights in all new legislation and to amend older legislation to include these principles. Although various amendments have been made to the

[283] Dagut (note 17 above) 39-40.

[284] Ibid 48.

[285] Ibid 37.

Copyright Act over the years, Section 12 ('Fair Dealing') and Section 13 (Regulations) have not been amended to address the needs of education, libraries, the digital environment, or persons with sensory disabilities. The rights entrenched in the SA Constitution have therefore not yet been included in the Copyright law.[286]

4.3. Section B: Are Persons with Sensory Disabilities accommodated at all in the current Copyright Law?

In the current law there are no definitions for 'disability', 'handicaps' or 'impairments', and it makes no mention of or reference to blind or visually impaired persons, Deaf or hearing impaired persons, or persons with other disabilities. For purposes of this research, I focused on literary and artistic works, notwithstanding the fact that limitations and exceptions relating to other categories of copyright works would also apply to persons with sensory disabilities in different circumstances. I have also focused particularly on Sections 12 and 13 of the Copyright Act, which encompass the key limitations and exceptions in the Act.

Although parallel importation is prohibited in our Copyright Act, I discuss it briefly, as it has potential for facilitating access to information for persons with sensory disabilities. I have not considered exceptions relating to 'orphan works'[287] in this research as they are currently the subject of much debate in many international forums, including WIPO, the USA, EU, IPA, IFLA and IFRRO.

There are no specific limitations and exceptions addressing the special needs of the abovementioned information user groups in our Copyright Act. I therefore investigated whether the current limitations and exceptions for other information users accommodated persons with sensory disabilities indirectly, if not directly.

It is important to note that limitations and exceptions are only defences in the case of infringement in terms of the Copyright Act and not 'users' rights' or rights equivalent to authors' rights.

Dean cautions that -

> [it] must be appreciated that these exemptions are all predicated on the assumption that in principle an act of infringement has been committed and this act is then excused by the exemption. If less than a substantial part is reproduced then there is no infringement and the availability of an exemption is irrelevant. For instance, in the case of the making of an unauthorised reproduction of a work, a substantial part of the work must have been reproduced – only once this has occurred do any of the exemptions relating to reproduction come into play.[288]

[286] See *Laugh It Off* (note 184 above).

[287] 'Orphan works' are copyright works where the rights owners are not able to be traced.

[288] Dean (note 64 above) [Service 10, 2000] 1-51 para 9.1.

4.3.1. Section 12 'Fair Dealing'

There is no internationally accepted definition or form of 'fair dealing'. The Australian Law Review Commission, when commenting on Australia's fair dealing provisions, noted that 'fair dealing is not a defence to infringement; rather, it defines the boundaries of copyright owners' rights.'[289] The concept of 'fair dealing' in the SA Copyright Act, as affirmed by Dean in the preceding paragraph, is a defence or limitation on the exclusive rights of authors in certain circumstances.

The concept of 'fair dealing' in South Africa was inherited through colonial legislation under the British Empire. Most Commonwealth countries, including South Africa, continue to use 'fair dealing' as a limitation or exception in their copyright laws. Fair dealing differs from the fair use doctrine in the USA in that it is narrower in scope and more restrictive in application but the fundamental principles are essentially the same.

The term 'fair dealing' is not defined in the SA Copyright Act and therefore lends itself to ambiguity, variant interpretations and different practical applications of the law. 'Only a court can determine what is 'fair' depending on the facts and circumstances of each individual case, and thus the law cannot presume to set out the limits to be observed. Those limits that have arisen have done so through case law and international acceptance.' [290]

'Fair dealing' provisions in Section 12(1) of the Copyright Act can apply to partially sighted persons who could interpret them as being allowed to make a single copy in enlarged print for research or private study, personal or private use, criticism or review or reporting current events in a newspaper or broadcast. Quotations or using material 'by way of illustration' in a classroom situation could also apply to partially sighted persons.

Blind persons would not be able to exercise rights in terms of Section 12, since they not only need to reproduce material but also need to modify and adapt material to make it accessible in an alternate format, e.g. Braille or other formats, or conversion from text to speech via dedicated software.

Hearing impaired or deaf persons who use assistive technology to enhance their auditory abilities, but who can read reasonably well, would more than likely be able to use the provisions of 'fair dealing' in the same way as sighted persons do. The Deaf community's access needs with regard to sign language are, however, not accommodated in Section 12 since adaptations in the form of conversions into more visual formats or translations are not permitted without permission from rights holders. This is a major barrier to accessing information for some 500,000 to 1,600,000 South Africans who use South African Sign Language (SASL) as a distinct

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[289] Australian Law Review Committee 'Fair Dealing in Australia' (2004) Ch 4 <http://152.91.15.12/agd/www/Clrhome.nsf/Page/74FF8C4A461E2DDFCA256D24000C3C96?OpenDocument>.

[290] Gray & Seeber (note 183 above).

language and main form of communication.[291] Sign language is mentioned in Section 6(5) (a)(iii) of the Constitution, in various legislative and government policies, as well as in Art 6(4) of the South African Schools Act 84 of 1996.[292] Yet, there is a dearth of educators in sign language and in material adapted for Deaf persons and those with other hearing impairments.[293] Lack of copyright limitations and exceptions in this regard exacerbates their access problems. This is corroborated by Akach's claim that 'there is an apparent non-recognition of the primacy of sign language as the mother tongue of the Deaf' and 'glaring failures that the often well-intentioned principles, policies and legislation on Deaf education have certainly not remedied'.[294]

Where conversions into more visual formats to facilitate learning and comprehension are necessary, for example, modifying a work to include more images, drawings and graphic details or captions, or where audio material needs to be converted into text, prior permission would need to be sought from the copyright holders.

When translating or modifying material to facilitate understanding of the information, or when modifying, adding or editing captions on videos, films or DVDs, the provisions of Section 12 would not apply to Deaf or other hearing impaired persons. In the case of captions, permission is required from the owner of the copyright in the video, film or DVD. Authorisation may also be necessary from the owner of the copyright in any novel, script or other work upon which the video, film or DVD is based. The making of captions is therefore regarded as an adaptation of the captioned video, film or DVD and of any novel, script or other work from which the video, film or DVD is derived. Making captions can therefore require several separate permissions from more than one rights owner.[295]

The SA Copyright Act prohibits translations of all works, except small extracts in terms of 'fair dealing' as per Section 12(11) which reads as follows:-

> The provisions of subsections (1) to (4) inclusive and (6), (7) and (10) shall be construed as embracing the right to use the work in question either in its original language or in a different

[291] UWC Centre of Excellence 'South African Sign Language Translation System' para 4 <http://www.coe.uwc.ac.za/index.php/SASL.html>. SASL has regional variations, similar to that which is found in spoken languages.

