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The Implications of the Internet and Technology on South Africa's Copyright Holders' Remuneration: Lessons from the European Union and Ghana

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Hungwe, Brian. (2024). The Implications of the Internet and Technology on South Africa's Copyright Holders' Remuneration: Lessons from the European Union and Ghana [PhD thesis, University of the Witwatersrand, Johannesburg]. WIReDSpace. https://hdl.handle.net/10539/47944

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UNIVERSITY OF THE
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JOHANNESBURG

THE IMPLICATIONS OF THE INTERNET AND TECHNOLOGY ON SOUTH AFRICA'S COPYRIGHT HOLDERS' REMUNERATION: LESSONS FROM THE EUROPEAN UNION AND GHANA

BRIAN HUNGWE

Thesis submitted in fulfilment of the requirements of the degree of

DOCTOR OF PHILOSOPHY

in the School of Law of the University of the Witwatersrand,

Johannesburg, South Africa

February 2024

Supervisor: PROF. M A. FORERE

School of Law
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DECLARATION

The undersigned, hereby declare that this thesis is my own work and that I have not previously submitted it in whole or in part at any university for a degree. It is submitted in fulfilment of the requirements of the degree of Doctor of Philosophy (PhD) 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.

BRIAN HUNGWE

Johannesburg, February 2024

ABSTRACT

Copyright law developed from the fifteenth century advent of the printing press and successively, it has evolved and adapted in synch with mutating technology. Five centuries later, the dawn of the Internet and digital technology has ominously outmoded existing analogue copyright principles creating a quandary for copyright law through its huge scale copyright infringement patterns encompassing copying, uploads, downloads, peer-2-peer sharing, MP3 format reproductions and the making available right of protected content to the public. The Digital Age carries the typical double-edged sword. While providing accessibility to a vast array of information, its seamless digital content storage, reproduction and dissemination capabilities deprives copyright holders' remuneration rights. Resultantly, a myth prevails that if it is on the Internet it is for free. Scholars have posited how with the established norms of copyright protection; the Internet has now created copyright malcontents forming a global generation of copyright criminals. Copyright works are copied often in private homes and distributed at a geometric to millions of end users at the click of a button. There are enforcement impediments around monitoring and controlling illegal copying without inverting the constitutional right to privacy. Such complications have also arisen with the use of Artificial Intelligence and its often unsanctioned capacity to generate copyright content such as music, art, texts and literary content. This now requires adaptations and novel applications of copyright law through harnessing the power of technologies without interfering with private copying. A priori, copying results in authors losing remuneration and competitive advantage. This study uses a qualitative research approach and provides a statutory remedy to the copyright remuneration tensions created by the Digital Age. It proposes a private copying levy that responds to private copying exception to facilitate end users' exploitation of creative online content while in return paying fair compensation to copyright holders. The compensation is in the form of a copyright levy, arising from levying digital devices capable of storing, and disseminating digital expressions. The levy is priced into the purchase price by the manufacturers, importers and distributors of the digital devices and passed on to the consumers. This study is drawing lessons from its operationalisation in the European Union and Ghana, respectively. The Collective Management Organisations shall be mandated to carry the overall management and distribution of the levy. The research is guided by utilitarianism, an ethical theory propounding balanced private and public interests in the exploitation of works. It creates authors' competitive advantages by granting temporary monopoly of their works in return for sufficient economic incentives to spur further innovations. By providing a copyright levy framework that remunerates authors, supporting innovation and creativity without impeding end users' access to works, this study ensures that copyright law remains relevant in the Digital Age.

DEDICATION

To my wife Fadzai,

my children, siblings, and late parents

ACKNOWLEDGEMENTS

A doctoral in philosophy research initiative is often a very lonely and strenuous exploration. Despite excruciating, it is ultimately fulfilling. Many people made this possible. I sincerely thank my supervisor Prof. Malebakeng Forere. Her conscientious attention to detail and incisive comments made this possible. She came along at Prof Hebert Kawadza's recommendation, to whom I am also truly indebted for encouragement.

During my studies, I obtained a kind bursary from my supervisor, Prof Forere and Prof Jonathan Klaaren. Often, educational support donors are a generous and caring people who unselfishly give, asking for nothing in return. Their benevolence is appreciated.

This academic enterprise came at a great cost to my family. I am truly indebted to my wife Fadzai, for all the inspiration and taking care of our family. At some point, my brother Godwin made some huge contribution towards my studies. During my gruelling three-year research, my children cheerfully put up with a certain degree of neglect. My wife and I's siblings have been extremely supportive, I am indebted to them. There are many individuals, too many to mention: scholars, friends and other well-wishers who provided emotional support to my family, academic texts, journals, and encouragement. An African proverb goes; 'One can repay a loan of gold, but one dies forever in debt to those who are kind.' I also remain indebted to God for His eternal grace, and protection.

PUBLICATIONS

During my research, the following peer-reviewed publications were published as part of my continuous engagements with intellectual property law and other areas of academic interest and research.

Journal: B Hungwe ‘Spurring Copyright holders’ innovation in the digital age through a statutory remuneration copyright levy for private home copying’(2024) *Commonwealth Youth and Development*, Unisa Press 2024. https://unisapressjournals.co.za/index.php/CYD/article/view/16092

Journal: B. Hungwe ‘The shifting digital media ecologies and how copyright law should adjust and adapt to journalism’ (2023) *IPLJ* 2023.

Journal: B Hungwe & A Munoriyarwa ‘An Analysis of the Legislative Protection for Journalists and Lawyers Under Zimbabwe’s Interception of Communications Act’(2024) *Statute Law Review*, Volume 45, Issue 1, April 2024, *hmae018, https://doi.org/10.1093/slr/hmae018*: Published: 16 March 2024.

Book Chapter: B. Hungwe ‘The Mozambique Situation: The political and legal implications of investigating and prosecuting perpetrators of war crimes, and or crimes against humanity in Cabo Delgado province’ (2022) in Saurombe, Ruhanya & Vambe (eds) *Mozambique is Burning: Islamic Insurgency in Cabo Delgado*, Midlands State University Press.

Journal: B. Hungwe ‘The legal complexities of terrorism as an international crime following the recruitment and enlisting of child soldiers in the Cabo Delgado, Mozambique insurgency war’ (2023) *Commonwealth Youth Development* Vol. 20 No. 1 (2022) *https://unisapressjournals.co.za/index.php/CYD/article/view/11360*.

Journal: B. Hungwe ‘The Right of Way for Single Publication Rule to promote press freedom in Zimbabwe’ (2023) *MSU Law journal* Vol. 8 (2021): Midlands State University Law Review. *https://msulr.msu.ac.zw/index.php/lr/article/view/10.*

Book Chapter: B. Hungwe ‘Fake news v Freedom of expression. Legislating media trademarks infringements on Social Media Platforms in Kenya and South Africa’ (2023) In Akpojivi & Chari (eds) *Communication Rights in Africa: Emerging Discourses and Perspectives*, Routledge, Taylor & Francis

Conference paper/s

Paper Topic: ‘Adjusting International Criminal Law to the Digital Age: Proposing offline and Online Hate Speech Formalisation as Part of the Inchoate Crime of Incitement to Commit Genocide or Crimes against Humanity’. Conference Theme: ‘Commemorating the 30th Anniversary of the Genocide in Rwanda: Genocides as Critical Junctures - In Search of an African Vision of International Criminal Justice’ organised by the University of Western Cape, University of North West and the African Centre for Transitional Criminal Justice, May 6-8, 2024, Cape Town, South Africa

ABREVIATIONS AND ACRONYMS

ACM SIGCOMM	Association of Computing Machinery- Special Interest Group on Data Communication
AI	Artificial Intelligence
ARPA	Advanced Research Projects Agency
AGRIMS	Age, Right holders Monthly Stipend
ARPANET	Advanced Research Projects Agency Network
ARIPO	African Regional Intellectual Property Organisation
Berne Convention	Berne Convention for the Protection of Literary and Artistic Works of 1886
BTAP	Beijing Treaty on Audio-visual Performances Composers Authors and Publishers Association **(**CAPASSO**)**,
CAB	Copyright Amendment Bill, 2017
CIPC	Companies and Intellectual Property Commission
CISAC	International Confederation of Societies of Authors and Composers (French: *Confédération Internationale des Sociétés d'Auteurs et Compositeurs*)
COLUM. J.L. & ARTS	Columbia Journal of Law & the Arts
CC	Constitutional Court
CORNELL L. REV.	Cornell International Law Journal:
CopyGhana	Reprographic Rights Organisation of Ghana
COSGA	Copyright Society of Ghana
CMOs	Collective Management Organisations
CRC	Copyright Review Commission
DACST	Department of Arts Culture, Science and Technology
DRM	Digital Rights Management

DSM	Digital Single Market
DuKE L.J.	The Duke Law Journal
ECJ	European Court of Justice
ECS	European Copyright Society
ECTA	Electronic Communications and Transactions Act 25 of 2002 (South Africa)
EU	European Union
EUDPD	European Union Data Protection Directives
GEMA	Society for musical performing and mechanical reproduction rights
GHAMRO	Ghana Music Rights Association
GRA	Ghana Revenue Authority
Hamline L Rev	Hamline Law Review
Hastings L.J.	Hastings Communications and Entertainment Law Journal
HARV. L. REV	Harvard Law Review
InfoSoc Directive	Information Society Directive
IT	Information Technology
IORRO	International Organisation of Reproduction Rights Organisations
IIPA	International Intellectual Property Alliance
IFPI	International Federation of the Phonographic Industry
IPJ	Intellectual Property Journal
IP	Intellectual Property
IPR	Intellectual Property Rights
ITU	International Telecommunications Union

J. INTELL. PROP. L.	Journal of Intellectual Property Law
JIPITEC	Journal of Intellectual Property, Information Technology and E-Commerce Law
JIPL	Journal of Intellectual Property Law
LLMs	Large Language Model
NORM	National Organisation of Reproduction Rights
NYU J. L. & Liberty	New York University Journal of Law & Liberty
MITT	Music Industry Task Force
NIPPS	Intellectual Property Policy and strategy
PAIA	Promotion of Access to Information Act 2 of 2000
PER/PELJ	Potchefstroom Electronic Law Journal
POSA	Performers Organisation of South Africa
POPIA	Protection of Personal Information Act 2 of 2000
PIJIP WORKING PAPER	Program on Information Justice and Intellectual Property
PNDC	Provisional National Defence Council Law
S. Afr. j. sci., Pretoria	South African Journal of Science
POPI	Protection of Personal Information, Act 4 of 2013
SABC	South African Broadcasting Corporation
SADC	Southern African Development Community
SARRAL	South African Recording Rights Association Limited
SAMPRA	South African Performing Rights Association
SAMRO	Southern African Music Rights Organisation
SAJIC	The Southern African Journal of Information and Communication

SCA	Supreme Court of Appeal
SONT	Stichting de Thuiskopie
SML	Austria's Special Media Levy
TDM	Text and Data Mining
TEU	Treaty of the European Union
TFEU	Treaty for the Functioning of the European Union
TMPs	Technological protection measures
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
TUL. J. T. & INTELL. PROP.	Tulane Centre for Intellectual Property Law
RiSA	Recording Industry of South Africa
SAIPLJ	South African Intellectual Property Law Journal
SALJ	South African Law Journal
SAJS	South African Journal of Science,
SAMLJ	South Africa Mercantile Law Journal
SAMPRA	South African Music Performance Rights Association
SAMRO	Southern African Music Rights Organisation
SARRAL	South African Recording Rights Association Limited
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UCLA L. Rev	University of California Law Review
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNCTD	United Nations Conference on Trade and Development
URL	Uniform Resource Locator

UrhG	Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz) (Germany)
U.S.	United States of America
VCRs	Video Cassettes Recorders
VPN	Virtual Personal Networks
WIPO	World Intellectual Property Organisation
WCT	WIPO Copyright Treaty of 1996
WTO	World Trade Organization
WPPT	Performances and Phonograms Treaty of 1996
ZAGPPHC	South Africa: North Gauteng High Court, Pretoria
ZASCA	South African Supreme Court of Appeal

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PART ONE

CHAPTER 1

IMPLICATIONS OF THE INTERNET AND TECHNOLOGY ON SOUTH AFRICA'S COPYRIGHT HOLDERS' REMUNERATION: LESSONS FROM THE EUROPEAN UNION & GHANA

1.1 INTRODUCTION

The advent of the Internet and digital technology, often called the Information Age or Digital Age inexorably facilitated the migration from analogue technology creating substantial ramifications on copyright law and its industries. The Digital Age's technology capabilities are a double-edged sword; both promising and harmful to creative content producers and end users. On one hand, the downside of the digital devices is that they facilitate harmful infringement patterns by their ease of storage, rapid dissemination of creative expressions to millions of end users, and this done at a negligible cost without any copy deterioration of quality.[1] This makes it difficult for content producers to maintain their framework for limited exclusive rights, in particular, the making available right. The upside is, inter alia, information availability systems encompassing social connectivity, communication speed and low-cost learning opportunities for end users. The existing copyright tensions now require statutory interventions to create market equilibrium. A fair balance between rightsholders' and end users' interests is necessary because the Digital Age has created grim prospects of indigence for many South African copyright holders' owing to its relentless facilitation of the exploitation of online content without corollary statutory compensation. The rightsholders' remuneration interest affected by the digital technology varies from musicians, filmmakers, literary arts (authors), producers, publishers, media proprietors/journalists and performers.

South African artists' songs are being downloaded and shared on WhatsApp platforms without accompanying compensation at alarming levels.[2] While some of the creative expressions distribution on such digital platforms is for non-commercial purposes, Recording Industry of South Africa (RiSA) reports that the sharing of content on

[1] F O. Odour 'The Internet and Copyright Protection: Are We Producing a Global Generation of Copyright Criminals' (2011) 18 *Jeffrey S. Moorad Sports L.J.* 501 (2011) 503; M Peters 'The challenge of copyright in the digital age'(2005) Lecture given at the Information Society Seminar, Externado de Colombia University, Bogotá, May 2005 59-60. See also Nicola Mawson 'Piracy case a landmark in SA' *iTWorld* 14 March 2014, available at *https://www.itweb.co.za/content/YKzQenMjA1d7Zd2r*. accessed 18 July 2023.

[2] Emmanuel Tjiya 'Piracy headache for SA musicians' *Sowetanlive*, 20 April 2020, available at *https://www.sowetanlive.co.za/entertainment/2020-04-20-piracy-headache-for-sa-musicians/*, accessed 30 January 2024.

unsanctioned digital platforms is depriving musicians their hard-earned money.[3] The occasional cease and desist letters[4] sent to copyists or other online infringers are not creating deterrence. Private copying without compensation has demonstrated downstream economic ramifications, and a prominent South African musician and record producer Kgaogelo Moagi (popular trade name Master KG) has indicated that,

> 'In music there are too many people who need to get paid from the same song - the producers, composers, the mixing and mastering engineers, marketing - the list goes on. All these professionals mentioned have to be paid from the creation of that one song. So, if a song is pirated it means none of them will get paid. It is really painful for your song to be all over if only a few paid for it. I think we don't have enough laws in our country to make sure that piracy is legislated, I'm hoping that one day we will be protected as artists.'[5]

The film industry contributes about R7 billion to the South African economy, creating about 30,000 jobs.[6] The digital copying/infringement patterns are however impacting on the industry's remuneration patterns. The film distributors noted that uploading and leak of a popular South African film - 'Four Corners' - created a dip in its ticket sales and the infringer only received a fully suspended three year jail sentence. The film was the country's submission for the most prestigious industry awards, the academy 'Oscars'. Although it was not nominated, it was billed as a coming of age gang thriller. Commenting on this case, Schonwetter posited that there is an urgent need to,

> 'make copyright laws fit for the 21st century […] So that they can appropriately deal with the challenges brought about by digital technologies. We need to accept that copying is rife on the Internet and difficult to restrain, and we should embrace the new opportunities for collaboration and knowledge sharing. And then we can identify the

[3] Ibid.

[4] See A M Louw 'What intellectual property lawyers can learn from Barbra Streisand, Sepp Blatter, and the "Coca-Cola cry-baby": Dealing with "trademark bullying" in South Africa' (2013) *PER / PELJ* 2013(16)5 11.

[5] Emmanuel Tjiya (note 2 above).South Africans urged to download music from legitimate platforms such as Vodacom My Muze, Apple Music, Spotify, Google Play Music, Tidal, Joox, Simfy Africa, Deezer and YouTube Music.

[6] South African Cultural Observatory (Saco) 'Measuring and Valuing SA's Cultural And Creative Industries'(2020) Capstone Report, Nelson Mandela University, available at *https://www.southafricanculturalobservatory.org.za/article/the-sa-cultural-observatory-measuring-and-valuing-sa-s-cultural-and-creative industries#:~:text=Books%20and%20Press%20made%20up,already%20slowing%20before%20the%20pandemic),* accessed 29 January 2024.

> instances in which we believe that stronger protection or better enforcement is nevertheless necessary to protect truly justified interests of rights holders.'[7]

Furthermore, Schonwetter noted that the cost of pursuing digital infringers is tedious, expensive, time consuming, with associated challenges around policing the Internet, and prosecuting many online infringements that occur.[8] Almost a decade later after the Four Corners case, publishers of books, Penguin Random House SA released a PDF copy of former Eskom executive, André de Ruyter's tell-all memoir early 2023, Before long, it was uploaded and shared on WhatsApp platforms creating trepidation that, 'now all that hard work [was] being impacted by individuals illegally sharing a PDF version of the book among friends and family online.'[9] The art of writing has remained a valuable form of cultural expressions, with the digital age creating disruptions from analogue that have fashioned new products such as e-reading devices and online eBook selling platforms.[10] The downsides of such platforms are susceptibility to circumventions of Digital Rights management (DRM) systems providing unlawful access to digital content. Andre de Ruyter's well-acclaimed scandal ridden book: 'Truth to Power: My three years Inside Eskom' implicating politically linked commanding criminal cartels at South Africa's government controlled primary electricity supplier, furtively migrated from print to messenger apps, and consequent gross digital infringement patterns harmed the author and publishers' remuneration prompting extensive copyright lawsuits threats. The publisher released a statement indicating,

> '[it is] appalled by the illegal distribution of a pirated PDF of Truth to Power by André de Ruyter, which is being disseminated on WhatsApp Messenger. The distribution of pirated copies infringes our copyright as well as that of the author, and it is unlawful in terms of the Copyright Act of 1976 … We wish to make clear to the public that the only way to obtain an

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[7] Intellectual property Law Unit, 'Our views regarding the "Four Corners" piracy case sentence' *University of Cape Town* , available at *https://ip-unit.org/2014/856/* , accessed 30 January 2024.
[8] Ibid.
[9]PDF is abbreviated for 'Portable Document Format' – where files are formatted and saved to facilitate them being easily shared and printed. See also Herman Eloff 'Delete that PDF! Legal action awaits those illegally sharing De Ruyter ebook' *News24* 17 May 2023 available at *https://www.news24.com/life/books/delete-that-pdf-legal-action-awaits-those-illegally-sharing-de-ruyter-ebook-20230517* accessed 5 July 2023; Jonathan G. Shaw 'Music piracy: Where are we today?' *MusikAfrica* 25 August 2022 available at *https://www.musicinafrica.net/magazine/music-piracy-where-are-we-today*. accessed 18 July 2023). RiSA reported a spike in online recorded music piracy, determined by some 8 000 top-40 tracks legally being downloaded each week before lockdown, which dropped by some 1 000 tracks once we were in it. See also for media proprietors: *Moneyweb (Pty) Limited v Media 24 Limited and Another* 2016 (4) SA 591 (GJ) para 3 and 129.
[10] S Øiestad & M Bugge 'Digitisation of publishing: Exploration based on existing business models' (2014) *Technological Forecasting and Social Change* 83 66.

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Media proprietors too have not been spared by the rampant digital copying and distribution of their works. Media24 launched litigation after its publications were reproduced and distributed through WhatsApp messenger apps.[12] The defendants, being administrators of a WhatsApp group platform had distributed for non-commercial purposes PDF versions of the publications. Media24 argued in its litigation papers that the infringements had caused a drop in its sales and impacted the livelihoods of employees.[13] It also viewed the illegal distribution of its content as theft, and sought an order for damages for any financial losses it suffered.

Conversely, targeting millions of online digital infringers is an almost impractical huge administrative burden. The ubiquity and speed with which digital expressions are distributed makes controlling private copying also excessively costly. Moreover, pursuing infringers operating from inside private homes creates a nightmare for monitoring and criminal enforcement mechanisms without inverting the constitutional right to privacy. Such tensions between copyright law and technology have created a watershed moment for copyright law,[14] with a scholar aptly calling it digital technology inspired copyright civil war.[15] Illustrating such challenges, Fleischmann posited that

> 'neither the courts nor the market has been able to resolve these difficulties … copyright law faces three immediate problems due to recent advances in digital technology [it will produce] more infringements, greater difficulty in detecting infringers because of privacy interests, and a continued public acceptance of unauthorized copying …This will make existing copyright law more difficult to enforce.'[16]

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[11] Ibid.
[12] Cebelihle Bhengu 'Media24 launches legal action against two women for copyright violation' *News24*, 12 December 2023, available at *https://www.news24.com/news24/southafrica/news/media24-launches-legal-action-against-two-women-for-copyright-violation-20231212*, accessed 14 January 2024. In papers filed in the Western Cape High Court, Media24 publisher alleges that the defendants shared PDF versions of Huisgenoot Lugbraaier in 2022 and between April and July 2023, shared various editions of its publications with members of the "Newspaper and Magazine Group" on WhatsApp, including Beeld, Sarie, Die Burger and Rapport.
[13] Ibid.
[14] E Fleischmann 'The Impact of Digital Technology on Copyright Law' (1987) 8 *Computer L.J. 1* (1987) 1.
[15] M B Radefeld 'The Medium is the Message: Copyright Law Confronts the Information Age in *New York Times v. Tasini*' (2003) *Akron Law Review*: Vol. 36: Iss. 3, Article 5 547.
[16] Fleischmann (note 14 above) 2.

In the early 1980s, Fleischmann noted that the advent of Internet required a legislative response. At the time, he moaned that the judiciary had failed to effectively enforce copyrights by defining the scope of protected copyright works with the market system and were thus unsuccessful in addressing the emergent challenges.[17] More than three decades later after Fleischmann's copyright concerns, the problems have exacerbated with scholars Adetunji and Okuonghae at the turn of the millennium bemoaning the relative ease of replication, manipulation, reproduction and dissemination of copyrighted materials in digital formats within the digital space.[18] The extent of digital copying and sharing goes against the grain of copyright exclusive rights protection norms with scholarly protests emerging that digital technology is now producing a global generation of copyright criminals.[19]

Notwithstanding this downside, the Internet and digital devices are undoubtedly considered a blessing, and any effort towards copyrighting is frowned by some as hindering the political, economic, and social trends of the 21st century.[20] The upside is for people to access informative materials, business to reach distant and often more rewarding untapped global markets. Copyright law has always evolved in response to technological changes because new inventions have consistently attracted copyright law adaptations.[21] While the current Digital Age is complex, appropriate copyright law amendments to address the existing challenges can be initiated. Nonetheless, technology appears to be constantly ahead of copyright law creating an environment that does not effectively protect copyrights, with new retrogressive societal behavioural patterns that are normalising deviant copyright infringements.[22] From the foregoing, the South African government introduced the copyright Amendment Bill (hereinafter 'the CAB') that seeks to align copyright law with the digital era

[17] Ibid.
[18] A O Adetunji & N Okuonghae 'Challenges of copyright protection in the digital age: the Nigerian perspective' (2022) *Library Philosophy and Practice (e-journal)* 7159 2. available at *https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=13905&context=libphilprac*. accessed 12 May 2023.
[19] Oduor (note 1 above) 501.
[20] Y L Shrayberg & K Y Volkova 'Features of Copyright Transformation in the Information Environment in the Age of Digitalization' (2021) *Sci. Tech. Inf. Proc*. 48, 30–37 (2021) available at *https://doi.org/10.3103/S014768822101007X*. accessed 11 May 2023.
[21] T Pistorius & O S Mwim 'The impact of digital copyright law and policy on access to knowledge and learning' (2019) *Reading & Writing* 10(1), a196. available at *https://doi.org/ 10.4102/rw.v10i1.196*. accessed 11 May 2023.
[22] R G Barbosa 'U.S. Copyright Law, Technology and Litigation. A National Approach and its International Consequences' (2016) *Anuario Mexicano de Derecho Internacional* Vol. 16, 2016. available at *https://www.sciencedirect.com/science/article/pii/S187046541730003X*. accessed 11 May 2023.

and developments at a multilateral level.[23] The current anachronistic Copyright Act is outdated and ineffective in addressing existing digital challenges because,

> 'The creative industry is impacted upon; educators are hampered in carrying out their duties; researchers are restricted to further developing research; and people with disabilities are severely disadvantaged by having limited access to copyright works. … a need exists for … legislation to be consonant with the ever evolving digital space; to allow reasonable access to education; to ensure that access to information and resources are available for persons with disabilities; and to ensure that artists do not die as paupers due to ineffective protection. The latter is supported by the experience of the power imbalance, vulnerabilities and abuse taking place in the music industry which Government was called to address.'[24]

While some proposed amendments in the CAB are welcome, they are still inadequate in guaranteeing the authors' remuneration rights in the digital era. The current challenges emerging are that copyright infringements, just like in the 1980s are now even 'more frequent, more costly, and more difficult to prevent'[25] and this requires further urgent legislative response to the existing copyright Act and the CAB. Copyright law as a creature of technology from the inception of the printing press,[26] pianos (l800s), radio (1920s), cable television (1960s), photocopying (1970s) and later the manufacture of cassettes,[27] should likewise respond to current technology developments. The copyright law responses to such seamless digital reproductions can be treated as part of copyright law's constant and efficacious adaptations to technology that have shaped its historical growth patterns.[28] Such an inter-twined relationship has been enduring and symbiotic, with a balancing act maintained between the interests of both authors and end users.

1.1.1 The remuneration plight of rightsholders under the Copyright Act and CAB

Many South African artists have died indigent owing to institutional failures to adequately remunerate them, and deficiencies within the copyright law to protect their interests. Their fame does not correspond with their financial status, with a number having died paupers despite attaining indelible global fame after making a significant contribution to the creative

[23] Memorandum on the objects of the Copyright Amendment Bill, available at *https://www.parliament.gov.za/storage/app/media/uploaded-files/Copyright%20Amendment%20Bill%20Draft.pdf,* accessed 3 December 2023 59-50.
[24] Ibid.
[25] Fleischmann (note 14 above) 3.
[26] Pistorius & Mwim (note 21 above).
[27] *GEMA v Grundig* 1 ZR 8/54, 17 BGHZ 266, 271-2 [1955] GRUR 492 52. (A Federal Supreme Court of Germany decision).
[28] M Peters 'The challenge of copyright in the digital age '(2006) 9 *Rev. Prop. Inmaterial* 59 (2006) 59.

industry. Solomon Linda died a destitute despite composing the song - 'The Lion Sleeps Tonight' – which featured in global musicals and movies earning millions of dollars.[29] Solomon Linda's song was recorded in 1939 and created what is described as a,

> 'haunting skein of notes that went on to become the most famous melody ever to emerge from Africa. The English-speaking world knows this as the central theme in The Lion Sleeps Tonight. There are versions in French, Japanese, Spanish, Danish, and other languages. More than 150 different artists have recorded it and it features in at least 15 movies and musicals. It has earned by some estimates over $15 million in composer royalties. Linda´s role in the song´s creation is undisputed, but he died a pauper, leaving his family too poor even to afford a headstone for his grave.'[30]

After marathon litigation Solomon Linda estate representatives reached a settlement with Walt Disney in the case *Griesel NO v Walt Disney Enterprises Inc., and others.*[31] Linda's descendants received compensation and remuneration in future royalties that would presumably sustain them.[32] Dean writes that the,

> 'settlement implicitly acknowledges that The Lion Sleeps Tonight is of South African origin and rooted in South African culture. From a South African perspective, the saga has a happy ending and there is some pride in having successfully championed the cause of the small creator among entertainment industry giants.'[33]

Another artist, Simon 'Mahlathini' Nkabinde of Mahlathini and the Mahotella Queens reached worldwide fame, made numerous international tours, and recorded over forty albums which were a huge commercial success.[34] He died in abject poverty without remuneration from his sales and potential fortune to support his dignified death.[35] Such contentious royalties' matters affecting authors dating back to the early twentieth century appear to be a perpetual phenomenon. Royalties' battles have often spilled into the courts while other artists such as Mahlatini were prepared to die in silence.

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[29]Owen Dean 'Copyright in the Courts: The Return of the Lion' *WIPO Magazine*, April 2006. available at *https://www.wipo.int/wipo_magazine/en/2006/02/article_0006.html.* accessed 29 October 2021.
[30] Ibid.
[31] *Disney enterprises Inc.* v *Griesel No* 2006 BIP 299 (T).
[32] Dean (note 29 above).
[33] Ibid.
[34]See Kyle Zeeman 'Our artists are dying poor and something needs to be done, says Eugene Mthethwa' *The TimesLive*, 27 May 2019. available at *https://www.timeslive.co.za/tshisa-live/tshisa-live/2019-05-27-our-actors-are-dying-poor-and-something-needs-to-be-done-says-eugene-mthethwa/*.accessed 7 July 2023.
[35] Ibid.

In February 2021, prominent and legendary South African musician Eugene Mthethwa in a bizarre protest stunt chained himself to a pole at Southern African Music Rights Organisation (SAMRO)'s Braamfontein offices demanding his needletime royalties.[36] Mthethwa alleged that SAMRO had not positively responded to his request for meeting to discuss his royalties for a period of over six years, but instead threatened to apply the legal prescription principle to avoid paying him his royalties. He averred that,

> 'They tell me that they will apply their prescription policy which says they will only pay royalties from 2014 to 2020. For me it is an admission of guilt and I'm saying why should I be punished for their own administrative problems. Some of the songs they don't want to pay were on higher rotation and I can't just forget about that. I'm going to be here until they sign and undertaking in writing and explain what they are going to do.'[37]

SAMRO CEO Mark Rosin described the protest action as regrettable but confirmed that Mthethwa had repeatedly raised the royalty issue and tried to amicably address his concerns.[38] Instead, Rosin admitted that SAMRO had been making regular royalty payments to authors' local composers and publishers.[39] However, there have been reports of other artists dying indigent.[40] Performing artists, just like musicians' plight are documented in various poignant media reports with legendary actress, Shaleen Surtie-Richards's case highlighting their plight. Reportedly, she could not afford to book herself into a hospital due to financial challenges.[41]

The advent of the Digital Age and on-going battles with the unregulated CMOs have compounded artists' predicament. There are growing protestations around how the CMOs are managing the collection and distribution of their royalties. The remuneration plight of South Africa's creative industry was dire during the analogue period and appears to have been aggravated after the advent of the nineteenth century Digital Age.[42] The analogue period is largely defined by physical creative copies in the form of music compact disks, records,

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[36] Patience Bambalele 'Samro "disappointed and alarmed" by Eugene Mthethwa's sit-in protest over "unpaid royalties"' *SowetanLIVE*, 19 February 2021 available at *https://www.sowetanlive.co.za/entertainment/2021-02-19-samro-disappointed-and-alarmed-by-eugene-mthethwas-sit-in-protest-over-unpaid-royalties/*a accessed 25 March 2022.
[37] Ibid.
[38] Ibid.
[39] Ibid.
[40] Letlhokwa George Mpedi 'It's all very well for performing artists to leave a rich legacy — but legacies don't pay the bills' *Daily Maverick*, 13 June 2021, available at *https://www.dailymaverick.co.za/opinionista/2021-06-13-its-all-very-well-for-performing-artists-to-leave-a-rich-legacy-but-legacies-dont-pay-the-bills/,* accessed 3 December 2023.
[41] Ibid.
[42] Shaw (note 9 above).

cassettes, and films whose reproduction was principally manual. Such compact discs were however pirated to huge remuneration losses for authors and owners.[43] The subsequent growth of the Internet bandwidth and faster computers in the late 1990s weakened the rightsholders' exclusive rights to reproduce and make available right. It exposed their work to novel unlawful exploitation and digital distribution systems fundamentally through MP3s music sharing,[44] the explosion of file sharing and formatting, private copying, and transmission networks. Regrettably, such flourishing end users' digital exploitation of copyright works impacted on rightsholders' remuneration streams.[45]

When users make payments to authors/owners for the exploitation of their works, the intermediaries managing the collection and distribution of the royalties are the Collective Management Organisations, (CMOs). Furthermore, they protect the intellectual property of authors while ensuring they receive royalties for their creative works,[46] yet the same CMOs have been accused of defrauding rightholders.[47] Consequently, in addition to the digital infringements, the mismanagement and misappropriation of royalties by CMOs is another of countless challenges that authors/owners face in respect of earning remuneration for exploitation of their works.

The 2002 amendments on CMOs to the Copyright Act 98 of 78 and Performers Protection Act 11 of 1967 were necessitated by the drop in sales due to piracy and poor

[43] N Primo & L Lloyd 'South Africa : Media piracy in emerging economies' in Joe Karaganis (ed) *Media Piracy in Emerging Economies* (2011) Social Science Research Council. 100 available at *http://piracy.americanassembly.org/the-report/* accessed 14 August 2021. Scholars observe that: Textbook piracy remained ubiquitous and, according to the International Intellectual Property Alliance (IIPA), was responsible for larger total losses than either film or music piracy throughout the 1990s and early 2000s. As a global trade in pirated cassettes and discs emerged in the 1990s, South Africa became both a destination market and a transit point for CD and, later, DVD smuggling into other African countries.'

[44] See Carl Kaplan 'In Court's View, MP3 Player is Just a 'Space Shifter' (1999) *Cyber Law Journal*, 9 July 1999 available at https://archive.nytimes.com/www.nytimes.com/library/tech/99/07/cyber/cyberlaw/09law.html. accessed 14 August 2021. See also *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, and 180 F.3d 1072, 51 U.S.P.Q.2d (BNA) 1115 (9th Cir. 1999). In the case, Rio users downloaded songs in the form of compressed MP3 files from their computer hard drives into the player's memory. The Recording Industry Association of America (RIAA), a trade group representing record companies, has fought the Rio, saying it encouraged music piracy.

[45] H Thopacu 'Validating South Africa's Copyright Reform through the Lens of US GSP: The Need to Abolish Reciprocal Requirements. African perspectives Global insights' (2020) *Policy Insights 84 South African Institute of International Affairs Policy Insights* 3.

[46] South Africa Music Performance Rights Association is the only accredited collecting society pursuant to the Collecting Society Regulations (promulgated on 1 June 2006 under GN 517 in GG 28894), in terms of section 9A of the Act and in terms of section 56(1) (b) of the Performers' Protection Act 11 of 1967, for the Recording Industry of South Africa (RISA).

[47] Copyright Review Commission Report 2011 (2011) 3. Department of Trade and Industry, available at *https://www.gov.za/sites/default/files/gcis_document/201409/crc-report.pdf*, accessed 10 August 2021.

returns in remuneration for musicians and performers.[48] Specifically, the amendment to section 9 of the Copyright Act introduced needletime royalty which is shared by agreement between the performer featured in the sound recording and the copyright owner of the sound recording. The amendments did not provide for the adequate remuneration envisaged.[49]

The 2011 Copyright Review Commission (CRC) report established that nine years after the enactment of needletime legislation in 2002, not a cent had been paid in royalties to musicians and record companies' and concluded that the legislation which provided for a statutory licence in respect of needletime failed to protect the owners' rights which were made subject to the licencing framework.[50] The CRC made further findings that the unregulated CMOs were operating in secrecy and flouting good governance principles leading to the breakdown of trust with stakeholders.[51] Mthethwa's stunt earlier referred to at SAMRO offices is a direct result of such an opaque management style. As a result of the challenges highlighted above namely – copying, unregulated collecting societies and lack of transparency obligations – many South African artists have died destitute despite their global fame and potential fortune associated with their success[52] The CRC's recommendations culminated in proposals to overhaul the current Copyright Act with the CAB and address the role of the CMOs and emerging Digital Age copyright law challenges. South Africa is in the process of passing Bills that will update both the Copyright Act and the Performers Protection Act. The need for the law to develop in tandem with Internet advancement was acknowledged by the court in the *Golden China TV Game Centre and Others v Nintendo Co*

[48]Copyright Amendment Act, 2002. It provided for the 'establishment, composition, funding and functions of collecting societies contemplated in section 9A of the Act and any other matter that it may be necessary or expedient to regulate for the proper functioning of such societies.' See *National Association of Broadcasters v South African Music Performance Rights Association and Another* 2014 (3) SA 525 (SCA). 7. Wherein the court observed that lobbying by musicians, performers and the recording industry saw the amendments to the Act and the PPA, being effected in 2002, to protect performers and owners of copyright in sound recordings. Record companies were motivated by reduced sales of compact discs (CD's) due to piracy, facilitated by technological advancements. Musicians and performers, on the other hand, were driven by their sense of being inadequately rewarded for their services.

[49]A Myburgh 'Copyright Amendment Bill sent back for the right reasons' (2019) *Mail & Guardian* 1 November 2019 available at *https://mg.co.za/article/2019-11-01-00-copyright-amendment-bill-sent-back-for-the-right-reasons/* accessed 19 August 2021.

[50]CRC Report (note 58 above) 46-52.

[51] Ibid.

[52]M A Forere 'Reforming the Right to Remuneration in the South African Copyright Amendment Bill '(2021) *Joint PIJIP/TLS Research Paper Series* 5-2021 4.

Ltd case,[53] where it was held that definitions in the Copyright Act are to be interpreted flexibly so as to cover new technologies as they appear.[54]

In light of the above summary of problems facing South Africa's copyright law framework, the CAB seeks to reorient the law towards new ways of content creation, storage and distribution while safeguarding remuneration of authors and owners alike, adapting to the Digital Age. Specifically, the Bill provides for the protection of authors' moral and economic rights, rights of producers of phonograms, prohibited conducts in respect of technological protection measures (TPMs), and copyright management information, management of digital rights through sections' 26 and 28, and promotion of broadcasting of local content.[55] The focus of this research will be limited to those aspects of the Bill which respond to the challenges standing in the way for the authors to receive their due remuneration as elaborated below. It is for this reason among others that the Bill was introduced with attempts to make it consonant with the ever-evolving digital space.[56] An assessment will be made in due course of how the Act and the Bill relate to the effects of digital copying and online distribution of digital expressions.

1.1.2 Copying

The Digital Age has spawned a generation of copying criminals due to the shifting cultural copyright law norms.[57] Oduor writes that the growth of a culture of sharing - particularly in the form of peer to peer (P2P) file sharing, copying, adaptations and modifications of derivative creations have gained a strong foothold especially amongst the younger generation challenging the scope of copyright law.[58] Copying is a form of infringement, which ordinarily attracts severe criminal penalties and civil law damages. Copyright is considered some form of property and therefore copying without authorisation is equated to shoplifting.[59] Private copying for non-commercial purposes reduces the sale of copyright works, which is considered 'harm' against copyright holders' especially musical and literary works hence many countries have sought to address such remuneration drawdowns through a private

[53]*Golden China TV Game Centre and Others v Nintendo Co Ltd* 1997 (1) SA 405 (SCA) para 13-14. Making reference to *WGN Continental Broadcasting Co et al v United Video Inc.* [1982] USCA7 796; 693 F.2d 622 627 (United States District Court for the Northern District of Illinois decision).
[54]Ibid.
[55]The Preamble to the Copyright Amendment Bill of 2017.
[56] Memorandum on the objects of the Copyright Amendment Bill (note 13 above) 59.
[57] Oduor (note 1 above) 507.
[58] Ibid.
[59] Ibid.

copying levy. South Africa has instead attempted to rectify the copying challenges through the introduction of TPMs in the CAB,[60] although it allows private copying for purposes such as format shifting,[61] which invariably taps into the income of authors and owners.

Before the advent of the Internet, copyright owners considerably managed the production and dissemination of their works. It was challenging for illegal copying to occur or to obtain works without purchasing them.[62] In the Digital Age, it is now a real challenge for copyright owners to control the reproduction of their works with end users enjoying technical capacity to meticulously reproduce exact copies of creative works. Copyright owners cannot enforce their rights against private individuals because monitoring extensive private copying is onerous. Furthermore, enforcements cannot be executed without interfering with the constitutional right to freedom of expression,[63] privacy[64] and dignity.[65] Copying has dwindled rightsholders' income as end users' accessibility to works correspondingly diminishes their purchasing interest hurting world economies. Statistics reveal that in 2006 pirated movie sales accounted for 60 per cent of South Africa's DVD market, costing the South African entertainment industry R500 million annually.[66] The remuneration for owners and/or content producers dwindled, creating a financial nightmare for entertainers as illegal file sharing and other forms of unlawful copying globally flourished.[67] Precedents from jurisdictions such the European Union (EU),[68] Ghana[69] and in

[60] Copyright Amendment Bill, s 27 & 28.
[61] Copyright Amendment Bill, s 12B(1) and (2)
[62]J C Ginsburg 'Copyright and Control Over New Technologies of Dissemination' (2001) 101 *COLUM. L. REV.* 1613.available at*: https://scholarship.law.columbia.edu/faculty_scholarship/63* accessed 20 July 2021.
[63]See *Harper & Row, Publishers, Inc. v. Nation Enters*., 471 U.S. 539, 558 (1985) (A United States Supreme Court decision); See also *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 477 (1984) (A United States Supreme Court decision); See E T Wang 'The line between copyright and the first amendment and why its vagueness may further free speech interests' (2007) *Journal of Constitutional Law* [Vol. 13:5. 1472 Available at https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1103&context=jcl. (Access 29 July 2021). In South Africa see *Laugh It off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* 2006 (1) SA 144 (CC). See P Masiyakurima 'Fair Dealing and Freedom of Expression' (2004) in *Copyright and Human Rights (ed. P Torremans), Kluwer Law International* 87-108.
[64] Section 14 of the Constitution of the Republic of South Africa, 1996. The right to privacy is constitutionally entrenched in the South African Bill of Rights. It provides as follows: 'Everyone has the right to privacy, which includes the right not to have: (a) their person or home searched; (b) their property searched ;(c) their possessions seized; (d) the privacy of their communications infringed.'
[65]See *Bernstein and Others v Bester NO and Others* 1996 (2) SA 751. Wherein the Constitutional Court held that 'In South African law the right to privacy is recognized as an independent personality right which the courts have included within the concept of dignitas.'
[66]M Bilstein 'South Africa's Movie Piracy Challenges' (2010) *American University Intellectual Property Brief, Spring* 2010, 27-32 21.
[67]Phalane Motale 'Another veteran entertainer dies poor' (2015) Sunday Independent 15 June 2015.available at *https://www.iol.co.za/entertainment/celebrity-news/local/another-veteran-entertainer-dies-poor-1871607.* accessed 22 July 2021.
[68]Mark Landler 'Fight Against Illegal File Sharing Is Moving Overseas' New York Times, 31 March 2004 available at *https://www.nytimes.com/2004/03/31/business/fight-against-illegal-file-sharing-is-moving-*

some relevant instances the United States[70] where downloading of music on a massive scale was held unlawful are important for South Africa to draw helpful lessons on how copyright law should respond to technological advancements. In response to unlawful copying, the EU countries[71] and Ghana[72] respectively have sought to legislate and protect copyrightable material from infringements through TPMs, operating in tandem with copyright levies. The main challenge against TPMs is their continued circumvention by mutating advanced digital technologies overriding encryptions. Technological copyright provisions for TPMs are therefore a short-term relief, persistently vulnerable to hacking due to processing capabilities of computer hardware and software.[73] A specific challenge for the CAB is that it has provisions allowing TPMs' circumvention to facilitate end users enjoying the benefit of fair use rights/exceptions while prohibiting illegal circumvention of the same.[74] The challenge is: to what extent can one draw a distinction between legal and illegal circumvention in order to ensure that authors/owners are protected online? The contradictions emanating from this legal quandary originate from an almost impossible tough balancing act which inadvertently opens room for creating lawlessness.[75] Thus, the law appears to give and take the same rights it grants because third parties are allowed to use a circumvention device to access protected works under fair use provisions.[76] The distinction between legal and illegal circumvention as introduced in the CAB, as well as failure of the TPMs to safeguard undue exploitation of authors/owners' works bring another question: should we regulate developers and what type of regulation should we adopt?

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overseas.html. accessed 9 May 2023. He reports that recording industry associations in Denmark, Germany, Italy and Canada have filed lawsuits or taken other legal action, aiming mainly at heavy users accused of offering a large number of songs online.

[69] C de Beukelaer & M Fredriksson 'Ghana's War on Piracy: Copyright and Human Rights in Africa' *A Review of African Political Economy* available at *https://roape.net/2018/09/03/ghanas-war-on-piracy-copyright-and-human-rights-in-africa/*. accessed 9 May 2023.