[292] The South African Schools Act 84 of 1996 (Art 6(4)), states that 'a recognised Sign Language has the status of an official language for purposes of learning at a public school'.

[293] Ibid.

[294] P A O Akach 'From Policies and Laws to the Implementation of Sign Language in Deaf Education: What Went Wrong?' in P A O Akach *Application of South African Sign Language (SASL) in a Bilingual-Bicultural Approach in Education of the Deaf* (2010) Paper 5, para 9 [PhD Thesis].

[295] International Union of the Protection of Literary and Artistic Works (Berne Union) Executive Committee and Universal Copyright Convention Intergovernmental Committee 'Copyright Problems Raised by the Access by Handicapped Persons to Protected Works' (1985) IGC(1971)/VI/II - B/EC/XXIV/IO, Annex II, 14 <http://www.wipo.int/mdocsarchives/B_EC_XXIV_85/B_EC_XXIV_10%20_IGC%201971_VI_11_E.pdf>.

> language, and the right of translation of the author shall, in the latter event, be deemed not to have been infringed. [296]

Reproducing a substantial portion of or a whole work without prior permission from the rights owner is a copyright infringement in terms of the Act. Dean explains that the 'concept 'substantial' in respect of a part of a work relates primarily to quality, not quantity. Thus the unauthorised copying of a small but essential part of a work constitutes copyright infringement'.[297]

4.3.2. Section 13 (Regulations)

The exceptions provided for in Section 13 of the current SA Copyright Act are a modified version of the U.S. 1976 "Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with Respect to Books and Periodicals", which state the minimum standards of educational fair use under Section 107 of H.R. 2223. [298] The Regulations provide for 'circumstances in which reproduction of works may be made generally and in particular by libraries or archives, for use in educational institutions…'[299]

South Africa, however, adopted a modified version of these Guidelines into its Copyright Act as the Section 13 Regulations in 1978, without adopting the relevant US 'fair use' provisions, and without aligning them with the rest of the Copyright Act itself. The result was a set of Regulations which are ambiguous, cumbersome and nebulous, making them difficult to interpret or apply practically in the analogue or digital environments. They lend themselves to ambiguity, misinterpretation and in the process, the possibility of infringement.

Section 13 (2) permits reproduction as follows:-

> The reproduction of a work in terms of section 13 of the Act shall be permitted–
> (a) except where otherwise provided, if not more than one copy of a reasonable portion of the work is made, having regard to the totality and meaning of the work.
> (b) if the cumulative effect of the reproductions does not conflict with the normal exploitation of the work to the unreasonable prejudice of the legal interest and residuary rights of the author.[300]

These exceptions are restrictive for all users of information, not only for persons with disabilities. They only allow a limited amount of handouts of reproduced material in a classroom and exclude persons involved in distance or open learning

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[296] SA Copyright Act 98 of 1978 s.12 (11). For full context of Section 12(11), read subsections (1) to (4) inclusive and (6), (7) and (10) of the Act.

[297] O H Dean *Handbook of South African Copyright Law* (1987), 1-1.Service 13, 2006 1-37 para 8.3 [footnotes omitted].

[298] See <http://library.troy.edu/documents/GuidelinesHR94-1476.pdf>.

[299] Dean (see 64 above) para 9.17 [Service 12, 2004] 1-58B.

[300] See <http://www.wipo.int/wipolex/en/text.jsp?file_id=130435>.

outside a classroom environment. There are no provisions for adaptations, modifications, translations (except as permitted in s12 (11) of the Act), conversions into alternative formats such as Braille, text-to-speech or audio-to-text, or conversion into digital formats. They do not permit format shifting, captioning, or editing of captions or other works, or adaptations to enable access for Deaf and other hearing impaired persons.

4.3.3. Parallel importation[301]

Some countries provide for parallel importation in their copyright laws but it has become a contentious issue in copyright law as it is often restricted or prohibited through trade agreements. Article 15.5(2) of the US-Morocco FTA[302], for instance, specifically prohibits parallel importation.

Section 23 (2) of the Copyright Act prohibits the importation into South Africa of reproductions of copyright works without the authority of rights-holders.[303] This affects persons with sensory disabilities because reproduced material in accessible formats that are more reasonably priced and available in other countries cannot be imported into South Africa for their use.

> This constitutes a barrier to access to learning materials, which is particularly acute because of the structure of the publishing industry…. These provisions also limit the ability of the Minister to pass regulations which allow parallel importation of alternative (and legitimate) copies of works from other markets.[304]

This is one of the issues that the WBU TVI hopes to resolve by providing for cross-border exchange of accessible formats.

This study therefore finds that the current copyright law does not accommodate blind or Deaf persons, and the provisions available for partially sighted or hard of hearing persons are inadequate. Since the limitations and exceptions date back to 1978, the Act does not address the digital environment nor does it embrace the principles of the Constitution or international IP agreements, nor does it comply with international and domestic human rights obligations.

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[301] Parallel importation is a legal process but prohibited in many countries' copyright laws. WIPO refers to parallel importation as 'the import of goods outside the distribution channels contractually negotiated by the manufacturer…' See <http://www.wipo.int/sme/en/ip_business/export/international_exhaustion.htm>.

[302] Morocco Free Trade Agreement Final Text (2004) Ch 15 <http://www.ustr.gov/sites/default/files/uploads/agreements/fta/morocco/asset_upload_file797_3849.pdf>. Also see discussion by F M Abbott 'Intellectual Property Provisions of Bilateral and Regional Trade Agreements in Light of U.S. Federal Law' UNCTAD - ICTSD Project on IPRs and Sustainable Development Issue Paper 12 (February 2006) 14 <http://unctad.org/en/docs/iteipc20064_en.pdf>, and M Hawin 'Parallel Importation of Copyrighted Material: A Comparative Analysis of the Position in Several Asian Countries' *Asian LR* 1 (2004) 69-122.

[303] A Rens, A Prabhala & D Kawooya (note 168 above) 62.

[304] Ibid.