[70]*MGM Studios, Inc. v. Grokster, Ltd* 545 U.S. 913 (2005) (A United States Supreme Court decision). The Supreme Court held that providers of software that designed to enable file-sharing of copyrighted works may be held liable for the copyright infringement that takes place using that software.'

[71]EU Council Directive 2001/29/EC, Recital 47.

[72] T Schonwetter & C B Ncube 'New hope for Africa? Copyright and Access to Knowledge in the Digital Age' (2011) 13(3) *Info* 64 -74 12. Available at *http://dx.doi.org/10.1108/14636691111131457*. accessed 9 May 2023.

[73]D S Marks & B H Turnbull 'Technical protection measures: The intersection of technology, law and commercial licences' (2000) *European Intellectual Property Review*, Vol. 22, No. 5, 109. See also C Visser 'Technological Protection Measures: South Africa Goes Overboard. Overbroad' (2006) *The southern African Journal of Information and Communication Issue* 7 2006 55.

[74] Copyright Amendment Act, s 27 & 28.

[75]M A Forere 'Keeping up with the developments in technology: A look into the music industry and the copyright laws in Southern Africa' (2019) 7 *SAIPLJ* 31 47.

[76] Copyright Amendment Bill, s 28P.

Exacerbating copying challenges is the rise of streaming technologies which are causing the relentless circulation of free musical works online. Platforms such as YouTube stream for free, while Spotify reportedly pay unsubstantial amounts.[77] Major labels were slated for an outdated streaming model that allowed them to maximise their revenue while some musicians struggle to make minimum wage. Musicians are reportedly reluctant to raise their concerns out of retributive fears their professional careers could be harmed by big industry.[78]

1.1.3 Impact of Artificial Intelligence on copyright law

There is no commonly accepted definition of Artificial Intelligence (AI).[79] Given AI's complex nature, this is not considered a problem by scholars,[80] but very persuasive definitions have been proffered with Rai et al positing that it is: 'the ability of a machine to perform cognitive functions that we associate with human minds, such as perceiving, reasoning, learning, interacting with the environment, problem solving, decision-making, and even demonstrating creativity.'[81] Computers perform responsibilities normally reserved for human beings requiring ordinary human intelligence. As such, they are now proficient in creating copyrightable content.[82] Examples of generative AI based on Large Language Models (LLMs) include ChatGPT, MusicLM, Stable Diffusion, Jukebox, DALL·E 2, and Midjourney, among others. Such LLMs can create text, images, and music that are identical to human beings created copyrightable content.[83] Importantly, the LLMs training data for such AI comprise of mainly copyrighted works.[84] AI has thus created tensions with copyright

[77]Lanre Bakare 'The music streaming debate: what the artists, songwriters and industry insiders say' *The Guardian*, 10 April 2021 available at *https://www.theguardian.com/music/2021/apr/10/music-streaming-debate-what-songwriter-artist-and-industry-insider-say-publication-parliamentary-report*. accessed 21 May 2023. It reports that streaming services generating more than £1bn a year in revenue alone, in the United Kingdom alone. But the fact remains that artists can be paid as little as 13% of the income generated, receiving as little as £0.002 to about £0.0038 per stream on Spotify and about £0.0059 on Apple Music.

[78] Ibid.

[79] Collins *et al* 'Artificial intelligence in information systems research: A systematic literature review and research agenda'(2021)*International Journal of Information Management*, Vol. 60, available at *https://doi.org/10.1016/j.ijinfomgt.2021.102383*, accessed 2 February 2025.

[80] Ibid.

[81] A Rai, P Constantinides & S Sarker (2019) 'Next-generation digital platforms: Towards human-AI hybrids' *MIS Quarterly*, 43 3.

[82] C T. Zirpoli 'Generative Artificial Intelligence and Copyright Law' (2023) *Congressional Research Service* (CRS), available at *https://acrobat.adobe.com/id/urn:aaid:sc:EU:493ab3c4-9aa8-4ae6-b4f7-c1c79061b8b3*, accessed 2 February 2025.

[83] M Sag 'Copyright Safety for Generative AI'(2023) *Houston Law Review*, Vol. 61, No. 2, available at *https://houstonlawreview.org/article/92126-copyright-safety-for-generative-ai*, accessed 3 February 2025.

[84] Ibid.

law given growing global litigation around its infringements of creative works.[85] In the Getty Images lawsuit, the plaintiff alleged that, 'Stability AI [copied] at least 12 million copyrighted images from Getty Images' websites . . . in order to train its Stable Diffusion model.'[86] The challenge with AI lies in its capacity to infringe copyrights by generating content that resemble or mimic original works. As such copyright holders have expressed concern that AI programs 'are uniquely capable of mass-producing works that copy their style, potentially undercutting the value of their work.' [87] While human beings can mimic other artists style, composition, rhythm, there are concerns AI can replicate the same at speed and effortlessly.[88] Already, precedents have demonstrated that AI has in some instances recreated whole articles, images, copyrightable characters such as Snoopy or Mickey Mouse.[89] Such emerging global copyright litigation disputes also face South Africa. There is therefore an urgent need to draft a coherent copyright law that meets the legal confrontations emerging from the development and use of AI, and potential ramifications on copyright holders' remuneration. AI is complex and evolving, presenting challenges to the copyright law framework and rights holders. AI can generate large volumes of content, plagiarising or duplicating existing works.[90] Other emerging AI complications include issues to with attribution, which is not always guaranteed as it interferes with the authors' moral rights and recognition of their works leading to potential loss of opportunities and accompanying remuneration.[91] Given that AI generation of substantially identical works to those created by human authors is real, there is need for copyright holders to secure their remuneration rights through agitating for legislative frameworks that guarantee incentives arising from the potential unsanctioned exploitation of their works. Such technological developments already present foreseeable ownership and infringement disputes. There are potential AI derivative works that can also possibly create copyright infringement disputes. Moreover, there are no existing South African laws expressly addressing AI developments and prospective copyright infringements. Nonethless, to a limited extent, the existing copyright Act and the CAB can be

[85] *Paul Tremblay et v. Openai, Inc*. Case Nos. *23-cv-03223-AMO (*United States District Court Northern District of California). See also *Getty Images (UK) Ltd v Stability AI Ltd* [2023] EWHC 3090 (Ch) Case No: IL-2023-000007. (High Court of Justice Business and Property Courts of England and Wales intellectual property list).
[86] *Getty Images (UK) Ltd v Stability AI Ltd* [2023] EWHC 3090 (Ch) Case No: IL-2023-000007. (High Court of Justice Business and Property Courts of England and Wales intellectual property list).
[87] C T. Zirpoli 'Generative Artificial Intelligence and Copyright Law'(2023) Congressional Research Service (CRS), 3. available at *https://acrobat.adobe.com/id/urn:aaid:sc:EU:493ab3c4-9aa8-4ae6-b4f7-c1c79061b8b3,* accessed 2 February 2025.
[88] Ibid.
[89] Sag (note 83 above).
[90] Ibid.
[91] Z Ü Kahveci 'Attribution problem of generative AI: a view from US copyright law'(2023) *Journal of Intellectual Property Law & Practice*, Vol. 18, Issue 11 796.

engaged to address AI-generated content copyright infringements. However, addressing AI copyright infringements is compounded by the fact that *'c*onventional manual detection and enforcement mechanisms now find themselves struggling to keep pace with the deluge of online content.'[92] AI can also generate false information, potentially compromising the administration of justice.[93] This has prompted calls to create a category of copyright laws specifically to address AI generated works.[94] This is also important to encourage ethical standards within the domain of copyright law protection given the exigencies fostered by AI. Notwithstanding, AI presents upsides and downsides for the South Africa's copyright law.

1.1.4 Unregulated Collection Societies and transparency obligations

A long-standing deficit in the Copyright Act has been its failure to regulate the affairs of CMOs, which had through improprieties compounded the authors' misery as indicated earlier. Nonetheless, the CAB has commendably stepped in to regulate the formation of collecting societies, their functions and as well as ownership in terms of sections 22B to 22F. A major problem for the authors and/or performers in South Africa is that the CMOs operate in secrecy and are often accused of defrauding authors/performers. There has been an expectation that the CMOs will be compelled to transparently and timeously provide records of their management and distributions of royalties to rightsholders - which has not been the case. Therefore, this research considers a suitable transparency model that will ensure that authors are paid adequately and in a transparent manner without creating mundane work for the collecting societies. Without transparency obligations, the capacity of authors/owners to secure fair compensation and proportional and appropriate remuneration is weakened.[95] This study is aimed at safeguarding the copyright holders' remuneration interest through creating a workable transparency model. This research will therefore grapple with the standard of adequate remuneration and transparency provisions expected in the copyright arena in order to ensure that authors are properly remunerated.

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[92] Amani Patel and Juli Hopf 'Up there : Is AI Sufficiently Contained by Intellectual Property Laws?' *Spoor & Fisher*, 7 September 2023, available at *https://spoor.com/is-ai-sufficiently-contained-by-intellectual-property-law/*, accessed 2 February 2025.
[93] Ibid.
[94] Ibid.
[95]R Xalabarder 'The Principle of Appropriate and Proportionate Remuneration for Authors and Performers in Art.18 Copyright in the Digital Single Market Directive' (2020) *InDtre* 4.2020 5.

To understand how the CMOs have operated, and help inform and draw lessons on how they will transparently address remuneration challenges under the CAB, it is important to understand how they previously managed needletime royalties, which are a significant remuneration stream for copyright holders in South Africa.[96] A poignant observation was made in GroundUp, a local publication on how needletime royalties were hitherto abused. Moore wrote that

> '[f]or most people around the world, the music industry represents glamour, fame, riches and influence. On the inside though it is famously opaque, litigious and corrupt. If South Africa is to create a vibrant local industry that will benefit aspirant musicians, then far more transparency is needed. Whoever controls the money controls the industry. And part of the reason why the local music industry has declined over the last decade, is because of the confused and contradictory reporting and lack of accountability around the money that is being made.'[97]

Needletime royalties are charged against copyright licences for playing sound recordings in public performances, by among others, retail shops, discotheque, and airports. However, there have been endless court battles over their either non-payments,[98] or misappropriation.[99] This study has proposed a private copying levy to be managed by the same CMOs previously accused of misappropriating needletime royalties and therefore lessons must be drawn from their previous royalties' management administration experience. Forere posits that

> 'the right of remuneration is made possible by the collecting societies, yet these organisations have been instrumental to creators' poverty in South Africa. To this end, many of them are not regulated, and so they act as they see fit and there has been no accountability to members.'[100]

Such pervasive concerns around needletime royalties' mismanagement should motivate the development of statutory transparency principles that create safeguards against recidivism.

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[96] Ibid at 4.
[97] Niki Moore 'SA music industry exposed: the money is not going to the artists' *GroundUp*, 26 November 2021, available at *https://www.groundup.org.za/article/sa-music-industry-exposed-money-not-going-artists/.* accessed 13 April 2023.
[98] Niki Moore (note 97 above).
[99] Snazo Notho 'Chicco Twala on needle time royalties - 'Administrators benefit more than artists' *DRUM*, 25 February 2022, available at *https://www.news24.com/drum/celebs/news/chicco-twala-on-needle-time-royalties-administrators-benefit-more-than-artists-20220225* accessed 9 February 2023.
[100] Forere (note 21 above) 16.

1.2 PROBLEM STATEMENT

Scholars opine that there is growing empirical evidence that poverty and social inequality that has shaped South Africa is partly responsible for high levels of piracy and online infringements in the Digital Age.[101] Many cannot afford the expensive media devices due to low income levels. South Africa is classified as a developing country,[102] and it has 'long suffered from extremely high levels of unemployment, trapping millions in poverty and contributing to stark inequalities that persist nearly three decades after the end of apartheid in 1994.' [103] Due to poverty, technological circumvention devices become attractive in overriding TMPs and unlawfully gain access to copyrighted material. The current Copyright Act and the CAB are insufficient in providing an adequate IPL framework that administratively secures remuneration for the authors, performers, and owners whose works are seamlessly digitised, uploaded, downloaded, copied, reproduced, adapted and disseminated online. This is so because the Act is outdated to deal with the Digital Age, while the CAB provides for private copying exceptions without accompanying compensation, and does not provide a comprehensive transparency obligation across the copyright holders' spectrum save for audiovisuals. [104] Digital copying and illegal downloads presents administrative and legislative enforcement challenges for the protection of works. Nwauche makes observations even around African copyright policy landscape, which he argues that is not currently leveraged for the benefit of creative industries because,

(i) there are high levels of infringement which inhibit revenue returns;
(ii) exceptions and limitations have not been fully operationalized and "require elaboration," limiting available source materials;
(iii) collecting societies are not always viable and thus revenue collection is limited; and

[101] S Asongu 'Software Piracy, Inequality and the Poor: Evidence from Africa' (2014) *Journal of Economic Studies,* 41(4) 526 – 553. See also Oduor (note 1 above) 514.
[102]World Economic Situation and Prospects (WESP). Prepared by the Development Policy and Analysis Division (DPAD) of the Department of Economic and Social Affairs of the United Nations Secretariat (UN/DESA). The statistical annex contains a set of data that the World Economic Situation and Prospects (WESP) employs to delineate trends in various dimensions of the world economy. 146. available at *https://www.un.org/en/development/desa/policy/wesp/wesp_current/2014wesp_country_classification.pdf.* accessed 17 August 2021.
[103]Reuters 'South Africa's unemployment rate reaches new record high in first quarter' *Reuters-Thompson* 1 June 2021. It reports that: 'South Africa's unemployment rate rose to a new record high of 32.6% in the first quarter of 2021 from 32.5% in the final quarter of 2020, the statistics agency said on Tuesday. The rate was the highest since the quarterly labour force survey began in 2008.'available at *https://www.reuters.com/article/safrica-economy-unemployment-idUSL2N2NJ0NV.* accessed 17 August 2021.
[104] MA Forere (note 52 above) 16.

(iv) the challenges and opportunities posed by the digital environment are not adequately provided for.'[105]

The challenges in the digital environment also include enforcement of private copying measures cannot be done without interfering with the constitutional right to freedom of expression,[106] privacy and dignity.[107] Already, the courts have affirmed that it may be impossible to enforce rights in the protected work effectively against all direct infringers recommending a practical remedy through acting against the device's distributor for secondary liability.[108] Based on the above problems, this work will consider the introduction of copyright levy to offset the problems of copying since TPMs have failed to protect authors/owners' remuneration online. Already, given such devastating effects digital systems have on remuneration patterns, authors/owners are clamouring for a copyright levy enactment.[109]

Part of the problem in getting the remuneration is the management of the affairs of the CMOs in South Africa. Thus, even assuming copying levy is imposed and remuneration is collected, the problem is when and how the copying revenue is distributed to the rightsholders.. The CMOs' management and distribution of royalties has attracted endless litigation around accountability mechanisms. To this end, their activities have been marred with controversy, misappropriation of funds and lack of transparency obligations in their management of royalties. Accordingly, this research will engage in the discussion to find a suitable transparency model without pressing undue burdensome work on the CMOs operations.

[105] E. Nwauche 'Intellectual property and creativity industries policy in Africa' in A.L.E. Brown and C. Waelde (eds) *Research Handbook on Intellectual Property and Creative Industries* (2018) 85–90

[106]See Laugh *It off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* 2006 (1) SA 144 (CC).

[107] Constitution of South Africa, s 14. The right to privacy is constitutionally entrenched in the South African Bill of Rights.

[108] Ibid at 914.

[109]Jonathan G. Shaw (note 9 above).It reported that, 'I've heard that many popular artists' music is ripped from digital media and made available to consumers sitting with older technology, typically in poorer socio-economic conditions. These consumers do not care less about the aspirations of companies and artists wishing to earn a living. If these consumers cannot afford the services, do they really affect the bottom line? From a policy perspective, a 'blank tape levy' or 'private copying levy' has been proposed for legislation since the mid-2000s, but has remained on the table. It may be too late to install a punitive measure to curb this kind of physical, personal piracy. It is an ethical concern that remains a fair debate.'

1.3 OBJECTIVES OF THE STUDY RESEARCH

In response to poverty among South African authors, which has been caused among others by unauthorised copying and clandestine performance of the collecting societies, the goal of this study is to propose changes in the legislative framework to ensure that authors/performers are properly remunerated. This overall goal shall be achieved through the two objectives as follows:

The first objective is to propose an income stream that will respond to the unabated and inescapable copying, and that income stream is a private copying levy.

The second objective is to recommend a framework for ensuring transparency in the collection and distribution of copying levy by the collecting societies.

1.4 RESEARCH QUESTIONS

The main questions addressed by the study are:

(i) What legal deficiencies exist in the copyright Act and the Copyright Amendment Bill impeding on the copyrightholders' right to fair compensation?
(ii) Is copying levy an appropriate approach to offset illegal copying?
(iii) What is the appropriate framework of copying levy that can be adopted in South Africa?
(iv) Which transparency framework can be adopted to ensure that the collecting societies discharge their mandate in a manner that brings trust among authors/performers without unduly burdening the collecting societies?

1.5 SIGNIFICANCE OF THE STUDY

In a study quantifying the contribution of copyright-based industries to the South African economy between the period 1970-2009, it was estimated that the sector contributed 4.1 per cent to GDP - more than the agricultural, food, beverages and tobacco sector with scholarly recommendations emerging around enacting effective copyright laws that promote the

investment of creative and innovative works.[110] The copyright industry also contributes 4.08 per cent to employment,[111] yet those that are supposed to benefit from this industry are continually pushed into abject poverty owing to authorised copying, absence of framework to determine adequate remuneration, alleged mismanagement and lack of transparency of the collecting societies. This study is important in that it seeks to contribute to the debate on how copyright law should adequately respond to digital technologies and provide a framework for compensating authors – by creating a fair balance between the interest of authors and end users. The fair use or fair dealing exceptions can operate conveniently with the introduction of the copyright levy. This study proposes fair compensation frameworks, accompanied by mechanisms to remunerate the authors/performers in South Africa.

Whereas the problems have been adequately identified by researchers before me, the solutions they have provided remain inadequate. The present research indeed does contribute to, and lead to further development of IPL and attendant regulatory mechanisms in South Africa to give Intellectual Property Rights (IPRs) efficient protection through an envisaged copyright levy that seeks to provide compensation for copyright holders from infringements. The study is useful for the legislature, creative content producers, the corporate sector, the judiciary, academics, and students.

1.6 LITERATURE REVIEW

Private copying levies often referred to as a – 'Blank tape levy'- have attracted the interest of various scholars across the globe. The existing literature on the levies is predominantly about its implementation within the European Union (EU), where it originated and contributed about 7% of the total copyright royalties in 2018.[112] Notwithstanding, Peukert writes that copyright levies remain that vital aspect of copyright law that have not received significant scholarly attention.[113] Moreso, there are hardly scholarly texts on copyright levies specifically addressing their relevance and impact on the African continent.

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[110]A Pouris & R Inglesi-Lotz 'The contribution of copyright-based industries to the South African economy' (2017) *South African Journal of Science*, 113(11-12), 1-7. Available at *https://dx.doi.org/10.17159/sajs.2017/20160286*. (Accessed 10 May 2023).
[111]P Anastassios & I Roula 'The Economic Contribution of Copyright-Based Industries in South Africa' (2011) *Department of Trade and Industry & World Intellectual Property Organization*. available at *https://www.thedti.gov.za/industrial_development/docs/ Economic_Contribution.pdf.* accessed 10 August 2021.
[112] C Peukert 'Copyright levies and cloud storage: Ex-ante policy evaluation with a field experiment' (2024) *Research Policy*, Vol. 53, Issue 2, 1, available *https://www.sciencedirect.com/science/article/pii/S0048733323002020*, accessed 18 January 2024.
[113] Ibid.

a.) Scholars' perspectives on the copyright levies and private copying

Copyright levies were first introduced in the 1960s because recordable cassettes, and later the Internet and digital devices facilitated end users to make private copies without compensating rightsholders'. The levies emerged as a statutory remedy, also in part because some acts of private copying could not be licensed for practical purposes by the copyright holders without inverting the right to privacy. The levies are therefore designed to compensate rightsholders for the harm caused by the reduced sales or lost licensing opportunities as a result of private copying. In South Africa, broadband networks and digital applications have extensively provided unrestrained access to online copyrighted works. Scholars write that copyright law uncertainty and delay in regulating technology provided opportunities for self-help efforts by end users.[114] As such, Depoorter writes that the, 'growing complexity and rate of technological innovation might call for a greater degree of regulatory governance in copyright law.'[115] Already, digital technologies have compounded the crisis with spending in music having declined by 10 per cent in 2014, 'making South Africa a dysfunctional market, in the international context.'[116] There are statistics showing that about 4 million songs are downloaded illegally each month in South Africa, worth R36 million monthly and R432 million annually.[117] This context is necessary to highlight the necessity for a copyright levy, and the relevance of related literature to help draw lessons for its implementation in the South African jurisdiction.

The copyright levy seeks to strike a balance between the rights of copyright holders and end users, by ensuring availability of content to the former and compensation to the latter to avert a market failure.[118] Statistics demonstrate growing Internet penetration and usage of digital technological devices particularly in some of Sub-Saharan Africa's commercial hubs, notably South Africa and Ghana respectively. In a study revealing the digital habits of people worldwide, South Africans emerged as the most insatiable Internet users, spending on average of at least 9.5 hours online per day in 2022, where 70 per cent of the population has

[114]B Depoorter *'Technology and Uncertainty: The Shaping Effect on Copyright Law'* (2009) 157 *U. PA. L. REV.* 1831 (2009) 1832.
[115] Ibid at 1838.
[116] N Matzukis *South African Music Law, Contracts and Business* 3 ed (2014) 198.
[117]Ibid at 199.
[118] S Karjiker 'Justifications for copyright: the economic justification' (2014)2 *IPLJ* 17.

Internet access.[119] The South African government objective to provide its population's universal web access by 2024 creating a digital surge makes this study on private copying levies relevant and important.[120]

There are growing scholarly contestations on the need for, and or reliability of private copying levies as a statutory compensation remedy to uncontrollable private copying. In South Africa, Matzukis' wide-ranging authoritative text - *South African Music Law, Contracts & Business* – makes a recommendation on the need to introduce private copying levy.[121] Matzukis underlined the emerging remuneration challenges faced by the rightsholders, particularly musicians in the digital era.[122] Similarly, Forere[123] and Dean[124] made related calls for a levy implementation to address the growing challenges impacting on rightsholders' remuneration in South Africa. Matzukis' comprehensive text importantly brings some informed perspective of how the Internet and digital devices interferes with authors' remuneration rights, particularly its accompanying downloads, file sharing, peer-2-per sharing, streaming, and uploads capabilities. While his text makes reference to the introduction of a copyright levy, it fails to get into details on how it can be implemented. Regardless, Matzuikis provides a broad overview of the music industry in the Digital Age, contracts, business and the effectiveness of CMOs in addressing the remuneration plight of authors.

Forere's contribution - *Keeping up with the developments in technology: A look into the music industry and the copyright laws in Southern Africa* – focuses on the impact of digital technologies on rightsholders' in South Africa, Botswana and Lesotho. It further examines how the music industry and the copyright laws in Southern Africa address the impact of technological developments on the user and content owners.[125] In the contribution, Forere finds that there have been some technological shifts in the exploitation of content by end users following the introduction of USB ports, webcasting, on-demand platforms and those consumers are shifting formats impacting on rightsholders' remuneration. She also

[119] Africanews 'Here is why South Africa is the most internet-addicted country in the world' *Africanews*, available *https://www.africanews.com/2023/07/18/here-is-why-south-africa-is-the-most-internet-addicted-country-in-the-world//*, accessed 18 January 2024.
[120] Ibid..
[121] Matzukis (note 116 above).
[122] Ibid.
[123] M A Forere (note 52 above) 89.
[124] O Dean 'Blank Media Levy to be revisited in South Africa? *Spoor & Fisher* Available at *https://www.spoor.com/en/News/blank-media-levy-to-be-revisited-in-south-africa*/ accessed 21 February 2021.
[125] M A Forere (note 83 above) 47.

considered whether the rights owners are entitled to compensation against private copy exception, and noted that unlike Botswana, South Africa did not provide a copyright levy. Given the continued exploitation of content online, and failure of TPMs to provide adequate protection, Forere proposes a copyright levy system arguing that,

> 'nothing is preventing the manufacturers or importers from passing the burden to the consumer by factoring the levy in the price. Nevertheless, one cannot overemphasise the importance of the levy system primarily because the advances of technology has rendered the reproduction rights of the copyright owners have become fruitless.'[126]

Dean in 2006 supported the copyright levy on blank CDs and cassette tapes in an attempt to control piracy and protect rights of musicians.[127] However, Dean did not provide the scope of how the levy could be implemented. In addition, his recommendation was relevant for the blank media such as CDs but new modes of consuming digital content have emerged. This explains why routine scholars' solutions to multifaceted digital problems are easily overtaken by new technological advances. Given the intricate nature of the Internet and digital technologies, it's problematic to proffer durable solutions where new technical variations always emerge overriding previous laws and solutions.[128] It is important that scholars like Matzuikis, Forere and Dean, have facilitated debate around the necessity for copying levy, which has been a dormant subject in domestic IP literature. This study is part of this digital engagement process.

b.) Transparency obligations

The collection and distribution of the copyright levies is done by Collective Management Organisations, (CMOs). The CMOs are authorised by copyright owners to monitor the use of their works, negotiate with end users, and provide requisite licenses against appropriate remuneration on the basis of a tariff system.[129] The CMOs are also responsible for the collection and distribution of the royalties to the rightsholders. A major problem for the

[126] Forere (note 83 above) 42.
[127] O Dean 'Blank Media Levy to be revisited in South Africa? *Spoor & Fisher* Available at *https://www.spoor.com/en/News/blank-media-levy-to-be-revisited-in-south-africa/* accessed 21 February 2021.
[128] Y L Shrayberg & K Y Volkova 'Features of Copyright Transformation in the Information Environment in the Age of Digitalization' (2021) *Sci. Tech. Inf. Proc. 48*, 30–37 (2021). available at *https://doi.org/10.3103/S014768822101007X*. accessed 13 May 2023. The writers emphasize that '… work on transforming copyrighting in the digital age continues, the balance of interests of society and copyright holders has not yet been achieved, and the rapid emergence of new technologies for the exchange and transmission of information poses new problems. The challenges posed by the coronavirus pandemic are also having an impact on the current discourse on open access to information and copyrighting in works.'
[129] M Ficsor *Collective Management of Copyright and Related Rights* (2002) 15-24. D O Oriakhogba *Copyright, Collective Management organisations and Competition in Africa* (2021).

authors' in South Africa is that the CMOs are not properly regulated, and are operating in secrecy, with occasional reports of misappropriation of royalties.[130] This study is aimed at safeguarding the copyright holders' remuneration interest through creating a workable transparency model.

Gilfillan presented a scholarly work on the roles, responsibilities and regulatory environment applicable to collection societies.[131] He posited that South African CMOs have been operating for almost fifty years and 'have for the most part done so in a private, unregulated and secret environment outside of the scrutiny of government or any other form of national oversight, and have done so as de facto monopolies.'[132] This observation dovetails with Forere's observations in her contribution on - *Reforming the Right to Remuneration in the South African Copyright Amendment Bill* – in which she painstakingly discusses the right of remuneration as provided for in the CAB, the challenges that authors/artists in South Africa face and provides solutions drawing lessons from the EU by assessing its Copyright Directive provisions that relate to salient fair remuneration rights in particular, the transparency obligations.[133] This is so because the right of remuneration for many South African authors and performers has been an illusion.[134] While Forere raised an important transparency model proposition for the CAB, the scope of her contribution was not limited to articulating and providing a detailed private copying levy to address the same remuneration challenges she raised and how transparent obligations will comprehensively operate around this new proposed revenue stream. In that study, Forere provides that the right to receive appropriate and proportionate remuneration is predicated on access to information regarding the use of the works in question and that transparency provisions facilitate the enjoyment of the right.[135] Furthermore, she highlights the relevance of Article 19 of the EU Copyright Directive, based on the brief justifications in Recitals 74, 75, 76 and 77 which provides for transparency obligations, before indicating that there is no equivalent of such a provision in the CAB except for audio-visuals. Transparency obligations are mandatory if the

[130] Dewald Van Rensburg & Ntombizodwa Makhoba 'Samro's rocky place' *News24 Business*, 23 September 2018, available at *https://www.news24.com/fin24/samros-rocky-place-20180923-2*, accessed 18 January 2024.
[131]G Gilfillan 'Clarifying the history, roles, responsibilities and regulatory environments concerning collection societies in South Africa Commentary motivated by "Report of the Meeting of the Deputy Minister Tobias-Pokolo with the music sector stakeholders 2010" with specific reference to Collecting Societies and to the need for intervention' (2010). Available at *http://nisaonline.com/wpcontent/Documents/collecting_societies_in_south_africa_as_of_13_sep_2010_-_d.pdf.* accessed 31 August 2021.
[132] Ibid.
[133] M A Forere (note 52 above) 1-7.
[134] Ibid. 7.
[135] Ibid. 15.

management and distribution of royalties are to avoid fraudulent suspicions that often create anxieties and tensions between stakeholders.

The latest text on CMOs in Africa, covering Nigeria, Kenya and South Africa by Oriakhogba discusses their operations and regulations from the perspectives of copyright and competition law in Africa without elaboration on copyright levies.[136] In this regard, Oriakhobga usefully provides statutory frameworks on how, using the Companies Act, King IV Report and existing copyright regulations South African CMOs transparency obligations could be improved, drawing comparable lessons from Nigeria and Kenya.[137] This study – using useful reference points proffered by Oriakhobga – further discusses and provides a delineated comprehensive transparency model statutory framework, with accompanying principles adopted beyond the African continent, including, inter alia, the WIPO Good Practice Toolkit for CMOs, and The International Federation of Reproduction Rights Organisations (IFRRO) good conduct practice. The approach is to create hybrid, salient transparency remunerations guidelines useful for this jurisdiction's implementation of a copyright levy. Oriakhobga however does not address private copying levies in the text.

Similar to Oriakhbobga's approach, Nzomo progressively provides an elaborate assessment of the CMOs in the same strategic African commercial hubs, namely Kenya, South Africa and Nigeria.[138] Nzomo opined that in the South African context, the laws governing the regulation of CMOs should require the latter to comply with accepted principles of good corporate governance.[139] Despite addressing CMOs aspects of good governance principles, Nzomo does not helpfully address the impact and implications of inadequate transparency provisions which are in part necessitating the collapse of CMOs. This despite Nzomo providing a comprehensive cocktail of mismanagement and administrative failures and remuneration leakages attributable to opaque CMOs management systems.[140].

[136]D O Oriakhogba *Copyright, Collective Management Organisations and Competition in Africa: Regulatory Perspectives from Nigeria, South Africa and Kenya*(2021) Juta.
[137] Ibid.
[138] V Nzomo 'Rethinking the Regulation of Collective Management Organisations in Africa: Legislative Lessons from Kenya, South Africa and Nigeria' (2016) *African Journal of Intellectual Property* Vol. 1, No. 1 15.
[139] Ibid at 15.
[140] Ibid at 2-3.

c.) Artificial Intelligence impact on copyright law and authors incentives

There is growing global literature on the Fourth Industrial Revolution, (4IR). In South Africa, several scholarly contributions have been produced on the same, particularly focusing on its impact on copyright law. Such literature also contributed towards current amendments to the Copyright Act, 1978, under the proposed Copyright Amendment Bill, 2017. Notable scholars around copyright law and 4IR include but are not limited to Forere;[141] Ncube;[142] Karjicker, Dean & Dyer;[143] Andanda;[144] Orikhogba;[145] Pistorius;[146] Schonwetter;[147] Chirwa [148] and Mwim.[149] While their contributions are important in stimulating debate and providing some understanding on the emerging 4IR exigencies, they understandably focus on chosen narrow aspects of copyright law impacted by digital developments. This is common and logical. Nonetheless, such contributions mainly through journals have laid a firm foundation for discussions around providing solutions to the AI tensions created by the 4IR. AI undermines authors' incentives, and there is need to regulate its technical capabilities by providing penalties for infringements and compensation for generation and use of creative works. AI invention, training and or use could be levied in accordance with statutory principles that safeguard authors' rights, and guarantee incentives in the event of proven exploitation of original works. Lately, no comprehensive South African authoritative text exits that provides

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[141] Forere (note 52 above); See also Forere (note 75 above), See also M A Forere 'Technology, Internet and the South African Copyright Amendment Bill: To Stifle or Enhance the Music Industry?' (Unpublished material, Accessed 21 May 2023).

[142] Among many others, see also: C Ncube, D Oriakhogba, I Ruten and T Schonwetter (ed.s) *Artificial Intelligence and the Law in Africa*, (2023) LexisNexis. See also D Chirwa & C B Ncube (ed.s) *The Internet, Development, Human Rights and the Law in Africa* (2023) Routledge; C B Ncube Science *Technology & Innovation and Intellectual Property: Leveraging Openness for Sustainable Development in Africa* (2021) Juta.

[143] Dean & Dyer *An introduction to Intellectual property Law*(2014).
See S Karjiker 'Fair use and artificial intelligence'*BusinessDay*, 8 January 2024, available at *https://www.businesslive.co.za/bd/opinion/2024-01-08-sadulla-karjiker-fair-use-and-artificial-intelligence/#google_vignette*, accessed 5 February 2025; See also Catrina Wessels 'The Copyright Amendment Bill: an interview with Sadulla Karijker' Litnet, 30 June 2017, Litnet, available at *https://www.litnet.co.za/copyright-amendment-bill-interview-sadulla-karjiker/*, accessed 5 February 2025.

[144] P Andanda 'Copyright law and online journalism: A South African perspective on fair use and reasonable media practice'(2016) *Queen Mary Journal of Intellectual Property*, Vol. 6. No. 4.

[145] C Ncube, D Oriakhogba, I Ruten and T Schonwetter (ed.s) *Artificial Intelligence and the Law in Africa*, (2023) LexisNexis. See also C B Ncube BE Reid & D O Oriakhogba(2020) 'Beyond the Marrakesh VIP Treaty: Typology of copyright access-enabling provisions for persons with disabilities' *The Journal of World Intellectual Property* 23 (3-4), 149-165; C B Ncube & D O Oriakhogba 'Monkey Selfie and Authorship in Copyright Law: The Nigerian and South African Perspectives' (2018) *PER / PELJ* 2018(21).. M Chirwa & DO Oriakhogba 'Access to the Internet as a Human Right' in DM Chirwa & CB Ncube (ed) *The Internet, Development, Human Rights and the Law in Africa* (2022) Routledge.

[146] Pistorisu and Mwim (note 21 above).

[147] C Ncube, D Oriakhogba, I Ruten and T Schonwetter (ed.s) *Artificial Intelligence and the Law in Africa*, (2023) LexisNexis.

[148]M Chirwa & DO Oriakhogba 'Access to the Internet as a Human Right' in DM Chirwa & CB Ncube (ed) *The Internet, Development, Human Rights and the Law in Africa* (2022) Routledge.

[149] Pistorius & Mwim (note 21 above).

relevant legal principles to be adopted arising from the impact of AI development on copyright law. Equally so, the courts are yet to handle AI related copyright infringement disputes.[150] Furthermore, there isn't clarity on the extent to which AI-generated content should be protected by existing copyright law in South Africa.[151] This also includes issues to do with authorship and ownership of copyright.[152] This contribution seeks to provide principles that should fill that gap, and this will entail providing a legal framework that recognises human skill and effort, and potential penalties relating to AI infringements. This is in line with Pistorius and Mwim recommendations on the evolution and adaptation of copyright law to digital technologies, in which they recommend a substantial effort at keeping up with technological advancement.[153] While the government has responded to the obsolete copyright Act by introducing the CAB, it still does not specifically provide for AI infringements. Khan and Gotora note that,

> 'the tremendous development of AI is posing multifarious challenges to copyright, including but not limited to image rights and moral rights i.e. the integrity of works. AI must be regulated to protect human creativity. Bearing this and the aforementioned foundations of copyright law in mind, it is evident that AI challenges the notions of authorship in copyright law.'[154]

Khan and Gotora have made a noteworthy contribution around articulating the direct challenges posed by AI to copyright law. The authors posit that it is arguable that the 'law must instead adapt and develop robust principles to navigate AI rather than outright reject its authorship status in respect of copyright,' and that, 'As AI systems autonomously generate works of art, literature and music, navigating the nuanced terrain of copyright law has become increasingly complex.'[155] They note the challenges around existing copyright law electing to only adjudicate upon the human authorship to the exclusion of works created solely by AI.[156] In this regard, they argue that existing South African laws 'are ill-equipped to deal with the inevitable challenges posed by AI, partly because the Act and the courts only

[150] Caitlin Stransky *A legal approach to whether AI generated content should be protected under copyright* (Upublished LLM thesis, University of the Witwatersrand, 2023)
[151] Ibid 16.
[152] Ibid 16.
[153] Pistorius & Mwim (note 21 above).
[154] R Khan & N Gotora 'One (innovation) flew over the law's head: The intersection of artificial intelligence and copyright'2023) *IPLJ* 75
[155] Ibid 80.
[156] Ibid 80.

refer to human persons, with little to no consideration of artificial persons.'[157] Understandly with limited research scope, the authors did not provide a comprehensive legal framework to delineate robust principles that could address the same challenges should they arise in future. Given the understandly narrow scope of their contribution, the authors could also not extensively deal with other copyright concerns relating to AI work joint ownership, AI created derivative works, and challenges around AI lack of attribution. However, their contribution provided compelling 4IR arguments and laid a foundation for debate around the AI copyright law challenges and contentious generated work ownership issues. Nevertheless, an opportunity still remains for South Africa to develop a comprehensive copyright legislative framework that addresses the same.

d.) Scholars' argument for and against the copyright levy

Substantial literature highlights the appropriateness of a private copying levy to offset the harmful effects of private copying. Nonetheless, some counter-arguments under economic, new licensing frameworks and business model considerations have been advanced against the implementation of the levy. Since the copyright levy was first introduced in Germany in 1965, the numbers of countries that are implementing it have grown to 75 across the world.[158] In Africa, there are now nine jurisdictions that have operationalised the copyright levy,[159] with Tanzania and Uganda having proposed legislation to give effect to the same.[160] This generally reflects the growing popularity of the levy on the continent.

The digital era is facilitating seamless reproductions of creative expressions protected by copyright, and the immediate challenge is rightsholders capacity to enforce copyright laws, control copying and distribution of their works. Olubiyi writes that, 'the income that accrues to copyright owners began to dwindle as more private persons had access to their work and were no longer interested in purchasing from the authors or copyright owners.'[161] The challenge with digital devices is that they can expeditiously reproduce exact huge

[157] Ibid 86.
[158] CopieFrance 'Private copying levy around the world' available at *https://www.copiefrance.fr/en/private-copying/private-copying-levy-around-the-world,* accessed 5 December 2023.
[159] CISAC *Private copying levy global study 2020* (2020) 3.
[160] See Joyous Edifonce 'Tanzania: MPs Commend New Copyright System' *Tanzania Daily News (Dar es Salaam),*22 September 2022, available at *https://allafrica.com/stories/202209220579.html,* accessed 4 December 2023*;* See Michael Wabugo 'Introducing a private copy levy can help Uganda's artistes' *The Observer*, 8 December 2021, available at *https://observer.ug/viewpoint/72112-introducing-a-private-copy-levy-can-help-uganda-s-artistes,* accessed 4 December 2023.
[161] I A Olubiyi 'Imposition of a copyright levy in Nigeria: legal justifications and comparative analysis' (2014) *Journal of Sustainable Development Law and Policy* Vol. 4 Iss. 1 (2014) 89-90.

quantities of creative works across digital platforms. Christie noted that monitoring and enforcing copyright against millions of infringing persons in their private homes is impractical and upsets the constitutional right to privacy.[162] With increased technological developments, private copying has become easier.[163] The question becomes how can the law respond to private copying driven by such technological advancements?

Various scholars converge on the point that with such digital reproduction capabilities, 'it seemed logical to impose levies on their digital surrogates in order to compensate rightsholders for losses incurred as a result of private copying.'[164] Such an approach has not been without criticisms from other scholars,[165] and the IT industry. An argument was advanced that the imposition of the levies on digital devices may go beyond the original purposes of the levy because the levies fail to account for the devices' other functionalities unrelated to copying. It has been argued that, 'a system of private copying levies that taxes digital reproduction equipment and media without taking into consideration their actual use may remunerate rightsholders for acts of copying unrelated to their creative work.'[166] To begin with, copyright levy is not a tax and this argument also misses that a levy on such digital devices is 'rough justice' operating on the presumption that it will be used for private copying, regardless of its multi-functionalities.[167] If its technical capabilities can store and distribute digital expressions, the copyright levy principle automatically applies.[168]

The copyright levy scholars' dissenting observations don't end there. Hugenholtz holds the view that the advent of DRMs systems and Technical Protection Measures (TPMs) make it increasingly possible to control how individuals use copyrighted works.[169] He opines that,

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[162] Ibid: See also A F. Christie 'Private Copying Licence and Levy Schemes: Resolving the Paradox of Civilian and Commonwealth Approaches'(2005) Intellectual Property Research Institute of Australia, (Occasional Paper No. 2/04) 4. See also *Gema v Grundig* (note 27 above) 492.
[163] M Kretschmer, 'Private Copying and Fair Compensation: An empirical study of copyright levies in Europe' (2011) *The UK Intellectual Property Office*, 2011 64. See also N W Netanel 'Impose a non-commercial use levy to allow free peer-to-peer file sharing' (2003) *Harv. JL Tech.,* 17 (2003) 1.
[164] F J C Blázquez 'Private Copying Levies at the Crossroads' in Susanne Nikoltchev (ed) RIS plus 2011-4, Who Pays for Private Copying? (2011) 8. See also J Reinbothe, 'Private Copying, Levies and DRMs against the Background of the EU Copyright Framework' (2003) Paper presented at DRM Levies Conference organised by Rightscom Ltd., Brussels, 8 September 2003.1; N W Netanel (note 141 above) 4.
[165] F J C Blazquez (note 164 above) 8.
[166] Ibid.
[167] T Koskinen-Olsson & N Lowe *Management of Copyright and Related Rights in the Field of Music* (2012) 77; EU InfoSoc Directive section 11.1.1.
[168] N W Netanel 'Impose a noncommercial use levy to allow free peer-to-peer file sharing'(2003) *Harvard Journal of Law & Technology* Vol. 17, Number 1 Fall 4.
[169] P B Hugenholtz *et al* 'The Future of Levies in a Digital Environment' (2003) 1.

> 'Rights holders and media distributors are now in a position to apply, and are increasingly using, such systems to identify content and authors, set forth permissible uses, establish prices according to the market valuation of a particular work, and grant licenses directly and automatically to individual users. Unlike levies, electronic copyright management systems make it possible to compensate right holders directly for the particular uses made of a work. Where such individual rights management is available there would appear to remain no need, and no justification, for mandatory levy systems.'[170]

Furthermore, Hugenholtz argues that this runs the risk of consumers paying twice for the same device where licensing frameworks exist. A similar argument is proffered by Oxera after conducting a research assessing the relevance and economic impact of copyright levies.[171] Oxera argued that even if the levies were to be withdrawn, they are unlikely to undercut to any noteworthy extent song writers incentives to produce music.[172] In fact, the research argues that copyright levies' are an inhibition to the growth of digital licensing and new business models.[173]

Such perspectives in literature fundamentally ignore the fact that double payments are outlawed under the copyright levy system. Levies provide scope for their reimbursements whenever they are unjustifiably imposed. Moreover, where licensing frameworks exist, levy payments are disallowed. Besides, TMPs have been constantly circumvented by new technology, and are not dependable for protecting works online. Visser, Mwim, Pistorius and Netanel in separate contributions highlight the vulnerabilities of TPMs as reliable technologies in protecting digital copyright content, given the growing processing capabilities of computer hardware and software.[174]

Karjiker opines that the principal economic justification for copyright protection is through creating provisions for economic incentives for rightsholders' to be innovative and create more copyrights.[175] This requires protection through the provision of property rights because market failure results from lack of innovation arising from deprived incentives to produce creating some disequilibrium in society. This arises because demotivating free-riding activities interfere with the free market economics of supply and demand that determine

[170] Ibid,
[171] Oxera *Is there a case for private copying levies. An economic impact analysis* (2011) 65.
[172] Ibid.
[173] Ibid.
[174] See C Visser 'Technological protection measures: South Africa goes overboard. Overbroad'(2006) *The Southern African Journal of Information and Communication* (SAJIC), 7, 55.. See also Pistorius & Mwim (note 21 above); See also N W Netanel (note 168 above) 10.
[175] S Karjiker (note 113 above) 29.

allocation of resources.[176] It is in this context that copyright levy is implemented, to secure rightholders' compensation in return for private copying of their works.

e.) Gaps in literature necessitating this study

Matzukis' wide-ranging authoritative text brings up remuneration challenges faced by the rightsholders' in the digital era.[177] Despite the text being useful in highlighting the complications facing rightholders' in securing their remuneration rights in the digital age, the author does not proffer any solution to the effects of private copying, apart from welcoming the introduction of CAB legislative interventions which he opines are still not adequate in addressing piracy and illegal downloads.[178] Notably, Matzukis makes reference to the introduction of a copyright levy in the text to address private copying challenges, but unfortunately fails to provide a detailed scope of the levy's potential practical statutory insights, into how it could be enacted or operationalised in South Africa. This study seeks to do just that.