4.4. Section C: Historical Timeline of Attempts to Address Persons with Sensory Disabilities in SA Copyright Law

4.4.1. Draft Regulations, 1998

Draft Regulations to amend Section 13 of the SA Copyright Act were published by the DTI for comment in Government Gazette No. 19112, dated 7 August 1998. These proposals were supported by PASA, DALRO, the Intellectual Property Action Group (IPACT) and the international bodies IPA and IFRRO.[305]

Due to the restrictive nature of the proposed Draft Regulations, however, strong objections were raised by the library and tertiary educational sectors. As a result, a representative Copyright Task Team was mandated by the South African Vice-Chancellors' Association (SAUVCA) and the Committee of Technikon Principals (CTP) to challenge these proposed amendments which had negative implications for education, libraries and impractical and inadequate exceptions for persons with sensory disabilities. Clause 8(1) of the Draft Regulations related specifically to persons with disabilities and read as follows:-

> Permitted reproduction for handicapped readers
>
> 8 (1) Any person may make a single copy or sound recording of a published literary, musical or artistic work in a format that is more appropriate to meet the needs of handicapped readers than the format in which the literary work was published.
>
> (2) Subregulation 8(1) shall not apply where a copy or sound recording of the work is commercially available in a format that would accommodate the needs of the handicapped reader.
>
> (3) If a [sic] it is necessary to make an intermediate copy of a work in order to make a copy or sound recording [sic] subregulation 8(1), such intermediate copy must be destroyed as soon as it is no longer needed.
>
> (4) A person who makes a copy or sound recording under subregulation 8(1) may not, without the express consent of the owner of copyright, use the copy or sound recording for any purpose other than for which the making of the copy or sound recording is permitted in terms of subregulation 8(1).[306]

After a strong lobby campaign against the restrictive Draft Regulations in general, by the educational and library sectors which had been excluded from the legislative process, the Minister of Trade and Industry, Mr Alex Erwin, acknowledged that the process lacked transparency. He therefore agreed to restart the process to include all stakeholders, including the library and educational sectors and some organisations serving the blind.

In March 1999, the DTI organised a workshop in Pretoria, to which all stakeholders were invited to present brief position papers. They were then invited to submit comments on the Draft Regulations to the DTI by May 1999. Issues affecting

[305] Gray & Seeber (note 183 above) 78.

[306] Copyright Act 98 of 1978, 5.

access to information by persons with sensory disabilities were raised in the SAUVCA/CTP Position Paper at this workshop.

With pro bono legal assistance from John & Kernick[307], the SAUVCA/CTP Task Team drafted a questionnaire and gathered comments on the Draft Regulations from libraries, educational institutions, NGOs and Government departments in South Africa. All comments and recommendations were then consolidated and submitted to the DTI on 28 May 1999. Because of the seriousness of the matter for users of information, the Task Team brought the matter to the attention of the Democratic Party at the time. This resulted in the withdrawal of the Draft Regulations by the DTI, despite strong opposition from PASA, DALRO and their international partners. DALRO refuted the arguments put forward by SAUVCA[308]. The print industries sector and its international partners attempted to get the amendments reinstated but this was 'met with silence from the DTI'.[309]

4.4.2. Proposed Amendments to the Copyright Act, 2000

On 10 May 2000, Proposals to Amend the Copyright Act and other IP laws were published in Government Gazette Notice 1805, No. 21156 for public comment. This time SAUVCA and the CTP mandated a representative Electronic Copyright Task Team to challenge these proposals which were again restrictive to education, libraries and failed to address the digital environment and the needs of persons with sensory disabilities.

The proposals did not address the access needs of persons with sensory disabilities directly, but the proposed amendments to Section 12 would have created access problems for them. Clause 12(1) (a) would only have permitted an individual (a natural person) to do a 'restricted act' using copyright works. It would have excluded legal bodies or entities such as the SANCB, disability units at tertiary institutions and other organisations that serve communities with sensory disabilities. The proposed inclusion of a presumption clause for rights-holders was also problematic. Information users would not be in a position to prove whether or not copyright subsisted in a work, and it was felt that it was the responsibility of the courts to do so, not individual consumers. As a result of a successful lobby campaign by the educational and library sectors, this time engaging the Minister of Education, Dr Kadar Asmal, the DTI withdrew all the proposals except proposed amendments to Section 9 of the Copyright Act. Section 9 amendments relating to broadcasts and sound recordings were later included in the Copyright Amendment Act 9 of 2002.

[307] 'John and Kernick' was a specialist IP law firm, established in 1923. In 2000, it became the IP law practice of Bowman Gilfillan Inc. and in March 2012, it merged with Adams and Adams, the largest IP law firm in the Southern Hemisphere.

[308] Gray & Seeber (note 183 above) 79.

[309] Ibid 77.

In October 2001, in response to the above action by the DTI, IFRRO, PASA and the Dramatic, Artistic and Literary Rights Organisation (DALRO) adopted the following resolution to pressure the DTI, but it was unsuccessful -

IFRRO:

1. *Urges* the South African Government to pass proposed amendments in the South African Copyright Act that were published for comment in the Government Gazette of 10 May 2000

2. *Encourages* the South African Government to prepare legislation to enable ratification of the WCT and WPPT by the South African Parliament.[310]

4.4.3. The Electronic Communications and Transactions (ECT) Act, 2002

Although South Africa is a signatory to the WCT, it has not yet ratified it. The provisions of this Treaty have therefore not been incorporated into the current Copyright Act.

To address the problem of cyber-crime, and to ensure compliance with certain clauses of the WCT, the Department of Communication published a Green Paper on e-Commerce in 2001 for public comment. SAUVCA IP sub-Committee submitted comments and recommendations, as well as several queries relating to anti-circumvention protection measures, fair dealing and the need for appropriate limitations and exceptions.

These were not taken into account when the ECT Act 25 was promulgated in 2002. The Act includes strict provisions for technological protection measures and prohibition of circumvention measures, without any exceptions for legitimate library or educational purposes, or for persons with sensory disabilities. Section 86 of the said Act creates a new cyber offence relating to the unauthorised access to, interception of or interference with data, which in essence, is an anti-circumvention prohibition. The anti-circumvention prohibition applies to data messages, namely electronic representations of information in any form.

The ECT Act prohibits the circumvention of TPMs and prevents uses of copyright-protected works that are expressly permitted under the Copyright Act, for example, fair dealing, browsing electronic resources for library purposes, accessing e-books via text-to-speech software by blind persons, or accessing public domain material. In essence, the ECT Act provisions of Article 86 override the current copyright exceptions. Blind persons in particular are negatively affected as anti-circumvention technologies have the capacity to block software that enables conversion from text to speech in electronic books and other material, effectively rendering the work inaccessible, even though the blind person may have already paid for the electronic copy.

[310] IFRRO 'Resolution: Passage of proposed Amendments to South African Copyright Act and Ratification of the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty, adopted by the Annual General Meeting in Cape Town' (2001) <http://www.ifrro.org/sites/default/files/Resolution-South-Africa.pdf>.

Visser raises concern about the inflexibility and lack of exceptions in the ECT Act. He states that –

> In South Africa, the prohibition on the circumvention of TPMs that control access to copyright works is complete – not only the circumvention of access control is proscribed, but also trafficking in devices that are "designed primarily" for circumventing access control. And the prohibition is absolute – there are no exceptions; no technical exception (such as for reverse engineering, encryption research, and security testing); nor an exception in favour of research or education.[311]

Some IP experts argue that the ECT Act in its current form is unconstitutional in that it blocks legitimate access to information and infringes users' rights which the Copyright Act grants to them. There are no limitations and exceptions in this Act to enable legitimate access to information.

Visser raises the issue that -

> [t]he fact that possession of the physical object that contains the copyright work (the CD-ROM for example) no longer guarantees access to the work can have serious implications for the possessor of such object. Even a lawful possessor will not be able to access a copyright work shielded behind a TPM without an access key, or without circumventing the TPM. And without access, it is impossible to use the copyright work.[312]

Article 86 therefore has negative implications for blind persons and infringes their 'fair dealing' rights in terms of the Copyright law. Not only are there no limitations and exceptions for blind persons in the current Copyright law, but the restrictive conditions of the ECT Act exacerbate their access problems. Despite recommendations being made to the Government by various stakeholders to review the ECT Act and the Copyright Act relating to persons with sensory disabilities, neither Act has been amended to date.

Once the copyright term has expired, works generally fall into the public domain. The ECT Act, however, allows public domain material to be 'locked up' under TPMs, sometimes indefinitely due to obsolescent devices rendering works inaccessible. This means that persons with sensory disabilities, who in the normal passage of time, would be able to use and convert public domain material into accessible formats, would now be prohibited from using that material. Indirectly, the ECT Act has proved to be discriminatory towards blind persons, creating technological barriers where no legal barriers exist'.

> Works in the public domain protected by TPMs are also 'rendered inaccessible, as any circumvention (even circumvention of technological protection applied to works in the public domain) will result in a contravention of the prohibition. This can, of course, result in a digital lock-up of works in the public domain.[313]

[311] C Visser 'Technological Protection Measures: South Africa Goes Overboard, Overbroad' (2006) 7 *SAJIC* 62.

[312] Ibid 60.

[313] Ibid.

Visser is adamant that 'where developing countries do adopt protection of TPMs against circumvention, appropriate exceptions and limitations in favour of research and education should be enacted at the same time'.[314] Persons with sensory disabilities would therefore benefit from such exceptions.

South Africa should take cognisance of Article 6(4) of the EU Copyright Directive –

> which provides that where, in the digital environment, a particular DRM mechanism restricts access to and use of content in a way which is inconsistent with a rights management proposition embodied in the law – i.e. a DRM mechanism denies a user the ability to perform some content management activity guaranteed by an express exception or limitation – then some process has to be found allowing the user to perform the content management activity provided for in the exception or limitation.[315]

In Crews' Study on Limitations and Exceptions for Libraries and Archives, he found that 26 member countries of WIPO have adopted exceptions for legal workarounds for anti-circumvention of Technological Protection Measures.[316]

Conroy, in her attempt to provide solutions for the SA Copyright law, recommends –

> 'that the prohibition should strike only at the act of circumvention but should not concern itself with the devices used to perform such circumvention. Not only would this be in line with traditional copyright law, but it obviates the problem of legitimate uses being unable to use the circumvention devices they require to exercise their privileges under a copyright exception.[317]

Conroy also suggests that the Copyright Act should 'be added to the list of statutes in Column A of the Schedule 1, and sections 85-89 in Column B' of the ECT Act. In this way, copyright works would then effectively be excluded from the anti-circumvention provisions of Chapter XIII of the ECT Act.[318] She also suggests a series of consequential amendments be made to the Copyright Act.[319]

The solution recommended by the ACA2K Project's SA research team is 'to declare the copyright exceptions and limitations contained in the Copyright Act as valid defences to any claims based upon the ECT Act'.[320]

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[314] Visser (note 311 above) 61.

[315] Garnett (note 140 above) 16.

[316] IFLA 'Limitations and Exceptions Worldwide' (2011) <http://www.ifla.org/en/node/5864>.

[317] M Conroy 'A Comparative Study of Technological Protection Measures in Copyright Law' (2006) 273 [Thesis].

[318] Ibid 288.

[319] Ibid. (For full details of Conroy's suggestions for amendments to the Copyright Act, see Section 3.3 at <http://uir.unisa.ac.za/bitstream/handle/10500/2217/thesis.pdf;jsessionid=BE84BCFC41CAF212F524CAB36A15A447?sequence=1>.

[320] ACA2K 'Executive Policy Brief' (2009) 8 <http://www.aca2k.org/attachments/154_ACA2K%20South%20Africa%20EPB.pdf>.

4.4.4. Proposed US-SACU Free Trade Agreement, 2006

From 2003 until 2006, the Office of the US Trade Representative was involved in negotiations with the SACU countries[321], regarding a Free Trade Agreement with a TRIPS-Plus IP Chapter. This document was confidential and its contents were not made known to the public.

Since the negative impact of the US/Australian Free Trade Agreement on education and research were well-documented by IP experts and researchers in Australia, I felt it necessary to alert the Chief Negotiator of the SA Foreign Trade Office, Mr Xavier Carim, to these documents and to the negative implications of a TRIPS-Plus regime for libraries, education and persons with sensory disabilities in South Africa and other SACU countries.

With support from the DFID and USAID who placed my concerns on their Trade Agenda with the DTI, I was invited to meet with Mr Carim to discuss the IP Chapter and also provided him with parliamentary debates and other documents relating to the US-Australian FTA, which indicated the restrictive nature of the IP Chapter and its negative implications for research, education, libraries and information users in general, including persons with sensory disabilities.