Dean supports the implementation of a copying levy, but incorrectly links it to addressing piracy challenges.[179] Various literatures erroneously connect copyright levies to fighting piracy. Even some countries have used private copy levies mechanism as a compensation for the potential losses deriving from online piracy.[180] Such literature and approach by countries unfortunately runs against the ECJ court reasoning and resultantly 'blurs the difference between legal and illegal content and creates a contradiction: if pirated content is illegal it should be stopped, not remunerated**,** both things together are not possible.'[181] This study elaborates, delinks and makes a distinction between copyright levies and piracy. This shall help correct levy misinterpretations and evade the dangers of conflating levies with piracy, and remunerating rights-holders via the private copy mechanism using pirated proceeds. The danger in linking piracy to copyright levy is that inevitably, piracy will become a licit business formally remunerated through copyright levies. There is therefore

[176] Ibid at 28.
[177] N Matzukis (note 116 above).
[178] Ibid at 41.
[179]O Dean (note 127 above).
[180] Innword, copyright & the Internet 'Piracy and private copy levy: the European Court of Justice makes an important ruling' 10 April 2014, available at *https://radiobruxelleslibera.com/2014/04/10/piracy-and-private-copy-levy-the-european-court-of-justice-makes-an-important-ruling/,* accessed 18 January 2024. It reports that, 'In various countries (for instance Italy) the right-holders are lobbying the government to increase the levies on the grounds that their revenues are declining because of pirated content on the iNternet.'
[181] Ibid. See also *ACI Adam BV and Others v Stichting de Thuiskopie, Stichting Onderhandelingen Thuiskopie vergoeding* Case C-435/12.

need for a scholarly approach that clarifies and creates a legally acceptable basis for the levy's implementation. Notwithstanding, despite supporting the idea of a copyright levy, Dean did not provide the scope of how the levy could be implemented.[182]

Scholars' Poort,[183] Quintais,[184] Kretschmer,[185] Helberger and Hugenholt,[186] Guibault,[187] and Christie,[188] provide illuminating insights in their scholarly contributions on private copying levies. Their works are however confined to one region, the EU, without addressing the relevance and practicalities of the implementation of the private copying levies in Africa. This provokes the need for a study that focuses on the relevance and necessity for a bespoke copyright levy that conforms to African socio-economic realities without copying and pasting EU principles. This study seeks to primarily close that scholarly gap, and develop a durable practical copyright levy framework that suits the South African environment. Notwithstanding this fact, scholars have noted that in general there isn't much copyright law literature on private copying levies.[189]

Another important aspect of copyright levies is the research into the welfare of rightsholders'. South African rightsholders are dying indigent because of lack of remuneration, and lost sales as a result of private copying.[190] Peukert writes that despite the practical relevance of private copying levies, there is scant literature analysing their economic effects, save for the writings of Kretschmer,[191] Poort and Quintais,[192] and Legros and Ginsburgh.[193] Regardless, the aforementioned scholars' assessments are also confined to the

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[182] O Dean (note 127 above).

[183] J Poort 'Copyright Levies' in Ruth Towse, Christian Handke (eds) *Handbook of the Digital Creative Economy* (2013).

[184] J Poort & J P Quintais 'The Levy Runs Dry: A Legal and Economic Analysis of EU Private Copying Levies (2013) *JIPITEC* Vol. 4 (3) 2013;

[185] M Kretschmer (note 163 above).

[186] N Helberger & B P Hugenholtz 'No Place Like Home for Making a Copy: Private Copying in European Copyright Law and Consumer Law' (2007) *Berkeley Technology Law Journal*, 2007.

[187] P.Bernt Hugenholtz L Guibault & S Sjoerd van Geffen 'The Future of Levies in a Digital Environment' (2003) *Institute for Information Law Amsterdam.*.

[188] A F Christie 'Private Copying and Levy Schemes: Resolving the Paradox of Civilian and Common Law Approaches' (2004), available at *http://dx.doi.org/10.2139/ssrn.690521*, accessed 10 October 2023; K Gaita & A Christie 'Principle or Compromise?: Understanding the Original Thinking behind Statutory Licence and Levy Schemes for Private Copying' (2004) 4 *Intellectual Property Quarterly* 422-447.

[189] C Peukert (note 107 above).

[190] Matzukis (note 116 above) 198.

[191] M Kretschmer (note 163 above).

[192] J Poort & J P Quintais 'The levy runs dry: A legal and economic analysis of EU private copyright levies' (2013) *J. Intell. Prop. Info. Tech. Elec. Com*. L., 4 (2013), 205.

[193] P Legros & V A Ginsburgh 'The economics of copyright levies on hardware' (2013) *Rev. Econ. Res. Copyright Issues*, 10 (1) (2013), pp. 20-35.

EU region, whose circumstances are different from the plight of the majority rightsholders in this jurisdiction. This study seeks to fill this gap in part by articulating the significance of guaranteeing economic incentives for rightsholders in the South African economy where IP plays a significant role in employment creation and contribution to the GDP.[194] Besides, there are concerns around lack of academic work that aims to quantify societal welfare effects of copyright levy schemes.[195]

Gilfillan highlighted an important copyright law challenge in regulating CMOs and providing provisions that holds them accountable, and transparent in their management of royalties. Nonetheless, Gilfillan did not provide a comprehensive transparency model that could help address the accountability challenges and regulate the operations of CMOs. Regardless, he also noted that, 'there is a paucity of publicly available material addressing colleting societies in South Africa.'[196] Some of the available literature does not specifically address CMOs copyright levies administration, as a separate royalty stream. This study is another effort towards covering that wide scholarly paucity.

Notwithstanding Gillian's concerns, Forere however identified relevant EU Copyright Directive provisions that can insulate the interest of rightsholders' by facilitating the production of timeous records in the collection and distribution of royalties for to help stakeholder exercise their rights. [197] Transparency obligations are mandatory if the management and distribution of royalties are to avoid fraudulent suspicions that often create anxieties and tensions between stakeholders. Forere writes that transparency obligations are 'the cornerstone of the enjoyment of the right to appropriate and proportionate remuneration.' [198] There is a significant body of jurisprudence that can also be used to advance the transparency obligations that however Forere did not highlight in her contribution. This study seeks to explore further ways, through which the Constitution's right to access to information, the enabling legislation Promotion of Access to Information Act, 2000 (PAIA), common law, the Companies Act of 2008 could be used to advance the

[194] Copyright Amendment Bill: Memorandum on the objects of the Copyright Amendment Bill, available at *https://www.ivir.nl/publicaties/download/DRM&levies-report.pdf*, accessed 4 December 2023 59.
[195] In the non-academic literature, reports by consulting companies arrive at conflicting conclusions about the welfare effects of copyright levies on hardware devices (see e.g. Oxera, 2011; Compass Lexecon, 2012). In general, the review and discussion of non-academic studies in Kretschmer (2011) and Ghafele (2017) leads to the conclusion that the evidence base is not sufficient for guiding policy decisions.
[196] Ibid.
[197] M A Forere (note 52 above) 1-7.
[198]Ibid at 15.

transparency obligations. Regardless, there isn't specific scholarly literature on the African continent and South Africa in particular addressing transparency obligations specifically relating to the role and responsibilities of CMOs in administratively attending to such a complex copyright levy remuneration stream. The latest text on CMOs in Africa, covering Nigeria, Kenya and South Africa by Oriakhogba discusses their operations and regulations from the perspectives of copyright and competition law in Africa without elaborating on copyright levies.[199] This study – using useful reference points proffered by Oriakhobga – further discusses and provides a delineated comprehensive statutory framework, with accompanying transparency principles adopted beyond the African continent to create hybrid, salient transparency remunerations guidelines useful for this jurisdiction, albeit limited in scope to copyright levy management.

Furthermore, there is dearth of relevant African scholarly texts that can help develop private copying levy jurisprudence and assist in defining its framework and development in this jurisdiction. Only extensive reports providing statistical data without comparative scholarly analysis are largely available.[200] This disinterest can perhaps be explained in part because only nine out of 54 African countries have a private copying remuneration system and distribution mechanisms,[201] creating less appetite for scholarly literature on the same as opposed to the EU, where 26 of its 27 Member States have adopted private copying legislation.[202] This deficiency in literature might present judicial interpretation challenges should complex private copying levy disputes arise in African jurisdictions that have operationalised it, and in South Africa should it implement the levy as proposed in this study. The same however cannot be said of EU jurisdictions scholarly literature owing to the levy's phenomenal growth.[203]

This study seeks to draw lessons on how Ghana implemented the copyright levies. While Ghana's copyright law recognises the authors' remuneration right through the introduction of a copyright levy, there isn't a significant body of precedents, copyright law and levy literature.[204] This makes exploring Ghana's implementation of the copyright levy an unnerving task, given the absence of relevant texts and journals. Also in part, this explains

[199]D O Oriakhogba (note 136 above).
[200] CISAC (note 159 above).
[201] Ibid at 3.
[202] Ibid at 6.
[203]See T Synodinou, P Jougleux & C Markou et al *EU Internet Law in the Digital Single Market* (2021). See one of many scholarly contributions by eminent EU scholars: J Poort & J P Quintais (note 192 above) para 1.
[204]Ibid at 66.

why scholarly studies by Kow Abekah-Wonkyi on Ghana's regulatory models for copyright protection of online musical works and arguing whether it should follow the EU approach are considered ground-breaking.[205] Abekah-Wonkyi unfortunately doesn't focus on Ghana's copyright levy, though he makes reference to how the operations of digitized platforms contribute to the unlawful access to copyrighted works, addressing the ambiguities in the copyright laws and how they impede on the full realisation of music copyright owners rights. In general, copyright issues have reportedly 'received relatively little attention in academic literature' in Ghana.[206] This study will perhaps help stimulate interest and discussion of the relevant topics that haven't received significant scholarly interrogation.

This study's additional challenge is that South African scholars acknowledge that 'there is no literature on the Copyright Amendment Bill focusing on remuneration' other than 'anecdotal publications.'[207] Research without the benefit of other scholarly material can be an overwhelming exercise. However, this existential gap in literature makes this research important because it is complementing little research available on remuneration. This study seeks to contribute broadly to copyright levies streams of literature on this vastly understudied subject on the African continent. This will help add to the growing literature on the regulation of copyright levies in Africa, CMOs, and digital markets.

1.7 THEORETICAL FRAMEWORK

Proponents of utilitarianism support the creation of Intellectual Property Rights (IPRs) to nurture innovation, and that they should be accompanied by a limited duration in exclusive rights to balance the interests of society between creators and end users.[208] Intellectual property is increasing in global capital and influence in particular with digital technologies, raising the attention of innovation and economic incentives. As such utilitarianism has been consistently applied to the protection of technological inventions, in return that authors are guaranteed economic incentives to spur innovation.[209] Karjiker opines that the utilitarian scope for copyright is its economic justification based on the premise that in the absence of

[205]Abekah-Wonkyi Kow *Regulatory Models for Copyright Protection of Online Musical Works: Should Ghana follow the EU Approach?* (Unpublished LLM thesis, University of Windsor, 2022).
[206]P Adusei, K Anyimadu-Antwi & N Halm 'Ghana' in C Armstrong et al (eds) *Access to knowledge in Africa: The role of copyright* (2010).
[207] Forere (note 52 above) 11.
[208] P S Menel 'Intellectual property: General theories' in Peter S Menel B Bouckaert & G de Geest *Encyclopedia of Law and Economics* (2000) 129.
[209] Ibid at 130.

limited copyright protection, 'authors will not be able to realise a sufficient return on their creations to incentivise them to create copyright works at the socially desirable level. The reason for this is the intangible nature of copyright works, which have a public-good quality, creates positive externalities and results in free-riding activities.'[210]

Copyright law has been considerably influenced by the utilitarian justification for the protection of works.[211] This has shaped its evolution particularly in Anglo-American jurisdictions where it has been entrenched within constitutional foundations cementing copyright and patent creations under the ambit of property rights.[212] The United States, (U.S) which is historically a beneficiary of European utilitarianism spread has the 'most famous distillation of the utilitarian defense … which protects intellectual property because – and insofar as – it "promot[es] the progress of Science and useful Arts."'[213] Within the EU and Germany in particular, there is a strong inclination towards utilitarian copyright approach geared towards incentivising authors.[214] The main body of the European Copyright Directives and their Recital 20 equally demonstrate some disposition towards a utilitarian posture with a provision for authors' incentives in line with market forces.[215] The utilitarian justification provides that the collective administration of copyright should strike a balance between authors and end users respective rights and interests to maximise on our wellbeing. Utilitarianism conceptual frameworks are applicable and relevant to achieving and sustaining such a delicate equilibrium, which approach is relevant to this study.[216]

The main thrust of this research is to draft and propose innovative guidelines towards the adoption and implementation of a copyright levy to provide adequate compensation for rightsholders' whose works are being unlawfully reproduced and disseminated by digital devices. The levy must therefore have utilitarian features that balance the interests of authors

[210]S Karjiker (note 118 above) 20.
[211] Ibid at 14.
[212]Ibid.
[213]G Bhatia 'Fair Use, the Three-Step Test, and Access to Knowledge: A Doctrinal, Rights-Based Approach' (2015) 3 available at *SSRN: https://ssrn.com/abstract=2634314* or *http://dx.doi.org/10.2139/ssrn.2634314* accessed 11 May 2023. See also United States Constitution: Article I, Section 8, Clause 8: [The Congress shall have Power . . .] 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. See also *Eldred v. Ashcroft*, 537 U.S. 186, 268 (2003).
[214] R Giblin 'A New Copyright Bargain: Reclaiming Lost Culture and Getting Authors Paid' (2018), 41 *Colum. J.L. & Arts* 369, 373.
[215] M Canellopoulou-Bottis 'Utilitarianism v. Deontology: A Philosophy for Copyright' (2018) A paper initially presented at the IP Colloquium of the Center for Intellectual Property of the Antonin Scalia School of Law, George Mason University, in May 30, 2018, at Hilton Head Island. Also available at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3298655* accessed 14 May 2023 21.
[216] S Blackbum *Oxford Dictionary of Philosophy* (1994).

and end users to promote the progress of science, with guaranteed economic incentives to cultivate the authors' innovative spirit. Safeguarding copyright holders remuneration interest is important because South Africa already is signatory to various international treaties, including the Berne Convention which obliges this jurisdiction to give recognition and protection to copyright works. The Berne Convention's three-step test which carries utilitarian private and public interest balancing features automatically becomes relevant to this study's philosophical framework.[217] In its general form, the three-step test provision was provided as a benchmark against which limitations and exceptions emerging in national legislations must be measured. It provides that,

> '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.'[218]

The fusion of utilitarianism concepts in international treaties arises in the Berne convention's natural law theoretical approach, while the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement)[219] simply buttresses rights of authors. As Senftleben observes, 'the utilitarian incentive concept [in the TRIPS; Berne Convention; WIPO copyright treaty] are thus intermingled. The three-step test is an amalgam of different considerations undergirding copyright protection with utilitarian features.'[220]

From the foregoing, South Africa by virtue of being a signatory to both treaties is thus obliged to account for these utilitarian concepts in its domestic copyright law regime. Therefore, the proposed copyright levy must not override, but fulfil the treaty obligations. This is important because South Africa has a private copying exception without a remuneration system. This tilts the economic incentive balance against authors in favour of end users and fails to conform to the three-step test given its prejudicial deprivation of author's compensation. Moreso, it prejudicially interferes with the normal exploitation of works stifling innovation.

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[217] M Senftleben *Copyright, limitations and the three-step test – An analysis of the three-step test in international and EC copyright law* (2004) 17.
[218] Berne Convention, art. 9(2); See also TRIPs Agreement, art. 13.
[219] See World Trade Organisation (WTO) - The TRIPS Agreement came into effect on 1 January 1995. available at *https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm*. accessed 5 July 2023.
[220] M Senftleben (note 217 above) 17. See also Tobias Schönwetter *Safeguarding a fair copyright balance - contemporary challenges in a changing world: Lessons to be learnt from a developing country perspective* (Unpublished LLM thesis, University of Cape Town, 2009) 39.

Utilitarianism theoretical framework is proposed in this study against a background of a proposed copyright levy to help facilitate South African copyrigtholders' realisation of their remuneration right and in part help this jurisdiction conform to international treaties. The advent of the Internet and digital devices has excessively interfered with economic incentives for rightholders through private copying, downloads, file sharing, P2P sharing among other complex digital reproductions and dissemination of works. It is submitted that a utilitarian approach that recognises the IPRs of owners with the exploitation interest of end users is important to promote innovation. Invariably, there are always economic power dynamics at play as copyright law seeks to strike a delicate balance between the various interests. As is always the case, the resulting system of copyright protection always cultivates the motivating power of economic incentives. Senftleben posit that,

> 'The promise of monetary rewards is offered to the creators of literary and artistic works as a bait to encourage their intellectual productivity. Copyright is perceived as an 'engine of free expression'. A marketable right is conferred to ensure a sufficient supply of disseminated knowledge and information. The market place underpinning, however, merely justifies rights strong enough to induce the desired production of intellectual works. Therefore, the exclusive rights of authors are regarded as granted prerogatives which deserve positive legal enactment.'[221]

Utilitarianism which assumes such economic justifications was first propounded by Jeremy Bentham – who is credited with developing its first account and his student John Stuart Mill.[222] Bentham held that there is need for society to maximise the good and bring about the greatest amount of good for the greatest number of people.[223] Bentham further justified IPRs by providing an illuminating distinction between innovators and imitators, creating a utilitarian theory of an 'incentive to create' noting that 'he who has no hope that he shall reap, will not take trouble to sow.'[224] This can be related to the copyright law and digital era complex relationship whose tensions this study seeks to address. Bentham added that,

> '[T]hat which one man has invented, all the world can imitate. Without the assistance of the laws, the inventor would almost always be driven out of the market by his rival, who finding

[221] Senftleben (note 217 above) 7.
[222] See also H L A Hart *Essays on Bentham: Jurisprudence and Political Philosophy* (1982) Available at *https://doi.org/10.1093/acprof:oso/9780198254683.001.0001* accessed 13 May 2023.
[223] B Duignan & J P Plamenatz 'Jeremy Bentham' (2021) *Encyclopaedia Britannica*, 5 May 2023 available at https://www.britannica.com/b iography/Jeremy-Bentham. accessed 6 April 2021.
[224] Bentham (1839) 31 quoted in G B Ramello 'Intellectual Property and the Markets of Ideas' (2005) *Review of Network Economics* Vol.4, Issue 2 – June 2005 161.

himself, without any expense, in possession of a discovery which has cost the inventor much time and expense, would be able to deprive him of all his deserved advantages, by selling at a lower price.'[225]

This free-riding activity common in the digital era often results in market failure. Therefore a need arises to strike a utilitarian balance between authors and end users for the benefit of society to achieve the common good, and/or increase happiness or utility.[226] Theoretically, utilitarianism advances the notion that 'authors or creators of works should be rewarded enough so that they can invest more time in producing works for public good.'[227] Mossoff takes the same approach in that copyright should support necessary incentives for the creation of works.[228] Consequently, without such envisaged economic incentives authors' capacity for creativity innovation is muted and end users suffer. Already, the internet has impacted negatively on the rights of authors through the seamless unlawful reproduction and dissemination of their work. There is little reward or nothing in some instances for the authors owing to such ubiquitous digital infringement patterns hence current attempts at amending the existing Copyright Act.[229] Forere writes that taking away authors' remuneration right is,

'against the spirit of copyright law, which is embedded in the economic/utilitarian theory of copyright protection which postulates that authors or creators of works should be rewarded enough so that they can invest more time in producing works for public good. Note that even natural law theorists have an objective to reward the author. Therefore, whether argued from the point of utilitarianism or naturalist theory, the common denominator for copyright is to reward or incentivize the creator.'[230]

Utilitarianism has some both moral and economic justification considerations. Karjiker posits that the economic analysis of law is sometimes rooted in utilitarian theory, with neo-classical

[225] Ibid.
[226]Ibid.
[227]MA Forere (note 52 above) 5. Qouting as well E Chua 'Fan Fiction and Copyright; Mutually Exclusive, Coexist-able or Something Else - Considering Fan Fiction in Relation to the Economic/Utilitarian Theory of Copyright' (2007) *eLaw Journal 14, No*. 2 (2007) 215.
[228] A Mossoff 'How Copyright Drives Innovation: A Case Study of Scholarly Publishing in the Digital World' (2015) *MICH. ST. L. REV. George Mason Law & Economics Research Paper* No. 13-25955 956-7.
[229]See B Klaus., S Flynn., and M A. Forere *et al* 'Copyright Reform in South Africa: Two Joint Academic Opinions on the Copyright Amendment Bill [B13B-2017] (2022) *PELJ* 25(1), 1-45 available at *https://dx.doi.org/10.17159/1727-3781/2022/v25i0a13880,* accessed 11 May 2023.
[230] M A Forere 'Technology, Internet and the South African Copyright Amendment Bill: To Stifle or Enhance the Music Industry?' (Unpublished material, Accessed 21 May 2023) 5.

economics similarly having foundation in the same moral and political philosophy which gave rise to utilitarianism.[231] Karijiker opines that,

> 'economic justification for copyright is based on the premise that in the absence of such protection authors will not be able to realise a sufficient return on their creations to incentivise them to create copyright works at the socially desirable level. The reason for this is the intangible nature of copyright works, which have a public-good quality, creates positive externalities and results in free-riding activities.'[232]

The principal justifications for copyright law are therefore the economic considerations that this research will grapple with to ensure that the current copyright legislative reforms do not disincentivise authors. This is important because the Internet has had implications on the capacity of authors to realise income from their works coupled with South Africa's ineffectual copyright law. The CAB seeks to promote the compulsory economic incentive through protecting and guaranteeing the authors right of remuneration while ensuring a proper balance with public interest.[233] While the CAB progressively reinforced the remuneration right, it omitted protecting authors against the vulnerabilities created by the private copying exceptions unaccompanied by corollary statutory compensation frameworks. Ramello writes that, 'A strong awareness of the problem of free-riding and its negative effects on the remuneration of creators prompted Bentham to openly side with an institution that provides an incentive for creative activities.'[234] In this regard, a statutory framework and institution that creates incentives for authors must be designed.

However, other scholars such as Plant have questioned the need for copyright protection on utilitarian grounds arguing that being first in the market, the desire of authors to have their works and ideas widely distributed provide adequate rewards for the production of literary works without the need for copyright protection.[235] Mass recognition of work without corollary economic incentive is retrogressive and demotivating. This where Plant missed the substance of utilitarianism because mass availability without adequate compensation frameworks for authors distorts the supply and demand market forces. Products become

[231] Kajicker (note 118 above) 21.
[232] Ibid.
[233] Forere (note 230 above) 20. See also Sections' 6A and 7A of the copyright amendment Bill guarantees the remuneration right of the author of literary and musical works, and visual artistic works respectively to receive royalties in respect of exploitation of the work.
[234] G B Ramello 'Intellectual Property and the Markets of Ideas' (2005) *Review of Network Economics* Vol.4 Issue 2 161.
[235] A Plant 'The Economic Theory Concerning Patents for Inventions' (1934) *Economica*, Vol. 1. 30–51.

unavailable and demand disappears. The utilitarian justification of copyright protection is, thus, premised on the fact that the copyright works are beneficial to society and their production should be encouraged as long as compensation frameworks are provided, not discouraged.[236] Karjiker opines that,

> 'The principal economic justification for copyright protection is to provide authors with the necessary incentives to create copyright works. Such incentives are necessary because in the absence of copyright protection authors, or a significant number of them, will not create copyright works (or create them in insufficient numbers) due to the public-good nature of such works. The reason for authors' unwillingness to create such works is the ease with which others are able to benefit from the efforts of authors, at the expense of authors. Protection, through the provision of property rights, is thus required to rectify this market failure because these works are considered to be socially beneficial and, therefore, their production should be encouraged.'[237]

Other commentators following the Plant's theoretical pathway are also critical of copyright protection arguing that it is costly because the public-good nature of copyright works means that they can be enjoyed by others without diminution of enjoyment at no extra cost.[238] Incentives for authors are therefore seen as an unnecessary societal burden. Copyright is, as the British historian Thomas Macaulay said in 1841 'a tax on readers for the purpose of giving a bounty to writers.'[239] Macaulay added, 'the tax is an exceedingly bad one; it is a tax on one of the most innocent and most salutary of human pleasures.'[240] The distinction between tax and incentives appears thin, if interpreted using the philosophical lens of Sprigman who opines that:

> 'I would put it even more directly. Copyright is a tax on learning. It is a tax on culture. It is a tax on speech. And this tax is more than an inconvenience. It is a barrier to those who cannot, or will not, pay it. By pricing some people out of art and literature they would otherwise consume, copyright can impede the spread of learning and culture.'[241]

However, it is submitted that this theoretical premise is counter-productive and will only militate against content creation, creativity and technological innovations as it is blind to

[236] Karjiker (note 118 above) 42.
[237] Ibid.
[238] E C Hettinger 'Justifying intellectual property' (1989) 18 *Philosophy and Public Affairs* 31 47.
[239] See Thomas Macaulay, Speech to the House of Commons (Feb. 5, 1841).
[240] Ibid.
[241] C Sprigman 'Copyright and Creative Incentives: What We Know (and Don't)' (2018*) Hous. L. Rev*. 451 (2017-2018) 455.

incentives as motivating factors that can only spur mankind towards increasing human happiness through creation of more works that are inspiring. Often such effective works reduce the burden of hard work through production of innovative technologically friendly gadgets. Plant's theory is also oblivious of the constitutionally guaranteed provisions that provide the right to work and safe labour practices,[242] and to provide labour in return for remuneration,[243] which has its origin in a person's right to existence.[244] This study is framed around the impact of current digital developments in which copyright works are copied without adequate compensatory frameworks which have already spawned immense criticisms from musicians and the legislatures. Famous United Kingdom musician Nile Rigers commented that,

> 'The fact is the system is unfair. Artists and writers are not remunerated properly or equally. They do not get their fair share of the pie. To fix this we need to have transparency and artists should be paid on a licence, not a sale. Alongside this songwriters should be getting a much bigger share as they are delivering the key ingredient. We don't even know what a stream is worth and there's no way you could even find out what a stream is worth, and that's not the basis for a satisfactory relationship.'[245]

If streaming can impoverish and not provide necessary economic incentives for authors to be innovative then such platforms as YouTube, Spotify and Apple are operating against the dictates of utilitarianism.[246] This is so because artists like Nile Rogers and other South African musicians in a similar predicament, should generate sufficient incentives from their work in promotion of the public good to prevent underproduction of creative material.[247] Regardless, utilitarianism and its economic and moral justifications has surpassed varying historical epochs in history and its relevance to date is firmly entrenched in global

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[242] See case of *Gcaba v Minister for Safety and Security and Others* 2010 (1) SA 238 (CC).
[243] See *Schlapilis v Missewitz* 1904 TS 174 178. See also *Amalungelo Workers' Union and Others v Philip Morris South Africa (Pty) Limited and Another* [2019] ZACC 45.
[244] M Conradie 'The constitutional right to fair labour practices: a consideration of the influence and continued importance of the historical regulation of (UN) fair labour practices pre-1977' (2016) *Fundamina 22*(2), 163-204 available at *https://dx.doi.org/10.17159/2411-7870/2016/v22n2a1* accessed 29 July 2021. 'It is safe to state that the right to work - to provide labour in return for remuneration - has its origin in a person's right to existence. A person's right to physical and emotional existence is probably the most fundamental of all human rights.'
[245]Lanre Bakare 'The music streaming debate: what the artists, songwriters and industry insiders say' *The Guardian*, 10 April 2021 available at *https://www.theguardian.com/music/2021/apr/10/music-streaming-debate-what-songwriter-artist-and-industry-insider-say-publication-parliamentary-repor*t. accessed 16 June 2023.
[246]M A Forere (note 230 above).
[247] Ibid.

constitutions,[248] which still find relevance in balancing the interests of copyright stakeholders to maintain societal equilibrium in the interest of promoting access to works in return for guaranteed economic incentives to spur innovations.

1.8 RESEARCH METHODOLOGY

This research relies essentially on desk review of the relevant literature on a vast array of emerging issues under discussion. To that aim books, scientific journals, research papers, reports and electronic sources will be reviewed. Primary sources will focus on international covenants, particularly the Berne Convention, Geneva Conventions, and WTO related treaties that shape the global IPL framework. South Africa's IPL as the relevant focus of study will be examined in detail, in particular the Copyright Act and the Copyright Amendment Bill and examine their compatibility with the Internet and digital technology developments. Furthermore, both domestic and international precedents relevant to the implementation of copyright levies will be discussed to help develop applicable principles in this jurisdiction. Case law will help illuminate emerging issues from the impact of the Internet and digital technologies on copyright law, and how the salient fair compensation principles, regulation of Collective Management Organisations (CMOs) and transparent obligations were addressed.

This study in part seeks to explore and draw global lessons from jurisdictions that have effectively operationalised the private copying levy by creating a resilient statutory foundation that is supplemented by robust principles. As such, drawing lessons from the European Union (EU) and Ghana is vital and relevant in identifying emerging identical durable principles that inform effective operationalisation of the levy. Both jurisdictions emanate from different geographical regions with distinct traditions, economies, history and demographics. Any resilient principle applicable in both jurisdictions will only be relevant to South Africa if tested against existing domestic relevant law, national intellectual property rights policies and economic considerations.

Applying tried and tested principles to South Africa is important partly because of the global harmonisation of Intellectual Property (IP) laws. Relevant and applicable principles emerging out of both the EU and Ghana's implementation of the levy will be considered and applied to suit South African domestic environment promoting uniformity, certainty and coherence in the global administration of copyright law. Many treaties such as the Berne

[248] Article 14 of the Germany Basic Law. See also The Schoolbook Case (1971) 31 BverfGE 229. (Decision of the German Federal Constitutional Court).

Convention,[249] WIPO Copyright Treaty (WCT),[250] WIPO Performances and Phonograms Treaty, (WPPT), and the TRIPS Agreement encourage reasonably coherent protection of copyright, also setting minimum standards for protection.[251] Importantly, the EU and Ghana are contracting parties to the international treaties, with South Africa still considering acceding to the same.[252] Incorporating existing international harmonised copyright law framework will help develop a hybrid South African domestic copyright law as the emerging legislative system would be an integration of applicable global principles helping to formulate a delineated private copying levy.

Lessons from both the EU and Ghana levy systems will also help to fashion domestic institutional arrangements and policies that promote IP growth through innovations and remuneration systems for authors. Moreover, given the diverse backgrounds of jurisdictions used for comparable purposes, this approach helps to illustrate similarities and disparities in the developed and emerging economies in the management of IP innovation systems, also assisting in the identification of existing copyright legislative gaps thus drawing practical and relevant principles to South Africa. IP scholars have noted that legal comparative analysis,

> 'has become even more fundamental in recent decades because of the further integration of legal systems due to the process of globalization of trade and the fast-evolving worldwide technological developments. As a result of this economic and technological integration, different legal traditions have consequently converged to an unprecedented level.'[253]

The EU approach to harmonising IP law has also witnessed a fusion of common law and civil law whose relationship of late has become increasingly blurred. South Africa's approach to copyright law dispute resolution involves the application of both common law and statutes.[254] Calboli writes that IP laws today are a combination of statutes and judicial precedents, which despite some differences make comparative legal analysis a very relevant methodology to

[249] See Berne Convention, Art. 2(1).
[250]WIPO World Copyright Treaty, Art. 10 incorporate the three-step test to determine limitations and exceptions, as provided for in Art. 9(2) of the Berne Convention.
[251] See TRIPS Agreement Art. 1(3).
[252]European Commission 'Africa IP SME Helpdesk' (2020) 28-29 Available at *https://intellectual-property-helpdesk.ec.europa.eu/system/files/2021-10/IP%20GHANA%20Fiche%20FINAL.pdf*. (Accessed 5 May 2023). See also Department of Trade & Industry 'Accession to world intellectual property organization treaties: A presentation to the Select Committee on Trade and International Relations' (2019) 26 March 2019 available at *http://www.thedtic.gov.za/wp-content/uploads/WIPO.pdf*. accessed 5 May 2023.
[253] I Calboli 'Comparative Legal Analysis and Intellectual Property Law: A Guide for Research' in Irene Calboli, & Maria Lillà Montagnani (eds) *Handbook of Intellectual Property Research: Lenses, Methods, and Perspectives* (2021) available at *https://academic.oup.com/book/41122/chapter/350438528*. accessed 5 May 2023.
[254] *Moneyweb (Pty) Limited v Media 24 Limited and Another* 2016 (4) SA 591 (GJ) para 3 – 9.

analyse both the similarities and differences of national laws.[255] While some focus will be made on jurisdictions within the EU, this research also seeks to draw lessons from an African developing country such as Ghana carrying approximately the same historical, socio-economic and political commonalities. Scholars mostly agree that the relevance of comparative legal analysis goes beyond the understanding of legal systems and extends to economics, and political science.[256] As a result, the EU and Ghana lessons shall help to systematically combine and contrast 'outside' and 'inside' Africa perspectives.[257]

1.8.1 The European Union

Several considerations qualify making the EU a good reference point and representative of other countries outside of Africa for comparative analysis and assisting in drawing lessons in this jurisdiction's proposed implementation of the levy. The EU is leading the world in the implementation of a copyright levy system delivering significant revenue to authors' and rightholders.[258] Whereas the private copying levies accounted for over a billion euros in revenues for rights holders around the world in 2018, the EU accounted for 90 per cent of those collections.[259] This makes the EU by far the largest global source of private copying income, with Germany and France being the largest contributors with collectively over $675 million total collections.[260] Intellectual property within the EU creates wealth and jobs accounting for about 39 per cent of total regional economic activity worth some €4.7 trillion annually.[261] In the same vein, about 30 per cent of all regional employment amounting to 56 million jobs is directly linked to intellectual property industries.[262] The EU IP industry has also helped combat EU recessionary pressures.[263] Given the predicted potential recessionary pressures within South Africa,[264] and huge unemployment rate,[265] it is recommended that the

[255] Ibid.
[256] Calboli (note 159 above).
[257] M Basedau 'Rethinking African Studies: Four Challenges and the Case for Comparative African Studies' (2020) *Africa Spectrum* 2020, Vol. 55(2) 194.
[258] CISAC (note 159 above) 8.
[259] Ibid.
[260] Ibid.
[261]European Patent Office and Office for Harmonization in the Internal Market 'Intellectual property rights intensive industries: contribution to economic performance and employment in the European Union' (2013) Industry-Level Analysis Report, September 2013, available at *https://euipo.europa.eu/ohimportal/en/*. accessed 29 April 2023.
[262] Ibid.
[263] European Union Intellectual Property Law Office 'Contribution of intellectual property rights intensive industries in the European Union' Observatory on infringements of intellectual property rights, 5 May 2023. available at *https://euipo.europa.eu/ohimportal/en/web/observatory/ip-contribution*. accessed 5 May 2023.
[264] Bloomberg 'South Africa has a 45% chance of a recession in 2023: economists' *Daily Maverick*, 16 January 2023. available at *https://www.dailymaverick.co.za/article/2023-01-16-south-africa-has-a-45-chance-of-a-recession-in-2023-economists/*. accessed 15 February 2023.

country expedite through the CAB redressing the copyright remuneration challenges brought by the Digital Age to incentive authors and stimulate innovation for economic growth. Moreover, the EU copyright levies have significantly supported creative industries with the EU parliament reporting that the sum total of private copying levies collected in 23 of the 28 Member States more than tripled since the harmonised Copyright Directive 2001/29/EC came into force.[266]Historically, the private copying levy and its principles were initially fashioned out within the EU region before spreading across the globe.[267] While wholesale adoption of the EU copyright levy framework ought to be avoided given vast socio- economic, legal policy framework differences, lessons that informed its robust and effective implementation remain important reference points in this jurisdiction. The utilitarianism philosophy underpinning this study was initiated within the EU which laid the basis for its growth, supporting economic incentives for authors to spur innovations.[268] It later permeated the thrust of various copyright law global jurisdictions, including South Africa.[269] From a theoretical standpoint, it's important for this study to be informed by the historical foundation that laid the basis for, and nurtured utilitarianism growth. The EU's persuasive Copyright Directives drafted in the early 2000s to help in part facilitate the implementation of the copyright levy are effective and discernible in various jurisprudence across Africa[270] and beyond.[271] The EU has a rich Intellectual Property Law (IPL) jurisprudence and most of its Member States have harmonised and operationalised the copyright levy with established

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[265] Trading economics 'South Africa Unemployment Rate' *Tradingeconomics.com.* 15 February 2023 Available at *https://tradingeconomics.com/south-africa/unemployment-rate#:~:text=In%20the%20long%2Dterm%2C%20the,according%20to%20our%20econometric%20models.* accessed 15 February 2023. It reports that, 'South Africa's unemployment rate was at 32.9% in the third quarter of 2022, down from 33.9% in the prior period and below market estimates of 33.4%.'

[266] EU Committee on Legal Affairs 'On private copying levies' Motion for the European Parliament Resolution, 17 February, 2014. available at *https://www.europarl.europa.eu/doceo/document/A-7-2014-0114_EN.html.* accessed 1 June 2022.

[267] K Gaita & A Christie 'Principle or Compromise?: Understanding the Original Thinking behind Statutory Licence and Levy Schemes for Private Copying' (2004) 4 *Intellectual Property Quarterly* 422-447.

[268]M Bottis 'Utilitarianism v. deontology: a philosophy for copyright' (2018) 10. A paper presented at the IP Colloquium of the Center for Intellectual Property of the Antonin Scalia School of Law, George Mason University. available at *SSRN: https://ssrn.com/abstract=3298655* or *http://dx.doi.org/10.2139/ssrn.3298655.* accessed 24 September 2022.

[269]C Knight 'Theories of distributive justice and post-apartheid South Africa' (2014) *Politikon,* 41(1) 2. available at *http://eprints.gla.ac.uk/92559/1/92559.pdf.* accessed 14 September 2023.

[270]See EU Copyright Directive levy principles incorporated into Kenya's Copyright Amendment Act, 2019, s 30 of the principal Act is amended '… (6) The rights of an owner of a copyright in a fixation of their performance are not infringed by the making of a single copy of the performance for the personal and private use of the person making the copy and in respect of such use the owner of a related right in the performance shall have the right to receive fair compensation consisting of a royalty levied on audiovisual recording equipment or audio-visual blank media suitable for recording and other media intended … The Copyright (Amendment) Bill, 2017 for recording, payable at the point of first manufacture or entry in Kenya by the manufacturer or importer for commercial purposes of such equipment or media.'

[271] J Poort (note 183 above) 1.

remuneration and distribution mechanisms in place. The most important principles are around the private copying exceptions articulating authors' compensation for 'harm' caused arising from lost sales.[272]

The EU copyright levies, similarly like other royalties in South Africa are managed by CMOs that are responsible for the redistribution of the payments to recommended beneficiaries. This is relevant to the extent that it provides useful lessons on how the domestic CMOs can operate efficiently in managing different sets of royalties without creating conflicting distribution patterns that prejudice authors. Forere notes that South Africa is not globally isolated in addressing its authors' remuneration challenges,[273] which are largely a manifestation of the effects of digital technologies. The EU's influential Copyright Directives, commission of inquiries reports and precedents have formulated a rich harmonised copyright law regime that is globally relevant and effective. The EU precedents have acted as guiding materials for various jurisdictions in their levies administrative framework in Africa, in particular where in the *Padawan SL v Sociedad General de Autores y Editores* (SGAE) case[274] the European Court of Justice (ECJ) held that the compulsory levy complies with the Copyright Directive where it is charged on devices whose capabilities can be reasonably assumed to facilitate copying.[275] Even outside the framework of the copyright levy, the EU's legal principles and persuasive precedents have jurisprudentially influenced even this jurisdiction,[276] and its global effect continues to date with its legal and policy frameworks quite dominant in the international economic, legal[277] and political order.[278]

[272]*Padawan SL v Sociedad General de Autores y Editores de España* (SGAE) Case C-467/08. It considered several issues, which included approximation of laws – Copyright and related rights – EU copyright Directive 2001/29/EC – Reproduction right – Exceptions and limitations – Private copying exception – Definition of 'fair compensation' – Uniform interpretation – Implementation by the Member States – Criteria – Limits – Private copying levy applied to digital reproduction equipment, devices and media.
[273] Forere (note 52 above) 6.
[274] Padawan SL case (note 72 above).
[275]See in Ghana s 27 Copyright Act, 2005 (ACT 690) and copyright Regulations, 2010 (L.I. 1962) Regulation 14—Imposition of levy There is imposed on the devices specified in regulation 15, capable of being used to copy copyright works. See also Nigeria, section 40(1) of the Copyright Act, Cap C28, Laws of Federation of Nigeria, 2004. See also Kenya Section 28(3), (4), (5) and (6) of the Copyright Act.
[276] See *S v Makwanyane and Another* 1995 (3) SA 391 para 35, 68-69; See also *AmaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC and Others* 2021 (3) SA 246 (CC) para 47.
[277] R Luck 'POPI - is South Africa keeping up with international trends?' (2014) *De Rebus* 84. Demonstrates the influence of EU precedents and law in South Africa.
[278]The EU publications Office 'The European Union: What it is and what it does' April 2021. available at *https://op.europa.eu/webpub/com/eu-what-it-is/en/*. accessed 16 December 2021.

From an economic perspective, South Africa is the EU's largest trade partner in Africa and, in turn, the EU is South Africa's biggest trade partner after China.[279] The Trade, Development and Co-operation Agreement (UNCTAD) in force since 2000 established a free trade area that covers 90 per cent of bilateral trade between the EU and South Africa.[280] According to UNCTAD trade statistics, the export of South Africa's total creative and cultural industry goods rose marginally from $331m in 2002 to $ 351m (€264,846,000) (R 3.12bn) in 2010.[281] This trade has substantially grown by 120 per cent in 2021.[282] This included statistical information from a CMO, the South Africa Music Rights Organisation (SAMRO), on its musical work traded and consumed within the EU.[283] Research findings confirm that the EU is one of the primary consumers of South African arts and creative products.[284] While this trade remains significant and desirable to foster development between South Africa and the EU, it has had its positive and a downside effect on the latter's cultural creations. Apprehensions have been raised by the music sector and the department of trade and industry that,

> 'Africa in general, including South Africa, is regarded as fertile territory for exploitation by EU and US music producers. South African music talent is 'exported' to EU Member States, where it is recorded and then imported back to South Africa. Consequently, intellectual property rights are considered to be flowing out of the continent rather than into it.'[285]

Furthermore, this downside is compounded by huge EU recordable equipment exports which are used for piracy and other authorised private exploitation of cultural creations in South Africa.[286] The principal subject in this study is the digital exploitation of authors' works without corollary compensation. Some of the imported equipment from the EU is the reprographic printing and ancillary machinery, sound recordings, and photographic

[279] The EU 'South Africa: EU trade relations with South Africa' (2021) available at *https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/south-africa_*accessed 24 September 2022.
[280]R Fisher *Country Report South Africa: Preparatory Action 'Culture in the EU's External Relations* (2014) 11.
[281] Ibid.
[282] The European Commission 'South Africa: EU trade relations with South Africa. Facts, figures and latest developments' (2021) available at *https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/south-africa_en#:~:text=Since%20the%20signing%20of%20the,increased%20by%20more%20than%20120%25*. accessed 26 September 2022.
[283]R Fisher (note 280 above) 11.
[284] EuropeAid *Trade in Creative and Cultural Goods and Services, in the context of EU-South Africa Development of Creative Industries in South Africa* (2013) EuropeAid/131470/L/ACT/ZA, Final Report/June 2013 5.
[285] Fisher (note 280 above) 13.
[286] EuropeAid (note 284 above) 13.

equipment which are contributing to infringement of authors' exclusive rights.[287] Nonetheless, the EU's fashioned out copyright levy to address such remuneration challenges caused by digital devices is a model for jurisdictions such as South Africa.