Apart from the TRIPS-Plus IP Chapter in the US-SACU FTA, there were a number of other controversial clauses which were not acceptable to the SACU countries. In late 2006, the SACU countries declined to sign the FTA and negotiations with the USA were suspended. This was a positive outcome as the provisions of TRIPS-Plus would have exacerbated the copyright problems for education and libraries, as well as for persons with sensory disabilities.

4.4.5. DTI'S Draft IP Policy Framework and SANCB Copyright Coalition

South Africa is a member of the African Group at WIPO and is supportive of the WBU Treaty for Blind, Visually Impaired and Other Reading Disabled Persons, as well the African Group's Treaty Proposal for Limitations and Exceptions for Education, Libraries and Archives. Although the DTI and DAC have co-hosted a number of stakeholder seminars [322] in an attempt to address issues affecting print-handicapped persons, the legal status quo remains.

As a result of the ongoing access problems experienced by its members, the SANCB established a Copyright Coalition including its Council, the SA Library for the Blind, Tape Aids for the Blind, Pioneer Printers, Blind SA Braille Services, the SA Disability Alliance, Access to Knowledge Alliance, University of Johannesburg, University of Cape Town, University of Kwazulu-Natal and various other institutions and academics in IP. Various workshops and meetings with the DTI have been held

[321] SACU consists of one least developed country, Lesotho, and four developing countries, namely, Botswana, Namibia, South Africa and Swaziland. SACU was established in 1910, making it the world's oldest Customs Union – see <http://www.sacu.int>.

[322] Held in Cape Town 2004, Port Elizabeth 2005, and Pretoria 2010 & 2011.

in recent years in an attempt to sensitize the Government and other stakeholders about the urgency of addressing the access needs of blind persons.

A Copyright Treaty Consultative Workshop to formulate the South Africa position on the WBU's TVI was organised by the DTI on 13 September 2010. The result of this workshop was a stakeholders' memorandum entitled 'The South African Position Regarding Copyright Limitations and Exceptions', which supported a 'two–phased Treaty' at WIPO: Phase One being the TVI as proposed by Brazil, Ecuador and Paraguay at WIPO, and Phase Two, which includes the African Group's proposal as mentioned above. The Summary of the abovementioned Position Document reads as follows:-

> Although some countries have provision for conversions into alternative formats, their copyright laws are territorial and do not address the broader international situation of cross-border exchange of information. Phase 1 of the Two-phased Treaty would address these issues. The main beneficiaries of Phase 1 will be blind, visually impaired and reading disabled persons living in developing countries, as they will have far greater access to works currently only available in high-income countries.
>
> However, even developed countries will benefit enormously from the liberalisation of access to foreign collections of accessible works and from the expansion of rights for blind, visually impaired and reading-disabled persons, e.g. in areas where access has generally been restricted by technological protection measures or restrictive licensing or contracts. Moreover, given the importance of economies of scale, everyone will benefit from the larger global market for accessible works. This will also create new markets for publishers and job opportunities for business persons interested in commercially producing works in in alternative formats. [323]

At a DTI Indaba[324] for all stakeholders in 2011, the DTI informed stakeholders that it was preparing an IP Policy Framework document which would be circulated for public comment later in the year. This Policy Framework would be the basis for updating the current IP laws. Although this document has not yet been published for comment, the DTI agreed to send a draft to the SANCB Coalition for input. Commenting on the document, the Coalition submitted the following recommendations for amendment to the current copyright law to Judge Farlam, Chair of the DTI Standing Advisory Committee on IPR:-

> **Recommendations on Copyright in the proposed legislation**
>
> **1. Limitations and exceptions**
>
> Introduce exceptions and limitations for the benefit of people with disabilities, limitations and exceptions [that] should:

[323] SANCB 'The South African Position Regarding Copyright Limitations and Exceptions' (13 September 2011). (Written permission to reproduce these recommendations in this dissertation was granted by Mr Jace Nair, Director of SANCB).

[324] Indaba is a Zulu word for 'meeting of the minds' or conference gathering.

1. Allow for the production and distribution of copyrighted works in open formats that are accessible to persons who are blind, visually impaired, print disabled or have other disabilities that prevent access to the work;
2. Ensure that works published under these limitations and exceptions could be legally exported and imported across national borders to facilitate access and resource-sharing;
3. Provide legal norms to ensure that digital technologies can be used to greatly expand the availability of a greater number of accessible works;
4. Ensure rights to create and distribute accessible formats without having to obtain permission from copyright owners, for non-profit purposes;
5. Provide for-profit companies with opportunities to use an exception, but only when an open and accessible format is not available in an identical or equivalent format from the copyright owner, and when the for-profit entity provides notice and remuneration to the copyright owner.
6. Copyright exceptions and limitations should automatically qualify as authorisation in the context of technical circumvention(fair use) provisions, specifically allowing:
   temporary acts of reproduction which are transient or incidental and an integral and essential part of a technological process;
7. time-shifting, format-shifting and space-shifting in certain circumstances (e.g. private use as well as library and archive use).

1.1 Promotion of Access to Knowledge for the Disabled

Remove barriers to access to learning materials faced by people with disabilities by allowing the permission-free conversion of learning material into accessible and open formats.

1.2 Promotion of Access to knowledge

Introduce exceptions for transformative or derivative works (including caricature, parody or pastiche) and educational use including distance learning and e-learning.

Introduce a limitation clause modelled after the ‘fair use’ doctrine to save South African copyright law from being unconstitutional.

1.3 Translation into local languages

Allow for the translation of works that are widely distributed in South Africa into local languages, if the rights holder has not done so after a period of 12 months.

2. Fair Use

Authorise the fair use of a copyright work, including such use by reproduction or other act, for purposes such as criticism, comment, news reporting, teaching, scholarship, or research is not an infringement of copyright.
Introduce specific key exceptions to address the following:

1. Parody and Satire
2. Time Shifting / Device Shifting
3. Format Shifting
4. Space Shifting
5. Teaching

6. Interoperability of software
7. Re-engineering of software
8. Research

3. Protect the public domain and the Commons

1. Define the public domain as a realm in which the public has positive rights to re-use creativity;
2. Introduce a provision which allows copying and adaptation of works in the process of enabling use of the public domain; for example, the copying involved in re-engineering software to use public domain elements;
3. Explicitly provide that all official, administrative and legal works, of whatever form, are automatically in the public domain to bring it in line with cabinet approved FOSS policy of 2007. (The FOSS policy mandates use of open licenses).
4. Where the public domain is not appropriate then require the use of open licences in accordance with the Cabinet approved FOSS policy of 2007.
5. Define licence in the legislation so as to explicitly support free copyright licences.

4. Users rights

Explicitly permit circumvention of technologies which jeopardise the balance of copyright by preventing users from exercising their rights under exceptions and limitations. Authorise the disabling of technologies which prevent the exercise of user rights which include limitations and exceptions for:

1. Fair Dealing
2. Court cases, laws, and government documents
3. Personal uses
4. Digital archiving
5. Teaching
6. Protection of Minors
7. Software filtering programs
8. Obsolete or broken digital locks
9. Non-infringing access
10. Research
11. Interoperability
12. Privacy
13. Perceptual disabilities
14. Circumvention of cell phone locks

Explicitly state that the copyright exceptions and limitations contained in the Copyright Act are valid defences to any claims based upon the Electronic Communications and Transactions Act of 2002 regarding circumvention.

5. Orphan works

Include a provision which will enable the re-use of orphan works, after reasonable notice, without a royalty for non commercial use such as education and research and for commercial use for a percentage of royalties.

6. Permit parallel import

Allow copyright works legitimately acquired in other countries to be imported into South Africa without requiring additional permission from the copyright holder in South Africa.

7. Standard Terms of Copyright Protection

1. Do not extend the exclusive rights granted under copyright in term and scope beyond what is required by the international treaties in terms of which South Africa is bound, specifically:
2. Reduce the term of photographs from 50 to 25 years;
3. Reduce the term of works first made public after the author's death to life of the author plus fifty years. Do not extend copyright terms beyond those required by treaties binding South Africa.

8. Allow Back-up copies of all digital consumer products

Specify that it is not an infringement of copyright for a person who owns a copy of a digital consumer product to make a backup copy of that digital consumer product.

9. Open standards and open formats

Promote an international copyright architecture that enables the disabled community to benefit from the opportunities that emerging technologies provide. Design the copyright act in a way that it promotes the adoption of vendor-neutral solutions and technologies that comply with open standards that enable and promote the availability of affordable assistive technologies, including open source software.

International and National harmonisation of copyright exceptions and limitations is necessary to provide a minimum standard for limitations and exceptions for the blind, partially sighted and other reading disabled persons and to allow and encourage the import and export of works in accessible formats.[325]

4.5. Conclusion

Studies of various IP conventions, treaties and policy documents, as well as a review of 125 countries' copyright limitations and exceptions confirm undoubtedly that limitations and exceptions to address the access needs of persons with sensory disabilities are indeed permitted to be adopted into national copyright laws. The majority of study countries that have provisions for persons with sensory disabilities address the needs of blind and Deaf and other hearing impaired persons directly, or indirectly through the broader category of physical and/or mental disabilities or handicaps. It appears, therefore, that South Africa has no reason for not adopting similar provisions in its copyright law. Apart from its non-compliance with other international commitments as aforementioned, it may well have reneged on 'national treatment'[326] requirements of international IP treaties too.

[325] SANCB 'Submission of Comments on IP Legislation' (2011) 3-5 (Written permission to reproduce these recommendations in this dissertation was granted by Mr Jace Nair, Director of SANCB).

[326] Articles 3 and 5(1) of the Berne Convention and Article 3 of the TRIPS Agreement.

Kindness - a language deaf people can hear and blind see." (Mark Twain)

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1. Introduction

This dissertation investigates whether the access needs of persons with disabilities are being accommodated in the current South African Copyright law,[327] and provides some possible solutions where their needs have not been addressed. A trend of developing and expanding disability law has been seen in many countries today, including South Africa. My research confirms that South Africa is a signatory to various international anti-discriminatory Conventions and has enacted various national anti-discriminatory laws too. Yet, the same intent to remedy discrimination and to accommodate persons with sensory-disabilities in national copyright law has not been evident.

5.2. Methodological Approach and Research Questions

Since South Africa is a member of various international IP conventions and agreements, it was pertinent for me to investigate current international and regional copyright trends relating to persons with sensory disabilities within a human rights and legal framework.

Applying a desktop methodological approach, I investigated which other countries had formally adopted copyright limitations and exceptions for communities with sensory-disabilities and selected some possible examples that could be adapted for or considered in the SA copyright context. In addition, I reviewed the limitations and exceptions in the current SA copyright legislation to establish whether the needs of persons with sensory disabilities were being accommodated in this legislation and how the ECT Act also affects access to information for persons with sensory disabilities. My study includes a timeline of attempts to accommodate their needs in the SA copyright law since 1998, and the outcomes thereof. Some recommendations are provided to assist the SA Government in their future endeavours to amend the Copyright legislation and the ECT Act.

5.3. Research Outcomes

An extensive review of the literature shows that many researchers have investigated the matter of copyright limitations and exceptions with regard to access to knowledge, in developed and developing countries. Where they have specifically considered access to knowledge issues that affect persons with disabilities, the main focus has been on blind, visually impaired or other reading disabled persons. This review has highlighted the lack of international and regional research and attention given to the specific access needs of Deaf and other hearing impaired persons in the

[327] For purposes of this research and for the sake of brevity, I did not investigate the individual categories of copyright works protected by the law, but rather focused on copyright works in general.

context of copyright law. It has also revealed a hiatus in research conducted nationally with regard to accommodating persons with sensory disabilities in the SA Copyright Act.

This research involved a study of the international and regional trends in copyright law with particular reference to limitations and exceptions for persons with sensory disabilities. Useful information emanated from international IP agreements, conventions and other relevant documents that relate to South Africa's IP and human rights obligations. In addition, a review of the copyright limitations and exceptions for persons with disabilities was done in 125 developed and developing countries to acquire a broad perspective of the current situation. It was encouraging to find that a lot more countries than originally anticipated have seen the need to include limitations and exceptions for persons with disabilities in their national copyright laws. Despite the lack of empirical or other research having been conducted on copyright and access issues specifically affecting Deaf and other hearing impaired persons, many of these countries have in fact accommodated them directly, or indirectly, in their national copyright laws.