1.8.2 Ghana

On the African continent, Ghana is a good reference point because it is a West African commercial hub, a fast growing economy,[288] and one of the few nine countries that have private copying remuneration system with collection and distribution mechanisms.[289] With South Africa, there is interplay of several legal, economic, political, historical factors that have shaped both jurisdictions' growth patterns on the continent.[290] There are historical colonial considerations that tie Ghana to South Africa in that while both are former British colonies, their copyright law regimes were tailor made from the British copyright cloth in shape and design.[291] Besides, Africa is the largest region after the EU in terms of levy collections. While the levies are an important revenue source for the EU, they carry the same significance in the few African countries that have operationalised it, Ghana included.[292] Presently, the copyright levy is the largest source of income for the CMOs in Ghana.[293] While Tunisia had the largest 2018 levy collections on the continent, Ghana earned slightly over €454 000 but no figures were immediately available for Botswana, Kenya, Malawi and Burkina Faso. It should be noted that Kenya[294] and Malawi[295] only recently operationalised the levy. Botswana would have been relevant as a neighbouring country sharing same

[287] M Kalaba, R Sandrey & D Ernst van Seventer 'Analysis of trade between South Africa and the EU and a preliminary attempt to examine the impact of the EU/SA FTA on trade' (2005) *Trade & Industrial Policy Strategies* (TIPS) 16.
[288] Christine Patton 'Five African countries for investors to watch in 2022' Investment Monitor, 20 December 2021 available at *https://www.investmentmonitor.ai/comment/five-countries-investors-watch-2022-african/.* accessed 16 February 2023.
[289] CISAC (note 159 above) 3.
[290]G M. Sikoyo., E Nyukuri & J W. Wakhungu 'Intellectual Property Protection in Africa Status of Laws, Research and Policy Analysis in Ghana, Kenya, Nigeria, South Africa and Uganda' (2006) *African Centre for Technology Studies (ACTS) Ecopolicy Series*; No. 16 16-20.
[291]D R Nicholson 'The South African Copyright Law: a historical overview and challenges to address access to knowledge issues in a country in transformation' (2015) 3. Paper presented at: IFLA WLIC 2015 - Cape Town, South Africa in Session 138 - Access to Information Network – Africa SIG. See also P Adusei, K Anyimadu-Antwi & N Halm 'Ghana' in Chris Armstrong, Jeremy de Beer, Dick Kawooya, Achal Prabhala & Tobias Schonwetter (eds) *Access to Knowledge in Africa: The role of Copyright.* (2010) 57.
[292] CISAC (note 159 above).
[293] M E Duncan *The Economic Contribution of Copyright Industries in Ghana* (2020) 50.
[294] The Kenya Copyright Amendment Act of 2019 came into effect on 2 October 2019, repealing and amending various sections of the Copyright Act 12 of 2001 (Chapter 130).
[295]CISAC 'Creators to benefit as Malawi implements private copying levies' *CISAC* 7 May 2019, CISAC, Available at *https://www.cisac.org/Newsroom/articles/creators-benefit-malawi-implements-private-copying-levies.* accessed 25 April 2023. It reports that as from April 15th, 2019, Malawi joined the increasing number of African countries that have started implementing the private copying levy.

historical, political and colonial configurations with South Africa, but CISAC did not provide details of the country's levy collection and distribution figures for its 2020 report covering the period 2018.[296] Botswana introduced the copyright levy three years earlier than Ghana, and despite it being a former British colony whose copyright law was also fashioned out of the British copyright law,[297] its creative industry, economy and demographics are smaller than Ghana. This places Ghana in a pole position to draw lessons for South Africa, and together with the EU provide jurisprudence and experience necessary to articulate principles that should inform the introduction of the copyright levy in South Africa. Ghana extensively operationalised the levy in 2010 and this provides the country with sound levy management experience. Prior to this, Ghana had introduced a levy in 1988 on blank cassettes to fight piracy, which was followed by a successful bandrole system on the same devices to raise revenue for authors.[298] This has since been abandoned as the current copyright levy is premised on EU Copyright Directives approach. As such, Ghanaian scholars are already finding with EU areas of convergence applicable to their copyright system with calls to explore the possibility of enacting similar Copyright Directives to advance its authors remuneration rights.[299]

The flourishing cultural industry in Ghana emanates from its rich and diverse ethnic groups giving impetus to the evolution of its arts and culture.[300] Its diverse societal ethnic composition has over 100 linguistic and cultural groups, providing a rich heritage supporting innovation skills which are complemented by a comprehensive utilitarian copyright law framework promoting the creative industry and protecting IPRs.[301] Digital technologies have equally facilitated access to computers, radio and television and corollary penetration and absorption of creative works. The quality of creative content is helped in part by increased recreational and tertiary institutions focus in imparting creative skills.[302] Supporting cultural creations is Ghana's comprehensive copyright law regime which like South Africa was

[296] No details of Botswana are available in the CISAC 2020 Report, see report available at *https://www.cisac.org/Newsroom/annual-reports/2020-annual-report*, accessed 5 February 2025.
[297] Companies and Intellectual Property Authority 'Copyright protection in Botswana' available at *https://www.cipa.co.bw/copyright-protection-in-botswana#:~:text=Botswana%20inherited%20the%20Copyright%20Act,2005%20which%20commenced%20in%202006.* accessed 25 April 2023.
[298] E J Collins 'Copyright, Folklore and music piracy in Ghana' (2006) *Journal of South-North Cultural and Media Studies Culture, Communication and Media Studies* 20(1):158-170 5.
[299] Abekah-Wonkyi Kow (note 183 above) 8.
[300] Duncan (note 293 above) 12.
[301] Ibid.
[302] Ibid.

inherited from its former colonial power, Britain.[303] The direct connection between Ghana and South Africa also lies in bilateral economic linkages emanating from its rapidly growing trade.[304] Trade volumes between Ghana and South Africa are significantly dominated by industrial products exports with South Africa largely importing minerals and unfinished products.[305] However, the trade imbalances are tilted against Ghana. There are over 200 South African companies registered in Ghana, generating nearly 20,000 employments for locals which have over the last decade undertaken about 200 projects with a capital investment valued in excess of $1.4 billion.[306] Importantly, and relating to this study, South Africa trade with Ghana exports in electrical goods which are potentially used in private copying.[307] Given that digital piracy is rampant in Ghana, South Africa could be a major contributor to the digital exploitation of the works with electronic equipment worth over $37m forming part of a huge export portfolio by 2020.[308] However, the point of departure with South Africa remains around how Ghana, just like the EU, operationalised its private copying levy.

1.9 CHAPTER OVERVIEW

This is divided into three parts, with part one focusing on the foundations; and part two focusing on the crux of this thesis, which is analysing the problems already identified and providing solutions with the final part providing a conclusion to the study. Chapter1 provides the background to the study, existing copyright legislative deficiencies impeding copyright holders' remuneration rights, and the theoretical framework guiding the study including providing a justification of the need for introduction of private copyright levies. Chapter 2 provides the background, relevance, and appropriateness of utilitarianism philosophy to the study. The chapter examines the utilitarian defence for copyright law, which advocates that recognition of IPRs spurs innovation, averts market failure, creating economic growth that

[303] Adusei (note 266 above) 60.
[304]Cyril Ramaphosa, The President 'Ghana- South Africa business forum: Remarks by President Cyril Ramaphosa at the Ghana- South Africa business forum during the State Visit in Accra, Ghana' *South African Gvt Website* 5 December 2021. available at *https://www.gov.za/speeches/president-cyril-ramaphosa-ghana-south-africa-business-forum-5-dec-2021-0000*. accessed 9 August 2022.
[305] Ibid.
[306] Ibid.
[307] Ibid.
[308] Trading Economics 'South Africa Exports to Ghana' (2022) *Tradingeconomomics.com* Available at *https://tradingeconomics.com/south-africa/exports/ghana* accessed 9 August 2022. Note that South Africa Exports to Ghana - data, historical chart and statistics - was last updated on August of 2022.

benefits both creators and end users. The essence of the theory is that authors should enjoy exclusive rights to their works for a limited duration to provide scope for recouping sufficient economic incentives from their investments, while providing their works access to the consumers. Economic incentives are expected to spur further creations that benefits society, creating some market equilibrium. The chapter explores the utilitarian theory and its interplay with copyright law. Chapter 3 provides a historical background to the development of copyright law and the Internet, digital technology, and explores how the digital copying of creative online content has impacted on the authors' remuneration. It makes this inquiry after assessing the historical plight of South African artists dying indigent despite achieving global fame and success due to poor remuneration compounded by both a weak copyright law regime, CMOs mismanagement of royalties and lack of transparency obligations. Furthermore, it makes an examination of the existing copyright law legal regime deficiencies to evaluate the extent to which they adapt to the Digital Age and secure authors' remuneration right. It makes making a recommendation for the implementation of a remedial private copying levy.

Chapter 4 provides the historical development of the copyright levy in the EU, the relevance of its exceptions, levy principles and effectiveness of its Copyright Directives on the right to fair remuneration. Ghana, as an African commercial hub is relevant to the extent that it shares similar copyright law, colonial, economic and political commonalities with South Africa. The chapter draws lessons and principles for South Africa from the developed salient remuneration right principles developed in both the EU and Ghana, and in particular how they implemented the copying levy. Chapter 5 provides a normative discussion for the justification and rationale for South Africa's copying levy, and several socio-economic and legal motivations for its implementation. The prime justifications for introducing the levy arises from the legal impracticalities of enforcing the authors' reproduction rights, and the need for a private copying exception in return for compensation arising from unavoidable and inevitable harm caused by recordable digital devices. The key aspect is to resultantly provide fair balance of rights between rightsholders' and end users, and compensation to the latter for the exploitation of its works.

Chapter 6 proposes legal principles that shall help develop an administrative framework for the levy's operationalisation. The chapter lays the normative basis for the development of the levy's statutory framework. It draws principles taking lessons from

existing domestic jurisprudence complemented by copyright levy adaptable principles from the EU, and Ghana. Additionally, it outlines the levy's targeted beneficiaries, specify recordable media and storage devices for levying purposes, propose tariffs frameworks and penalties for non-compliance with levy obligations. Chapter 7 explores a transparency model for the collecting societies in distributing the levies collected. It arises from the existing CMOs poor regulatory framework, which facilitated collection and distribution of royalties without corresponding obligations to provide detailed information on the management of the royalties to rightsholders. The chapter addresses how the existing constitution, enabling legislation, statutes and common law could help provide scope for transparency obligations in the levy's implementation. While some key tenets of EU Copyright Directives could be used to address transparency shortcomings, local jurisprudence is also relevant to achieving the same objectives. Chapter 8 concludes the study by highlighting the scope of each chapter and elaborating its key findings. It provides recommendations on how the proposed copyright levies could provide the statutory remedy, as a result of the contemporary Internet and digital era challenges.

CHAPTER 2

UTILITARIANISM PHILOSOPHY AND COPYRIGHT LAW

2.1 INTRODUCTION

This chapter examines the utilitarian theory in the context of the necessity for copyright holders' economic incentives arising from the end users' seamless exploitation of their works by means of the Internet and digital technological devices. Utilitarianism[309] theoretical framework is relevant to this research and it shall sustain the argument that authors need to be adequately incentivised for their works to encourage more creations that are beneficial to society proportionately providing happiness to the greatest number of people.[310] However, there are additional Intellectual Property Law (IPL) related theories such as natural, labour, reward, and personality rights theories that will be discussed in this chapter to broaden the scope of discussion and understanding of disputes around copyright remuneration. While these theories are important in providing alternative diverging perspectives on utilitarianism, they are not applicable to this research because they do not provide adequate justifications for modern copyright protection. This chapter will briefly discuss below how the theories relate to utilitarianism and affect our understanding of authors' remuneration. Thereafter, an analysis shall be provided to enlighten why they are not harmonically connected to the thrust of this study. A brief historical background and conceptual framework for utilitarianism will be provided, followed by a historical path and pattern utilitarianism has permeated various global jurisdictions. Some discussion of the relationship between utilitarianism and the economic incentives of copyrights will follow before an analysis of aspects of South African copyright law and practice that are counter utilitarian theory and eliciting reform will be provided.

2.2 HISTORY OF INTELLECTUAL PROPERTY (COPYRIGHT LAW) PROTECTION REGIME AND RELATED THEORIES

To understand why utilitarian theory is the appropriate theory, there is need to sustain the arguments advanced in this thesis that the law needs to ensure that creators are adequately remunerated to stimulate further creativity for the public good. To buttress this viewpoint, we must first provide an overview and discussion of the origins of various theoretical

[309] J Bentham *An introduction to the Principles of Morals and Legislation (*1781) Ch 1-iv.
[310] R Veenhoven 'Happiness as an aim in public policy: The greatest happiness principle' in Alex Linley and Stephen Joseph (eds) *Positive Psychology in Practice* (2004) 1.

frameworks that relate to copyright and/or intellectual property protection. In the process, we seek justification for why authors were given incentives in the first place and locate the relevance and rationale of related theories. The copyright exclusive protections for a limited duration to draw sustainable economic incentives attracted enormous interest in the Western world after the enactment of the Statute of Anne,[311] and provided the historical basis for the setting up of the World Intellectual Property Organisation (WIPO) before it extended to developing economies.[312] The incentives have a bearing on various theories, some relevant and/or irrelevant to the Digital Age. Regardless, it is important to understand and locate utilitarianism in the growth patterns of copyright incentives.

2.3 COPYRIGHT LAW RELATED THEORIES

Labour-based theories include natural rights, labour, reward, and personality theory, which provide moral justification for copyright protection. Nonetheless, as shall be demonstrated, they do not provide satisfactory justification for modern copyright law protection.[313] It is important to juxtapose their theoretical framework against utilitarianism to understand how and why under the contemporary Digital Age economic considerations they fall short of guaranteeing adequate copyright protection. In general, utilitarianism underpins modern copyright protection with associated economic incentives to spur innovation providing the basis for the justification.[314] This research seeks to unlock the value of intellectual property law creations by justifying and providing adequate remuneration for copyright holders whose works are consistently exploited online without authorisation and accompanying compensation. This can be facilitated by the drafting of an alternative statutory remuneration stream that counters the effects of the inevitable Internet and digital-related infringement patterns, thus securing, safeguarding, and guaranteeing the authors' adequate remuneration. Furthermore, this will be complemented by the drafting of a transparency model with salient principles in the management and distribution of royalties by collection societies to enable authors to have access to records on the exploitation of their works. The utilitarian approach is to balance the interests of authors and end users by guaranteeing the former's access to

[311] See Roger Knights 'Economic, political and legal importance of copyright and related rights in international commerce: The present situation and future developments' WIPO Regional workshop on copyright and related rights in the Information Age, September 6, 2000 2-3.
[312] WIPO 'WIPO — A Brief History' Available at *https://www.wipo.int/about-wipo/en/history.html.* (Accessed on 22 November 2023). Formerly established as BIRPI in 1893 – and in 1974 it joined a community of nations, the United Nations and member States were obliged to be members of the specialised agencies.
[313] S Karjiker 'Justifications for copyright: The moral justification' (2013) 1 *IPLJ* 42.
[314] Karjiker (note 118 above) 13.

works in return for the latter's economic incentives to inspire further innovations and production of cultural creations. It is in this context that labour-based and personality theories are interrogated.

2.3.1 Natural rights theory

Locke[315] is the main proponent of the natural rights theory captured in his seminal work - 'The second treatise of government' - which provides that persons have a natural right of property arising from their labour as well as the fruits of that labour.[316] The theory propounds that property is the fruits of one's labour in which he or she has an inherent right to that intellectual asset with its related copyrighted benefits.[317] The inherent property right arises because the author spends time and effort creating new work and should therefore reap the fruit of his labour. The property ownership is not universally shared or become part of the common stock.[318]

Despite the natural rights theory's contemporary links with intellectual property rights, in its original theoretical form its conception of property rights was associated with land ownership.[319] The degree of ownership was determined by the productive transformative extent an individual expended his labour on the land.[320] As such Locke never referred to copyright law, but his arguments have of late been deliberately connected to intellectual property creations.[321] The link to copyright law would lie in Hettinger's proposition that, 'what a person produces with his own intelligence, effort and perseverance ought to belong to him or her and to no one else: "Why is it mine? Well, it is mine because I made it, that is why it would not have existed but for me."'[322] In this sense, Hettinger enunciates that the natural

[315] J Dunn *The Political Thought of John Locke: A Historical Account of the Argument of the Two Treatises of Government* (1969) 99. See also John Locke (1632-1704) at https://plato.stanford.edu/entries/locke/. He was an English philosopher. Among Locke's famous political works is 'The Second Treatise of Government' in which he argues that sovereignty resides in the people and explains the nature of legitimate government in terms of natural rights and the social contract.
[316] A C Yen 'The interdisciplinary future of copyright theory' in M Woodmansee and P Jaszi (eds) *The construction of authorship: textual appropriation in law and literature* (1994)161-162.
[317] M du Bois 'Justificatory Theories for Intellectual Property Viewed through the Constitutional Prism' (2018*) PER / PELJ* 2018(21) 7.
[318] J J Osei Tutu 'Humanizing Intellectual Property: Moving Beyond the Natural Rights Property Focus' (2017) 20 *VAND. J. ENT. & TECH. L* 245.
[319] Karjiker (note 313 above) 46.
[320] Ibid.
[321] Ibid at 48.
[322] E C Hettinger 'Justifying intellectual property' (1989) 18(1) *Philosophy and Public Affairs* 36.

law copyright protection becomes a moral consideration, which lies in the authors' entitlement to his creations arising from the fruits of his labour.[323]

The point of difference between utilitarianism and the natural rights theory is that the former focuses on the outcome, the consequence of an act or work to determine its effectiveness in promoting happiness or disharmony, while the latter's primary objective is narrowed to the natural inherent rights of authors in their works without considering the broader interests of society and the mandatory economic incentives as compensation for the creation's exploitation to encourage further innovation. Contemporary IP growth is determined by societal market responses to work which in turn determine the market value of the work. If the intellectual creation is popular, adequate private returns to innovative activity can be guaranteed. It is acknowledged that IP rights incentivise authors' innovation, with employment in the United States (U.S) IP-intensive industries expected to grow faster over the next decade, with an average worker in the industry earning about 46 per cent more than those in different sectors.[324] The U.S's IP is worth a staggering $6.6 trillion, more than the nominal GDP of any other country in the world.[325] The natural rights theory's failure to recognise the compensatory role societies plays in stimulating growth through provision for economic incentives that stimulate innovation misplaces this theory in the contemporary commercial transactions where reciprocal business arrangements are the lifeblood of business.

Bentham rejected natural rights as 'simple nonsense: natural and imprescriptible rights, rhetorical nonsense, nonsense upon stilts' because in his view rights can only be created by law through the government as the enacting authority. According to Bentham, rights do not naturally arise. Locke's seeks to assert natural rights in society carrying a domineering force over the modern legislative function of governance. The government and society operates under law, through rights created and established by law, which laws must be specific, certain, known and complied with. The existence of natural rights operating outside the framework of existing law can only be recognised to the extent they are compatible with recognised existing sources of law. Bentham's suggestion that persons have independent natural rights outside custom, common law, legislation, statutes and accompanying subsidiary existing law is not comprehensible. MacIntyre opined natural rights

[323] Ibid at 36; See also Karjiker (note 213 above) 48.
[324] The Global Innovation Policy Center U.S. Chamber of Commerce 'Why is IP important' available at *https://www.theglobalipcenter.com/why-is-ip-important/* accessed 17 May 2023.
[325] Ibid.

beliefs are akin to, 'one with belief in witches and in unicorns.' Besides, natural rights are not empirically verifiable therefore ambiguous because society has varying ethnicities, languages, customs which are not universally shared. The anarchical context of natural rights – as law – arises because they cannot be repealed and are imprescriptible or regulated by law passed by the sovereign enjoying the doctrine of effectiveness.[326] Importantly, natural law ignores that a modern copyright law remuneration framework can be statutorily created to guarantee and protect the creators' remuneration, especially in the Digital Age. The emphasis on the greater good by advancing the majority societal interests fundamentally segregates utilitarianism from the natural rights theory understanding of IP protection.

2.3.2 Labour theory

In labour theory, Locke's justification for property was premised on the fact that every person has a property in his own person and labour. As such works are created through one's own labour, and by mixing labour with land or other tangible property, it is suggested that a natural right to that property is automatically acquired.[327] This is because the product is a direct effort of its creator, arising from the investment of such labour. Furthermore, labour theory postulates that works are a product of an individual's own intelligence, combined with diligence, effort and determination and should therefore not belong to any person who never made such investment into the work. This is so because it is argued that the object would not have existed without the creator's effort.[328] By fostering the argument that all humans possessed property in their own person, Locke argued that,

> '[t]he "labour" of his body and the "work" of his hands, we may say, are properly his. Whatsoever, then, he removes out of the stat that Nature hath provided and left it in, he hath mixed his labor with it and joined to it something that is his own and thereby makes it his property. It being by him removed from the common state Nature placed it in, it hath by this labour something annexed to it that excludes the common right of other men. For this "labour" being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough and as good left in common for others.'[329]

[326] J Bentham *'Anarchical Fallacies'. Nonsense upon Stilts: Bentham, Burke and Marx on the Rights of Man* (1987)' 58.
[327] T Ciro 'The Scarcity of Intellectual Property' (2005) 1 *The Journal of Law and Technology (JILT*) 3.
[328] M du Bois (note 317 above) 8. See also E Hettinger (note 322 above) 37.
[329] J Locke *Second Treatise of Civil Government John Locke* 3 ed (1690) 287-288.

Du Bois posits that this principle of acquiring property over one's own intellectual creations played an important role in the recognition of IPRs.[330] This labour law proposition is further supported by Hettinger who opines that the most powerful institution supporting property rights arises because people are granted rights to the fruits of their labour investments.[331] The natural right theory is closely related to the labour theory in that every creation emerges through skill and labour, and the weaknesses of both theories in providing adequate modern copyright protection are joined at the hip.[332]

Among several other problematic aspects of natural rights and labour theory is the conceptual framework that labour should form the basis of ownership. Karjiker argues that it is problematic to determine the levels of effort invested in a particular work to justify ownership.[333] This is especially so if 'the amount of labour expended is so trifling that no property right has arisen' and or 'if a person is particularly incompetent and expends extraordinary amount of labour doing relatively menial task, does that justify him having property rights in the product?'[334] Another consideration applies to derivative works which would invariably create difficulties in establishing the overall value of each contributor to the work to justify ownership.[335] In addition, it does not always follow under copyright law that ownership emerges as a result of expending effort in creating the work. In fact, it was held in the *Moneyweb v Media 24* case that the expression 'sweat of the brow' is imprecise and capable of being misinterpreted.[336] As such, originality can only be determined by the court,

> 'after it has weighed up all relevant considerations and made a value judgment. Our law still regards the time and effort spent by the author as a material consideration in determining originality. But the time and effort spent must involve more than a mechanical, or slavish, copying of the existing material.'[337]

The court also referred to the case in *Waylite Diary CC v First National Bank Ltd*, in which Judge Harms held that it does not always follow that the actual time and effort expended by the author is the prime consideration for determining ownership and originality, and that it just remained a subjective assessment in accordance with an individual's

[330] F Mostert 'The development of the natural-law principle as one of the principles underlying the recognition of intellectual property: A historical survey from Roman law to modern-day law' (1987) *SALJ* 494-496.
[331] Hettinger (note 322 above) 31-52.
[332] M du Bois (note 317 above) 15. See also Hettinger (note 322 above) 18.
[333] Karjicker (note 290 above) 49.
[334] Ibid.
[335] Ibid.
[336] Moneyweb case (note 254 above) para 15.
[337] Ibid.

standards.[338] The precedents provided clarity that the labour an author expends in creating a factual work does not necessarily imply ownership or copyright protection.

Under the Lockean approach property formed the basis for qualified franchise[339] with accompanying political rights, and was not to be valued or considered under market forces or in economic terms.[340] This approach significantly misses the central role IP plays in economic terms particularly in South Africa where copyright-based industries create 4 per cent of the employment contributing significantly to the GDP.[341] Globally, government policies are increasingly being drafted and modelled around making IP valuable economic creations. Industries protected by copyright are expected to have a considerable impact on national economies.[342] In South Africa, the IP policy instrument is aimed at 'promoting innovation, technology transfer, research and development, creative expression, consumer protection, industrial development and more broadly, economic growth'.[343] From the foregoing, the Lockean conception of property is not compatible with modern copyright protection.[344]

The Digital Age poses a significant challenge to the Lockean natural rights theory because of the complex nature of emerging rights in digital creations which are accompanied by numerous derivative works. The value of most digital creations largely depends on market forces and repetitive fluctuations. Its ownership patterns are not dependent on the energy expended or sweat and brow approach but often are managed by large corporations with numerous shareholders who exercise influence and control dependent on the value of their equity. For example, Apple Inc., an American multinational technology company produces a variety of software products[345] which are a result of impersonal contributions that would render the Lockean natural right theoretical approach to ownership untenable. Du Bois also posit that 'the natural right of a creator to utilise an own creation is distinct from the

[338] *Waylite Diary CC v First National Bank Ltd* 1995 (1)-SA 645 (A) at 649I
[339] B Russel *History of Western Philosophy* (2005) 577.
[340] Karjiker (note 213 above) 51.
[341] See A Pouris & R Inglesi-Lotz (note 110 above) Qouting the World Intellectual Property Organization (WIPO) *The economic contribution of copyright-based industries in South Africa* (2011).
[342] Ibid.
[343] Ministry of Trade and Industry, International Trade and Economic Development *Intellectual property policy of the republic of South Africa* (2018) 3. available at *https://www.gov.za/sites/default/files/gcis_document/201808/ippolicy2018-phasei.pdf. a*ccessed 4 February 2022.
[344] Karjiker (note 213 above) 51.
[345] See Q Zhang 'Research on Apple Inc's Current Developing Conditions' (2018) *Open Journal of Business and Management*, 6, 39-46 available at *doi: 10.4236/ojbm.2018.61003* accessed 17 May 2023.

exclusive rights […] to make and sell copies of the work. The "right" to receive what the market will bear is a socially created privilege, and not a natural right at all.'[346] The theory's application to intangible intellectual creations is unclear if it is to be determined by whether the total value of a creation is entirely attributable to the envisaged labour of an individual. Therefore, the anachronistic posture of the theory makes it unsuitable for the Digital Age because of its incapability to acclimatise with time.

2.3.3 Reward Theory

Reward theory is labour-related theory with resemblances to the natural rights theory. It is founded on the theoretical premise that a property right should be granted to an author as a 'just desert' of his labour.[347] The theory accords a sentimental view of the author and labour is considered as an endeavour which should be avoided and something an author would not in his normal ordinary daily routinely do.[348] A worker is considered a concerned hard-working person who selflessly contributes to society without anticipation of reciprocal accompanying incentives for the efforts.[349] Consequently, the creator receives an ordinary social reward for the creative efforts. The exclusive rights are regarded as 'an expression of gratitude to an author for doing more than society expects or feels that they are obliged to do.'[350] The moral link in the theory arises in that the owner is entitled to compensation for the creation of a product that is beneficial to society which he is entitled to own. For this creation, compensation comes as a reward and not an incentive.[351] This is a marked difference to the utilitarian theory to be discussed in detail below that places emphasis on 'incentives' for copyright holders, which are not seen as a 'reward' but some form of remuneration which come as a statutory right to encourage creativity. The reward theory has some distributive justice,[352] in that society owes the creator a reward or gratitude for his contribution. The reward theory's approach will find relevance in centralised command economies, not in pragmatic modern capitalist states administered by free market forces.

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[346] Karjiker (note 213 above) 40.
[347] Ibid at 52.
[348] Ibid.
[349] Ibid.
[350] Ibid at 36.
[351] Ibid.
[352] M Deutsch 'Equity, equality, and need: What determines which value will be used as the basis of distributive justice?' (1975) *Journal of Social Issues* 37–49. See also C Knight 'Theories of Distributive Justice and Post-Apartheid South Africa' (2014) *Politikon 41, 2014 - Issue* 1 23–38.

Similarly to the natural rights and labour theories, the theory unhelpfully gives no indication as to what form the reward should take.[353] The same criticism accorded to the natural rights theory applies to the reward theory because you cannot determine, quantify or measure the effort expended in the work which should be commensurate with the reward.[354] Karjiker questions the justification and levels of a just reward arising from an inept but honest effort.[355] The theory is meant to reward authors for past voluntary actions, which is the opposite of the utilitarian theory which grants incentives for works with consequentialist outcomes and value. Reward theory views remuneration in the context of a reward, eschewing economic incentive considerations aimed at promoting further innovations. Such moralistic considerations the theory advances have no space in the globally competitive economic order, where profit motives drive industrial production capacity. Current IP innovations are driven by an appetite for incentives, share price growth, and recognition through corporate dividends, not merely for social generosity traits enveloped in societal expressions of gratitude.[356] This is so because the theory's primary motivation is the community benefit rather than appreciation for the inventor or author through incentives.[357] The theory advances the view that the reward is best for society leading to the collective uplifting of national culture.[358] A priori, without equitable investment return expectation, innovation will dry up.[359] This theory does not correspond with the current dictates of commerce and business that are geared towards incentives and innovations.

2.3.4 The personality theory

The personality theory emanates from the works of Kant[360] and Hegel,[361] who link an author's personality and spirit to the work. The theory dictates that that author cannot be free unless ownership of the work is guaranteed.[362] Hegel extends the intellectual protection of an author's creations to the protection of his personal identity, inherent in or attached to his

[353]. M du Bois (note 317 above) 15. See also Hettinger (note 322 above) 2.
[354] Ibid
[355] Ibid.
[356] See EPO-EUIPO *Intellectual property rights intensive industries and economic performance in the European Union* (2016) Industry-Level Analysis Report, EPO-EUIPO. See also EUIPO 'IP Contribution' European Union Intellectual Property Observatory. available at *https://euipo.europa.eu/ohimportal/en/web/observatory/ip-contribution*. accessed 17 May 2023.
[357] V Onyeagbako 'Justifications for Copyright and Patents Protection' (2020) *My Intellectual Property Law Guide* (MIPLG) 9. available at *http://dx.doi.org/10.2139/ssrn.3596193*. accessed 15 May 2023.
[358] S M Stewart *International Copyright and Neighbouring Rights* (1983) 3.
[359] Klopper et al *Law of Intellectual Property in South Africa* (2011) 144.
[360] T Ciro 'The Scarcity of Intellectual Property' (2005) *JILT* 2.
[361] D Knowles 'Hegel on Property and Personality' (1983) *Philosophical Quarterly* 45.
[362] T Ciro (note 360 above).

creation. Property rights in the work are perceived to enhance individual personality and liberty, and are devoid of economic value considerations in the work.[363] This explains Kant's view that a property right is an extension of the authors' personality, not the economic manifestations arising from it.[364] It is believed that the protection of property augments an author's personality, which ipso facto safeguards the work from unlawful appropriation. The manifestations of the work automatically bear a link to the authors' individuality, moral rights, the right to paternity, and integrity.

Personality theory has shortcomings that are incompatible with modern copyright protection. Karjiker posit that it is difficult to 'quantify the sufficiency of a work, before it can qualify as an expression of individuality and therefore entitled to copyright protection.'[365] There is also disquiet around dreary content of no substantial value qualifying for protection as an expression of personality. However, there may be circumstances in which the quality of the work may not be a genuine reflection of an individual's personality, causing reputational damage, and/or affecting his dignity.

Hegel's perception of property right which dovetails with human personality development is incompatible with IP controlled by corporate entities.[366] Furthermore, Karjiker opines that IP law 'does not distinguish between various categories of work on the basis that some represent greater expressions of personality, and thus being more deserving of protection.'[367] Under common law, the theory cannot positively sustain copyright litigation that seeks to protect the remuneration rights of a deceased's descendants as the creator's carries the personality right to the grave. Moreover, the personality of the deceased and his reputation are only enforceable in the creator's lifetime as such it may be difficult to enforce the honour and reputation in death under defamation common law considerations.[368] Courts in civil proceedings have solidly rejected to grant a similar cause of action for 'post-mortem

[363] Karjiker (note 213 above) 54.
[364] R M Hurt & R N Schuchman 'The Economic Rationale of. Copyright' (1966) 56 *Am. Econ. Rev. Papers & Proc.* 423.
[365] Karjiker (note 213 above) 56.
[366]See S Burrone & G S Jaiya 'Intellectual Property (IP) Rights and Innovation in Small to Medium Sized Enterprises' (2004) *World Intellectual Property Organization*, 1-25. See also *South African Broadcasting Corporation SOC Ltd v Via Vollenhoven and Appollis Independent CC and Others* [2016] 4 All SA 623 (GJ). The SABC as a corporate entity, without the individual personality envisaged by Hegel, was asserting a copyright infringement and contractual claim over a documentary that it had commissioned. The SABC obtained their interdict successfully arguing against the exploitation of its commissioned work, asserting in part, copyright in the work.
[367] Ibid.
[368] W H Binder *'Publicity Rights and Defamation of the Deceased: Resurrection or R.I.P.?'* (2002) 12 *DePaul J. Art, Tech. & Intell. Prop. L.* 297

defamation.'[369] Therefore, personality right theory fails to provide adequate justification in modern copyright law in that it fails to sustain the rights of authors which subsist well after the death of the copyright holder.[370]

The four discussed labour based and personality rights theories fail to provide adequate justification for modern copyright law protection. Karjiker contended that if copyright as an institution is justifiable, it must be principally based on utilitarian theory or economic theory. [371] The justification for the utilitarian theory and its economic considerations in copyright law protection which seeks to promote and protect copyright holders' remuneration are now considered. Moreover, the basis for copyright law protection in some EU jurisdictions, the U.S and United Kingdom whose copyright law influenced South Africa's IPRs is utilitarian in scope.

2.4 Utilitarianism

2.4.1 Historical background to utilitarianism

In the history of philosophy, utilitarianism has been considered one of the most powerful and persuasive approaches to normative ethics.[372] It has its earliest formative roots in several philosophers, particularly the hedonists,[373] and ancient Greek philosophers' Aristippus,[374] and Epicurus[375] who viewed happiness as the only good for the well-being of the people.[376] The philosophy was rooted in the thinking that happiness in society was connected to morally appropriate behaviour which avoid harm. From this philosophical approach, a moral evaluation of utilitarianism was formed, creating a foundational normative basis for its

[369] W H Binder (note 368 above). See also P Milmo WVH Rogers R Parkes C Walker & G Busuttil *Gatley on Libel and Slander* 10 ed (2005) 8 -11.
[370] *Disney Enterprises, Inc. v Griesel NO and Others* unreported case number 12003/04 of 7 September 2004.
[371] S Karjiker (note 118 above) 13.
[372]J Driver 'The History of Utilitarianism' in Edward N. Zalta (ed) *The Stanford Encyclopedia of Philosophy* (2014). available at *https://plato.stanford.edu/archives/win2014/entries/utilitarianism-history/.* accessed 23 November 2021.
[373]Stanford Encyclopedia of Philosophy 'Hedonism' (2004). available at *https://plato.stanford.edu/entries/hedonism/ Hedonism*. accessed 25 November 2021. It writes that the: 'The word 'hedonism' comes from the ancient Greek for 'pleasure'. Psychological or motivational hedonism claims that only pleasure or pain motivates us. Ethical or evaluative hedonism claims that only pleasure has worth or value and only pain or displeasure has disvalue or the opposite of worth.
[374]Aristippus of Cyrene Ancient Greek Philosopher (c. 435 – c. 356 BCE) was a hedonistic Greek philosopher and the founder of the Cyrenaic school of philosophy.
[375]Stanford Encyclopaedia of Philosophy 'Epicurus' (2005). available at *https://plato.stanford.edu/entries/epicurus*/.accessed 25 November 2021.
[376] K Anuradha 'A brief notes on Utilitarianism: A study on Bentham and J.S.Mill views' (2018). available at *https://www.legalserviceindia.com/legal/article-3093-a-brief-notes-on-utilitarianism-a-study-on-bentham-and-j-s-mill-views.html a*ccessed 26 November 2021.

interpretation. The emerging classical utilitarians associated with developing this thinking were British moralists and thinkers such as Richard Cumberland,[377] John Gay,[378] and Francis Hutcheson.[379] As theologians, they believed that God sanctioned the obligatory promotion of happiness.[380] This utilitarian idea ultimately mutated into a doctrine propounded by Scottish philosopher David Hume who became another utilitarianism protagonist.[381]

Later, the English philosopher Jeremy Bentham is credited with developing the first effective and systematic account of utilitarianism, popularising what became known as 'Bentham's School.'[382] Bentham emerged during the seventeenth and eighteenth century age of reason or enlightenment when foremost intellectuals of the time in Europe questioned the common traditional thinking, the hierarchical pyramidal society, [383] authorities, [384] and religion, [385] while emphasizing reason, analysis, individualism and freedom. [386] The intellectuals during the period interrogated existing thoughts, promoted fundamental freedoms and championed equality, providing a rational formulation of political issues and policy.[387]

Utilitarianism was developed further by Bentham's student, John Stuart Mill, and both, as classical utilitarians defined the theory as far as it related to benefit and harm,

[377] R Cumberland *De Legibus Naturae* (1672). Cumberland's ethical theory is summed up in his principle of universal benevolence, the source of moral good that no action can be morally good which does not in its own nature contribute somewhat to the happiness of men. Cumberland maintained that the whole-hearted pursuit of the good of all contributes to the good of each and brings personal happiness; that the opposite process involves misery to individuals including the self.
[378] J Gay 'Dissertation concerning the Fundamental Principle of Virtue or Morality' in Edmund Law's translation of William King's Latin *Essay on the Origin of Evil* (1731). Gay's philosophical works argued that virtue was conforming to a rule of life which promotes the happiness of others. His short 'Dissertation concerning the Fundamental Principle of Virtue or Morality' is one of the seminal works in the history of English utilitarianism. In the eighteenth century its influence may be found in the works of the theological utilitarian,
[379] Francis Hutcheson (1694-1746). The Scottish moral philosopher) developed an early version of the utilitarian principle of 'the greatest Happiness for the greatest Numbers' as a way of calculating the best action to take when faced with alternatives.
[380]J Driver (note 372 above).
[381] Ibid.
[382] Ibid.
[383] R L Bloom B L Crapster & H A Dunkelberger 'Jeremy Bentham and Utilitarianism' in The Cupola, Gettusburg College (eds) *Section XII: The Post-Enlightenment Period, Ideas and Institutions of Western Man* (1958) 43.
[384] Ibid.
[385]J E Crimmins 'Bentham on Religion: Atheism and the Secular Society' (1986) *Journal of the History of Ideas. University of Pennsylvania Press* 95.
[386] Bloom *et al* (note 383 above) 44.
[387] Ibid.

happiness and unhappiness, or pleasure and pain.[388] However, Mill improved and modernised the utilitarian approach. Mill's utilitarian argument is based on his claim that 'each person, so far as he believes it to be attainable, desires his own happiness.'[389] Mill applied three considerations to support his theory development, namely, desirability, exhaustiveness, and impartiality. He argues that 'happiness is desirable as an end in itself; it is the only thing that is so desirable (exhaustiveness); and no one person's happiness is really any more desirable or less desirable than that of any other person (impartiality).'[390] Mill's evidential basis for supporting people's desires is that as human beings, they have the sense to see objects, to hear accompanying sounds hence people will have a similar capacity to desire things they see, feel, or hear.[391]

Bentham argued that human beings are ruled by two sovereign masters, pleasure, and pain, and propagated the principle of utility as the normative anchoring position for what is right, from individuals and governments.[392] The principle of utility generally means usefulness. In Benthamite philosophy, utility refers to happiness, pleasure, interest, and morality, as opposed to aesthetic values. Utilitarianism is primarily focused with increasing net utility which is an ethical and moral principle stating that the action that is morally right is that which is accompanied by producing the most good in society.[393] With this brief background to the utilitarian theory, I provide utilitarianism's conceptual framework.

2.4.2 Utilitarianism concepts

a.) Consequentialist theory

Bentham's inspirational philosophical work – 'An Introduction to the principles of morals and legislation'[394] - became the theoretical reference point for utilitarianism. In this seminal work Bentham writes that,

> 'Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what

[388] F A Abumere 'Utilitarianism' in Christina Hendricks and George Matthews (eds) *Introduction to Philosophy: Ethics* (2020) 45-51.
[389] J S Mill *Utilitarianism* (1861) Ch. 4.
[390] Abumere (note 388 above) 48.
[391] Mill (note 389 above). See also A Abumere(note 388 above) 48.
[392]J Driver (note 372 above).
[393] J Driver 'Pleasure as the Standard of Virtue in Hume's Moral Philosophy' (2004) *Pacific Philosophical Quarterly*. 85 173–194.
[394] J Bentham *An Introduction to the Principles of Morals and Legislation* (1789) chap 1-iii.

> we shall do. On the one hand the standard of right and wrong, on the other the chain of causes and effects, are fastened to their throne. They govern us in all we do, in all we say, in all we think: every effort we can make to throw off our subjection, will serve but to demonstrate and confirm it.'[395]

This influential text is also about law and justice, and the components that make the law just.[396] For Bentham actions only receive approval in their promotion of happiness or pleasure, and rejected if their tendencies create negative outcomes such as unhappiness, or pain.[397] Human beings, as Bentham propounded are motivated by the need to maximise their pleasure and minimise their pain. If the logic of Bentham is to be followed, our actions are therefore key determinants of our well-being as far as they relate to the two sovereign masters: pleasure and pain being end products of our actions.[398] Therefore, utilitarianism is concerned with the consequence of our actions that the end justifies the means, and the law is just, if it produces the greatest amount of happiness for the greatest number of people and unjust, if it does the opposite. Thus, utilitarianism is considered a consequentialist theory.[399] As a normative ethical theory, consequentialism is about the right ethical approach we should take, and how we should arrive at the right ethical consideration. The consequences of our actions ultimately matter when making ethical considerations in decision-making processes.[400] The theory can be used to determine the justifications of our actions if it produces maximum happiness, thus diminishing pain to the greatest number of people. Elliot and June posit that,

> 'consequentialism is the category of ethical theories that determine the morality of potential, current and past actions by analyzing the outcomes or potential out-comes of those actions. Actions that bring about good results are morally permitted. Actions that bring about bad results are morally prohibited. What is best, is an action or a kind of action that brings about the greatest happiness or benefit. What is bad, is an action or a kind of action which causes pain, unhappiness or harm.'[401]

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[395] Ibid at Ch. 1.
[396] Ibid at Ch. XVII.
[397] J Bentham (note 394 above).
[398] R L Bloom (note 383 above) 44.
[399] G E M Anscombe *Modern Moral Philosophy* (1958) 13. The author is credited with coining 'Consequentialism' in her essay. Utilitarianism is by far the most widely known form of consequentialism.
[400] Ibid.
[401] D Elliott & J Karlana 'Consequentialism' in Patrick Lee Plaisance (eds) *Communication and Media Ethics* (2018) 159-170.

Pleasure and/or pain, being the emotional output of our state of mind determined by our previous actions are as Anscombe postulated consequentialist in nature.[402] Utilitarianism is concerned with the consequences as opposed to the motives.[403] Therefore any action is good, relative to its consequences and an action will therefore have good positive utility, if it augments happiness more than it diminishes it.[404] Abumere asserts that,

> 'On consequentialist grounds, actions and inactions whose negative consequences outweigh the positive consequences will be deemed morally wrong while actions and inactions whose positive consequences outweigh the negative consequences will be deemed morally right. On utilitarian grounds, actions and inactions which benefit few people and harm more people will be deemed morally wrong while actions and inactions which harm fewer people and benefit more people will be deemed morally right.'[405]

The positive aspect of utilitarianism is that its consequentialist nature should help in guiding decision-making processes, as people are primarily concerned with outcomes that bring great satisfaction or happiness and beneficial to all. Bowden also sees the social value in defending and accepting the consequence notion of utilitarianism in that,

> 'the gravity of an action depends on its consequences. It is [therefore] illogical to reject a theory that states that the consequences of what we do has no bearing on whether we should or should not carry out that act. The consequentialist components of utilitarianism, therefore, need to be accepted. What we still need to decide are the measures of good or bad consequences.'[406]

Utilitarianism assumed a mathematical theoretical dimension in which Bentham sought to measure sovereign masters - pleasure and pain - under some calculation he devised to advance the precepts of his theoretical objectives.

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[402] Anscombe (note 399 above) 13.
[403] Elliott et al (note 401 above).
[404] David Benatar *A justification for rights* (Unpublished PhD thesis, University of Cape Town, 1992) 65.
[405] Abumere (note 388 above) 46.
[406] P Bowden 'In Defense of Utilitarianism' (2009) 16th Australian Association Professional and Applied Ethics Annual Conference: Professions in the Community, Goulburn, NSW: (AAPAE) Annual Conference, June 2009. Manuscript, available at *http://dx.doi.org/10.2139/ssrn.1534305* accessed 25 November 2021.

a.) The Felicific calculus: Calculating happiness or pain

Bentham provided the utilitarian calculation for happiness or pain, called the felicific calculus, or hedonic calculus,[407] which is commonly referred to as a happiness calculator. The calculus encompasses the calculation of the morality of our actions under a proposed mathematical model, which measures and determines whether maximum happiness or pleasure has been realised, including pain. Bentham proposed his felicific calculus as a method to determine whether an action is moral or otherwise.

The specific variables at the heart of the felicific calculus measuring the presence or lack of happiness developed by Bentham are the intensity, duration, certainty, propinquity, fecundity, purity, and extent of the action in question.[408] If the cumulative aggregate of the pleasure exceeds the pain then that action is said to be moral.[409] To determine this happiness, Abumere postulates that the theory articulates that we should strive to calculate the expected utility emanating from our actions and its overall societal effect, and thereafter use it as a moral barometer of our decision making processes.[410] From the calculus there is a teleological consideration of the consequentialist principle that the good outcomes must offset the bad for the moral justification of the action to suffice.[411] It is on the face of it farcical that pleasure or happiness, let alone pain could be calculated and quantified. Moreover, comparing both pleasure and pain on a scale after calculating the figures and quantities can be problematic because human emotions are difficult to quantify. The application of mathematical figures to determine the levels of human emotions, happiness, and pain arising from the conduct of actions is difficult to visualise.

As previously indicated, the felicific variables for pleasure and pain are determined according to their intensity, certainty or uncertainty, duration, and propinquity or remoteness.[412] Each variable highlighted above must be considered in estimating pleasure and pain. Every value of any pleasure or pain will be considered for the purpose of estimating the tendency of any act by which it is produced, and two other variables are considered, namely

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[407] W C Mitchell 'Bentham's Felicific Calculus' (1918) *Political Science Quarterly, Vol. 33, No. 2*. 161-183. The felicific calculus is an algorithm formulated by utilitarian philosopher Jeremy Bentham for calculating the degree or amount of pleasure that a specific action is likely to induce.

[408] J Bentham (note 394 above) Ch. 2.

[409] Ibid.

[410] Abumere (note 388 above) 47.

[411] L Pojman & J Fieser *Ethics: Discovering Right and Wrong* 6 ed (2012) 103.

[412] Ibid.

fecundity and purity.[413] Its fecundity takes into consideration the chance of it being followed by pleasurable sensations or pain of the same kind while its purity takes the chance of it being followed by the opposite pain sensations or pleasure.[414] Another factor under consideration is its extent, meaning the number of persons who are affected by the end result. Considering these factors, the value of pleasure or pain will be greater or less according to each set value.[415] The calculation considers the total interests of the group as a whole. The criterion considers the sum of the interests of all individuals in the group which is added to all the interests of the members of the group.[416] In this framework, there is the multiplication, subtraction and comparison of the scales of justice through measuring pleasure by subtracting pain and measuring any act on the utilitarian calculus.[417] Justice lies in the maximisation of pleasure and minimisation of pain in the aggregate.[418] It places everything on the total outcome.

Mill's view of the felicific calculus is that Bentham's interpretation misses the fact that putting human emotions on a mathematical scale is incomprehensible because not all pleasures are identical. He argues that there are higher and or lower pleasures that make it 'better to be a human being dissatisfied than a pig satisfied; better to be Socrates dissatisfied than a fool satisfied.'[419]

Nonetheless, constructive features emerge from utilitarianism. The philosophy seems to espouse that every citizen counts and is equal. In this sense, it is both democratic and fair to reject old-fashioned pyramidal societies and class hierarchy. As a consequentialist philosophy, it thrives to create a healthier society for all, determined by majoritarian ethical actions that produce the most desirable and approved favourable outcomes. This is because philosophy considers and calculates the interests of the broader sections of society before arriving at an outcome that represents the majority interests. The utilitarian theoretical objective is a universal approach that thrives to satisfy the greatest number of people, minimising the degree to which pain can affect the greatest number of people. This can only be a noble, ethical, and morally justifiable approach to finding pragmatic solutions that have enduring and universally accepted outcomes. Karjiker argues that if copyright as an

[413] Ibid.
[414] Ibid.
[415] Ibid.
[416] W C Mitchell 'Bentham's Felicific Calculus' (1918) *Political Science Quarterly* Vol. 33, No. 2.165.
[417] Ibid.
[418] R Wacks *A Very Short Introduction to the Philosophy of Law* (2006) 64.
[419] J S Mill *Utilitarianism* (1863) ch. 2.

institution is justifiable, it must be principally based on the utilitarian/incentive theory both of which are considered below.[420]

2.4.3 Utilitarianism and copyright: Advancing economic rights and due remuneration to authors

The implications emerging from the advent of the Digital Age require lawmakers to create a delicate balance between the interests of authors and end users. Ginsburg recommends the need to strike a happier balance, with Lessig articulating the necessity to guarantee sufficient incentives to facilitate production of future similar copyright works, while Sadler postulates the need for incentives to be based on remuneration that almost nears control of their works – all this coming against a utilitarian argument advancing the prevalent language of incentives dovetailing with compensating copyright holders for the exploitation of their works.[421] The economic link between utilitarianism and copyright law has an incentive thrust that seeks to advance the public interest by providing end users with access to copyright works in return for creators to receive adequate remuneration to be innovative. Karjiker posits that the incentive link assumes an economic dimension which is useful in understanding and unlocking the remuneration value for creations.[422] Economics can be defined around the study of scarcity – considerations that apply in determining the exploitation of available resources and anticipated returns in investments, commonly referred to as economic incentives.[423] Generally, if the creations or products are not readily available it determines how the people respond to incentives[424] hence it is argued that an economic analysis of law provides useful insights into the attractiveness of copyright as an legal institution spurring growth and novelty inventions.[425] In this economic context, it can be argued that it is economically desirable to secure the remuneration rights of copyright holders as this guarantee innovation, promoting employment, and economic development. Further, the economic analysis of law is occasionally regarded as a form of utilitarian theory because of its focus on supply and demand as driving market forces that spur innovation and the

[420] Karjiker (note 118 above) 13.
[421] J C. Ginsburg 'Essay: How Copyright Got a Bad Name for Itself' (2002) 26 *COLUM. J.L. & ARTS* 6I, 64 (2002). See also L Lessig 'Intellectual Property and Code' II *ST. JOHN'S J. LEGAL COMMENT*. 635, 638. See also S K. Stadler 'Incentive and Expectation in Copyright' (2007) 58 *Hastings L.J.* 433 (2007) 478.
W Fisher 'Theories of Intellectual Property' in Stephen R. Munzer (ed) *New essays in the legal and political theory of property* (2001) 169.
[422] Karjiker (note 1183 above) 13.
[423] B Khumalo 'Defining Economics in the Twenty First Century' (2012) *Modern Economy*, Vol. 3 No. 5, 597-607.
[424] M Parkin *Microeconomics* 9 ed (2010) 2.
[425] Karjiker (note 213 above) 19.

production of creative content. It has been argued that such economics derive normative values from comparable moral and political philosophies that sired utilitarianism.[426] There is therefore a need to explain the nexus between utilitarianism and economic considerations at play to justify their mutual existence and justification for copyright protection.[427]

The link between utilitarianism and copyright industries includes twin economic factors conjoined with economic incentive considerations.[428] Copyright law and copyright industries are already fronted at the centre of twenty-first century economic development.[429] Therefore any amendment to copyright law that does not guarantee utilitarian economic incentives has profound implications that can generate a huge national controversy, as events in the past six years around the CAB demonstrate.[430] If anything, copyright industries' contribution to the global economies[431] and South Africa in particular are huge.[432] This makes economic analysis of utilitarianism in this context imperative. Copyright should be discussed from an economic perspective because its own survival is hinged on a provision for creators' economic incentives to sustain public demand and produce more creations.[433] Copyright protection and economic incentives help avert market failure where the digital era's free riding activities are commonplace and predictable. This context in a free market is desirable because end users need to work, but they must be accompanied by copyright protection measures that ensure a fair balance between all market forces. Therefore, obligatory incentives must be considered as a rational basis for copyright protection. This is so because scholars write that,

> 'when the issue of the justification for copyright protection is raised, the standard response is inevitably an appeal to the notion that such protection is required to provide the necessary incentives for authors to create such works, and to do so others must be prevented from exploiting (or 'free-riding' on) the efforts of authors by giving authors a "monopoly" over

[426] C Roederer & D Moellendorf *Jurisprudence* 1 ed (2006) 187.
[427] Karjiker (note 118 above) 13.
[428] K Tomaselli 'The 2022 Copyright Amendment Bill: Implications for the South African universities' research economy (2022) *Communicare: Journal for Communication Studies in Africa* 16 Vol. 41, No. 2 14-33. He writes that; 'IPRs are central for development and innovation with regard to information-led economies where content is the prime good being traded, whether or not on open access.'
[429] A Kalvi 'The impact of copyright industries on copyright law' (2005) *Juridica International* X/2005 95.
[430] See Linda Ensor 'Debate rages on over controversial Copyright Amendment Bill' *BusinessDay*, 11 August 2021 Available at *https://www.businesslive.co.za/bd/national/2021-08-11-debate-rages-on-over-controversial-copyright-amendment-bill/*. (Accessed 16 May 2023).
[431] WIPO *Guide on Surveying the Economic Contribution of the Copyright Industries 2015* (2015) 14.
[432] A Pouris & R Inglesi-lotz (note 110 above). Scholars write that, 'It was estimated that the sector contributed 4.1% to GDP - more than the contributions of other sectors such as agriculture and food, beverages and tobacco.'
[433] Karjiker (note 118 above) 21.

> their creations …. These concepts and their analysis are familiar to economists, which makes copyright such a suitable subject for economic analysis.'[434]

Copyright law ordinarily provides direction in the manner in which the work should be exploited and the convoying of desired economic incentives. This statutory framework and approach are important to discourage authors' demotivation by providing a legal reciprocal platform in which the desired incentive outcomes are negotiated and concluded. According to the incentive story, 'this ease of copying makes it difficult for original creators to make money from their creations, reducing economic incentives to create.'[435] This is so because, as Fisher puts it,

> 'Potential innovators will know that once they reveal their breakthroughs to the world, others will be able to take advantage of them for free. Consequently, innovators will be unable to recoup the costs of their innovations (the costs of the education they underwent to prepare them to make the innovations, the outlay for research and development, their opportunity costs, etc.). Aware of this risk, potential innovators will devote their energies to other, more lucrative activities, and society at large will suffer.'[436]

These are devastating economic outcomes arising from weak copyright protection measures that allow IP reproduction without accompanying exclusive rights carrying a reasonable duration, and a proper incentive mechanism to sustain copyright holders' livelihoods. The end result is demonstrated by scholars' Barro & Martin who write that,

> 'copying is cheaper than innovation over some range. As the pool of uncopied ideas diminishes, the cost of imitation tends to increase…the consequence from the absence of intellectual property rights across economies… [is that] the leading places tend to have insufficient incentive to invent, and the follower places tend to have excessive incentive to copy.'[437]

Such economic considerations are important because they address the impact of copyright infringement on the society. If the contributions of copyright industries to the economy are huge, then a legislative framework that encourages innovation and incentives for copyright

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[434] Karjiker (note 118 above) 18.
[435] Ibid.
[436] W Fisher 'Theories of Intellectual Property' in Stephen R. Munzer (ed) *New Essays in the Legal and Political Theory of Property* (2001) 168.
[437] R J Barro & X Sala-i-Martin 'Technological Diffusion, Convergence, and Growth' (1997) *Journal of Economic Growth* Vol. 2, 1 1.

holders is obligatory.[438] Consequently, market failure may inconveniently arise because of lack of adequate copyright protection.[439] In this context, an author loses capacity to control and derive incentives from work, with end users exploiting them without providing corresponding incentives. The authors' demotivation arising from free-riding activities results in the under-production of creative goods, and the market for the same disappears because either innovation is absent, or prices have skyrocketed due to low supplies and high demand.[440]

However, there are contrary views proffered by Plants suggesting the need to empower consumers at the expense of authors who should be allowed to reap the benefits of their creative works under free market forces.[441] Plant questioned the need for copyright protection on utilitarian grounds, misleadingly arguing that mass availability of work often without accompanying incentives is a fulfilling reward on its own.[442] He premises his argument on that authors in general want to be the first in the market, and have their works widely distributed and that the accompanying popularity levels generated can operate as an effective reward for authors without the need for copyright protection of literary works.[443] While it may be true that authors may want their work widely distributed benefiting from the fame associated with such dissemination, the cost of such marketing is borne by the publisher or record producer. If unauthorised exploitation of work is extensive, this affects sales and levels of remuneration for authors if their benefits are largely dependent of sales. Congruently, Sunder argues that evidence suggests that utilitarianism has failed as a theory of intellectual property both descriptively or prescriptively.[444] He suggests that free market forces, the law and economics should operate independently to spur innovation because end users inevitably create derivatives altering ownership patterns that copyright law cannot outpace. Sunder provides an amusing but misplaced viewpoint that,

> 'The modern law and economics approach would rely on the market to spur creation, but this leads to the mistake that drugs for baldness are more important than drugs for malaria because the former enjoy a multi-billion dollar market, while those who need the latter are too poor to offer much to save their own lives. Understanding intellectual property as incentive-to-create

[438] A Pouris & R Inglesi-Lotz (note 110 above) 3.
[439] Karjiker (note 118 above) 40.
[440] Ibid. See also TG Palmer 'Intellectual property: A non-Posnerian law and economics approach' (1989) 12 *Hamline L Rev* 261 262.
[441] A Plant 'The Economic Theory Concerning Patents for Inventions' (1934) *Economica*, Vol. 1. 30–51.
[442] Ibid.
[443] Ibid.
[444] M Sunder 'IP3' (2006) *Stanford Law Review*, Vol. 59 283.

> reduces to the claim that the ability to pay, as evidenced in the marketplace, should determine the production of knowledge and culture.'[445]

Furthering Sunder's approach, Lemley views IPRs as a form of government regulation of the free market, restricting consumers' freedom to engage with their personal property in order to improve the lives of inventors.[446] He argues that the,

> 'freedom to make art or build a new phone is constrained by a government requirement that my art or my phone not be too similar to someone else's. In the case of patents, that is true even if I have never heard of the other person or seen their phone or their patent, and indeed even if they never built a phone at all.'[447]

Lemley further argues that authors are happy,

> 'to create and share their work for free now that the Internet has given them the means to do so. At the same time, the money provided by IP allows the existence of a professional creative class that may be desirable for distributional reasons or because we like the sorts of things they create more than we do the work of amateurs.'[448]

Lemley believes that it is difficult to justify the existing IP regulatory mechanisms and other abundant laws departing from the free market, protecting authors from digital piracy infringements.[449] He suggests that utilitarianism supporters are blind enthusiasts of an ineffectual theory, driven by some new faith and hostile to new evidence suggesting there is more creativity if people are allowed to freely use works without protectionist laws. Correspondingly, both academics celebrate accessibility without protectionist measures, and ignore the effects of such an approach on developing African economies. The danger of depriving authors of incentives is captured by Tomaselli's critical view of free access, in which he argues that when information is no longer good with a monetary value, it can no longer be traded.[450] The argument that free information will boost innovation with authors getting wider readership regrettably generates exposure of creations without consistent income or incentives.

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[445] Ibid.
[446] M A Lemley 'Faith-Based Intellectual Property' (2015) *UCLA L. Rev.* 1330
[447] Ibid.
[448] Ibid.at 1334.
[449] Ibid at 1335.
[450] K G Tomaselli (note 428 above) 1-3.

Plant and Lemley's argument is misdirected in that business is always premised on consumers' ability to pay, and the scarcity and/or availability of the product determines value in the absence of price controls. If the utilitarian value of work is such that a monopoly can affect the common good, the government can intervene with incentives to ensure availability without compromising property rights. Macaulay agrees and disagrees with both Plant and Lemley, and his reasoning is profound in understanding the dynamics behind copyright protection, periods of control, and incentives. Macaulay views the monopoly granted by copyright protection as an evil but agrees that 'for the sake of the good we must submit to the evil; but the evil ought not to last a day longer than is necessary for the purpose of securing the good.'[451] Once the author has recouped from initial investment, the work might be made accessible and exploited by consumers.[452] Utilitarian ideals facilitate reasonable authors' work monopoly for a limited duration until sufficient copyright investment returns have been realised. The duration of exclusivity must be warranted and limited only to the time necessary to facilitate authors accruing sufficient incentives to innovate.[453]

Economic justification for copyright protection frequently employs words such as 'investment'[454] and 'market,'[455] providing an economic rationale for incentives with utilitarian copyright traits. Incentives in creative works imply a desire for authorial control, profit, or financial gain, and supposedly employment security under market forces.[456] The IP industry provides employment sustaining a substantial portion of the South African population.[457] In order to appreciate the necessity for adequate incentives, scholars[458] write that it is useful to consider the skill, labour and judgment invested into some of the greatest

[451]M Shuk Chun Lam 'The granting of intellectual property rights and their effect on the promotion of future innovation and creativity' (2015) *The King's Student Law Review*, Vol. 6, No. 1 (Spring 2015) 2. Qouting As per Macaulay, rt. hn. T. B., HC Deb 05 February 1841 vol. 56 cols. 341-360 at 348.
[452] Shuk Chun Lam (note 428 above).
[453] Ibid at 11.
[454] Karjicker (note 118 above) 18.
[455] Ibid at 30.
[456] R M Bizri, A Kojok, A Dani *et al* 'Barriers to Entrepreneurial Endeavors in a Developing Economy' (2012) *World Journal of Social Sciences* Vol. 2. No. 6. 79 – 100.
[457] Department of Arts and Culture 'Employment in the Cultural and Creative Industries in South Africa: Measuring and valuing South African creative economy' (2017) 1. available at *http://www.dac.gov.za/sites/default/files/Research%20Report%2020Employment%20in%20the%20Cultural%20and%20Creative%20Industries%20in%20South%20Africa.pdf.* accessed 10 December 2021. Its findings are that: 'An estimation of employment in the cultural and creative industries (including cultural and support occupations) showed that 4.2% of jobs in SA are in the CCIs. If one includes all three parts of the creative trident, total cultural/creative employment in South Africa accounted for 6.72% of all jobs in the country, or just over a million jobs, in 2015.'
[458] J J Baloyi 'Demystifying the role of copyright as a tool for economic development in Africa: Tackling the harsh effects of the transferability principle in copyright law' (2014) *Potchefstroom Electronic Law Journal (PELJ), 17*(1), 104.

musical creations. Copyright law generally outlines the circumstances under which such rights would subsist.[459] It has been demonstrated that a robust copyright protection regime triggers entrepreneurial growth aspirations.[460] From the foregoing, it is important to assess how utilitarianism, viewed with some economic justification for copyright protection has spread and influenced global, social, political, and economic advances.

2.5 Utilitarian global appeal

The history and genesis of copyright law is connected to the birth of the Statute of Anne,[461] the first copyright law in the world which laid the foundation for normative utilitarian features that modelled innumerable emerging global copyright statutes in various jurisdictions.[462] The extent of global utilitarianism influence is a manifestation of its features permeating the economic,[463] legal[464] and political sphere[465] of different sovereign states across the world. Utilitarianism is an ethical theory that focuses on the consequences of actions and determines what is right and wrong.[466] It is still relevant from the 17th century, when it emerged in England, to the contemporary copyright world order.[467] To date, the theory is enduring and provoking stimulating debate in the field of academia, helping shape and direct policies within the global public and private spheres.[468] While utilitarian scholars

[459] A J C Copeling *Copyright law in South Africa* (1969) 48-49. See also Lord Reid establishing the requirement for originality in copyright works, in the English case of *Ladbroke (Football) Ltd v Wlilliam Hill (Football) Ltd* 1964 1 ALL ER 465 (HL). (An English House of Lords decision).
[460] Baloyi (note 458 above) 104.
[461] In 1709 British parliament enacted the Statute of Anne; short title: Copyright Act 1709 8 Anne c.21; long title: *An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times therein mentioned.*
[462]M Senftleben (note 217 above) 8.
[463] Carla Tardi 'Utilitarianism' Investopedia, September 20, 2021. available at *https://www.investopedia.com/terms/u/utilitarianism.asp.* accessed 2 December 2021.
[464] S Nathanson 'Act and Rule Utilitarianism' (2016) Internet Encyclopaedia of Philosophy. available at *https://iep.utm.edu/util-a-r/#SSSH4aii1*accessed 3 December 2021.
[465] G Elfstrom 'Utilitarianism and International Ethics' in Robert A. Denemark & Renée Marlin-Bennett (eds.) *The International Studies Encyclopaedia* (2010) 7214 29.
[466] Ibid.
[467] Ibid.
[468]K Bykvist 'Utilitarianism in the twentieth century' in Ben Eggleston and Dave Miller (ed) *Cambridge Companion to Utilitarianism* (2013). 103-124. She writes that: 'In the twentieth century, both the practice and the theory of utilitarianism were developed extensively. First, utilitarian thinking continued to have a pervasive influence on law, as well as political and economic policy.'

such as Bernard Williams[469] critiqued modern utilitarianism in 1973 thus, 'the day cannot be too far off in which we hear no more of it,'[470] other scholars like Crisp retorted,

> 'If anything, that day is even further off than it was when Williams wrote those words. Utilitarianism ends the twentieth century in as strong a position as it did the nineteenth: with many proponents and of course many critics, and as a focus of a great deal of lively ethical discussion.'[471]

While it is acknowledged that the theory has undergone different variations and refinements since the early twentieth century, scholars have observed that after the middle of the same century, utilitarianism is now more associated with scholars identifying themselves as consequentialist and very few philosophers subscribing to classical utilitarian views on hedonistic value theory.[472] However, there is a general consensus that the influence of the classical utilitarian has been profound not only within moral philosophy, but within political philosophy and social policy.[473] As its theoretical influence spread after the seventeenth century, the utilitarian copyright protection became more pronounced in Anglo-American systems where the theory ensconced and established itself in the respective jurisdictions' IPL constitutional foundations.[474]

2.5.1 Utilitarianism and the European Union

The European Union (EU) was the birthplace of utilitarianism,[475] until Britain severed its ties with the European continental body following the Brexit referendum.[476] Utilitarianism spread across Europe had a significant role in the downfall of autocratic regimes.[477] Burns writes that utilitarianism radicalised many during the eighteenth century, influencing people to

[469]Sir Bernard Arthur Owen Williams, FBA (21 September 1929 – 10 June 2003) was an English moral philosopher. He authored *Truth and Truthfulness: An Essay in Genealogy* (2002*);* B Williams and J. J. C. Smart *Utilitarianism: For and against* (1973); B Williams and A Sen *Utilitarianism and Beyond* (1982); B Williams *Shame and Necessity* (1993).
[470] B Williams & J J C Smart *Utilitarianism: For and Against* (1973) 150.
[471] R Crisp 'Utilitarianism in the Twentieth Century' (2001) *A Journal of Religion and Philosophy*.1.
[472]J Driver (note 349 above).
[473] Ibid.
[474]S P Calandrillo 'An economic analysis of intellectual property rights: Justifications and problems of exclusive rights, incentives to generate information, and the alternative of a government run reward system' (1998) 9 *Fordham Intell Prop Media & Ent LJ* 301 310.
[475] Utilitarianism is a tradition of ethical philosophy that is associated with Jeremy Bentham and John Stuart Mill, two late 18th- and 19th-century British philosophers, economists, and political thinkers. See J E Gustafsson 'Bentham's Binary Form of Maximizing Utilitarianism' (2018) *British Journal for the History of Philosophy* 26 (1): 87–109.
[476] The United Kingdom EU membership Brexit referendum took place on 23 June 2016. EU parliament gave passing the Notification of Withdrawal, 2017.
[477] J Burns 'Utilitarianism and Reform: Social Theory and Social Change 1750–1800' (1989) *Utilitas* 1(2).1.

critically examine existing thoughts and challenge authorities as its features permeated into Montesquieu[478] and Rousseau's[479] writings, themselves persuasive philosophers partly held liable for igniting the French revolution.[480] Notably, David Thompson writes,

> 'there had been growing in Europe, throughout most of the eighteenth century, what has been called ' the revolutionary spirit.' This spirit, a spirit of rationalist criticism and of resistance to the established powers of the Roman Catholic Church, the absolutist monarchy, and the privileged nobility, was fostered particularly by the work of a remarkable series of French thinkers and literary men, the philosophes.'[481]

Thompson adds that the writings of men such as Voltaire, Montesquieu, Diderot, and Rousseau were widely read throughout Europe, and they themselves became European figures of distinction and inspiration.[482] The events that eventually shaped the ultimate revolutions of France were in part imbued by philosophical inputs of Bentham's utilitarian traits. The French copyright systems are natural law based, despite their proximity to the utilitarian British philosophical epicentre, and even hosting and granting citizenship to Bentham, the chief exponent of the philosophy.[483] Like the French's natural right theoretical approach, Germany's copyright law also illustrates the interaction between the theory's principles and utilitarianism.[484] Frischhut writes that the utilitarian theoretical influence within the EU is discernible from the factors that influenced its origins.[485] In 1950 French foreign minister and founding father of the EU Robert Schuman said that 'Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity.'[486] While the approach and atmosphere that prevailed

[478] Baron de La Brède et de Montesquieu (1689 – 1755), a French political philosopher, the principal source of the theory of separation of powers, through his work *The Spirit of the Laws* (1748).
[479] Jean-Jacques Rousseau (1712 – 1778) His political philosophy influenced the progress of the Enlightenment throughout Europe, as well as aspects of the French Revolution.
[480] J Burns 'Utilitarianism and Reform: Social Theory and Social Change 1750–1800' (1989) *Utilitas* 1(2) 4.
[481] D Thompson *Europe Since Napoleon* (1960) 25.
[482] Ibid.
[483] Jeremy Bentham in October 1792 he accepted the *French citizenship granted* to him by the National Assembly.
[484] Forere (note 52 above) 5. See also the German Copyright Act of 161 Article 14(1) private property, including the economic rights.
[485] M Frischhut *The Ethical Spirit of EU Law* (2019) 124.
[486] Ibid. This has a consequentialist notion of utilitarianism. The author writes that the Schuman Declaration was presented by French foreign minister Robert Schuman May 1950 and proposed the creation of a European Coal and Steel Community. The ECSC was the first of a series of supranational European institutions that would ultimately become today's EU.

during the period was inspired by deontology,[487] the spirit behind the EU integration carries a utilitarian consequentialist feature.[488]

Contemporary EU legislation, public policy considerations, and decision-making processes appear more as offshoots of utilitarian consequentialism.[489] In current EU politics and legislative framework, the utilitarian effect of consequentialism as an end product of a blueprint has been argued to closely relate to 'risk assessment.'[490] In the EU law in general - there are similarly 'impact assessments,'[491] which plays an important role in the decision-making, as well as the 'effet utile' principle in CJEU case-law, both of which are consequentialist.[492] Consequentialist theories assume that the judgment about the moral correctness and wrongness of actions depends exclusively on the quality of the consequences of action. At the cornerstone of EU policies are public policy impact assessment programmes which are limited to decisions with far-reaching consequences.[493] Also risk assessment deals with consequences, either from a legal or from an ethical perspective. [494] A key characteristic of utilitarianism is consequentialist which is a pronounced thinking in long-term development tendencies.[495]

2.5.2 United States and Utilitarianism

Utilitarian copyright protection is more pronounced in Anglo-American systems, where the theory established itself in the constitutional foundations of the respective jurisdictions. The United States (U.S) is not the focus of this study for comparable purposes; it is an important setting to understand the extent and impact of utilitarianism in the Northern Hemisphere. The genesis of the relationship between utilitarianism and the U.S could best be understood in the

[487] In moral philosophy, deontological ethics or deontology is the normative ethical theory that the morality of an action should be based on whether that action itself is right or wrong under a series of rules, rather than based on the consequences of the action.
[488] Frischhut (note 485 above).
[489] Ibid at 23.
[490] See also Recommendations for National Risk Assessment for disaster risk management in EU (2021). available at *https://www.preventionweb.net/publication/recommendations-national-risk-assessment-disaster-risk-management-eu-2021, a*ccessed 2 December 2022. Part of EU Consequentialist programmes for the common good for all.
[491] See also Environmental assessment can be undertaken for individual projects, on the basis of Directive 2011/92/EU (known as 'Environmental Impact Assessment' – EIA Directive). EU consequentialist programme for the common good.
[492] The 'effet utile' principle requires all national institutions to give full force and effect to EU law. However, the practical realisation of this obligation depends on a clear interpretation of the relevant provisions of EU law by the European Court of Justice (ECJ).
[493] Frischhut (note 485 above) 23.
[494] Ibid.
[495] Ibid.at 24.

political and legal context of the relationship between Bentham, the father of modern utilitarianism, who supposedly had much in common ideologically with James Madison,[496] the father of the U.S. Constitution.[497] Macias posit that Bentham's constitutional theory is useful in understanding the intellectual environment that produced the U.S. Constitution.[498] Bentham took a deliberate interest in American politics, similarly with the French revolution and its legal developments. He had a deep relationship with the American Constitution founders and took profound examination of the Constitution itself often engaging leading American politicians of the time including Madison, Benjamin Franklin, John Jay, Aaron Burr, and John Quincy Adams.[499] Marcia believes the extent of the relationship between Madison and Bentham espoused later through literature 'similarities of thought' between Bentham and Madison, and she argues that the U.S Constitution 'is best viewed as a document inspired by, and compatible with, the rationalism represented by English utilitarianism.'[500] As such in the U.S, Bentham has been the subject of numerous law review articles ranging from his influence on specific historical-legal developments in the U.S [501] to the influence of his philosophical jurisprudence on American law.[502]

The net effect of the Madison-Bentham relationship in American constitutional history is that the resultant U.S Constitution was largely consistent with Bentham's utilitarian theories. It had progressive inputs from Bentham, who had come to believe that the U.S was an ideal nation for 'full-blown utilitarian codification'.[503] Bentham's intellectual engagement with U.S politicians and thinkers proved fruitful in nurturing the growth and entrenchment of his legal philosophy. There were several correspondences between Bentham and Madison during the nineteenth century. Madison reportedly,

> 'alone among the American founders came nearest to Bentham in expounding a utilitarian rationale for his chosen form of government. While they disagreed about specifics, they both understood the centrality of the government in producing virtuous citizens and rulers. Their

[496] James Madison (1751–1836),
[497]S J Macias 'Utilitarian Constitutionalism: A Comparison of Bentham & Madison' (2018) *NYU Journal of Law & Liberty* Vol. 11, No. 3. 1028.
[498] Ibid.
[499] Ibid.
[500] Ibid.
[501] D Alfange Jr. 'Jeremy Bentham and the Codification of Law' (1969) 55 *CORNELL L. REV*. 58; see also T DiFilippo 'Jeremy Bentham's Codification Proposals and Some Remarks on Their Place in History' (1973) 22 *BUFF. L. REV*. 239; C N Gregory 'Bentham and the Codifiers' 13(1900) *HARV. L. REV*. 344.
[502]W H Alexander 'Jeremy Bentham, Legal Philosopher and Reformer' (1930) 7 *N.Y.U. L.Q. REV*. 141, 465(pts. 1 & 2. See also J Birkhead 'Making Laws More Effective: Jeremy Bentham and Jean-Jacques Rousseau on Good Citizenship' (1995) 5 *U.S. A.F. ACAD. J. LEGAL STUD*. 79.
[503] S J Macias (note 407 above). 1034.

> shared enlightenment assumptions about human nature resulted in texts that were remarkably compatible, but it seems that only Bentham came to this realisation. To the extent Madison's words still have relevance to the continuous reshaping of American government, then Bentham's criticisms and commentaries on the same must be considered equally useful in achieving a more perfect—or at least more utilitarian— union.'[504]

The U.S. Constitution is loud with utilitarian traits.[505] Its emerging jurisprudence and provisions are shaped and modelled around utilitarianism as espoused by the language of its Copyright Clause under Article I of the U.S Constitution granting Congress the power, '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.'[506] After the U.S Constitution entrenched the copyright provision, its first Congress implemented the copyright provision through the enabling Copyright Act of 1790.[507] The subsequent Act for the Encouragement of Learning, by Securing the Copies of Maps, Charts, and Books to the Authors and Proprietors of Such Copies was unsurprisingly modelled around the 1710 Statute of Anne.[508] It granted authors exclusive rights for fourteen years with another option for renewal for the same period.[509] The limited monopoly was designed for creators to recoup economic incentives from the work and stimulate creativity advancing the progress of science and the useful arts, while promoting wide public access to works.[510]

U.S. court precedents continued to affirm the utilitarian posture of the Constitution through interpretations which favoured the copyright principles granting exclusive rights of limited duration to serve the public interest in promoting the creation and dissemination of new works. In the case of *Wheaton v. Peters*, the court, upheld the same utilitarian approach by promoting monopoly for a limited duration to facilitate authors reaping benefits from the work, and outlawed the notion of copyright as a perpetual natural right.[511] Similarly, in

[504] Ibid at 1088.
[505] Ibid at 1043.
[506] Article I, Section 8, Clause 8, of the United States Constitution.
[507] The Copyright Act of 1790 (First Copyright Act adopted by the First Congress), 1st Congress, 2nd Sess., Chapter XV; Stat. 124-126] (May 31, 1790).
[508] Association of Research Libraries 'Copyright Timeline: A History of Copyright in the United States' available at *https://www.arl.org/copyright-timeline/*. accessed 11 January 2022.
[509] Ibid. See also The Copyright Act of 1790 (First Copyright Act adopted by the First Congress), 1st Congress, 2nd Sess., Chapter XV; Stat. 124-126] (May 31, 1790).
[510] Further revisions /amendments to the Act followed and were implemented in 1831, 1870, 1909, and 1976.
[511] *Wheaton v. Peters* 33 U.S. 591 (Supreme Court of the United States decision). It was the first United States Supreme Court ruling on copyright and upheld the power of Congress to make a grant of copyright protection subject to conditions and rejected the doctrine of a common law copyright in published works.

another precedent *Mazer v. Stein,*[512] the Supreme Court acknowledged that the economic philosophy behind the provision empowering Congress to grant patents and copyrights lies in the promotion of economic incentives that would advance public welfare in science and useful Arts.[513] Further from the Constitution, the utilitarian appeal would also apply in the formulation of the U.S. The House Report on the 1909 Copyright Act provides the following,

> '[t]he enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings … but upon the ground that the welfare of the public will be served … Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given.'[514]

Precedents have been enumerated, as observed in *Eldred v. Ashcroft* that the Congress, not the courts should decide how best to pursue the Copyright Clause's objectives.[515] Therefore, American copyright law, just like South African copyright law which shall be discussed below is a creature of statute. The copyright clause of the Constitution lays the basis for a broader interpretation of copyright cases. The so-called incentive theory is embedded in the copyright provision underpinning the rationale for copyright protection in the U.S, whose inclusion was designed to motivate authors and inventors. Copyright law and utilitarianism are embraced by provisions and precedents endorsing the law to provide incentives for creative intellectual efforts that benefit the public. As such in *Fox Film Corp v Doyal,*[516] the U.S Supreme Court held that incentives maximise productions and distribution of IP works. Various precedents have persuasively followed this legal approach.

2.5.3 The Berne Convention, TRIPs Agreement and WIPO Copyright Treaty

Utilitarian features are engrained within influential international copyright treaties that have helped create a foundation for the harmonisation of copyright law within national jurisdictions' domestic legislation. The Berne Convention seeks to grant harmonised copyright protection in literary and artistic works anchored in a natural rights foundation.[517] The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement followed the Berne Convention a century later, but while the former deals only with

[512] *Mazer v. Stein* 347 U.S. 201 (1954) (Supreme Court of the United States decision).
[513] C Goldwag 'Copyright Infringement and the First Amendment' (1979) *Columbia Law Review* Vol. 79, No. 2. 320-340.
[514] U.S. House Report on the 1909 Copyright Act.
[515] *Eldred v. Ashcroft* 239 F. 3d 372 (Supreme Court of the United States decision).
[516] *Fox Film Corp v. Doyal*, 286 U.S. 123 (Supreme Court of the United States decision).
[517] M R F Senftleben (note 217 above) 17.

copyright works, the latter is more inclusive providing an array of IP rights protection. South Africa is, however, a party to the Berne Convention and the TRIPS Agreement, but it has signed and not ratified the WIPO Copyright Treaty.[518]

The TRIPS Agreement was drafted to create global uniformity by arresting distortions in international trade. However, the traits of the three treaties carry utilitarian features around copyright economic incentive considerations.[519] A year later after TRIPS Agreement came into effect, WIPO Copyright Treaty[520] was adopted by Member States in 1996 to facilitate the harmonisation of literary and artistic works while underscoring 'the outstanding significance of copyright protection as an incentive for literary and artistic creation'.[521] Senftleben writes that the natural right theory emerging out of the Berne Convention and the utilitarian incentive concept are thus coalesced. [522] Senftleben further provides that TRIPS equally embraced and advanced a utilitarian approach.[523] The central aim of Article 7[524] would 'remind us of the role that intellectual property rights play in incentivizing creativity and innovation yet alerts us to its detrimental side-effects.'[525] If incentives are central to the promotion of innovation and economic growth, then the essence of Article 7 captures that and it extends the economic stimulus for development beyond national boundaries.[526] The use of technological innovation within TRIPS suggests incentivising the production of new creations to stimulate growth.[527] What is unique about the three treaties is that they capture the three-step test considerations that underpin compulsory incentives for the exploitation of works without interfering with the normal exploitation of the work.[528]

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[518] J de Beer, J Baarbé & C B Ncube 'Evolution of Africa's Intellectual Property Treaty Ratification Landscape' (2018) *The African Journal of Information and Communication*, 22, 53-82. available at *https://dx.doi.org/10.23962/10539/26173*. accessed 16 May 2023. See also WIPO-Administered Treaties. available at *https://www.wipo.int/wipolex/en/treaties/ShowResults?start_year=ANY&end_year=ANY&search_what=C&country_id=190C&treaty_all=ALL*am accessed 16 May 2023.
[519] Senftleben (note 217 above) 17.
[520] World Trade Organisation (WTO) - Agreement on Trade-Related Aspects of Intellectual Property Rights. Available at *https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm*. (Accessed 21 October 2021).
[521] See the preamble of the W1PO Copyright Treaty.
[522] Senftleben (note 217 above) 17.
[523] Ibid.
[524] TRIPS Agreement, Art. 7.
[525] A Slade 'The Objectives and Principles of the WTO TRIPS Agreement: A Detailed Anatomy' (2016) *Osgoode Hall Law Journal Volume* 53, Issue 3 Art. 6956. available at *https://digitalcommons.osgoode.yorku.ca/ohlj/vol53/iss3/6*.accessed 21 October 2021.
[526] Ibid.
[527] Ibid at 963.
[528] See Articles 9(2) Berne Convention; Article 13 TRIPs Agreement & Article 10 WIPO Copyright treaty.

The WIPO Copyright Treaty embraced the emerging thread of copyright protection provided for in all the treaties providing and emphasizing the need for copyright protection as an incentive for innovation and production of more works, thus clothing the treaties with some measure of utilitarianism.[529] As signatory to the Berne Convention and the TRIPS Agreement, South Africa is obliged to account for the underscored utilitarian features in its domestic legislation, in particular the current proposed copyright amendments.

2.5.4 Ghana: Utilitarianism in the legal framework

Utilitarianism is fused into Ghana's copyright law by virtue of the country signing the Berne Convention,[530] and the TRIPS Agreement. Unlike South Africa, Ghana signed and ratified the WIPO Copyright Treaty (WCT).[531] The utilitarian features of the international treaties espoused under the Berne Convention natural right theory elements and all the treaties three-step test principles are therefore by ratification expected to be reflected in its copyright law framework.[532] Similarly, the majority of EU Member States have ratified all the three treaties. However, it is unfortunate that Ghana is yet to conduct extensive research that credibly determines the level of its copyright industry's contribution to GDP to determine the extent to which they can be recognised in the mainstream economy. Such statistics would create a legitimate basis for the authors to use their significant contributions to the overall economy to leverage their case for better economic incentives.[533] However, general estimates provide that about 30 000 people are employed in the copyright industries along the value chain contributing about 0.20% to Ghana's GDP.[534]

The Constitution of Ghana recognises the right to fair remuneration and equal pay for work of equal value.[535] This also corresponds with its enabling Labour Act provisions which stipulate that every worker should receive equal pay for work of equal value without any

[529]Tobias Schönwetter *Safeguarding a fair copyright balance -contemporary challenges in a changing world: Lessons to be learnt from a developing country perspective* (Unpublished LLM thesis, University of Cape Town, 2009) 39.
[530] Berne Convention available at *https://www.wipo.int/treaties/en/notifications/berne/treaty_berne_135.html* accessed 16 May 2023.
[531] WCT Notification No. 62, WIPO Copyright Treaty, Ratification by the Republic of Ghana. available at *https://www.wipo.int/treaties/en/notifications/wct/treaty_wct_62.html*. accessed 16 May 2023.
[532] See Schönwetter (note 502 above) 39.
[533]ARIPO *Comparative Study on Copyright Laws of ARIPO Member States and their Adherence to International Instruments on Copyright and Related Rights* (2016) 10.
[534] Ibid.
[535] Ghana Constitution, 1992: Article 24: '(1) Every person has the right to work under satisfactory, safe and healthy conditions, and shall receive equal pay for equal work without distinction of any kind. (2) Every worker shall be assured of rest, leisure and reasonable limitation of working hours and periods of holidays with pay, as well as remuneration for public holidays.'

discrimination.[536] The mandatory 'equal' remuneration scope of the legislative framework is an eloquent express recognition of compensatory incentive frameworks that should correspond with an individual's effort towards production. The constitutional fair remuneration scope and Labour Act equal pay provisions can be read together with Article 26(1) of the Constitution – relating to intellectual property creations - guaranteeing the right to 'enjoy' and maintain the cultural rights and practices. Article 39(4) stipulates that the State shall endeavour to preserve and protect places of historical interest and artefacts. Furthermore, the Constitution progressively under Article 20 guarantees the right to protection from deprivation of property.

Its Constitution guarantees freedom of speech and expression which include freedom of the press and other media, and the right to information.[537] There are concerns that copyright law is the main challenge restricting access to primary legal information. Scholars raise concern that it is very challenging for the public to access certain information where authors/publishers rights are very strong, thus impeding access to information provisions.[538] Furthermore, there isn't legislative clarity on whether individuals can use right to information constitutional provisions as a defence in a copyright claim.[539] Scholars also warn of challenges in raising the constitutional freedom of expression as a defence to copyright infringements.[540] The copyright Act is a source of friction as it protects and regulates expressions of folklore,[541] with critics equating it to the 'nationalization of rights to folkloric expressions.'[542] This because it takes authorship rights away from the creators of folkloric expressions thrusting them in the President as a trustee for the nation creating a potential legal contradiction because the Constitution guarantees the right to the free participation in ethnic culture.[543] Ostensibly, such restrictions on artists who seek to make a living from their work are an affront to freedom of expression. Collins writes that,

> 'This is deeply problematic. Following [Ghana's] independence in 1957, many artists have explicitly and habitually drawn on Ghana's folk traditions to develop today's creative industries. The 2005 Act means that the current generation of cultural practitioners must

[536] Section 68 of the Labour Act, 2003 (Act 651).
[537] Ghana Constitution Art. 21(1).
[538] C Asare & J Odetsi-Twum 'Public Access to Primary Legal Information in Ghana: Opportunities and Challenges' (2021) *Library Philosophy and Practice (e-journal)* 5751 9.
[539] P Adusei, (note 266 above) 64.
[540] Ibid at 65.
[541] See Copyright Act of 2005 (Act 690) s 44.
[542] See K Ludewig 'The Nationalization And Commercialization of Ghanaian Folklore' (2009) 6 *Mich. J. of Pub. Aff.* 2-5.
[543] Ghana Constitution Art. 26(1)

either seek permission to use and rework their cultural heritage, or look elsewhere for inspiration.'[544]

The copyright holders' rights are captured under the Copyright Act as economic rights with copyright protection measurers entailing exclusive rights to the reproduction and distribution of the work.[545] The rights of the author are protected during the life of the author and seventy years after the death of the author.[546] The duration of copyright in sound recording are protected from the publication until the expiration of seventy years after the year of publication.[547] The recognition of the economic incentives arising from the unlawful exploitation of works that often occurred without statutory compensation frameworks was rectified in line with the Berne Convention and TRIPS Agreement three-step test through the introduction of the copyright levy. The incentives for rightsholders in the Digital Age are now recognised, balancing the interests of both private and public interests, and creating a market equilibrium that guarantees further innovation and production of works.[548] The effect of the levy imposition is well-expressed in its compulsory statutory form.[549]

2.5.5 South Africa and utilitarianism

South Africa's utilitarian copyright law framework has its roots in the country's historical colonial relationship with Britain.[550] South Africa and the U.S as demonstrated earlier, borrowed and incorporated the British's utilitarian theoretical framework onto their copyright law.[551] The utilitarian posture of the British IPL is evident in its granting of creators and owners' exclusive control for a limited duration over their intellectual creations through IPRs, which as Lam put it, is recognised as essential to the achievement of promoting innovation and creativity in the United Kingdom (UK).[552] The intangible assets value in the UK was

[544] Stephen Collins 'Ghana's copyright law for folklore hampers cultural growth' *The Conversation*, 22 September 2019. available at *https://theconversation.com/ghanas-copyright-law-for-folklore-hampers-cultural-growth-123550*. accessed 22 November 2023.
[545] Section 5 Copyright Act, 2005 (Act 690).
[546] Ibid s 12.
[547] Ibid s 16.
[548]Ghana Copyright Act s 27—Levy on devices used for reproducing copyright materials (1) There shall be imposed on any device capable of being used to copy a copyright work a levy of a sum that shall be prescribed in Regulations made by the Minister in consultation with the Minister responsible for finance. (2) The levy shall be collected by the Customs, Excise and Preventive Service at the time of importation or production.
[549] Ghana Copyright Act s 27(9) A person shall not import any device capable of copying protected materials without payment of the levy.
[550] M Riby-Smith 'South African copyright law—the good, the bad and the Copyright Amendment Bill' (2017) *Journal of Intellectual Property Law & Practice*, Vol. 12, No. 3 216.
[551]P J King *Utilitarian jurisprudence in America: The influence of Bentham and Austin on American legal thought in the nineteenth century* (1986) 139-218.
[552]M Shuk Chun Lam (note 459 above) 1.

estimated around £137 billion, and a strong legal framework may be seen as the most economically important incentive for these investments to be made in IP creations.[553] The utilitarian underpinning in UK's IP are often evaluated with reference to the theoretical justifications for their existence, with considerations being applied to their effect on future innovation and creativity.[554] Moreover this is the business thrust of South Africa's IP law.