Of the total number of countries examined in Schedule A in Chapter Three of this dissertation, 70 of them have some provisions for persons with disabilities. 29 of these countries have accommodated blind or visually impaired persons only, whilst 41 countries have addressed visually and hearing impaired persons specifically, or indirectly through the use of terms such as 'disabled persons', 'persons with disabilities', 'handicapped persons' or 'persons with a visual, aural, intellectual or print disability'. My final analysis reflects that just over 58 per cent of the countries reviewed in Schedule A have specific provisions that apply to persons with physical, mental and/or sensory disabilities.

Although the remaining 55 countries' laws reviewed in Schedule B in Chapter Three, did not mention or specifically address access needs of persons with sensory disabilities, their fair use or fair dealing provisions, as well as other exceptions for education, research, libraries and translations and/or adaptations could be interpreted to include persons with sensory disabilities.

In a more in-depth analysis of copyright limitations and exceptions for persons with sensory disabilities in ten countries, I highlighted appropriate examples and/or clauses or sub-clauses in Chapter Three which may, with appropriate modification and contextualisation, be considered in our copyright law to facilitate access to information and accommodate the special needs of persons with sensory disabilities.

My review of the SA Copyright Act shows that there is no mention or reference made to persons with disabilities, either in the list of definitions or in the text of the Act or its Regulations. A closer perusal of Sections 12 and 13 of the Act indicates inadequacies (particularly affecting Deaf and other hearing impaired persons) and restrictions or prohibitions (particularly affecting blind and other visually impaired persons). It reveals that although the current Copyright law has limitations such as 'fair dealing' and exceptions for educational and library purposes in Section 12 and 13, they fail to meet the specific needs of blind persons, and are inappropriate and/or inadequate for Deaf and other hearing impaired persons in the

analogue and digital environments. The limitations and exceptions are arguably unconstitutional particularly with regard to blind persons, as they are unable to exercise even their 'fair dealing' rights as information users due to restrictive or prohibitive copyright clauses, in particular those relating to adaptations and conversions to accessible formats.

The SA Government seemingly ignores the trends in many other countries to address the needs of persons with sensory disabilities in copyright law and may well be in conflict with its 'national treatment' obligations in international IP agreements. What is more serious is that it undoubtedly neglects its obligations in terms of international human rights conventions. It also perpetuates the situation whereby the copyright law contradicts other domestic laws that promote and protect the rights of persons with disabilities, including the right to equality, access to information and education, and freedom of participation and expression. The Copyright Act is also in conflict with other national legislation, for example, laws that govern libraries. The National Library for the Blind Act[328] and the National Library of South Africa Act[329] mandate libraries to provide optimal access to information to their users. Yet, the lack of appropriate copyright limitations and exceptions effectively render these mandates ineffectual, particularly in the digital environment, and restrict their service to persons with sensory disabilities.

This research provides a timeline of attempts to amend the current copyright law from 1998 to date. It reveals opposing perspectives and polarisation amongst rights holders, in particular the South African print and publishing industries and reprographic reproduction organisations, on the one hand, and the educational and library sectors, on the other. It also highlights challenges by the library and educational sectors, particularly under the auspices of SAUVCA and the CTP, and their successful actions against restrictive proposals by the DTI to amend the Copyright Act and Regulations in 1998 and 2000 respectively.

This research also reveals a lack of priority and attention on the part of Government to accommodate the needs of persons with sensory disabilities in the copyright law. Although limitations and exceptions for 'handicapped' persons were included in the draft proposals by the DTI, and supported by rights holders, they were impractical and inadequate in the analogue and digital environments. These proposals were withdrawn more than a decade ago, yet the access needs of persons with sensory disabilities have still not been accommodated in the copyright law.

5.4. Policy and Legislative Frameworks

What is conspicuously absent is a comprehensive IP Policy Framework in South Africa which drives the legislative process. The ACA2K Project's research findings show that inconsistencies in national legislative frameworks arise or are evident where certain laws in a country aim to provide for persons with disabilities while the

[328] National Library for the Blind Act 91 of 1998, Art 4(1-2).

[329] National Library of South Africa Act 92 of 1998, Art 4 (1-2).

copyright statute does not. The lack of provisions for persons with sensory disabilities in the eight study countries' copyright laws (including South Africa) 'potentially perpetuates an access gulf between individuals with disabilities and other users of the same services and facilities'.[330] My research findings corroborate some of the research outcomes of this project.

Despite South Africa having signed various international treaties and declarations and having passed national anti-discriminatory laws, it has neglected its obligations to provide equal access to information through its copyright law. Without the benefit of appropriate and adequate copyright limitations and exceptions, persons with sensory disabilities are prevented from enjoying the same opportunities or experiencing the same enjoyment of copyright works under the SA Copyright Act as non-disabled persons.

Pilch stresses that -

> Limitations and exceptions benefit all members of society. If they did not exist, copyright holders would have a monopoly over all uses except reading. In the case of visually impaired persons, even the act of reading is compromised if there are not sufficient exceptions in national copyright laws to support the creation and distribution of accessible and affordable versions of works.[331]

Development of the copyright system should be driven as far as possible by strong doctrinal and empirical evidence. As Hargreaves recommends -

> Policy should balance measurable economic objectives against social goals and potential benefits for rights holders against impacts on consumers and other interests. These concerns will be of particular importance in assessing future claims to extend rights or in determining desirable limits to rights.[332]

Well drafted policy drives investigation, implementation and application of fair, balanced and appropriate laws, particularly in the context of a developing country. It is therefore incumbent on the SA Government to develop and frame its IP policies and procedures within the context of international IP property and human rights commitments and its obligations under the Constitution and Bill of Rights, and in particular, in the context of a digital world. The drafting of an IP Policy Framework has been on the agenda of the DTI for more than a decade. Despite seeking input from the SANCB in 2010, the DTI has yet to finalise its IP Policy and make it available to the public.

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[330] 'Copyright & A2K in Africa: Research Findings on Limitations & Exceptions from an Eight-Country Study Briefing Paper' 2 (May 2009) par 3.1 <http://www.aca2k.org/attachments/213_ACA2K%20Briefing%20Paper%202%20-%20May%202009-forweb.pdf>.

[331] J T Pilch 'Library Copyright Alliance Issue Brief - Treaty for Improved Access for Blind, Visually Impaired and Other Reading Disabled Persons' (2009) 5 <http://www.librarycopyrightalliance.org/bm~doc/brieftvifinalrev101509.pdf>.