As South Africa developed from a collection of colonies, and later a dominion and constitutional republic in 1994, the constant revisions of its copyright law from colonisation were a significant replica of the evolving British copyright statutory outlook.[555] Despite minimal statutory provisions having been borrowed by the Copyright Act of 1978 from its British statutory ancestry, the utilitarian scope of the existing copyright law remains intact. In *Biotech Laboratories (Pty) v Beecham Group plc*, the court noted that South Africa's copyright law is based on the Anglo-American copyright model, in which commercial rights reign supreme.[556] The recognition of economic incentives as part of the authors' remuneration right to spur innovation is reflected in precedents. The definition of an author, the court noted, is wide enough to cover any person with a financial interest in the work before concluding that 'one need not be cynic to be sceptical about the philosophical premise on which South African copyright protection is based.'[557] As such, scholars note that 'English authorities nevertheless remain a cogent persuasive force by virtue of the correspondence between and parallel development of English copyright law and South African copyright law.'[558] In the absence of local authorities, English precedents and principles carry persuasive force, especially in copyright law.[559] As such, decisions of the British courts are still useful in interpreting those portions of the Act that have a British base.[560]

There have been attempts to secure remuneration rights for creative content producers since the 1990s. The introduction of CAB was the most practical effort towards the same. The CAB attempts to replace the Copyright Act of 1978 and, in part, adapt copyright law to the Digital Age by borrowing fair use exceptions captured within the United States copyright

[553] Ibid.
[554] Ibid.
[555] Riby-Smith (note 550 above); See also P J King *Utilitarian jurisprudence in America: The influence of Bentham and Austin on American legal thought in the nineteenth century* (1986) 139-218.
[556] *Biotech Laboratories (Pty) v Beecham Group plc* (2002) 2 All SA 652 (SCA) 659.
[557] Ibid.
[558] Klopper et al *Law of Intellectual Property in South Africa* (2011) 149. See also *Galago Publishers (Pty) Ltd v Erasmus* 1989 (1) SA 276 (A) 284 G.
[559] Ibid.
[560] W A Joubert & J A Faris *The Law of South Africa* 2 ed (2004) Vol 5. 2. 4.

law.[561] The CAB appears to take cognisance of the widespread poverty, and the inability of authors to exploit their copyright works due to some inhibiting unbalanced contractual frameworks, digital era infringements of their works and a current lame copyright law outlook that doesn't guarantee their remuneration.[562] There is a commendable attempt at providing incentives to encourage further innovation in the commercial environment, taking due regard to the market forces which are contractually tilted in favour of publishers/producers against authors.[563] Redressing forms of existing copyright contractual frameworks, guaranteeing compulsory remuneration rights is an effort towards guaranteeing authors' economic incentives. Prior to the introduction of CAB, the authors did not see the benefit derived from the exploitation of their work.[564] Poverty levels compounded by historical injustices under apartheid policies,

> 'created an endless circle in which creators are incapacitated from utilising their copyright works in entrepreneurial activities. Because these creators do not have the means to economically exploit their copyrights, they find themselves thus compelled to transfer ownership of these copyrights to others, in the hope of deriving some economic benefit.'[565]

CAB is a plausible reaction to balancing private and public interests in the exploitation of works that ensure that economic incentives are guaranteed to encourage further innovation and improve the economy. While this is the case, there are shortcomings within the Bill that facilitate the exploitation of works through private copying exceptions, without an accompanying alternative remuneration stream.[566] Such a situation discourages innovation and deepens the author's indigence. However, South African IP policy documents enunciate some utilitarian features. The IP policy document adopts a utilitarian incentive approach for the development of IP legislation in South Africa. The document notes that the State will seek to leverage the flexibilities contained in the TRIPS Agreement, 'to ensure that South Africa protects IP rights while simultaneously promoting public health, local manufacture, research

[561] R M Shay 'Fair deuce: An uneasy fair dealing-fair use duality' (2016) *De Jure Law Journal*, 49(1), 105-117. Available at *https://dx.doi.org/10.17159/2225-7160/2016/v49n1a7*. (Accessed 17 May 2023).
[562]Copyright Amendment Bill B133 2017, as reflected in the Bill preamble, the Bill's purpose is 'to provide for the sharing of royalties in copyright works; to provide for the payment of royalties in respect of literary, musical, artistic and audiovisual work'.
[563]Copyright Amendment Bill B133 2017 Sections 6A and 7A of the Bill: Notwithstanding— (a) the assignment of copyright in [the work]; or (b) the authorisation by the author of … [the work concerned] of the right to do any of the acts contemplated in [the related section], the author shall have the right to share in the royalty received for the execution of any of the acts contemplated in [the relevant section].
[564] Baloyi (note 458 above) 1-82.
[565] Ibid.
[566] CISAC (note 159 above) 3.

and development, innovation, food security, environmental considerations, transfer of technology and broad socio-economic development.'[567] The policy document captures the key elements and legal spirit behind utilitarianism in that utility, under its theoretical framework, suggest that economic growth and development is a corollary effect of creations and innovation, human welfare, efficiency, and happiness that must be 'maximized' arising from a either a progressive policy framework and or accompanying legislative structure that causes desired results or consequences to be produced.[568] The enunciated IP policy captures in its consequentialist focus among others innovation, food security, technological and socio-economic growth. By also making reference to TRIPS, the utilitarian posture of the government policy framework emerges. The key utilitarian aspects around the policy framework provide that it will seek to 'protect IP rights,' encourage 'innovation' and 'facilitate economic development.'[569] The WIPO Copyright Treaty also has a utilitarian feature and provides in its preamble, '[e]mphasizing the outstanding significance of copyright protection as an incentive for literary and artistic creation.'[570] The treaty then makes it imperative for the utilitarian approach to be reflected in the national copyright laws of member states. South Africa, as a signatory to the Berne Convention and the TRIPS Agreement, must consider doing the same with the WIPO Copyright Treaty.[571] The utilitarian guiding spirit around IP protection within the international treaties must therefore explicitly permeate South Africa's Constitution, the CAB and provide a comprehensive protection for IPRs while providing scope for economic incentives that takes note of the Digital Age's effects on the authors' remuneration.

2.6 CONCLUSION

The advent of the Internet and digital technologies is a blessing and curse. While making information accessible to the public interest, it has encouraged the exploitation of works

[567]The 'Draft Intellectual Property Policy of the Republic of South Africa Phase I 2017 Notice 636 of 2017' (published in GG 41064 of 25 August 2017) 5. available at *https://www.gov.za/sites/default/files/gcis_document/201708/draft-intellectual-property-policy.pdf.*

[568] C Rajshree *Knowledge as Property: Issues in the Moral Grounding of Intellectual Property Rights* (2010) 92–139.

[569] Draft Intellectual Property Policy (note 415 above).

[570] Preamble of the WIPO Copyright Treaty of 1996.

[571] World Intellectual Property Organisation (WIPO) Development Agenda project to assist small and medium sized enterprises (SMEs) to navigate and optimally utilise the South African intellectual property right system. available at *https://www.wipo.int/export/sites/www/sme/en/documents/guides/customization/creative_expression_sa.pdf.* accessed 8 December 2021. South Africa is a member of the Berne Convention and the TRIPS agreement. It has signed but not yet ratified the WIPO Copyright Treaty. This has made it possible for works to benefit from copyright protection without any formalities or requirement of registration.

without ancillary compensation. Yet, at this age, IPRs should receive adequate remuneration to invest time and money in intellectual creations. Utilitarianism, as demonstrated in this chapter, seeks to strike a balance between private and public interests without compromising innovation. Rather than allowing free-riding activities in which works are easily accessible without statutory interventions to secure economic incentives, utilitarianism seeks recognition of the effort into the work by granting limited copyright protection duration until the author recouped value in the investment. Invariably, free-riding, and cheap imitations diminish profitable returns and consequently dampen efforts towards creative innovations. Copyright protection might be regarded as evil, but it is necessary in circumstances where licenced works are provided for a limited period to restore value in the work for authors. Justification for granting protection will ultimately diminish when a return on the initial investment is sufficiently realised.

Utilitarianism has a rich historical base which has gradually developed into various global jurisdictions. Its features are an important justification for copyright protection based on the premise that in the absence of such protection, authors will not be able to realise adequate returns from their cultural creations. As this chapter illustrates, incentives are necessary to spur innovation and creativity. A combination of utilitarian theory and economic justification lies in the social and economic benefits of limited copyright protection through further innovation, creative products, employment generation, significant revenue inflows for the state, and corollary GDP growth. Copyright protection, in terms of economic justification, is the principal justification of copyright law. As such, legal reforms that guarantee alternative statutory remuneration streams as economic incentives to compensate for the effects of private copying are necessary to avoid perpetuating authors' destitution.

Notwithstanding, current copyright law carries a combination of these theoretical underpinnings which are exploited depending on the prevailing interests of either trade union represantives, or motives and ideological interests of the employer, or large corporations. The prevailing theoretical framework and outcome is determined by the majority parties or dorminant voice at a stakeholders' collective bargaining forum, which is normally accompanied by tensions as various interests clash. In a number of instances, it is the outcome of a political-economic process involving the lobbying of large corporations holding rights for longer and stronger rights and enforcement, and consumer and digital rights organisations lobbying for user freedoms.

CHAPTER 3

AUTHORS REMUNERATION CHALLENGES: COPYING, TRANSPARENCY OBLIGATIONS AND COLLECTIVE MANAGEMENT ORGANISATIONS

3.1 INTRODUCTION

The digital and information technology has presented enormous copyright remuneration challenges for authors arising from the pervasive private copying of copyrightable works without ancillary compensation frameworks. This chapter shall explore how the digital copying of unlimited creative content replicas have impacted on the authors' remuneration and recommend a remedial private copying levy to address the same. An examination of the Copyright Act 98 of 1978 and its accompanying 2006 Copyright Regulations, and the proposed Copyright Amendment Bill, 2017 (CAB) will be made to evaluate the extent to which they adapt to the Digital Age and secure authors' remuneration right. Prior to the Digital Age, South African rightsholders in the creative industry were already facing insurmountable remuneration challenges, as many were dying impoverished despite their celebrity status and accomplishments.[572] The authors' right of remuneration is facilitated by the Collective Management Organisations (CMOs) – responsible for the licensing, collection, management, and distribution of needletime royalties – but such societies are not adequately regulated and operate in an opaque management manner creating accountability and transparency concerns. It is only needletime CMOs that are regulated. In this regard, this chapter has two objectives. The first objective is to examine the threats in the music industry occasioned by technology and the manner in which the Copyright Act, its CMOs copyright regulations and the CAB create encroachments in the remuneration rights of artists and copyright owners thereby making a case for introduction of copyright levy. The second objective is to examine the inadequacies within the Act, Regulations, and the CAB in safeguarding the right of remuneration and creating accountable CMOs that conduct their affairs in a transparent manner in the management of the royalties to facilitate the creators' capacity to receive fair remuneration for their work. The transparency model will help

[572] Forere (note 52 above) 5.The author writes that about Solomon Linda who died in 1962. 'Who cannot forget that Solomon, (wan author of the million-dollar song, The Lion Sleeps Tonight, died a pauper yet his song appeared in the big screens of Walt Disney, making millions of dollars? Solomon was not the last South African author to experience unfair treatment as regards remuneration of his work – there are many stories of this nature in South Africa in which the fame does not translate into adequate or fair remuneration, if at all.'

provide accountability mechanisms in the collection and distribution of the proposed copyright levy.

To appropriately dissect and provide some instructive context to the highlighted issues above, this chapter begins by discussing the history of Copyright law and the significance of the first copyright legislation - the Statute of Anne - in providing an efficacious utilitarian legal framework for authors that guarantees exclusive rights for a limited duration to help them recoup sufficient returns from their work. The relevance of international treaties, in particular the Berne Convention and the Internet treaties in securing copyrights is provided to locate authors' rights within the realm of a harmonised set of international laws that protects copyrighted works from infringement across Member States. A historical background to the Internet's development and its threats to intellectual property protection through accompanying digital devices and copying repercussions of works are provided. Currently, private copying exceptions exist without corresponding compensation frameworks for rightsholders. Yet, such exceptions must be accompanied by compensations to conform to the international treaties three-step test under the Article 9(2) Berne Convention, which demands of any exploitation of works to not unreasonably prejudice the legitimate interests of rightsholders providing Member States direction in the interpretation and application of exceptions.[573] An examination of the effects of private copying is made and tested against the doubtful efficacy of Technological Protection Measures (TPMs) in controlling access to copyrighted material. Thereafter, a private copying levy, to be accompanied by a private copying exception is recommended coming against the background of the ineffectiveness and circumvention of TPMs. The inclination of the of the existing copyright law regime towards making works access and the unenviable remuneration plight of copyright holders' are further illustrated to demonstrate the private copying levy necessity.

3.2 HISTORY OF COPYRIGHT LAW

The technological revolution around the invention of the printing press in the fifteenth century and the mass duplication of literary works gave birth to copyright law.[574] The

[573] See Article 9(2) of the Berne Convention, Right of Reproduction: '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.' The three-step test also applies to TRIPS Agreement, Art 13; The WIPO Copyright Treaty, Art. 10; The EU Copyright Directive Art. 5(5).

[574] O Fischman-Afori 'The Evolution of Copyright Law and Inductive Speculations as to Its Future' (2012) 19 *J. INTELL. PROP*. L. 231 (2012) 233.

printing press was first invented in Germany by Johannes Gutenberg following the production of paper before the dynamic technology migrated to England. A unique feature of the invention was its capacity to expeditiously and mechanically reproduce voluminous literary works and make them extensively accessible. The net effect of such production levels was to confer monopoly rights on the printers of books.[575] During the period preceding the printing press, booksellers perpetually held copyright to all literature.[576] A critical point of note is that before the emergence of the printing press, copyright infringements were not seriously considered because the physical manual reproduction of copies was evidently a painstaking task riven by innumerable errors created by scribes.[577] The manual reproduction of copies was clumsy, making naturally generated copies discernible from the rest. However, such manual reproductions required some unique reproduction skills at emerging academic institutions where extensive literature was sought. It is difficult to imagine this in the contemporary Digital Age, where digital and 3D printing have efficiently minimised huge physical effort, away from the spectacle of scribes' manual page-by-page reproduction of manuscripts in handwriting.[578]

Technological changes forced copyright law to evolve, and the invention of the printing press created a scope for the subsequent development of printing privileges granted to regulate the printing of works.[579] However, the positive development of the printing press had its own negative offshoots. Liftig postulates that 'throughout history, when technology for production and replication of intellectual goods advanced, there were disputes concerning the rights to produce and duplicate these works hence the reproduction of the copies by machines, created infringement copying problems around re-prints.' [580] Notably, is the statement by Martin Luther in 1525 stating that, '[w]hat, my dear printers, is one to make of the fact that you so publicly take and steal from one another, that you strive for each other's ruin? Have you become but brigands and thieves?'[581]Such unauthorised reproductions are manifested in contemporary challenges associated with copyright infringement patterns.[582]

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[575] L R Patterson *Copyright in Historical Perspective* (1968) 7.
[576] J Rosenoer *Cyberlaw: The law of the Internet* (1997) 34–35.
[577] Ithiel de Sola Pool *Technologies of freedom* (1983) 14.
[578] Ibid.
[579] E W Ploman & L C Hamilton *Copyright: Intellectual Property in the Information Age* (1980) 1.
[580]K Liftig 'The Evolution of Copyright Law in the Arts' (2009) *Honors Scholar Theses*, 113. 1.
[581]F W Lomber G F Lucius D J Rust L Sackreuter & D E Zimmermann *Geist aus Luthers Schriften* (1828) 368.
[582]*Galago Publishers (Pty) Ltd and Another v Erasmus* 1989 (1) SA 276 (A) 280. Where a test was applied to determine whether there had been an infringement of copyright. See also Patents Act 57 of 1978, Section 10 Register of Patents.

First publishers were protected from unauthorised reprints in the eighteenth century through a ban on reprints granted by way of exception.[583] In 1557, the Stationers Company, a publisher's guild was created at the back of a Royal Charter and managed the trade in books for the next century and half.[584] The Company had perpetual rights over the printing, and copying of the work.[585] The Stationers Company controlled the reproduction right of its members to make available copies of the original work. Copyright was regarded as a private property right, and court assistants were responsible for the enforcement of the related rights accrued.[586] The Stationers' Company had a management of rights system synonymous with the current obtaining in the patent or trademark register.[587] The registration system covered books, issued licences, and provided penalties for copyright infringements. During the fifteenth century a registration book was created to record authorised works, and thus became a forerunner to the current copyright registration system.[588] The current South African IPL registration system covers mainly patents, trademarks, and copyrights registration only relates to cinematograph films.[589]

After the emergence of the printing press around 1400s, the enforcement of copying infringements became brutal as the Stationers enforced their printing monopoly by burning books and the presses of any infringers.[590] When the burning of books as a remedy was first implemented, copyright law was still in its infancy. The same remedy is still provided for under copyright law five centuries later in relation to the delivery and destruction of infringing material.[591] An effective system for copyright protection in the contemporary world bestows enormous power for copyright holders to exercise control over the exploitation

[583] Spanish King Ferdinand granted a printing privilege to Johann Walder dated June 29th, 1540, which reads: 'Since we understand that you have bought four books at great expense and risk to your trade... and are determined to reproduce said four works by means of the press, measures are to be taken to ensure that you shall not be denied the fruits of your labour and shall suffer no irreparable damage. For it has become commonplace that thieves of others' efforts reprint, for their own enrichment, books that are well printed.' Cited in T Eger and M Scheufen 'The past and the future of copyright law: technological change and beyond' in Jef De Mot (ed) *Liber Amicorum Boudewijn Bouckaert, Brugge* (2012) 7.
[584]B Z Khan 'Economic History of Copyrights in Europe and the United States' in R Whapples (ed) *EH.Net Encyclopedia* (2006).
[585] Ibid.
[586]Ibid.
[587] Trade Marks Act 194 of 1993. s 16 Application for registration.
[588]H R Varian 'Copying and Copyright' (2005) *Journal of Economic Perspectives* 19 (2) 121-138.
[589]Section 16 and 19 of the Trademarks Act 194 of 1993 provides for registration of trademarks to safeguard against infringements and for evidential purposes on infringement litigation. However, with Copyright Law, copyright is secured automatically when you create an original work that people can see or hear such as a book, painting or music. Most works eligible for copyright protection do not require registration or other formalities, except for cinematograph films.
[590] Varian (note 588 above) 121-138.
[591] H Blignaut 'Copyright' in Dean & Dyre (ed) *Introduction to intellectual property law* (2014) 58.

of their works against unauthorised reproduction, adaptation, and use of the copyrighted works. This would include a remedy for the destruction of the infringing copies which is part of the current copyright law remedy for infringement.[592]

In 1661, the first licencing Act was passed and granted the right of members of the Stationary Company to publish 'copies' which solemnised the marriage of the two words into a lasting union to this date under - 'copyright'. The descendants of this union are different global copyright statutes that try to give effect to this enduring matrimonial copyright marriage under 'copy – right.' The Licensing Act of 1662 empowered the company to act against the infringement of their right. For these actions to have legitimacy and create an organised enforcement mechanism, a register of licenced books was created and maintained, with an accompanying right to conduct a search and seizure of pirated unlicensed books. The historical basis of search and seizure warrants was originally founded under copyright law. Thus, a rational basis and foundation for future search and seizure enforcement mechanisms against piracy was created. Search and seizure Anton Piller orders originating from a 1975 English case which later permeated into several jurisdictions of former British colonies are also a product of English common law and were intended to prevent the destruction or hiding of relevant evidence particularly in cases of alleged trademark, copyright, or patent infringements.[593]Anton Piller court applications in South Africa and other jurisdictions have since been consistently used in IPL infringement cases as a continuation of the early search and seizure development of copyright law in the sixteenth century.[594]

The Stationers Company had the exclusive right to reprint works and publish books in perpetuity.[595] In 1557 the Stationers Company received a Royal Charter with a privilege to regulate book trade and this was done to protect the trade quality, minimise unprofessional practices and limit competition.[596] After the expiry of the English censorship laws in 1694, its legislature in 1710 enacted the Statute of Anne,[597] and it thus became the first copyright

[592] Ibid at 58.
[593]The search and seizure warrants, emanate from 1975 English case *Anton Piller KG v Manufacturing Processes Ltd and Others* [1975] EWCA Civ 12, [1976] 1 All ER 779.
[594] *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam, Maphanga v Officer Commanding, SA Police Murder & Robbery Unit, Pietermaritzburg* 1995 (4) SA 1 (AD). See also O H Dean *Handbook of South African Copyright Law* (1987) para 1.11.9
[595]C Tripathi 'Historical Development of Law of Copyright' (2020). available at *https://www.mondaq.com/india/copyright/978858/historical-development-of-law-of-copyright*. accessed 13 August 2021.
[596]Ibid.
[597] Statute of Anne. Act for the Encouragement of Learning, 1710, 8 Ann., c. 19, § 11 (Great Britain.)

statute in Britain and the first full-fledged copyright statute in the world.[598] The Statute of Anne remarkably

> '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 ... The features of the Statute of Anne that justify the epithet of trade regulation included the limited term of copyright, the availability of copyright to anyone, and the price-control provisions. Copyright, rather than being perpetual, was now limited to a term.'[599]

The enactment of the Statute of Anne, for the first time, granted copyright to authors rather than printers and publishers. It stated that

> 'Whereas Printers, Booksellers, and other Persons, have of late frequently taken the Liberty of Printing, Reprinting, and Publishing, or causing to be Printed, Reprinted, and Published Books, and other Writings, without the Consent of the Authors or Proprietors of such Books and Writings, to their very great Detriment, and too often to the Ruin of them and their Families.'[600]

The Statute was also a result of the rise of professional writers in the seventeenth and eighteenth centuries, whose remarkable demand for remuneration culminated in the progressive enactment that recognised their writing efforts.[601] The clamour for incentives and the recognition of the authors' rights under the Statute of Anne provides a utilitarian scope mainly found in the common law countries, which attaches value for incentives to boost innovation, creations and economic growth.[602] The advent of the printing press enabling the reproduction of copies and thereafter the enactment of the Statute of Anne, did not help initiate the incorporation of private copying levy provisions into the legislation. There were not many machines, and the available were owned and managed by the Stationers Company. Scholars argue that an increase in proud authors who genuinely wanted to generate income and live off the fruits of their labour, sweat and brow, as opposed to the politics of patronage and inheritance provided scope for author protective provisions of the 1710 Statute of

[598]Jeremy Norman's HistoryofInformation.com Exploring the History of Information and Media through Timelines. Available at *https://www.historyofinformation.com/detail.php?entryid=3389*. (Accessed 23 July 2021).
[599]J Rosenoer *Cyberlaw: The Law of the Internet* (1997) 34.
[600]Statute of Anne. Act for the Encouragement of Learning, 1710, 8 Ann., c. 19, s 11 (Great Britain.)
[601]L Bently & J C Ginsburg P 'The Sole Right . . . Shall Return to the Authors": Anglo-American Authors' Reversion Rights from the Statute of Anne to Contemporary U.S. Copyright' (2011) *University of Cambridge Faculty of Law Legal Studies Research Paper Series*. Paper No. 11/06 available at *http://www.law.cam.ac.uk/ssrn/*. accessed 10 August 2021 3.
[602] Forere (note 52 above) 5.

Anne.[603] Statute of Anne, Section 11 stated that, 'Provided always, [t]hat after the expiration of the said term of fourteen years, the sole right of printing or disposing of copies shall return to the Authors thereof, if they are then living, for another [T]erm of fourteen years.' Thus, the Statute of Anne linked the duration of authors' exclusive rights to their lifetime of existence. The Statute provided an opportunity for authors' ownership of copyright and the fixed term protection of copyrighted works. Provision for copyright duration in the Statute of Anne had utilitarian features designed to help authors recoup and secure a return on their investment.[604] An infringement of copyright could occur, 'if any person printed, reprinted or imported the book without consent, and the infringement fines were one penny for every sheet of the book, one moiety of which went to the author, the other to the Crown.'[605] This was a substantial fine during the period and was accompanied with the destruction of infringing copies. While originally the Statute applied to the copying of books, it subsequently shifted the scope of copyright protection to cover engravings, sculptures, drawings, paintings and photographs.[606] Performing rights were also subsequently covered by copyright in 1833, as were musical rights by the Copyright Act of 1842.[607] To date, Statute of Anne's reversion rights have proved more enduring if not always more beneficial to authors.[608]

In this century, the Statute's significance emanates from both the judiciary and scholars invoking it as an embodiment of utilitarian underpinnings of copyright law.[609] In the Australian case of *Ice TV v Nine Network,*[610] the court pointed that the Statute of Anne 'echoed explicitly the emphasis on the practical or utilitarian importance that certain seventeenth-century philosophers attached to knowledge and its encouragement in the scheme of human progress.'[611] Other scholars argue that it is a global model for copyright statutes.[612] While the Statute permeated into various jurisdictions over time, copyright

[603] Ibid at 3.
[604] J C. Fromer 'Expressive incentives in intellectual property (2012) 98 *Virginia Law Review* 4.
[605] Ibid.
[606] R Deazley M Kretschmer & L Bently *Privilege and Property Essays on the History of Copyright* (2010) 12-395.
[607] Ibid.
[608]Copyright Amendment Bill B13B-2017, Clause 23 provides the following amendment s 22: '(3) No assignment of copyright and no exclusive licence to do an act which is subject to copyright in such work shall have effect unless it is in writing and signed by or on behalf of the assignor, the [licenser] licensor or, in the case of an exclusive [sublicence] sub-licence, the exclusive [sublicenser, as the case may be] sub-licensor, as stipulated in Schedule 2: Provided that assignment of copyright in a literary or musical work shall only be valid for a period of up to 25 years from the date of such assignment.
[609]I Alexander *Copyright Law and the Public Interest in the Nineteenth Century* (2010) Chap. 2.
[610]*IceTV v Nine Network* [2009] HCA 14
[611] Alexander (note 609 above).
[612]L Bently *The History of Copyright. Global Copyright: 300 Years Since the Statute of Anne, from 1709 to Cyberspace* (2010).

legislation globally remained uncoordinated without any attempt towards harmonisation until the nineteenth century. In 1886, the Berne Convention was introduced to provide mutual recognition of copyright between nation states and to promote the development of international standards for copyright protection.[613]

3.2.1 Copyright Law and International Conventions

Bilateral copyright protection treaties emerging during the late nineteenth century climaxed in the 1886 Berne Convention which was a milestone in the evolution of copyright law.[614] The formalisation of the treaty arose because the ubiquitous exploitation of copyright works defied geographical boundaries motivating the need for an international agreement to protect works outside different borders. To date, the treaty has continued to provide the basis for international copyright law.[615] While the Statute of Anne did not have a binding force of an international treaty, it permeated, just like the Convention, into statutes of various jurisdictions creating progressive international evolution of copyright law.[616] The significant progression of the Convention provided mutual international recognition of copyright, creating uniform standards for copyright protection. The need to register works separately in each individual country was discontinued and the Convention now has 179 contracting states in the world.[617] South Africa is a member of the Berne Convention.[618] The Convention also provided a harmonised copyright framework establishing minimum standards for national copyright legislation. The minimum standards provided duration for the author's term of copyright which are for the author's lifetime plus 50 years.[619] The works guaranteed for protection were extended to every expressed creative content in the literary, scientific and artistic domain.[620] The key rule dictating that copyright arises with the creation of a work

[613]G O. Hatch 'Better Late Than Never: Implementation of the 1886 Berne Convention' (1989) *Cornell International Law Journal: Vol.* 22: Iss. 2, Article 1 171-172.
[614]
[615]O Fischman-Afori (note 574 above).
[616]Ibid.
[617]Copyright House 'Berne Convention' available at *https://copyrighthouse.org/countries-berne-convention/*. accessed 4 November 2021.
[618]South Africa became party to the Convention on 3 October 1928. Berne Convention for the Protection of Liberty and Artistic Works of 1886.
[619] Berne Convention, Art. 2 (c.)
[620] Berne Convention, Art. 2(1.)

without the formalities linked to public registration was adopted.[621] It is relevant to South Africa's copyright law.[622]

The Convention also provided helpful limitations and exceptions to copyright which were infused into South Africa's legal copyright framework.[623] The exceptions, which form part of the defence for end users in infringement proceedings, facilitate the unauthorised reproduction of literary and artistic works under certain conditions.[624] While the exceptions were left to member states to develop, the guiding principles were set out under Article 9(2) of the Convention. It set out the three-step test which state that reproduction can only be made, '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.'[625] The exceptions under the Convention were broadened to include instances where quotations were made from lawfully published works, illustrations for teaching or educational purposes, and news reporting all which form part of South African copyright law.[626] Since the Convention was drafted prior to the advent of the Digital Age, it could not provide adequate legal protection against existing complex digital work infringements. Hence, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), often referred to as Internet treaties, were created to adapt copyright, performances and phonogram works in line with the digital era.[627]

The WCT is a special agreement under the Berne Convention,[628] which was adopted to confront the challenges of the digital environment offering protection of works and rights of their authors to enjoy the exclusive right of authorising the making available to the public of the original copies of their works through sale or other transfer of ownership.[629] The main subject matters protected by copyright under the WCT are computer programs, and

[621] Berne Convention, Art. 5(2).
[622] O H Dean & S Karjiker *Dean: A Handbook of South African copyright law* (2015) 1-21 Chap 3.
[623] Berne Convention, Art. 10 (1).
[624] Ibid.
[625] Berne Convention Art. 9.
[626] Berne Convention Art. 10; See also Section 12 of the Copyright Act which allows certain acts of reproduction to be done without permission. 'Fair Dealing' in Section 12, allows reproduction for the following purposes: - Research or private study, Personal or private use, Criticism or review, Reporting current events (e.g., in a newspaper or broadcast), Judicial proceedings or a report of judicial proceedings, Quotation (a fair portion).
[627]WIPO Copyright Treaty, adopted in Geneva on December 20, 1996. available *https://www.wipo.int/wipolex/en/text/295166*. accessed 18 May 2023.
[628] WIPO World Copyright Treaty, Art 1.1
[629] WIPO World Copyright Treaty, Art. 6 Right of Distribution.

compilation of data or other material databases.[630] It provides authors of works with control over their rental, distribution, and communication to the public.[631] Furthermore, it also fights digital infringements through prohibition of circumvention of technological protection measures (TPMs) for the protection of works.[632] The CAB has also developed its Digital Rights Management (DRM) provisions around this. However, the treaty appears to be too broad in its prohibition of circumvention of TPMs, even when such circumvention is used in pursuit of fair use rights.[633]

The WIPO Performances and Phonograms Treaty (WPPT) was adopted in 1996.[634] It provides, inter alia, for exclusive rights to authorise broadcasting and communication of unfixed performances to the public, fixation of unfixed performances and reproduction, distribution of performances fixed in phonograms and rentals. Article 8 of the WCT and the WPPT's Article 14 also clarify the extent of rights holders' control when works, performances, and phonograms are made available to the public through the Internet. This provision is relevant for the purposes of this study which seeks to determine the effects of the unauthorised downloading of works from the Internet by consumers and how the remuneration right of authors can be guaranteed. This research seeks to demonstrate that once copyright holders lose control of their works and TPMs are circumvented, there is unlimited access and reproduction of works prompting the need of a remedial mechanism that can still guarantee the right of remuneration without cumbersome and difficult enforcement mechanisms. Moreover, the Internet treaties leave it to member states to provide adequate legal protection and effective legal remedies against the circumvention of TPMs used by rights-holders to restrict unlawful and unauthorised acts.[635] Nonetheless, faced with the threat of infringements heightened by the use of digital technologies, right holders are increasingly turning to technology for protection of their creations. The WCT and WPPT standards in ensuring remuneration are important in this study to determine the best international practice for formulating legislation around a copyright levy, which will be discussed later in this

[630] WIPO World Copyright Treaty, Art. 7 Right of Rental.
[631] WIPO World Copyright Treaty, Art. 6 to 8.
[632] WIPO World Copyright Treaty, Art. 11.
[633] Ibid.
[634] WIPO Performances and Phonograms Treaty, entry into force May 20, 2002. available *https://www.wipo.int/wipolex/en/treaties/textdetails/12743*. accessed 18 May 2023.
[635] See WIPO Internet Treaties. available at *https://www.wipo.int/copyright/en/activities/internet_treaties.html*. accessed 24 November 2023.

chapter. However, South Africa has not ratified these treaties yet.[636] Nevertheless, it is important to juxtapose South Africa's copyright Act and the CAB against international standards to test their relevance and effectiveness in guaranteeing authors' remuneration and providing the scope for adequate compensation for the exploitation of copyright works in the Digital Age.

The Berne Convention does not have explicit provision for a private copying levy.[637] However, under Article 9(2) it provides that home copying is a matter for respective national jurisdictions to entertain under a three-step test provided that any reproduction of works did not conflict with the normal exploitation of works, and prejudice the authors' legitimate interests. The relaxation of the authors' exclusive rights should be combined with compensation for such exploitation of works. Any introduction of a private copying levy by Member States must therefore be aligned with the dictates of the three-step test, whose similar provisions are carried under the TRIPS Agreement and the WCT created to adapt copyright legislation to the Digital Age.

3.3 HISTORY OF THE INTERNET AND COPYRIGHT LAW

The development of the Internet is central to this research in exploring its implications on authors' remuneration under South Africa's copyright law. This is because the Internet and the digital revolution have fundamentally altered copyright law in a disruptive manner. Pistorius and Mwim noted that the challenges associated with digitisation are defying the traditional concepts of copyright law which involve the categorisation of works into different classes. This is compounded by the flawless online, digital reproduction and distribution of works which then poses challenges to copyright law.[638] The infringing dangers of Internet are aptly captured by Al-Ameen, who writes that

> 'Copyright laws, policies and enforcement mechanisms would be considered weak if infringers reign free. The vulnerability of internet copyrighted materials is dire in the internet age mainly because of the ease of engaging in illegal copying, sharing, downloading, and streaming of copyright materials … The novel possibility afforded by digital media … means that acts which were once almost non-existent have become pervasive. They include content

[636]S Samtani 'The Domestic Effect of South Africa's Treaty Obligations: The Treaty Obligations: The Right to Education and the Copyright Amendment Bill' (2020) *PIJIP/TLS Research Paper Series* 10-2020 8.
[637] R L. Stasio 'Remuneration for Home Copying: A Controversial Directive Remains Elusive' (1996) 19 *B.C.Int'l & Comp. L. Rev.* 235.
[638]Pistorius & Mwim (note 21 above).

> mashup, plagiarism, photography infringement, online content ripping, P2P file-sharing, illegal streaming, the illegal use of Virtual Personal Networks (VPN), and so on.'[639]

Considering the complications highlighted above, this research is important for facilitating statutory solutions to the complex emerging remuneration challenges faced by the authors. This is important because the Internet has become an inseparable part of the modern world, whereas facilitative computer networks have sophisticated global interconnectivity and instantaneous wireless communications. This is the inexorably changing nature of technology and communication systems which this jurisdiction is part of. South Africa's first Internet protocol (IP) address was established in 1988, but it was only on 12 November 1991 that the first IP connection was made. Therefore, 12 November 1991 is regarded as the start of Internet access in South Africa.[640] The Internet has shaped vast global communication in a rapid and unique way. There is an admission that Internet development's foundation was set by telegraph, telephone, and radio inventions but it was the computer that in an extraordinary manner integrated such technological capabilities.[641] Scientists involved in the development and evolution of the Internet posited that the

> 'The Internet is a worldwide broadcasting capability, a mechanism for information dissemination, and a medium for collaboration and interaction between individuals and their computers without regard for geographic location. The Internet represents one of the most successful examples of the benefits of sustained investment and commitment to research and development of information infrastructure.'[642]

In its original form, the Internet's early research into packet switching was collaboration between the U.S government, industry, and scholars. In its development, scientists refer to four distinct areas, which include technological evolution, arising from the research on packet switching and the Advanced Research Projects Agency Network (ARPANET), the operations and management of the complex operational infrastructure, and the involvement of the

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[639] A Al-Ameen 'Copyright in the era of internet adversity: pre-empting a new dawn for Nigeria' (2020) *Information & Communications Technology Law*, 29: 2.

[640] Kyle Venktess 'Timeline: Internet turns 25 in South Africa' *Fin24* 11 November 2016. Available *https://www.news24.com/fin24/Tech/News/timeline-internet-turns-25-in-south-africa-20161111.* accessed 27 October 2021. In 1990 - The .za address is granted to South Africa by the Internet Corporation for Assigned Names and Numbers (Icann). 1991 - The first IP connection is established between the Rhodes University computer lab and the home of internet hall of fame inductee and scientist Randy Bush in Portland, Oregon, US. 1992 - Internet access for businesses and private use began in June with the registration of the first.co.za domain.1997 - The ANC launched its website - anc.org.za as one of the first African political organisations to establish a website.

[641] B M. Leiner, R E. Kahn, J Postel et al 'A Brief History of the Internet' (2009) *ACM SIGCOMM Computer Communication Review*, Vol. 39, No. 5, 2009 22.

[642] Ibid.

community, working together to create and evolve the technology.[643] Eventually, this has resulted in the commercialisation of the Internet in its current global information infrastructure. Internet development is complex and has mutated to support gigantic global commerce infrastructure, community development, and information acquisition.[644]

The Internet is also a direct offshoot of the Cold War era military confrontations,[645] as much as copyright law owes its genesis to printing technology. The Cold War created a dangerous nuclear standoff between the U.S and the former Union of Soviet Socialist Republics (USSR). As a result, this prompted the U.S State Department to urgently design a communications system capable of surviving a devastating thermonuclear attack.[646] The radical Internet development that followed transpired when communication systems were analogue and based on circuit switching. With time, scientists canvassed a new kind of communication network that exploits the advantages of digital switches to facilitate interactive computing over large distances. In 1962, Licklider proposed the concept of global computer networks.[647] He recorded and produced the first written description of social interactions that facilitated social networking – otherwise known as the 'Galactic Network' concept.[648] His idea imagined an integrated vast network of global computers globally linked creating a pool of accessible data by anyone that defied geography. Kleinrock convinced Roberts of the 'theoretical feasibility of communication using packets rather than circuits, which was a major step along the path towards computer networking. The other key step was to make the computers talk together.'[649] The breakthrough of this interaction and experiment was the realisation of computer interconnectedness, running simultaneous programmes, and retrieving data. In 1966, Roberts developed the computer network concept which was later developed into ARPANET, published in 1967.[650]

After this idea was mooted, the U.S. Department of Advanced Research Projects Agency (ARPA) began to facilitate more research on packet-switching theory, establishing a

[643] Ibid.
[644] Ibid.
[645] J Naughton 'The evolution of the Internet: from military experiment to General Purpose Technology' (2016) Journal of Cyber Policy, 1:1, 5-28, available at *DOI: 10.1080/23738871.2016.1157619*. accessed 6 July 2023.
[646] Ibid.
[647] W M Mitchell *The Dream Machine: J. C. R. Licklider and the Revolution That Made Computing Personal* (2001) 470.
[648] Leiner *et al* 'A Brief History of the Internet' (2009) *ACM SIGCOMM Computer Communication Review*, Vol. 39, No. 5, 2009 23.
[649] Ibid.
[650] Ibid.

computer network of connections created to link up in a broad area.[651] As indicated earlier, the original conceptualisation of this approach was to evade the devastating effect of a nuclear war, and its potential to disrupt and puncture the existing vast communication networks.[652] The design was structured in such a manner that communications would not depend on a single path – or central server – but would have a myriad of networks distributed into various forms like a gateway that could avoid blockages of all communications arteries.[653]

The development of the Internet was further facilitated in 1973 when multiple networks were integrated under the Transmission Control Protocol/Internet Protocol (TCP/IP), followed by a network project using dial-up phone lines. In 1982, the PhoneNet[654] system was created and linked to ARPANET[655] and the first commercial network, Telenet.[656] Access to the Internet was widened, and emails were globally networked and communication between nations was facilitated. In 1981, computer workstations and personal computer growth helped to establish local area networks (LANs). Consequently, a domain name system was created to cope with the exponential growth of Internet users. In 1985, the first domain name, symbolics.com belonging to a company manufacturing computer was registered.[657]

In 1990, ARPANET was retired and hypertext was developed in the mark-up language (HTML) and the uniform resource locator (URL), creating the World Wide Web.[658] The technological advancements continued unabated and in 1995 Microsoft gave birth to Windows 95, and subsequently Amazon, Yahoo and eBay were created, becoming decade's

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[651]C Johnson & B Donnelly *Lawyering in the digital age* (2003) A Brief History of the World Wide Web and the Internet. available *http://www2.law.columbia.edu/donnelly/lda/ih/techprofx.html*. accessed 7 November 2021. They write that with packet switching a message that is sent from one computer to another is broken down into small packets of digital data. Packets can travel different routes to the point where they are reassembled into the complete message.

[652] A Kovacs 'Quieting the Virtual Prison Riot: Why the Internets Spirit of "Sharing" must be Broken' (2002) 51 *DuKE L.J.* 753, 758 (2002) 755.

[653] Oduor (note 1 above) 503.

[654]As normal telephone equipment used the inside two wires, PhoneNET could share cabling with telephones, allowing both phone calls and networking over a single cable.

[655] ARPANET a programme funded by United States Defence department was to link computers at Pentagon-funded research institutions over telephone lines.

[656]Telenet was the first regulated commercial packet carrier in the world and the first licensed public data network in the United States. The corporate sector and government entities paid fees for connecting lines to their computers and local networks to the network.

[657] Symbolics.com: the first registered .com domain name, *Internet* 15 March 2023. available at *https://www.stackscale.com/blog/symbolics-com-domain-name/#:~:text=Symbolics.com%20is%20the%20first,(now%20napkin.com).*. accessed 23 November 2023.

[658]This refers to an information system on the internet which allows documents to be connected to other documents by hypertext links, enabling the user to search for information by moving from one document to another.

later technological Internet inspired giants with a net worth running into billions of United States dollars.[659] Predictably, the tech giants eventually became the hub of litigation for Internet related copyright infringements.[660] Java[661] and Internet Explorer were both created in 1995 thus expanding scope for development of works on websites. Various other computer programs and companies followed and again posed significant dangers to copyright law on a vast international scale.[662] Internet related music and video piracy posed earliest disruptions to existing copyright law, resulting in the Napster copyright infringement case that held companies liable for Internet related copyright infringement.[663] New global industries have created enormous Internet and technology driven business opportunities and liabilities that have tremendously impacted on copyright law. Scholars Eger and Scheufen provided a convincing outlook of how the Internet has affected copyright law,

> 'First, digital information can be conveyed to the public without the need for any physical media such as paper or audio and video cassettes. Secondly, different from previous forms of copying, digital technology allows making copies that are identical to the original digital master, without any loss in quality. Thirdly, digital technology in combination with the internet has made the copying and global spread of all types of digital content cheap and simple.'[664]

The Internet-related reproduction of works is a much more complex instantaneous infringement pattern and quite different from the printing press Gutenberg invented in the fifteenth century, which was preceded by the laborious manual hand reproduction of copies by scribes. As such, the rapid growth of the Internet and digital technologies poses a challenge to legislators, judiciaries, scholars, and legal practitioners to be circumspect and

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[659] Jim Goldman 'Amazon is to eBay What Google is to Yahoo' *CNBC.com* 6 October 2009.available at *https://www.cnbc.com/id/33478980*. accessed 24 March 2022.

[660] M Ding 'Perfect 10 v. Amazon.Com: A Step Toward Copyright's Tort Law Roots' (2008) *Berkeley Technology Law Journal*, vol. 23, no. 1. 373–403.

[661] Java was created in 1995, and its effectiveness in facilitating interactivity and multimedia made well suited for the Web.

[662] *Google LLC v. Oracle America, Inc*., 593 U.S. 140 S. Ct. 520 (2021). See also Chris Perez 'Netflix sued for copyright infringement over 'Wild Wild Country' documentary' *New York Post*, 31 January 2019. available at *https://nypost.com/2019/01/31/netflix-sued-for-copyright-infringement-over-wild-wild-country-documentary/* . accessed 24 March 2022.

[663] *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (2001) (A United States Court of Appeals for the Ninth Circuit decision). It is considered a landmark intellectual property case in which the United States Court of Appeals for the Ninth Circuit affirmed the ruling of the United States District Court for the Northern District of California, holding that defendant, peer-to-peer (P2P) file-sharing service Napster, could be held liable for contributory infringement and vicarious infringement of the plaintiffs' copyrights. This was the first major case to address the application of copyright laws to peer-to-peer file sharing.

[664] T Eger & M Scheufen 'The past and the future of copyright law: technological change and beyond' in Jef De Mot (ed) *Liber Amicorum Boudewijn Bouckaert, Brugge* (2012) 15.

advance solutions that address emerging complex remuneration challenges for copyright holders. According to the ITU World Telecommunication Indicators Database, it took only four years for the web to reach 50 million users. In contrast, the telephone took 74 years and radio about 40 years, while personal computers and television took 16 and 13 years, respectively.[665] Scholars have also observed that,

> 'The Internet is a powerful tool that has already demonstrated its ability to create new jobs, advance technology, shorten product life cycles, circumvent international communications barriers, and transcend political and social chasms. At the same time, it has become a tool that has devalued some intellectual property almost as much as it has created new value for others. It has caused confusion amongst leading policy-makers, and while it has created new business opportunities, it has itself threatening to become an impediment to future economic expansion. Without proper management, the Internet will become worthless to the intellectual property community.'[666]

The impediment to future economic expansion that Gibbs relates to the above refers to rampant copying infringements under copyright law, as discussed below. Scientists behind Internet development warned that, 'If the Internet stumbles, it will not be because we lack technology, vision, or motivation. It will be because we cannot set a direction and march collectively into the future.'[667] For the future of the Internet, it has been argued that it is not how the Internet and technology will change, but how the process of change and evolution itself will be managed. To manage copying or unauthorised reproduction and adaptation of copyrights without compensation for authors is the question in this study.

3.4 COPYING

Copying inhabits a significant share of this study; it is the prime infringement pattern intricately linked to the advent of the Internet and digital technologies. This study seeks to analyse the extent of remuneration harm caused by private copying, linked to the Internet and digital technologies, and what statutory remedies could be implemented to address such

[665]World Telecommunication/ICT Indicators database (2016) 20th Edition. available *http://www.itu.int/en/ITUD/Statistics/Pages/publications/wtid.aspx.* accessed 7 November 2021.
[666]A Gibbs 'Intellectual property, the internet and electronic commerce internet trends role of the internet in the development, management and commercialization of intellectual property' (2001) International Conference on Intellectual Property, The internet, electronic commerce and traditional knowledge, WIPO in cooperation with the National Intellectual Property Association of Bulgaria.
[667] B M. Leiner, R E. Kahn, J Postel et al 'A Brief History of the Internet' (2009) *ACM SIGCOMM Computer Communication Review*, Vol. 39, No. 5, 2009 31.

effects. Therefore, a copying definition is necessary to provide an appropriate copyright law and Digital Age context. Patry writes that,

> 'the word "copy" has two meanings. As a verb, "to copy" means reproducing content from one work into another work (we say one song was "copied" from another song). It also means copying into another form (you "copy" your CD onto your iPod). The verb of "copy" is what we mean by the exclusive right to reproduce a work. "Reproduce" is a synonym version of the verb to copy. The noun version of "copy" refers to a physical object, a CD or the mp3 file on your iPod that contains the intangible work (the song or the performance). When I say I own a CD "copy" of a work, I am referring to the noun.'[668]

In its original sense, a 'copy' was treated as a noun, where before the advent of the printing press book publishers were regarded as owning book copies. The Statute of Anne is worded in such a way that it provides connotations of a noun, indicating the 'vesting the copies of printed books in authors or purchasers of such copies.' Patry writes that a 'copy' was eventually associated with the now exclusive right to reproduce, whose synonym is linked with the verb to copy. [669] Broadly speaking, copying entails reproduction of work without authorisation from the author. Therefore, if unauthorised, the use of the digital technologies and the Internet to reproduce a copy or copies in this sense will translate to copyright infringement.[670] Copyright law - at its core protection of works from copying - provides guidelines of circumstances that constitute an unlawful appropriation.[671] As a publisher's right, copyright was quite literally a right to copy written texts in England within the context of the publishing monopoly of the Stationers' Company.[672] But now, digital innovations have complicated the nature and form of copying, and the same would apply to digital copying of literary, dramatic, or musical work which entails reproduction of the work or a substantial part of it in any material form.[673]

While the above is a general legal interpretation for copying, there is also private copying, which refers to '[a] copy made by an individual specifically for one's personal use,

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[668]William Patry 'We need to redefine what 'copy' means' *The Guardian,* 13 March 2012, available at *https://www.theguardian.com/law/2012/mar/13/how-to-fix-copyright-extract*. accessed 18 May 2023. Taken from his book W Patry *How to Fix Copyright* (2012). William Patry is a senior copyright counsel at Google and considered one of America's foremost experts on copyright law.
[669] Ibid.
[670]C Riefa 'Know Your Copyright from Wrong: A Guide to UK Copyright Law' (2000) *SSRN Electronic Journal*, 2000 28.
[671] O B Arewa 'Freedom to Copy: Copyright, Creation and Context' (2007) *Northwestern Public Law Research Paper No. 07-06, UC Davis Law Review*, Vol. 41, No. 2, 2007, 485.
[672] Ibid at 487.
[673] A Sparrow *Music Distribution and the Internet: A Legal Guide for the Music Business* (2006) 38-40.

hence no commercial purpose.'[674] Regardless, copying remains an unauthorised reproduction of work though it could be covered under fair use or fair dealing exceptions if no commercial value is to be generated from it as a private reproduction. Copyright owners particularly in the entertainment and media companies tend to characterize copying and other unauthorised uses of existing material as some form of theft.[675] Unauthorised copying interferes with the right of reproduction which is one of the exclusive rights conferred on copyright owners under South Africa[676] and international conventions.[677] In principle, this exclusive right to authorise or control the reproduction of the copyright works is bestowed upon the author under copyright law. In its origins, copyright law granted the holder the exclusive right to copy a creative work of authorship and thereafter actions for copyright infringement have revolved around a physical demonstration of copying.[678]

In copyright litigation, to prove liability, the author is required to establish a causal and/or substantially similar connection between copyright work and the alleged infringing copy.[679] To make a liable finding of a substantially similar work, the author will need to scrutinise the copy to establish whether the work is the result of a truly independent work or a result of subconscious copying.[680] In litigation, there are several essential elements that must be proven to sustain a copying claim. Shyamkrishna argues that,

> 'It remains equally true that copying, in one form or another, remains the true sine qua non of copyright law. In a copyright-infringement suit, the plaintiff is required to prove that the defendant "copied" the protected work. Although this burden of proof has a clear factual element to it, that is, whether the defendant had access to the work and actually copied it, it entails much more. Copyright's substantial-similarity requirement steps in here. Substantial similarity is a judicially created rule that places the burden to establish that the defendant's copying is actionable as a legal proposition on the plaintiff in a copyright-infringement suit, even when the copying is shown to exist as a factual matter. The defendant's copying thus must be shown to be improper or wrongful in order to be actionable. The substantial-

[674] M Boyer 'The Economics of Private Copying' (2017) The Jean Jacques Digital Chair Toulouse School of Economics Fellow. Policy Paper *2017*-08
[675] O B Arewa (note 671 above) 506.
[676] Copyright Act 98 of 78 s 1(1)..
[677] Berne Convention, Art 9(1); See also WIPO *Understanding Copyright and Related Rights* (2016) 11.
[678] B Shyamkrishna 'The Normativity of Copying in Copyright Law' (2012). *Penn Law*. 702 205. available at *https://scholarship.law.upenn.edu/faculty_scholarship/*. accessed 22 March 2022.
[679] See also Moneyweb case (note 254 above) para 78-99.
[680] Arewa (note 671 above).

> similarity analysis has courts focus entirely on the significance of the similarity between the plaintiff's and the defendant's works for their assessment of actionability.'[681]

Despite the implications of copyright infringements entailing both criminal and civil penalties, they have never significantly provided deterrence with temptations to copy still prevalent despite litigation threats.[682] Copying has increased with the advent of the Internet and digital technologies.[683] Part of the copying challenges lies in ignorance because the unrestricted access and flow of information created a misinterpretation around copyrights, lulling the public into believing that sharing protected content was legal.[684] Lessig writes that 'it is becoming harder to spend an hour on the Internet without colliding with copyright law.' [685] Simply put, interacting with a vast trove of online material creates huge infringements enticements of copying or creating variations, adaptations, or derivatives of material carrying copyrights. Oduor was blunt after indicating that 'in most developing countries, it goes without saying that there are more "copyright criminals" than in developed countries. Thus, artists in some of these jurisdictions would prefer even harsher penal laws to increased civil liability.'[686] South Africa happens to be a developing economy and is also ensnared by the downside effects of emerging technologies. While such calls for deterrent penalties are loud, they forget the levels of societal misapprehension of copyright law around failure to distinguish between sharing and posting of material to outright theft or infringements of the same.[687] In some instances, there is a deliberate violation of copyright and normalisation of deviance around copying conduct.[688] Therefore, it becomes difficult to regulate abnormal conduct that society has normalised as right. Scholars posit that normalisation of the deviant conduct,

> '[is a gradual process] wherein, in the absence of perceived losses or harm, deviant practices become acceptable. A prominent feature of the phenomenon is the desensitization process, wherein frequent engagement in deviant practices facilitates the practice's normalization and

[681] Ibid.
[682] See Section 27 of the Copyright Act 98 of 1978. See also O H Dean 'Copyright infringement as a criminal offence' (1988) *De Rebus* 203-210. See also *Worldwide Film Distributors (Pty) Ltd v Divisional Commissioner, South African Police, Cape Town and others 1971* 4 SA 312. See *Waylite Diary CC v First National Bank* Ltd 1995 (1)-SA 645 (A) at 649I. *See also* Moneyweb case (note 9 above).
[683] Pistorius & Mwim (note 21 above).
[684] A Kovacs 'Quieting the Virtual Prison Riot: Why the Internet Spirit of "Sharing" must be Broken' (2002) 51 *DuKE L.J*. 753, 758 (2002). See also Oduor (note 1 above) 502.
[685] L Lessig 'For the Love of Culture: Google, Copyright and our Future' *The New Republic*, 26 January 2010 28. Available at *http://www.tnr.com/article/the-loveculture* . (Accessed 22 May 2023).
[686] Oduor (note 1 above) 514.
[687] J Litman 'Sharing and Stealing' (2005) 27 *HASTINGS COMM. & Er. L.J*. 1, 20-21 (2005) 23.
[688]See Odour (note 1 above) 507-517.

> perceived standardization within everyday operations. This normalized perception sets a new precedent for what is viewed as tolerable and routine, establishing a new normal from which further deviations may occur. In the absence of external intervention (e.g., external audits, change in procedures), this cycle of deviance is disrupted only when deviant behaviour incurs an undesirable outcome.'[689]

Copying has demonstrated devastating implications for copyright law, copyright holders' remuneration, and the economy. A culture of copying tolerance is festering and normalised such that an average person does not realise the implications of unauthorised distribution of work to friends.[690] These shifting patterns of understanding copying were created by the public's changing perceptions toward the Internet, as opposed to analogue and its rigid acknowledged traditional principles.[691] Gachago writes that,

> 'Following the age of the printing press, the next major technologies to influence copyright were the new recording and broadcast technologies that brought revolutions that forced major shifts in copyright legislation in its efforts to curb infringement. The current digital era poses the biggest challenge copyright legislation has had to face in its history with technology enabling copyright infringements of a scale that by far exceeds all other periods combined.'[692]

Such disconcerting effects of technology highlighted in the foregoing are compounded by South Africa's weak legal framework and enforcement mechanisms to address copying.[693] The International Intellectual Property Alliance January 2021 report emphasised that,

> 'South Africa's current copyright protection and enforcement framework is not up to the challenges of the digital age. New technologies are providing South Africa's consumers with increasing access to legitimate creative content and exciting opportunities for the growth of the copyright industries and all creators. Unfortunately, South Africa's inadequate response to

[689]Nedlar et al 'A qualitative systematic review on the application of the normalization of deviance phenomenon within high-risk industries' (2022) *Journal of Safety Research, Vol*. 84, 2023,92. 290-305, available at *https://www.sciencedirect.com/science/article/pii/S0022437522001827*. accessed 22 May 2023. See also D Vaughan *The Challenger launch decision: Risky technology, culture, and deviance at NASA* (1996).
[690] E Gard 'Conversations with Renowned Professors on the Future of Copyright' 12 *TUL. J. TECH. & INTELL. PROP*. 35, 38 (2009) 38.
[691] E Gard 'Conversations with Renowned Professors on the Future of Copyright' (2009) 12 *TUL. J. TECH. & INTELL. PROP*. 35, 38 (2009) 37. See also Oduor (note 1 above) 522.
[692]Roger Gachago *The Effect of Technology on Copyright* (Unpublished M, Phil Information and Communication Technology Law, University of Cape Town, 2011) 3.
[693] Special Report on Copyright Protection and Enforcement submitted to the United States Trade Representative by the International Intellectual Property Alliance, 28 January 2021. International Intellectual Property Alliance. available at *https://www.iipa.org/files/uploads/2021/01/2021SPEC301REPORT.pdf*. accessed 5 November 2021 71. The IIPA is a private sector United States coalition of various organisations that produce copyright protected works advocating for strengthening international copyright protection and enforcement mechanisms.

> persistent [copying] enabled by these same technologies threatens to undermine this progress. As an important emerging market and a dominant economy in sub-Saharan Africa, South Africa is uniquely positioned to demonstrate how a modern copyright regime can contribute to the growth of creative industries in an era of rapid digital and mobile expansion throughout the country and the region.'[694]

The report further recommended that, given the COVID-19 global pandemic, South Africa's economy should rebound from the socio-economic devastation by expanding and creating incentives for investment in the creation of more films, music, video games, books, and journals. It further argues that South Africa's Internet penetration and availability of digital devices has provided consumers with many options to copy, download, distribute and stream content and with it bandwidth speeds and lax controls over such bandwidth abuse.[695] While copyright law ordinarily guarantees exclusive right to control reproduction of work, the Digital Age has made monitoring and managing copying problematic. This is so because technological advancements are occurring every hour, with authors losing control of their works distributed through vast electronic mediums, with computers carrying the seamless ease of ripping media files using digital devices or popular file sharing tools.[696] The complex digital exploitation of works often occurs in private homes and enforcement mechanisms are also difficult to implement without compromising the constitutional rights to privacy. Therefore, it is prudent to devise a statutory solution that guarantees remuneration rights without interfering with the privacy rights of the end users. This approach is advisable in circumstances where authors waive their reproduction rights through a private copying exception, on condition there is compensation through a copyright levy for private copying. The levy is statutorily guaranteed upon the sale of digital devices that are capable of storage, and distribution of creative content. The justification for a statutory copying levy remedy must first be preceded by an interpretation of the fundamental doctrines facilitating the implementation of the levy; namely 'fair use' and 'fair dealing' exceptions. This is important before outlining the devastating effects of copying unaccompanied by rightsholders compensation frameworks.

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[694] Ibid.

[695] Ibid. 83-84. It reports that: 'South Africa has one of the highest rates of music piracy worldwide. According to a 2019 music industry study, 61.6% of Internet users admitted downloading International Intellectual Property Alliance (IIPA) Stream-ripping is the major music piracy issue in the country, with 39% of all users and 58% of 16–24-year-olds saying they had downloaded illegally via stream-ripping. Bit Torrent and cyberlocker use is also high, with more than one-fifth of users (21%) downloading music through these means.'

[696] N V. Kumar 'Digital Rights Management and Intellectual Property Protection (2012) available at *http://dx.doi.org/10.2139/ssrn.2030762*, accessed 23 November 2023.

3.4.1 Levying Artificial Intelligence to compensate South Africa's authors

Artificial Intelligence, (AI) presents both opportunities and setbacks for South Africa's authors.[697] The lopsided nature of AI creates an inflection point manifesting into an existential crisis in which copyright works are recreated without compensation, potentially constructing a market failure.[698] Karjicker posit that market failure is created if compulsory legal protection afforded to copyright works by copyright law is non-existent.[699] It is in this context Marwala argues that for the benefits of AI to achieve social justice and economic development, they must serve the people and not just the privileged few.[700] As such, AI can be used to accelerate growth, improve public services, and create new industries in several sectors that include healthcare, agriculture, and education.[701] Nonetheless in Intellectual Property, (IP), AI downside has created numerous challenges because of its capacity to recreate creative content without compensating creative content producers, particularly markets for translations, news reporting, paintings and the creation of background music.[702] For example, in the United Kingdom, over 4,000 artists called on the government to 'create a levy on smartphone sales to fund visual art in the face of cuts, studio closures and the rise of generative AI.'[703] While AI can augment and democratise creativity, the dangers of its evolution now lies in it undermining the knowledge ecosystem and the economic incentives for authors.[704] Pasquale and Sun posited that,

> 'Generative AI may unfairly compete with authors, journalists, and other creative workers, displacing them in the market. Most AI firms are not compensating creative workers for composing the songs, drawing the images, and writing both the fiction and nonfiction books that their models need in order to function. AI thus threatens not only to undermine the

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[697] T Marwala 'Artificial Intelligence and the Future of Work'Medium.com, 30 August 2024, available at *https://medium.com/@tshilidzimarwala/artificial-intelligence-and-the-future-of-work-324a5f76864c,* accessed 3 February 2025.
[698] Karjiker (note 118 above) 25-27.
[699] Ibid.
[700] Marwala '(note 697 above).
[701] Ibid.
[702] James Tapper 'Put levy on smartphones to help creatives survive AI threat, top UK artists tell Labour' The Guardian, 8 September 2024, available at *https://www.theguardian.com/culture/article/2024/sep/08/levy-smartphones-creatives-ai-threat-uk-artists-labour*, accessed 3 February 2025. This article follows an open letter to British culture secretary proposing 'freelancers' commissioner' to champion cause of the low-paid in creative industries.
[703] Ibid. The artists urged Nandy to help visual artists in the UK with funding and political support, saying the creative industries are worth £126bn a year to the British economy. "Despite this, many … visual artists, particularly freelancers, are among the creative industry's lowest earners," the letter says. "We must address these disparities and support these essential workers."
[704] F Pasquale & H Sun 'Consent and compensation: Resolving generative AI's copyright crisis' (2024) *Virginia Law Review*, Vol. 110 207.

> livelihoods of authors, artists, and other creatives, but also to destabilize the very knowledge ecosystem it relies on.'[705]

To address such market disequilibrium, Pasquale and Sun furthermore propose levying AI providers.

> 'We thus also propose a levy on AI providers, to be distributed to the copyright owners whose work they use without a license. This scheme is designed to ensure that creatives receive a fair share of the economic bounty arising out of their contributions to AI. Together, these mechanisms of consent and compensation would result in a new grand bargain between copyright owners and AI firms, helping to ensure the long-term viability of both AI and the human thought and expression it depends on.'[706]

There have been calls that AI-generated works should enjoy protection within the realm of copyright and neighbouring rights.[707] Such AI works are generated without the aid of a human being effort. Of particular interest in this study, is the capacity of AI to reproduce or copy copyrightable works without consent, attribution and compensation, giving rise to flagrant infringements.[708] Pasquale and Sun seem to follow in Senftleben footsteps, who two years earlier also proposed a new legal obligation to pay equitable remuneration – an AI system 'levy' – on users of AI systems that generate literary or artistic content.[709] Sentftleben writes that the objectives and conceptual contours of the levy,

> 'would serve the overarching purpose of creating a new revenue stream to support the creative work of authors of flesh and blood. Revenues accruing from remuneration payments for the use of AI systems would be channelled to collecting societies which use the money for the purpose of fostering human literary and artistic productions. At the core of the proposal lies the expectation that AI systems generating literary and artistic content will become more and more sophisticated in the foreseeable future.'[710]

A mandatory levy must in principle be designed to provide for equitable remuneration that encourages further innovation and creativity. In this context, it is prejudicial to have AI systems displacing human creative genius and its natural mode of content production on the

[705] Ibid 207.
[706] Ibid 207.
[707] Ibid
[708] M R F Senftleben 'A tax on machines for the purpose of giving a bounty to the dethroned human author—towards an AI levy for the substitution of human literary and artistic works (2022) *IViR Working Pape*r, available at *https://ssrn.com/abstract=4123309*, accessed 4 February 2025.
[709] Ibid.
[710] Ibid 2.

basis that such emerging technologies are faster and efficient. Senftleben argues that 'human creativity has so many added values for society in comparison with algorithmic processes of content generation that the proposed AI levy can be justified.'[711] Thirwili acknowledges this viewpoint after positing that, 'In South Africa, this means recognizing that AI, while a valuable tool, cannot replace the depth of human experience and insight. It is in this synergy between human and machine intelligence that we can find the greatest potential for progress.'[712]

The downside of AI lies in its copying and plagiarising capabilities of content at rapid speed.[713] This has created a predicament for authors whose works are seamlessly reproduced without statutory compensatory frameworks.[714] This development has been referred to as an existential crisis.[715] The emerging negative realities disrupting the copyright regime are that Large Language Models, (LLMs) such as MidJourney and ChatGPT are already 'outperforming' human beings.[716] The challenge developing out of this is the manner in which the remuneration for authors' is undermined.[717] Hence Senftleben, Pasquale and Sun recommend a solution in which compensation through the imposition of a levy on all AI providers is provided.[718] In this contribution, such a task is proposed to be through a Collective Management Organisation, (CMO), with statutory levy collection and distribution powers. Copyright law encourages authors to create works by granting them exclusive rights, which are followed by economic incentives to encourage innovation.[719] Such exclusive rights guarantee and entitle authors to prevent reproduction, distribution and or use of their work without consent. Pasquale and Sun posit that,

> 'The opacity and scale of AI systems are disrupting the knowledge ecosystem by significantly eroding authors' proprietary control of their works, well beyond extant digital practices that

[711] Ibid 3.
[712] Marwala (note 697 above).
[713] Sage and Sun (note 704 above) 208.
[714] Ibid.
[715] Ibid. See also in the same journal reference to Michael Cavna 'Artists Are Alarmed by AI—and They're Fighting Back' Washington *Post*, 14 February 2023, available at https*://www.washingtonpost.com/comics/2023/02/14/ai-in-illustration/ [https://perma.cc/4RFW-5FX3*, accessed 3 February 2024. He writes that: ''I feel like it's a violation of the soul,' says one popular cartoonist who is suing artificial intelligence companies for using images without permission, as illustrators ask: Will this transform our industry?'
[716] Sage and Sun (note 704 above) 208.
[717] Ben Schwartz 'AI and the Hollywood Writers' *The Nation*, Strike 8 May 2023, available at *https://www.thenation.com/article/economy/ai-and-the-hollywood-writers-strike/*, accessed 3 February 2025. He writes that creative workers are fighting to preserve the human factor in the entertainment industry.
[718] Pasquale & Sun (note 704 above) 211.
[719] Copyright Act, 1978.

> have already undermined many authors' well-being. Whereas prior scraping at scale tended to be focused on the nonexpressive aspects of works (such as facts), AI is focused by many prompts on their expressive dimensions. Search engines have historically provided links that lead users to works themselves. In contrast, AI tends to provide substitutes for such works while failing to provide citations to the works in its dataset most similar to the texts, images, and videos it presents as a computed synthesis.'[720]

Several arguments have been proffered that AI systems will come up with even better impulses for the improvement of society than any human could possibly imagine.[721] It would appear technology and human beings are competing for space and survival. Notwithstanding, such dispositions ignore the fact that AI are not true creators, as such its technical creative genius should not be used to undermine human beings. Senftleben argues that,

> 'Even if an AI system could carry out all this analytical work, it would still be incapable of creating alternative visions of a better society for which it has no template. As AI systems are not affected by societal conditions in the same way as humans, it seems hard to imagine that they could free themselves from the data input fuelling their algorithm and arrive at new reflections of societal conditions.'[722]

Human beings express themselves in relation to societal developments, and AI is a technical tool which cannot bluff. Natural works are genuine responses capturing and reflecting societal horrors, empathy, joy, pain, thoughts, and anxieties. Senftleben writes that,

> 'AI systems do not perceive and experience social and political conditions as humans do. [because] Shortcomings of society – or social and political developments in a broader sense – may offer starting points for humans to embark on expressive work reflecting these trends, proposing alternatives, and offering impulses for the audience to think about changes. Lacking the same exposure to societal conditions and corresponding experiences, an AI system, however, is incapable of generating similar impulses.'[723]

As AI developments, training and usage gathers pace, global artists, writers, designers, and photographers have posted 'Do Not AI' signs on their social media accounts, protesting the use of their works for AI model training.[724] Regardless, the challenge lies in the blackbox nature of AI systems, in which it is laborious and difficult to determine if their works have

[720] Pasquale & Sun (note 704 above) 213.
[721] Senftleben (note 708 above) 10.
[722] Ibid 10.
[723] Ibid at 10.
[724] Pasquale & Sun (note 704 above) 215.

been used or not. In any event, AI's leading firms are reluctant to compensate authors for usage or reproduction of their works.[725] As a result, 'the bottom line here is grim. If uncompensated and uncontrolled expropriation of copyrighted works continues, many creatives are likely to be further demoralised and eventually defunded as AI unfairly outcompetes them or effectively drowns them out.'[726] AI providers assert they owe authors nothing; hence scholars are exploring alternative paths to compensation which includes levying AI producers.[727] This arises because huge technology firms 'have become rich in part based on uncompensated or under-compensated contributions from both users and content providers.'[728]

In the South African context, there isn't clarity on the extent to which AI-generated content should be protected by existing copyright law in South Africa.[729] This also includes issues to do with authorship and ownership of copyright.[730] Such clarity is important in providing a framework for AI dispute resolution. This is in line with Pistorius and Mwim recommendations that a substantial effort at keeping up with technological advancement must be made.[731] Scholars in South Africa have noted that while the government has responded to the digital challenges by introducing the CAB, it still does not adequately provide for AI infringements. Khan and Gotora note that,

> 'the tremendous development of AI is posing multifarious challenges to copyright, including but not limited to image rights and moral rights i.e. the integrity of works. AI must be regulated to protect human creativity. Bearing this and the aforementioned foundations of copyright law in mind, it is evident that AI challenges the notions of authorship in copyright law.'[732]

With the rise of AI, complex legal questions have emerged about copyright; hence South Africa must ensure that it is adapting its legal frameworks to keep up with these changes, and

[725] Ben Schwartz 'AI and the Hollywood Writers' *The Nation*, Strike 8 May 2023, available at *https://www.thenation.com/article/economy/ai-and-the-hollywood-writers-strike/*, accessed 3 February 2025. He writes that creative workers are fighting to preserve the human factor in the entertainment industry
[726] Pasquale & Sun (note 704 above) 221.
[727] Ibid at 230.
[728] H Sun *Technology and the Public Interest* (2022) 124.
[729] Ibid 16.
[730] Ibid 16.
[731] Pistorius & Mwim (note 21 above) 1-7.

[732] R Khan & N Gotora 'One (innovation) flew over the law's head: The intersection of artificial intelligence and copyright'2023) *IPLJ* 75

that the CAB offers that offers a timely opportunity.[733] The legal fraternity has also indicated that while advent of AI-generated works presents both opportunities and challenges for the South African IP laws, there is need to be proactive in legislative reform, and promoting awareness and ethical AI guidelines.[734] In this regard, levying AI to compensate authors for harm created must be prioritised.

3.4.2 Interpreting fair use and fair dealing exceptions

Private copying exceptions facilitate end users' copying without being licensed or authorised in certain limited circumstances provided compensation is paid to rightsholders. It's debatable whether they operate as a defence to a copyright infringement claim, or they are to be regarded as user rights. Regardless, it's generally important to dissect and define them, given that they form an integral part in the implementation of a proposed copyright levy.

The copyright levy only operates in hand with copying for non-commercial purposes under private copying exceptions. However there are contradictions on whether the exceptions themselves are user rights or defences to an infringement claim..[735] Dean posits that fair use is not a right but a defence because an act of infringement has been committed from which the individual is exempted from prosecution.[736] The same approach to exceptions is taken by Oriakhogba and Osadolor, who write that exceptions could not be regarded as user's rights, but defences to an infringement claim.[737] Nonetheless, Pistorius argues that canons of statutory interpretation favour exceptions operating as a right, not a 'merely' a defence to a claim.[738] This is so because the,

> 'general purpose of the copyright exceptions and limitations is to balance the public's right to access copyright works and economic rights of copyright owners. The balance between public

[733] Hanani Hlomani and Andrew Rens Artificial intelligence, copyright infringement and protection – a legal quagmire? *Daily Maverick*, 24 March 2023, available at *https://www.dailymaverick.co.za/article/2023-03-24-artificial-intelligence-and-copyright-a-legal-quagmire/*, accessed 3 February 2025.
[734] Amani Patel and Juli Hopf 'Is AI sufficiently contained in Intellectual property Laws?' *Spoor & Fisher*, 7 September 2023, available at *https://spoor.com/is-ai-sufficiently-contained-by-intellectual-property-law/*, accessed 3 February 202
[735] Moneyweb case (note 254 above) para 139.
[736] O H Dean (note 127 above) 1-57.
[737] D Oriakhogba & F O Osadolor 'Musings on the Fair Use and Fair Dealing Exceptions to Copyright: Nigeria and South Africa in Focus' (2017) *Ebonyi State University Law Journal* (2017) 8(1) 144.
[738] T Pistorius 'Copyright Law' in H Klopper, T Pistorius, B Rutherford, LA Tong and P vander Spuy (eds), *Law of Intellectual Property in South Africa* (2011) 211-212.

> and private rights also affects access to learning materials … when a provision is enacted for the public benefit, it should be liberally construed.'[739]

This understanding is also shared by Van derWalt and du Bois, who hold the view that the defence argument suffices because it,

> 'corresponds exactly with the general purpose of the public domain in the sense that intellectual property rights should be construed and developed in such a way that intellectual property works would still be readily accessible to the public and available for future creative use.'[740]

Furthermore, Pistorius argues that fair dealing provisions in section 12 of the Copyright Act are not a defence because in that all exempted acts are not in principle acts of infringements. Notwithstanding, exceptions can operate as both a right and defence depending with the legal context in which they are used. In litigation, they operate as a defence to an infringement claim to escape liability. In the *Moneyweb* Case, the respondent, Media24 averred that it should be 'absolved from liability by virtue of the statutory defences' in sections 12(1) (c) (i) and 12(8) (a) of the Act.[741] Further, the court noted that 'the onus of proving a defence in terms of section 12(8) (a) rests on the respondents.' [742] It is also understandable, that the exceptions can operate as rights that accrue to the end users. This is in light of Pistorius's implied rights interpretation emanating from the teleological and generous interpretation of Chapter 3 of the Constitution, which seeks to balance the public right of access to copyright materials and economic rights of authors.[743] The exceptions are also explicit as rights if they are approached from the standpoint of access to information in the exploitation of copyrights for educational,[744] and news purposes.

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[739] Ibid.
[740] AJ Van der Walt and M du Bois, 'The Importance of the Commons in the Context of Intellectual Property ' (2013) 1 *Stellenbosch Law Review* 47.
[741] Moneyweb case (note 254 above) para 6. C.
[742] Ibid at para 77.
[743] *Cape provincial administration v Honiball* 1942 AD 14; *R v Magana* 1961 (2) SA 654 (1); In both cases Pistorius argues that where a provision is enacted for the public good it must be liberally construed as such.
[744] *See Blind SA v Minister of Trade, Industry and Competition and Others* 2023 (2) BCLR 117 (CC) para 2 & 6. In which the court declared that sections 6 and 7, read with section 23 of the Copyright Act 98 of 1978, are unconstitutional, invalid and inconsistent with the rights of persons with visual and print disabilities, as set out in sections 9(3), 10, 16(1)(b), 29(1) and 30 of the Constitution, to the extent that these provisions of the Copyright Act limit the access of such persons to published literary works, and artistic works as may be included in such literary works, in accessible format copies.'

3.4.2 Effects of fair dealing and fair use under the Act and CAB on end users and rightsholders

The fair dealing doctrine, provided under the Act is regarded as inflexible, restrictive and emanating from a distinct set of pre-defined positions.[745] Oriakhogba and Osadolor posit that the doctrine's inflexibility is its main strength because it provides a certain legal position that precisely defines the purposes that fall within its ambit.[746] The doctrine provides under section 12 of the Act that the use of literary, musical and artistic works, broadcasts, and published editions will qualify as fair dealing if the use is for the purposes of,

> (a) research or private study by, or the personal or private use of, the person using the work; or (b) criticism or review; or c) reporting current events in newspapers, magazines, or similar periodical or by means of broadcast or in a cinematograph film.'[747]

The Act is also applicable to cinematograph film, sound recording and computer programs only in circumstances where they are used for the purposes of criticism, review or reporting of current events.[748] Home copying of the works under section 12(1) as incorporated by sections' 16, 17 and 18 is allowed for the purposes of personal and private use. but the fundamental defect of the Act is that it is allowed without creating a compensation mechanism for rightsholders..[749] The implementation of the copyright levy will allow for the making of private copies provided it is used for non-commercial purposes and or essentially does not interfere with the three-step test which is embodied under section 13 of the Act, also originating from Article 9(2) of the Berne Convention and Article 13 of the TRIPS Agreement, which states that,

> '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.'[750]

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[745] D Oriakhogba & F O Osadolor (note 754 above) 144.
[746] Ibid at 145.
[747] South Africa's Copyright Act 98 of 78, ss 12, 15(4), 18 and 19A.
[748] Copyright Act s16 (1), 17, and 19B.
[749] D Oriakhogba & F O Osadolor (note 745 above) 145.
[750] Article 13 of the TRIPs Agreement; see also P B Hugenholtz & R Okediji 'Conceiving an International Instrument on Limitations and Exceptions to Copyright' (2012) *Amsterdam Law School Research Paper*. 2012: 37 where the authors outline the interpretations of the exceptions that, Limitations and exceptions cannot be "overly broad" [= "certain special cases"; Limitations and exceptions cannot "rob right holders of a real or potential source of income that is substantive" [= "conflicting with normal exploitation of the work"]:

South Africa is signatory to both the Berne Convention[751] and TRIPS Agreement,[752] which makes it mandatory for states to apply the three-step test to the granting of exceptions. As earlier indicated, section 13 of the Act captures the spirit of the three-step test in a language almost identical to the wording of the international treaties.[753] Allowing private copying without compensation is in conflict with the three-step test because it interferes with the normal exploitation of work, and unreasonably prejudicial to the legal interests of rightshholders. The remuneration harm created is unavoidable because there is no legal provision or formular for rightsholders to recoup incentives from their investments.[754] .[755]

Fair dealing and fair use are the most used copyright exceptions. and are based on that not all copying should be banned except under prescribed legitimate considerations, such as inter alia, research, news reporting and criticism.. While both exceptions are identical in some respects, the fair use doctrine is open-ended and more flexible, while fair dealing is close-ended and inflexible. While fair dealing is captured under the Act, the fair use doctrine forms part of the Copyright Amendment Bill, and the key challenge and controversy for South Africa's parliament is framing the latter in such a manner that it doesn't compromise the remuneration interest of rightsholders, but spurs innovation while balancing that with the interest of end users. The fair use doctrine under the CAB, which is borrowed from the United States' Copyright Act provides that,

> 'the fair use of a copyrighted work, including such use by reproduction in copies or phono records or by any other means specified by that section, for purposes such as criticism,

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Limitations and exceptions cannot "do disproportional harm to the rights holders" [= "prejudice legitimate interests"].

[751] The Berne Convention obliges South Africa to give recognition and protection to copyright works from signatory countries.

[752] TRIPS Agreement Art. 13.

[753] Copyright Act s13, 'The reproduction of a work shall be permitted as prescribed, but in such a manner that the reproduction is not in conflict with a normal exploitation of the work and is not unreasonably prejudicial to the legal interests of the author.'

[754] CISAC (note 159 above) 48.

[755] Section 12B, specific exceptions from copyright protection applicable to all works: '(1) Copyright in a work shall not be infringed by any of the following acts: (a) Any quotation: Provided that— (i) the extent thereof shall not exceed the extent reasonably justified by the purpose; and (ii) to the extent that it is practicable, the source and the name of the author, if it appears on or in the work, shall be mentioned in the quotation;

….

(2) For the purposes of subsection (1) (j), permitted personal uses include— (a) the making of a back-up copy; (b) time or format-shifting; or (c) the making of a copy for the purposes of storage, which storage may include storage in an electronic storage medium or facility accessed by the individual who stored the copy or the person responsible for the storage medium or facility.'

comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.'[756]

Fair use, similarly with the fair dealing provides scope for the court to exercise discretion in copyright infringement cases to decide whether the alleged infringer should be absolved from liability because he or she was making 'fair use' of the work. The court's evaluation of the fair use conduct will take account such common law considerations as, '(a) the purpose and character of the use; (b) the nature of the work; (c) the amount and substantiality of the portion of the work used; (d) the effect of the use on the copyright's holder's potential market.'[757] Dean notes that the four factors must not be construed for a test for fairness, but should be considered as guidelines for the court to follow in the exercise of its discretion to assess the fairness of infringing conduct before granting an exception.[758] The court has latitude to decide what conduct qualifies exemption. In this regard, the fair use provision is generally viewed as an, 'open-ended flexible regime, which allows courts to determine – on a case-by-case basis – what qualifies as fair use within certain criteria.'[759]

The implementation of fair use can be problematic in that it is difficult to ascertain how the court's discretionary powers can meet the requirements that an exception cannot be granted unless the infringing act is a certain special case.[760] If anything, the court is not required to determine whether the conduct is a special case or not, rather that the court is only required to make a finding whether the infringing conduct in the exploitation of the work is fair, or amount to fair use.[761] The application of fair use where infringements acts occur becomes a challenge because it is 'difficult to conceive how any "fair" action of whatsoever nature can be classified as being a certain special case and thus pass the first of the three tests required by the Berne Convention and the TRIP'S Agreement.'[762] To the contrary, the application of fair dealing in considerations of special cases has little complications because any conduct that meets the special case exemption is determined in accordance with its specific closed list of exemptions. Dean writes that,

[756] United States Copyright Act, s107.
[757] D Oriakhogba & F O Osadolor (note 754 above) 146.
[758] O H Dean 'Unpacking copyright exemptions' (2022) *blogs.sun.c.za*, 24 October 2022, available at *https://blogs.sun.ac.za/iplaw/files/2022/10/UNPACKING-COPYRIGHT-EXEMPTIONS.pdf*, accessed 19 January 2024.
[759] Fairness found: How Canada quietly shifted from fair dealing to fair use' in M Geist (ed.) The Copyright *Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (2013) 157-186.
[760] O H Dean (note 127 above).
[761] Ibid.
[762]Ibid.

> 'If the contentious activity is thus listed or can be regarded as falling within one of the listed exceptions, it follows that it is a certain special case. The public knows what it can do without obtaining consent from the copyright owner and conversely the copyright owner knows what limitation has been placed on her exclusive rights. The disadvantage of the Fair Dealing system is that it lacks flexibility. In the event that circumstances require the making of further exceptions it is necessary for the legislation to be amended so as to expand the closed list of exceptions, which could be a time-consuming process.'[763]

However, where legislative challenges impacting on private copying levies occur as a result of the emerging digital technologies, there is scope for the minister under section 13 to promptly introduce new exemption regulations that should comply with the three-step test.[764] Conversely, the flexibility of the fair use doctrine provides latitude for the judiciary in the exercise of their discretion in the interpretation of the case to determine what conduct might amount to fair use, thus creating endless and often conflicting precedents. Thus fair use creates uncertainty in law, because as Dean puts it, 'judges can in the exercise of their discretion decide that just about anything can constitute Fair Use and amount to a new exception, no-one, not copyright owners nor users, can know in advance whether a particular activity can qualify for an exception.'[765]

Notwithstanding, there have been concerns that fair use exceptions provided in the CAB, will have the opposite effect of cutting off rightsholders income streams, particularly local artists, writers and musicians, because of the free access to South African content given the bill's supposedly extensive exceptions to copyright; provided under fair use doctrine's supposedly expansive set of principles facilitating free use of content under the fair use doctrine.[766] Other stakeholders at the Bill's consultative meetings voiced similar concerns that fair use is a concept that entitles the court to make a decision using its discretion when it comes to drawing up a list of copyright exemptions while fair dealing is more predictable in

[763] Ibid.

[764] Copyright Act s 13.

[765] O H Dean (note 127 above).

[766] Neil Turkewitz 'South Africa: A Story of Fair Use & Unfair Dealing' *Medium.com*, 26 June 2020, available at *https://medium.com/@nturkewitz_56674/south-africa-a-story-of-fair-use-unfair-dealing-226edcb6a140*, accessed 18 January 2024. He writes that, '[there are] grave risks to South Africa's economic and cultural interests were the legislation to be passed in its current form [with its existing fair use provision]. South African authors, musicians, songwriters and others in the creative community had previously highlighted the outsized role of American tech companies, academics and organizations in pressing for adoption of the law as part of their global policy agenda to expand fair use, without regard to the particulars of the South African experience, and without any consideration for the impact on the South African creative community.'

that exemptions are listed in legislation and are amendable by the minister.[767] With the introduction of private copying levies, making of private copies will be covered under private copying exceptions and accompanied by rightsholders compensation for the harm created. The copyright levy is designed to balance such existing tensions between end users and rightsholders. However, both private copying exceptions, namely fair dealing and fair use, can cohabitate with copyright levies provided such compensation is statutorily guaranteed where they are introduced.

3.4.3 Artificial Intelligence, fair use and fair dealing exceptions

AI firms have argued that their exploitation of online content is protected by the fair use doctrine.[768] The interpretation and application of fair use doctrine is uncertain on new emerging technologies, with a seemingly broken contract between authors and AI firms.[769] The battlelines remain around contentious copyright issues of consent, credit, and compensation.[770] The CAB contains clauses for fair use, which according to Karjicker can open doors for copyright infringements in the context of text and data mining relating to AI.[771] Interpretations of the same will be left in the judicial law-making domain.[772] Under the current CAB, Karjicker fears that AI could do untold harm to South African authors without clarity about the role of copyright protection, and failure to adequately protect artists and authors.[773] Karjicker argues that 'there is a risk of relegating them to again being considered mere hewers of wood and carriers of water.'[774] This is an important consideration especially where compensatory frameworks for AI exploitation of online creative content are either obscure or non-existent. AI models are trained on millions of online available copyrightable materials and furthermore it engages in computational text data mining involving among other processes scraping and downloading.[775] This inevitably in some instances infringe on the exclusive author's right of reproduction. Copying of another work's

[767] Sibongile Maputi 'Fair use will result in uncertainty if copyright amendment bill is passed, select committee hears' *Parliament of South Africa*, 9 March 2023, available at *https://www.parliament.gov.za/news/fair-use-will-result-uncertainty-if-copyright-amendment-bill-passed-select-committee-hears*, accessed 18 January 2024.
[768] F Pasquale & H Sun 'Consent and compensation: Resolving generative AI's copyright crisis'(2024) *Virginia Law Review*, Vol. 110 210.
[769] Ibid.
[770] Open Letter to Generative AI Leaders, Action Network, https://actionnetwork.org/petitio ns/authors-guild-open-letter-to-generative-ai-leaders [https://perma.cc/8D5W-WGFL] (last visited Mar. 3, 2024)
[771] Sadulla Karjiker 'Fair use and artificial intelligence' *BusinessDay*, 8 January 2024, available at *https://www.businesslive.co.za/bd/opinion/2024-01-08-sadulla-karjiker-fair-use-and-artificial-intelligence/*, accessed 4 February 2025.
[772] Ibid.
[773] Ibid.
[774] Ibid.
[775] Pasquale & Sun (note 704 above) 210.

is impermissibly infringing author's reproduction rights protected by copyright law. Reproduction is subject to copyright exceptions, or fair use limitations provided under common law or statute.