[332] Hargreaves (note 118 above) 1.

5.5. Some Recommendations

My research confirms that there appear to be no legal restrictions or other barriers or reasons for the Government not to accommodate persons with sensory disabilities in its copyright law. In addition to its international commitments, it is morally, politically and legally obliged, in terms of its own liberal Constitution, to provide these rights to persons with disabilities as a matter of urgency.

I therefore make the following recommendations which may be helpful to the SA Government, to ensure that access to knowledge is prioritised and that it becomes a reality in our copyright legislation and other relevant laws in the near future.

- The SA Government should prioritise this matter and commit to remedying the current copyright situation as expeditiously as possible, by finalising its IP Policy Framework. Thereafter, it needs to amend the Copyright Act and Regulations appropriately, so that South Africa becomes fully compliant with international human rights conventions, IP agreements and treaties and other domestic legislation. In particular, the amendments need to provide equal rights and benefits for persons with sensory disabilities in the copyright law. Input from all stakeholders should be taken into account to reach a fair and balanced legislative solution.

- Research conducted internationally, regionally and nationally, as discussed in earlier chapters of this dissertation should serve as a body of evidence to guide legislators in drafting and implementing appropriate and effective amendments in the South African Copyright law. Special consideration should be given to the research findings and South African Country Report, compiled by the ACA2K Project research team in South Africa, as mentioned above, as they provide pertinent empirical evidence and practical recommendations for implementing relevant changes in the SA Copyright Act.

- Examples of clauses and/or sub-clauses or appropriate wording modelled on limitations and exceptions of a select number of countries as provided in Chapter Three should also be considered for modification and adoption in our copyright law. In addition, other useful resources and recommendations provided by the Open Review of the SA Copyright Act mentioned in Chapter Two, as well as the provisions for adaptations and translations provided by Baude et al. as follows:-

  Adaption for the sensory disabled
  Section 1: It shall be permissible [for the purpose of education and training of students] to reproduce a written work already made public in a form useable by the visually

impaired [one year after such work is made public], provided such distribution is made for non-commercial purposes [and provided that no editions in the same form have been produced for commercial purposes by the author or an authorized agent].
[Section 2: In addition to the above provisions, where and to the extent that copying a portion of a written work is permissible under articles [X – educational fair use, fair use in textbooks], adaptation for the visually impaired is also permissible.]
Section 3: An institution devoted to the promotion of the welfare of the aurally handicapped, an educational institution, or an agent of the government may transcribe a work broadcast or diffused by wire, or a copyright sound recording [exclusively for the purpose of the use by the aurally handicapped].[333]
Translations:
Section 1: Translations of copyright works into languages may be performed for exclusive use in the course of education [one year after such work is made public][, provided that no translations of the work into the same target language have been produced for commercial purposes by the author or an authorized agent].
Section 2: In addition to the above provisions, where and to the extent that copying a portion of a written work is permissible under articles [X - educational fair use, fair use in textbooks], translation is also permissible.
Section 3: Translations of copyright works intended for general usage may be made by individuals and institutions, provided that no translations of the work into the same target language have been produced by the author or an authorized agent, upon payment of a reasonable fee to be determined by [some official governmental body which collects the fee and distributes compensation to the author], where the fee takes into account the use of the translated work, whether or not the translator will receive compensation for the effort and revenue for the individual copies, and fair compensation for the original author.

NOTES - TRANSLATION. Section 1 is intended to permit textbooks written in English or another common language to be translated into a rarely-used language so that they can be read by students in developing countries in their native languages. Section 3 is intended to include commercial for-profit translations.[334]

- I concur with the ACA2K Project team's recommendations that a detailed list of specific exceptions and limitations, in the context of a developing country, should be considered (similar to what Australia has done in its updated Copyright law) together with 'an additional and subordinate catch-all clause modelled after the 'fair use' doctrine in the United States'[335]. The ACA2K team posits that this 'provision would (in the future) prevent numerous unanticipated uses being deemed illegal simply because the law cannot keep up with the pace of technological change'.[336] Rens, consultant and advisor to ACA2K Project, provides a rider, though, that 'reference to specific access to knowledge provisions

[333] Baude et al (note 208 above) 101.

[334] Ibid 103-104.

[335] Armstrong (note 175 above) 271.

[336] Ibid.

of other countries, 'does not constitute a general argument for South Africa to imitate the copyright legislation of those countries'.[337]

- Parallel importation is a complex and contentious issue, especially in the context of international and regional trade agreements and practices. The current copyright law prohibits this practice, despite the fact that it could facilitate access to information for persons who urgently need information in accessible formats. In view of this, I suggest that this topic be researched in more detail before it is adopted into the Copyright Act.

- In addition to my recommendations for amendments to the copyright law, I recommend that the Government review the ECT Act, particularly Article 86 on anti-circumvention protection measures, which has no limitations and exceptions for legitimate fair use of digital works. This Article is arguably unconstitutional and in contravention of human rights conventions and exacerbates the access issues that persons with sensory disabilities currently experience. Clauses recommended by Conroy[338] would serve as a workable solution to ensure access to knowledge and create balance in the Copyright Act and ECT Act.

5.6. Conclusion

It would be astute of South Africa to examine all possible options available, including those provided in this research, and then to draft appropriate amendments to the Copyright law, with as many exceptions as possible, within a broad 'fair use' framework and in the context of a developing country. These should address research, education, libraries and the needs of persons with sensory disabilities in a digital environment.

International treaties currently being debated at WIPO will not be adopted for some years but their proposals and supporting documentation may provide an enabling framework and the necessary impetus for South Africa to move forward on amending its copyright law as expeditiously as possible.

In addition, this research lends itself to further research opportunities in a number of areas with regard to persons with sensory disabilities, including parallel importation, access and DRMs, orphan works, and traditional knowledge issues emanating from the controversial Intellectual Property Amendment Bill of 2010, as mentioned in Chapter Three above.

This dissertation provides the SA Government with valid evidence and a compendium of options to investigate, review, adapt and include in its policymaking and legislative processes. If adopted appropriately, these would expedite appropriate

[337] Rens (note 202 above) 5.

[338] Conroy (note 317 above) Ch 4.

amendments to the Copyright Act, and in the process, entrench constitutionally grounded values in the law and copyright policy.

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