Fair use allows for copying, or distribution in certain circumstances under the prescribed four-factor test. Precedents involving AI have demonstrated concerns that LLMs tend to memorise works in their training data.[776] If AI recreates original creative content, as alleged in several emerging precedents, there are potentially fair use infringements.[777] Furthermore, works acquired unlawfully online ipso facto militate against fair use doctrine. Generative AI tends to mimic the style of artists, such as singers, illustrators, or writers. This makes the fair use argument less persuasive because 'the output is closer to substitution for the copyrighted material used in the training data than transformation.'[778] Blaszczyk et al presents a balanced picture of the AI use implications to fair use doctrine, which is important to capture and summarise.

> 'In deciding AI fair use cases, courts might be swayed by a host of legal and policy arguments regarding generative AI model training — the supposed spread of misinformation, perpetuation of biases, and replacing of artists; increasing productivity; enabling new forms of creativity; and accelerating research. Further arguments involve job displacement resulting from AI and questions of antimonopoly policy. Some of these concerns might be too broad for copyright doctrine to address. More generally, if the courts reject fair use for generative AI, they could halt innovation or push it offshore; if they accept fair use, they might divert economic gain from individual creators. Applications of the fair use doctrine in this context are yet to be decided; it is possible that cases could point in divergent directions.'[779]

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[776] See United States of America Northern District of California cases, In re: *OpenAI ChatGPT Litigation*, Master File No. 3:23-cv-3223; *Tremblay v. OpenAI, Inc*., No. 3:23-cv-03223; *Silverman v. OpenAI, Inc*., No. 3:23-cv-03416; *Chabon v. OpenAI*, Inc., No. 3:23-cv-04625. See also A Cooper & J Grimmelmann 'The Files are in the Computer: On Copyright, Memorization, and Generative AI' (2024). Cornell Legal Studies Research Paper Forthcoming, Chicago-Kent Law Review, Forthcoming, available at SSRN: *https://ssrn.com/abstract=4803118*, accessed 4 February 2025.See also Michael D Murray, Generative AI Art: Copyright Infringement and Fair Use, 26 SMU SCI. & TECH. L. REV. 259 (2023);

[777] K Tyagi 'The Copyright, Text & Data Mining and the Innovation Dimension of Generative AI'(2024) *Journal of Intellectual Property Law and Practice*, Vol. 19, No. 7, 2024.

[778] Blaszczyk et al 'Artificial Intelligence Impacts on Copyright Law' *Expert Insights*, 20 November 2024, available at *https://www.rand.org/pubs/perspectives/PEA3243-1.html*, accessed 4 February 2025.

[779] Ibid.

Nonetheless, the most important consideration is providing a legal framework for statutory compensation for exploitation of copyrightable online material to avoid undermining the three-step test under the Berne Convention, recognising the need to avoid prejudicing authors while encouraging innovation. This can be cured by statutorily guaranteed remuneration for the invention and use of AI.

3.4.4 A brief overview of the private copying repercussions on rights holders

Private copying without compensation has a negative effect on IPRs, resulting in huge losses in potential remuneration. Under the current Copyright Act, South Africa has a private copying exception without a remuneration system.[780] The proposed CAB seeks to introduce fair use provisions[781] with a private copying exception, which CISAC highlighted would be highly detrimental to creators.[782] This potential effect must be demonstrated. This is so because the private copying exception facilitates exploitation of work without compensation, and this potentially amounts to a deprivation of a right. Reproduction of content in the digital age is easy and inexpensive, the duplicated copy itself is perfect and the distribution itself is effortless and cost-free and instantaneous.[783] At the heart of private copying or illegal downloads are mobile phones, computers, software, cameras, photocopiers, printing machines, and compact disc (CD) players, manufactured in the country or imported. South Africa drafted a 2021 policy paper on copyright content services, which indicated that copying created huge revenue losses for authors across the entire content distribution chain.[784] The policy paper also noted that the current copyright law framework, including the CAB, were ineffective in addressing these challenges before calling for stricter restrictions to police illegal file sharing and streaming websites.[785] It noted that authors in developing countries are harmed the most and without the economies of scale of international providers or distributors they are heavily reliant on the revenue generated by sale and the exploitation of their work.[786] In South Africa, the scope for infringements is high and facilitated by digital technologies and huge access to the Internet where statistics show that as of January 2021,

[780] Copyright Act 98 of 1978 s 12 & 13.
[781] Copyright Amendment Bill s 12A,
[782] CISAC (note 159 above) 48.
[783] D S Marks & B H Turnbull 'Technical protection measures: The intersection of technology, law and commercial licences'(2000) *European Intellectual Property Review, Vol*. 22, No. 5 198.
[784] Draft White Paper: Audio and Audiovisual Content Services Policy Framework: a New Vision for South Africa. available at *https://www.gov.za/sites/default/files/gcis_document/202010/43797gon1081.pdf.* 122. accessed 28 October 2021.
[785] Ibid at 123.
[786] Ibid at 122.

there were 38.1 million active Internet users in South Africa.[787] This figure had risen by 3 million by 2022.[788] Although copying is prevalent in middle-income countries, it has a historical and political context in South. Primo and Lloyd argue that exploitation of works without authorisation has a bearing on the South Africa's distinctive history of repression, political contestation, and diplomatic tension dating back to the apartheid era, whose cultural economy marked illicit flows of works.[789] This was compounded by the 1980s and the early 1990s economic boycotts of South Africa's cultural goods which became expensive and in some instances unavailable.[790] This resulted in widespread and widely tolerated copying. The hugely uneven purchasing power between blacks and whites also created disparities in the capacity for disadvantaged black population to access works.[791] Such a historical context perhaps explains why South Africa is ranked number fourteen in the world in terms of illegal downloads.[792] This is so because of a general perception that many people think that copying is acceptable, creating questions on whether changing the national mindset is conceivable.[793] It is estimated that South Africans are unlawfully downloading one million movies a month from sites such as Pirate Bay, KickAss Torrent and others. Johnson writes that,

> 'The figure is worrying for reasons as diverse as illegal downloads fill the coffers of organised crime to society failing to support creative endeavours. However, it still does not tell the whole story because a new breed of sites has emerged which allows films and music to be streamed, and thus, technically, not downloaded. Trade in counterfeit DVDs is also brisk in SA.'[794]

The Journalist reported that South Africa was encumbered with staggering billions of rands in annual losses attributable to unauthorised access of copyrightable content and the global

[787] Joseph Johnson 'South Africa: digital population as of January 2021' *Statistica* 7 September 2021. available at *https://www.statista.com/statistics/685134/south-africa-digital-population/.* accessed 28 October 2021. It reported that as of January 2021, there were 38.13 million active internet users in South Africa. Among them, an overwhelming majority (over 36 million) also used mobile internet. During the same period, it was also found that nearly 99 percent of those using social media accessed their accounts through mobile phones.
[788] See also Statista Research Department 'South Africa: digital population as of January 2022' *Statista,* 26 April 2023 available at *https://www.statista.com/statistics/685134/south-africa-digital-population/#:~:text=South%20Africa%3A%20digital%20population%20as%20of%20January%202022&text=As%20of%20January%202022%2C%20there,internet%20users%20in%20South%20Africa*. accessed 25 May 2023. It reports that as of January 2022, there were 41.19 million active internet users in South Africa. According to the same report, it was also found that 28 million internet users in the country used social media, which was around 46 percent of the total population.
[789] N Primo & L Libby 'South Africa' in Joe Karaganis (ed) *Media Piracy in Developing Economies* (2011) 99.
[790] Ibid.
[791] Ibid.
[792]Jane Matzukis 'Piracy is everybody's issue' *Business Technology of Media Company* 24 July 2015. available at *https://www.itweb.co.za/content/p6GxRKqYXOrMb3Wj*. accessed 28 October 2021.
[793] Ibid.
[794] Ibid.

picture of the same involving motion pictures was higher.[795] The country's economy is significantly driven by the film and television industry and in 2017, USD$34 million income was generated through the industry which supports over 22 000 jobs, according to PricewaterhouseCoopers Entertainment and Media outlook 2018-2022 report.[796] Economists have also warned that illegal downloading has caused a drop in music sales affecting music production and the global economy.[797] This is linked to the economic logic that lack of economic incentives due to free riding activities affect innovation leading to a reduction in cultural content creations. Without incentives to foster innovation, authors are less motivated to create content. Already, economists posit that 'illegal file sharing and unauthorised copying of digital material prevents musicians from reaping the fruits of their labour and has the potential to stifle artistic creativity and compromise electronic innovation.'[798]

The devastating effect of copying, and or illegal downloads is global phenomenon. The Intellectual Property Law Institute (IPI 2007) in its widely commented report estimated the global annual loss to $12,5 billion dollars and 71 060 jobs.[799] While the effects of the Internet and digital technologies on copyright are also global in nature,[800] South Africa must urgently address remuneration leakages arising from the uncontrollable private copying by creating a statutory remuneration stream that cushion and compensates authors from this harsh Digital Age reality.

3.4.4 Response to unauthorised copying: Technological Protection Measures (TPMs)

The introduction of the CAB was a notable effort in adapting the law to the Internet and digital developments.[801] This because the current Copyright Act did not cater for the digital era, and the CAB sought to close the gap by addressing emerging remuneration right challenges for copyright holders through, among other provisions, providing for

[795] The Journalist 'Hitting pause on piracy' *The Journalist.org* 28 May 2019. available at *http://www.thejournalist.org.za/the-craft/hitting-pause-on-piracy/*. accessed 28 October 2021.
[796] Ibid.
[797] A Baumann *The economic impact of illegal downloading on the music market* (2016) 20.
[798] Sénateur S. Brow quoted by A Baumann *The economic impact of illegal downloading on the music market* (2016) 20.
[799] Ibid at 21.
[800] I A Olubiyi (note 161 above) 99.
[801] Copyright Amendment Bill & Performers Protection Amendment Bill: public hearings, NCOP Trade & Industry, Economic Development, Small Business, Tourism, Employment & Labour, 14 March 2023, available at *https://pmg.org.za/committee-meeting/36546/#:~:text=The%20South%20African%20Copyright%20Amendment,expression%2C%20and%20access%20to%20knowledge*. The committee's reports and expectation was that 'The South African Copyright Amendment Bill would propel South Africa into the digital age and enable South African citizens to enjoy their fundamental rights to education, cultural participation, freedom of expression, and access to knowledge.'

Technological Protection Measurers, (TPMs). The TPMs are technical methods or devices used by copyright holders to protect their work involving access and copy control.[802] This entails password control systems, payment systems and encryption measures.. The enactment of the CAB will only result in express TPMs provisions getting effective providing for penalties and rendering unlawful certain circumstances providing for circumventions of digital rights management systems. It had emerged that infringement patterns needed to be addressed through TPMs that deterred infringers from exploiting copyrights using digital copying technology. The foremost challenge facing the new CAB is around TPMs provisions namely sections' 26 and 28. TPMs are meant to guarantee digital content protection, but evolving technological gadgets continue to circumvent them.

However, the circumvention of TPMs by end users is permissible under Bill's provisions dealing with fair use exceptions.[803] Outside the provided exceptions framework new emerging technologies with TPMs circumvention capabilities continue to be invented exponentially increasing instances of copyright infringements.[804] TPMs are therefore a temporary relief, 'continuously vulnerable to attack by hackers, especially as the processing capabilities of computer hardware and software continue to advance rapidly.'[805] The challenges in respect of legal circumvention is to what extent it provides a utilitarian remuneration scope in balancing the rights of the authors and users as expected under section 12 of the Bill.

The CAB's fair use exception, and the Performers Protection Bill section 8F (1),[806] allows for circumvention of TPMs to make a private copy. There appears to be an unforeseen statutory contradiction between the CAB and the Electronic Communications and Transactions Act (ECTA). This is because the same circumvention is prohibited by sections 86(1), 86(3), and 86(4) of the ECTA. The contradiction can be judicially resolved through

[802] I Kerr A Maurushat & C Tacit 'Technical Protection Measures: Tilting At Copyright's Windmill'(2003) 34 *Ottawa Law Review* 7 16.
[803] Fair Use provisions: s 12A and 12B of the Copyright Amendment Bill.
[804]C Visser (note 174 above) 55.
[805] Ibid.
[806] Copyright Amendment Bill, s 28P (1).

application of principles around the canons of statutory interpretation.[807] However, this could be avoided by legislature's timely intervention setting out a coherent harmonised statutory framework.

Furthermore, the CAB makes it illegal to manufacture, sell, import, or let for hire any TPMs circumvention devices if there is a clear established intention to gain access to or infringe encrypted and technologically protected work.[808] This is problematic because third parties are allowed to use TPMs to circumvent and gain access to works under fair use exception provisions.[809] Forere opines that this opens room for creating lawlessness, bemoaning the apparent two contradictory statutory provisions, the one prohibiting the manufacture, importing or selling of circumvention devices and the other allowing a consumer to resort to circumvention devices to unlock the protected work.[810]

3.5 ABSENCE OF TRANSPARENCY IN THE AFFAIRS OF COLLECTIVE MANAGEMENT ORGANISATIONS

Collection societies are intermediaries between content creators and end users in the promotion, collection, and distribution of music royalties.[811] The CMOs also protect and enforce the IPRs of copyright holders operating as non-profit entities with limited liabilities or often under partnerships.[812] There is a general expectation that CMOs should conform to good corporate governance principles under the Companies Act.[813] In South Africa, there are several CMOs, which include the Southern Africa Music Rights Organisation (SAMRO), National Organisation of Reproduction Rights **(**NORM**),** the Composers Authors and Publishers Association **(**CAPASSO**)**, the South African Music Performance Rights Association **(**SAMPRA**)** and the Performers Organisation of South Africa Trust **(**POSA**).** CMOs have been subjected to several public enquiries commissioned by the government

[807] J Pelegrin 'Statutory Construction: Severing Statutes and Resolving Conflicts' (2016). An informational and educational resource for the Colorado General Assembly by the Office of Legislative Legal Services. available at *https://legisource.net/2016/02/19/statutory-construction-severing-statutes-and-resolving-conflicts/.* accessed 7 November 2021. She writes that: 'Sometimes two statutes conflict, not because one is general and the other is specific, but because one prohibits what the other allows or requires. As in other cases, the court will first try to reconcile the differences and give effect to both sections. If the differences are irreconcilable – there is a true conflict – the statute that has the latest effective date is the one the court will apply. If both statutes were passed in the same legislative session with the same effective date, the statute that has the latest date of passage will apply.'

[808] Copyright Amendment Bill, s 28O.

[809] Copyright Amendment Bill, s 28P.

[810] Forere (note 52 above) 47.

[811] Oriakhogba (note 136 above) 1.

[812] Ibid.

[813] Ibid at 135.

following public concerns about their management of royalties. The government previously set up an inquiry when allegations of fraud were raised against SAMRO.[814] The Copyright Review Commission (CRC) was also established by Ministry of Trade and Industry in 2010 in part to inquire and make an assessment of the concerns and allegations around CMOs model used in the distribution of royalties.[815] Also the terms of reference considered by the CRC spanned the licensing, royalty collection and distribution framework. The major focus of the CRC inquiry was to

> 'ascertain how it came about that, nine years after the enactment of needle-time legislation in 2002, not a cent had been paid in royalties to musicians and record companies. It concluded that the legislation, which provided for a statutory licence in respect of needle-time, did not adequately protect the rights owners, whose rights were made subject to the licence.'[816]

Furthermore, the CRC recommended that to improve the level of compliance with good corporate governance principles, there was a need for copyright law amendments that forced CMOs to operate under the Companies Act and created supporting regulations.[817] This after the CRC inquiry established some transparency gaps in their management of royalties which revealed that

> 'Constitutive documents [were] outdated and in conflict with the Companies Act; There are no independent directors; An internal audit function is not in place; Disclosure of the executive directors' remuneration is limited (contravention of the Companies Act of 2008 and the King III); The members' rights are disempowered by these outdated constitutive documents; and there is limited transparency with regard to the categorisation of membership. [and for SAMPRA's situation] The audited financial statements for the last two completed financial years have not been issued; There are no independent directors; No disclosure for executive directors' remunerations; The annual reports are not published; and No reports are provided to the members with regard to the status of the internal control environment. With

[814] Music in Africa Foundation 'SA arts department to probe SAMRO amid royalties allegations' 4 April 2018. available at *https://www.musicinafrica.net/fr/node/31948*. accessed 3 November 2021. In the report, it claims that: 'Lawyer Graeme Gilfillan, accused SAMRO of giving artists only 16.7% of their royalties while siphoning the remaining 83.3% through a "mysterious composer" known as DP. Gilfillan told City Press that artist should receive 100% of the royalties for rearranged musical works. This scam, the City Press article says, has been running for more than five decades and amounts to a total of R1.2bn involving various local and international artists.
[815] CRC Report (note 47 above) 11.
[816] Ibid.
[817] Ibid at 53.

> the exception of the issuance of the audited financial statements, the situation for NORM is not different from SAMPRA.'[818]

After such negative findings, the CRC recommended that CMOs provide an efficient, transparent, and equitable service to their members. It was observed that the information gap compromised the capacity of the authors to exercise their full rights towards the exploitation of their work, and as such to bolster the transparency remuneration right, the CRC made a statutory reform recommendation that authors should receive regular and detailed information around the management of their remuneration right.[819] This is an important transparency provision to secure the remuneration right of authors should the copying levy gets implemented. Additionally, it also advised that adherence to the good principles of corporate governance is compulsory. A particular call was made for the SAMRO to amend and align its constitutive documents with the latest Companies Act of 2008.[820]

Copyright holders' rights to receive adequate, appropriate, and proportionate remuneration can be effectively realised if the copyright statutory framework provides scope for access to information regarding the exploitation of their works. Forere submits that, 'transparency is the cornerstone of the enjoyment of the right to appropriate and proportionate remuneration.'[821] Transparency obligations become more imperative given the copyright industries contribution to the economy. Authors on their own have a weak bargaining position against multinational companies with a huge financial muscle, as opposed to CMOs with a robust influence by virtue of their representational capacity. As such, they can provide an influential negotiating position on behalf of authors against strong publishers and producers' financial leverage positions often exhibited in licencing and rights assignment negotiations. While CMOs can facilitate the realisation of a balanced contractual framework in their negotiations with powerful commercial entities, it does not help if they are also operating in secrecy without providing reciprocal information on the exploitation of the authors' works they are managing. As Gilfillan put it,

> 'Collecting Societies have been operating in South Africa for almost fifty years and have for the most part done so in a private, unregulated and secret environment outside of the scrutiny of government or any other form of national oversight and have done so as de facto

[818] Ibid.
[819] Ibid at 41.
[820] Ibid.
[821] Forere (note 52 above) 16.

monopolies. It's thus long overdue that a proactive interventionist hands on approach to copyright ownership and administration in South Africa be driven at a ministerial level.'[822]

3.5.1 Features of transparency for collective management organsations Model

Transparency as a value of good corporate governance carries a broad meaning, but in general it principally involves the availability of reliable and relevant information about the financial performance, management or good governance of a public institution, or company.[823] Such transparency principle facilitates a proper evaluation of a company, or institution to enable an audit or examination of its governance. The principle is also entrenched in the rule of law constitutional and democratic governance principles of an open, accountable, and transparent society with access to information.[824] Ancillary to transparency, are accountability mechanisms that entail providing provisions that motivates relevant and necessary disclosures within set legally permissible parameters in the public interest, or the exercise of a right. There are various international benchmarks that have been set in the promotion of transparency principles. The WIPO Toolkit for Collective Management Organisations Good Practice sets out eighty-five good practice conditions to help ensure accountability, transparency and good governance, and effective financial management of Reproduction Rights Orgnanisations (RROs), which are clustered in thirteen broad categories relating to collective management societies.[825] These are detailed from laws, regulations and codes of conduct for of WIPO Member States. The examples of good practice are formulated in the form of model codes of conduct, and they are also criteria for assessing the effectiveness of RROs.[826] Compliance with such good practices has been held to constitute evidence of effectiveness.[827] Transparency has an effect in the management and promotion of efficiency, effectiveness and responsiveness.[828] This study arises because of the effect of the Internet and digital technologies on copyrightholders remuneration. Transparency in the

[822]G Gilfillan (note 131 above).

[823] Millar *et al* 'Corporate Governance and Institutional Transparency in Emerging Markets'(2005) *Journal of Business Ethics* (2005) 59: 166-174.

[824]I Koivisto 'Transparency and Law' - The Transparency Paradox (2022) *Online edn, Oxford Academic*, available at *https://doi.org/10.1093/oso/9780192855466.003.0006*, accessed 30 January 2024.

[825] D Oriakhogba & D Kawooya 'The Status of Reproduction Rights Organisations (RROs) in Africa' (2022) *Joint PIJIP/TLS Research Paper Series* 11-2022 8. See also WIPO *WIPO Good Practice Toolkit for Collective Management Organizations* (2021).

[826] Ibid.

[827] 4 C I Okorie 'Corporate Governance of Collecting Societies in Nigeria: Powers of the Copyright Sector Regulator' (2018) 6 South African Intellectual Property Law Journal 24- 46.

[828] M Jashari & I Pepaj 'The Role of the Principle of Transparency and Accountability in Public Administration' (2018) *AUDA*, Vol. 10, no. 1/2018 60-61.

management is sustained by the use of new modern technologies (ICTs).[829] The Internet is considered one of the main factors of transformation towards a higher level of transparency and open information accessibility.[830] Transparency is considered,

> 'a controlling element against maladministration and corruption and the promoter of good governance and accountability toward protection of public interest and citizen's rights. In this regard, the principle of transparency can be considered as an advocate of legitimacy and accountability in the administration that reciprocal confidence between the government and the citizens and guarantee ease of gaining information.'[831]

Transparency promotes reliability and integrity of organisations and its deficiency has a direct impact to dim the confidence often in the operations of an organisation. Transparency obligations are part of salient statutory remuneration rights features, yet they are insufficiently legislated in the existing Copyright Act, and to some extent, in the CAB. Importantly, CMOs are also not sufficiently regulated in the Act despite enjoying a strategic monopoly position in the collection and distribution of authors' royalties.[832] Consequently, their collection and distribution of royalties has been shambolic, leaving authors in destitution, without health care and pensions.[833] This has resulted in the CMOs being accused of lacking transparency in the management of authors' royalties.[834]

3.5.2 Weaknesses of the existing CMO regulations, Copyright Act & Copyright Amendment Bill

While South Africa has ingrained transparency obligations within its public and private sectors through constitutional and statutory provisions, there are shortcomings within its existing copyright law regime to address access to information impediments. The main legislation that will be key to the implementation of the copyright levy are the 2006 Copyright Regulations on needletime collection societies, the Copyright Act, and the Copyright Amendment Bill. Formulating an appropriate transparency model for the CMO's distribution of the proposed copyright levy would help create trust among the stakeholders, efficiency, and accountability within the respective institutions.[835]

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[829] D Oriakhogba & D Kawooya (note 825 above).
[830] Jashari & Pepaj (note 828 above).
[831]Ibid..
[832]Ibid.
[833]Ibid.
[834]Ibid.
[835]CRC Report (note 47 above) 24. See also in *Foschini Retail Group (Pty) (Ltd) & others v South African Music Performance Rights Association* [2013] ZAGPPHC 304 a group of retailers (the "retailers") who played

a.) CMOs Copyright Regulations

The minister is empowered under section 39cA of the copyright Act to make regulations providing for the 'establishment, composition, funding and functions of collecting societies … and any other matter that may be necessary or expedient to regulate for the proper functioning of such societies.' Invariably, the main functions of the CMOs being that of distribution of royalties, they must be accompanied by clear rules, guidelines and transparency obligations to its registered members. The existing 2006 Collective Management Organisations Regulations (CS Regulations) on the Establishment of Collecting Societies cater for needletime CMOs only. Nonetheless, it's important to interrogate the extent to which they promote transparency and regulate the functions of CMOs because this will be key to their management and distribution of the copyright levy being proposed in this study.[836] This is relevant given the CRC 2011 Report key findings on the operations of the CMOs that they have weak internal control, outdated constitutive documents, lack of internal audit, independent directors, lack of issuance of audited financial statements and lack of publication of annual reports.[837] The CRC then made recommendations that the CS Regulations be extended to cover all CMOs and that the Copyright Intellectual Property Commission, (CIPC) be empowered to take over the administration of CMOs conducting itself outside acceptable professional standards.[838]

The CS Regulations were enacted in 2006, prior to introduction of the Companies Act of 2008. There is therefore urgent need to align the Regulations with the Companies Act, which as of necessity must provide enforceable corporate governance frameworks, especially as they relate to transparency obligations. Legislative alignment of the Regulations and the Act promotes certainty and clarity of the law, and the regulations must as of necessity conform to the dictates of parent Act against which it is evaluated.

From the CS regulations, the regulator of the CMOs is the CIPC, which also has supervisory powers.[839] The unaligned CS regulations provide for Companies and Intellectual

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background music in their stores referred their dispute concerning the royalty charged by SAMPRA to the Copyright Tribunal.

[836] Regulations on the Establishment of Collecting Societies in the Music Industry GN 517 in GG 28894 of 1 June 2006 (South Africa).

[837] CRC Report (note 47 above).

[838] Ibid.

[839] CS Regulation 4(1). It provides that the Registrar shall exercise a supervisory function in regard to collecting societies in accordance with the Copyright Act, 1978, the Performers' Protection Act, 1967, and these Regulations.

Property Registration (CIPRO), and not the CIPC, and it also refers to the Registrar of Copyright, as opposed to the Commissioner, as provided in the Companies Act. The CS Regulations indicate that the Registrar 'shall exercise a supervisory function in regard to collecting societies in accordance with the Copyright Act, 1978, the Performers' Protection Act, 1967, and these Regulations.'[840] The provision is broad in scope and lacks clarity, and impedes the effectiveness of the CIPC supervisory function. Public officers are also governed by administrative law, which is enacted are an instrument of public policy. Therefore, a general lack of clarity creates a considerable degree of uncertainty, undermining the capacity of administrators and the law to govern human behaviour.[841]

The CIPC supervision powers under the CS Regulations also need to be clarified to include support, supervision, and intervention, in specified circumstances. This is so because Regulation 4.1 gives the Registrar supervisory authority, yet the scope of supervision is not defined. The supervisory role the CIPC is not clearly defined, without even peremptory language for mandatory activities. This is important for clarity purposes to facilitate the legitimacy of CIPC's functions should the need arise to either support, supervise or intervene to enforce transparency in the CMO's administration of rights. The lack of clarity in the CS Regulations impedes the objectives of the WIPO Toolkit on CMOs which recommends government involvement in providing supervisory frameworks for the CMOs, thus granting their operations.[842] The exercise of governmental power must be done within clear legislative frameworks. Moreover, WIPO provides that supervision of CMOs should be fair, transparent, and proportionate, and that governments should avoid setting requirements which place disproportionate administrative and financial burdens on collecting societies.[843]

Among some of the CIPC requirements for the establishment of the CMOs are that they must be capable of ensuring adequate, efficient and effective administration of rights entrusted to it. The Registrar, who is also known as the Commissioner, may not grant accreditation to a CMO unless there is satisfaction from the particulars supporting the application that the applicant is able to ensure adequate, efficient and effective administration

[840] CS Regulation 4(1).
[841] A Kerhuel & R Arnaud 'Measuring the Law: Legal Certainty as a Watermark' (2011) *International Journal of Disclosure and Governance*, 8(4): 360– 379.
[842] WIPO 'WIPO Good Practice Toolkit for Collective Management Organizations (The Toolkit): A Bridge between Rightholders and Users' (2021) 117-118, available at *https://www.wipo.int/edocs/pubdocs/en/wipo_pub_cr_cmotoolkit_2021.pdf*, accessed 12 September 2022. The WIPO Good Practice Toolkit for Collective Management Organizations (CMOs) brings together examples of legislation, regulation and codes of conduct in the area of collective management from around the world.
[843] Ibid.

of the rights to be entrusted.[844] The Regulations ought to be amended to specify conditions that should be met realise the objectives for 'adequate, efficient and effective administration of rights'. This provides for clarity and certainty in the administration of CMOs rights. For example, Kenya, which has just enacted a copyright levy, has accompanying CMOs regulations that address specificities that must be met before accreditation is provided by the Kenya Copyright Board.[845]

The CS Regulations provide a framework for transparency mechanisms empowering the Registrar to initiate certain procedures to advance their fulfilment. The Regulations peremptorily require the Registrar to be invited to attend annual or special general meetings of CMOs and receive an annual activity report, setting out information on its activities, financial records and such other records as may be necessary to assess the degree of compliance with the law.[846] The report is expected to be submitted within thirty days of the end of the financial year of such collecting society.[847] The CMOs are expected to keep the Registrar informed of its annual audited financial statements and any documentation or report that the Registrar may reasonably require.[848]

The CMOs are entitled to provide annual statements of accounts and the list of its senior executive and management and reports of the auditors.[849] Such reports must be submitted to the general meeting and the overall amount, certified by the auditors, of the remuneration paid to any director or other employee of the collecting society.[850] The CIPC and the CMO, in accordance with the Companies Act operate separate auditing procedures, of the same collections society. This creates questions around the necessity and efficiency of such a duplicated parallel auditing procedure, and whether they provide fundamental checks and balances and increase transparency and accountability mechanisms, or they are simply wasteful administrative formalities. Given the background to the country's biggest auditing

[844] CMO Regulations 3(a).
[845] Kenya Copyright Act section 46 of the Copyright Act and Rules 15 and 16 of the Copyright Regulations of 2005. Whether admin fee exceeds 30%; 29 • Whether distribution follows distribution plan as per distribution rules; and • Systems for collecting and distributing royalties
[846] CMO Regulation 4(2).
[847] CMO Regulation 4(2).
[848] CMO Regulation 4(3) (f) (g).
[849] CMO Regulations 5(4) (a) (b) (d).
[850] CMO Regulations 5(4) (a) (b) (d.

scandals,[851] and allegations of accounting improprieties within CMOs, such concurrent auditing procedures may be necessary in the short term.

Despite the existence of such auditing frameworks, and regulatory transparency mechanisms, a court found instances of mismanagement, lack of transparency, accountability and probity in the dealings of the South African Recording Rights Association Limited (SARRAL) regarding the administration of its members' mechanical rights.[852] SARRAL was the first CMO to be accredited after the Regulations were introduced. There is therefore lax in the monitoring of the activities of the CMOs, despite a coherent regulatory framework that should ordinarily hold them to account for improprieties. The Regulations must therefore be followed by effective regulatory monitoring mechanisms to fulfil the rightsholders remuneration rights.

In terms of the CS Regulation, the Registrar is not empowered to accredit non-needletime CMOs. If the copyright levy proposed in this study is introduced, it will be prudent for the minister to amend the regulations to include powers for the Registrar to accredit CMO with a mandate to collect and distribute the levy. The CMO regulations unfortunately fail to stipulate penalties for non-compliance with the provisions on royalty distribution of the needletime CMOs. Such a lack of legislative clarity is a deficiency which prompts a resort to common law to achieve penalty objectives. Jurisprudence attest to the effect of provided penalties in creating deterrence, or a safeguard against recidivism. CMOs should understand the legal effect of particular misconduct to instil compliance because it is better to deter misconduct than punish it.[853] The CRC 2011 report, produced almost five years later after the CR Regulations were introduced, provides that the challenge is not total absence of regulation, but compliance by CMOs and the effectiveness of the enforcement mechanisms under the regulatory framework.[854] The regulations also provide no provision

[851] See Adri Senekal de Wet 'Tongaat Hulett fraud, corruption scandal – the sweet tooth of double standards' IOL, 14 April 2022, available at *https://www.iol.co.za/business-report/opinion/tongaat-hulett-fraud-corruption-scandal-the-sweet-tooth-of-double-standards-dcbd74e6-36c0-47f2-8883-9cb2eae82b20,* accessed 31 January 2024. Following allegations that Tongaat Hulett management: 'accused acted in common purpose to misrepresent to THL, its employees, creditors, shareholders and more, that the revenue that was derived from land sales was the correct value, and correctly reflected in the financial reports when, in fact, they had backdated sale agreements.'

[852] Shapiro v South African Recording Rights Association Limited (SARRAL) Unreported Case No. 14698/04 (2009 33-45.

[853] N du Preez & P Muthaphuli 'The deterrent value of punishment in crime prevention using judicial approaches' (2019) *Just Africa* 1/2019 34-35.

[854] D O Oriakhogba *strengthening the regulation regimes for collecting societies in South Africa and Nigeria: any room for competition law?* (Unpublished PhD thesis, University of Cape Town, 2018) 135.

for process to be followed on the withdrawal of CMOs accreditation.[855] Where the CIPC intends to effect withdrawal of accreditation, it is envisaged that related Administrative Justice Act procedures that are fair will be followed.[856] There is also need for clarity for the regulator's powers to explicitly provide for, inter alia, supervision powers to require bank statements, audits. However, penalties for non-compliance with the provisions of the Companies Act concerning royalties' distribution may trigger the winding up of the organisation.[857].

The management and distribution of royalties are expected to conform to a distribution plan, for transparent and accountability purposes.[858] The CMO is peremptorily required to distribute once a year royalties in accordance with a distribution plan. The distribution plan and any amendments of it must be first approved by the Registrar, who must determine if it complies with the principle that it does not provide for arbitrary or discretionary distributions.[859]

The capped 20% administration fee under the Regulations requires CMOs to initially conduct the annual audit before submitting distribution plans to the Registrar for approval. The distributions plan is important in promoting transparency and guidelines in the realisation of the remuneration right. As an amendment to the Regulation 8(5), it is proposed that CMOs must be allowed to process royalties and later submit the distribution plan on which the distribution was based, as well as distribution reports that show compliance with the regulations.[860] This is important to facilitate efficient and expedited realisation of the remuneration rights. Any accounting misdemeanours or misappropriation of funds can be unearthed if proper accounting procedures are followed. The constraint created by the need to have distribution plans approved first before royalties are disbursed[861] is that it makes periodic quarterly distributions impossible. Facilitating periodic quarterly royalties' distributions, as to be proposed in the payments of the copyright levy, will introduce flexibility amongst CMOs and make them competitive in the digital age where audits can be complemented with technology. Besides, it is practical for CMOs to do quarterly

[855] CS Regulation section 3(6).
[856] Promotion of Administrative Justice Act, 2000, s3, procedurally fair administrative action affecting any person.
[857] CS Regulation 8(4).
[858] CS Regulation 8(1).
[859] CS Regulation 8(5).
[860]CS Regulations 6(2) and 8(5) (a) (b)(c).
[861] CS Regulation 8(5).

distributions accompanied by audited books[862] and they could therefore submit distribution plans and audited books before doing distributions for purposes of maintaining transparency and good accounting practices under the regulations.[863]

The Regulations do not provide a framework for the distribution of non-members royalties collected. Oriakhogba notes that, 'CMOs in [South Africa] have formed the practice of tracing non-members and, when found, asked to become members before giving them their share of the collected royalties.'[864] In the event that royalties are unclaimed after three years, it is, 'written back to the income of the CMO' and 'distributed to the members based on the normal distribution criteria.'[865] This approach is not recommended because CMOs cannot legally make membership a criterion for payment of royalties to non-members who are successfully traced. While the CMOs could deduct prescribed administration costs for tracing non-members, the funds however as a right belong to the rightsholders, and not the collection society management.[866] However, as recommended by the CRC, there is need for legislative intervention in this regard.[867] Such regulation should prescribe the minimum retention period for unclaimed royalties, after which it 'should only be used for social-related activities and cultural projects that will benefit local artists.'[868]

b.) Deficiencies in the Copyright Act and Copyright amendment Bill 2017.

The existing Copyright Act, which was drafted and enacted prior to the birth of the Internet and digital technology is *ipso facto* outdated and effective in various respects.[869] The drafters of the Copyright Amendment Bill noted that rightsholders were hamstrung by the Act's failure to adapt to the digital age. The Memorandum on the objects of the Bill, state that because of the nature and form of the current Act,

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[862] CISAC 'Professional Rules for Musical Societies Status'(2018) Rule 7 & 18A, available at *https://www.cisac.org/sites/main/files/files/2020-10/SG13-0787R4_Professional_Rules_for_Musical_Societies_2018-11-15_EN.pdf,* accessed 23 January 2024.
[863] CS Regulation 8(5).
[864] D O Oriakhogba 'Regulation of collective management organisations in South Africa' (2019), available at ttps://www.wto.org/english/tratop_e/trips_e/colloquium_papers_e/2019/chapter_12_2019_e.pdf, accessed 24 January 2024.
[865] CRC Report (note 47 above) 77.
[866] Shapiro v South African Recording Rights Association Limited (SARRAL) Unreported Case No. 14698/04 (2009) 32.
[867] CRC Report (note 47 above) 80.
[868] Ibid.
[869] Copyright Amendment Bill, Memorandum on the objects of the Copyright Amendment Bill, 59. available at *https://www.parliament.gov.za/storage/app/media/uploaded-files/Copyright%20Amendment%20Bill%20Draft.pdf,* accessed 1 February 2024.

> 'The creative industry is impacted upon; educators are hampered in carrying out their duties; researchers are restricted to further developing research; and people with disabilities are severely disadvantaged by having limited access to copyright works. For this reason, a need exists for Intellectual Property (''IP'') legislation to be consonant with the ever evolving digital space; to allow reasonable access to education; to ensure that access to information and resources are available for persons with disabilities; and to ensure that artists do not die as paupers due to ineffective protection.'[870]

The study seeks to have the copyright framework address the impact of the Digital Age on copyrightholders' remuneration. It also seeks to improve on the transparency frameworks, which the Act does not sufficiently address to allow rightsholders to have unimpeded access to information.[871] Additionally, the Act also fails to address remuneration leakages caused by the use of digital devices, by failing to provide an alternative remuneration due to inevitable and uncontrollable digital copying of creative content without compensation. The Act unfortunately provides private copying exceptions without accompanying remuneration.[872] The Act has also failed to effectively regulate the activities of the CMOs. The CRC Report, after making public inquiries highlighted extensive findings of improprieties, mismanagement, lack of audit reports, and accountability and transparency challenges in the CMOs operations.[873] Under the Act, the drafters of the CAB noted that rightsholders have, 'experience[s] of the power imbalance, vulnerabilities and abuse taking place in the music industry.'[874] Such deficiencies in the Act prompted the government to spearhead the drafting of the Copyright Bill.[875]

Furthermore, the Act in its form is inconsistent with the IP Draft National Policy, which is geared towards ensuring consistency and coherence in aligning the approach of various government institutions with IP matters.[876] As observed by the courts, the Act carried unconstitutional provisions that impeded access to information and rights of several groups in society.[877] The Act is also not strategically aligned with the WIPO digital treaties, the Beijing

[870] Ibid.
[871] Forere (note 52 above).
[872] CISAC (note 159 above) 48.
[873] CRC Report (note 47 above) 10-27
[874] CAB, Memorandum on the objects of the Copyright Amendment Bill (note 869 above) 59.
[875] Ibid.
[876] Ibid.
[877]Blind SA v Ministry of Trade case (note 744 above). The court declared that sections 6 and 7, read with section 23 of the Copyright Act 98 of 1978, are unconstitutional, invalid and inconsistent with the rights of persons with visual and print disabilities, as set out in sections 9(3), 10, 16(1)(b), 29(1) and 30 of the Constitution, to the extent that these provisions of the Copyright Act limit the access of such persons to

Treaty for the Protection of Audio Visual Performances; and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired.[878] As such, the Act is ipso facto not aligned for purposes of ensuring effective governance, social protection, employment creation and reduction of inequalities.[879]

It has also been noted that the Act in its current form does not protect the economic interests of authors and creators of work against infringement by promoting the progress of science and useful creative activities. The drafting of the CAB is envisaged to reward and incentivise authors of knowledge and art, because the extant Act had resulted in rightsholders dissatisfied and had not benefited from access to the copyright system.[880] As such, the CAB was drafted to create a copyright law regime that is consistent with the digital era and help secure the rightsholders remuneration.

c.) Deficiencies within the Copyright Amendment Bill

While transparent obligations amendments have been attempted in the CAB, in some instances, they are inferred and not expressly provided for. Although transparency principles have been well articulated within the Constitution, statutes, common law, and the EU's Article 19 framework, they are not profoundly and expressly provided for either within the copyright Act or the CAB, except for audio-visuals.[881] Transparency obligations are compulsory given the authors' existing weak historical bargaining powers and lack of economic power leverage to renegotiate existing contractual framework where their works superseded previous sale expectations. Xalabarder writes that,

> 'little information (if any) regarding exploitation revenues and out of fear of being blacklisted, [authors] are unwilling to challenge the agreed contractual terms. In recent years, the problem is becoming more apparent, as growing digital markets generate new economic revenues, but Authors and Performers do not benefit from them.'[882]

published literary works, and artistic works as may be included in such literary works, in accessible format copies.
[878] Ibid.
[879] Ibid.
[880] Ibid at 59-60.
[881] Ibid at 16.
[882] Xalabarder (note 95 above) 4.

The proposed CAB was primarily a response to copyright law adjusting to digital developments and help secure authors' remuneration rights. At the time of writing, with public hearings gathering momentum, the CAB was in the final leg of a second parliamentary process that could facilitate its passage later this year (2023). [883] The CAB has in the spirit of adjusting copyright law to suit the digital era attempted to introduce salient transparency principles to promote effective accountability mechanisms in the administration of royalties. It is unfortunate that the transparency principles and need for production of timeous audited reports by contracting parties, licensees/assignees are only limited to audio-visuals,[884] hence the principles ought to be developed and applied across the whole spectrum of copyright holders. Forere notes that,

> 'this might be attributed to the fact that copyright works are not registered in South Africa except for audio-visuals. Therefore, it might be cumbersome to expect registration of exploitation if the underlying work itself is not registered. However, I cannot begin to emphasize the importance of reporting in a transparent manner if authors/performers are to enjoy the right of remuneration. Therefore, whether copyright works are registered or not, all forms of exploitation must be registered, and authors/performers should have access to such data. The right to receive information must not be inferred from the provision regulating CMOs. It should stand out as it is the case with Article 19 of the EU Copyright Directive.'[885]

While such transparency provisions are assigned to audiovisuals, Forere further observes that there is no provision for transparency obligations for the copyright owner of literary and musical works and artistic works to provide a report on the exploitation of works to the author.[886] Similar circumstances relate to the performer in the audio-visuals.[887] Plausibly, a user of sound recordings is obliged to keep and provide to performers' details of the exploitation of sound recordings. [888] The transparent obligations are extended to CMOs compelling them to 'provide to each performer or copyright owner regular, full and detailed information concerning all the activities of the collecting society in respect of the

[883] Pam Saxby 'The Copyright Amendment Bill process may have been scuppered by a procedural blunder in the provinces, but it limps on regardless' *Daily Maverick*, 6 March 2023. available at *https://www.dailymaverick.co.za/opinionista/2023-03-06-the-copyright-amendment-bill-process-may-have-been-scuppered-by-a-procedural-blunder-in-the-provinces-but-it-limps-on-regardless/*. (Accessed 14 April 2023).
[884]Forere (note 52 above) 16.
[885] Ibid at 18.
[886] Ibid at 10.
[887] Ibid.
[888]Copyright Amendment Bill, s 9A (1) (b).

administration of the rights of that performer or copyright owner.'[889] Overall, the CAB progressively guarantees the remuneration right by making it compulsory for authors to receive their compensation for the exploitation of their works.[890]

Further, CMOs are generally required to distribute royalties among the members whose rights they manage. Specifically, needletime CMOs are required to retain no more than 20% of collected royalties. The regulatory framework is silent in the case of non-needletime CMOs and this gap has not been filled by the proposal in the CAB thus calling to question the adequacy of the proposed regulatory framework under the CAB to cater for the regulation of CMOs in South Africa. However, depending on the developmental stage of the CMO, a maximum of 30% is considered allowable in practice. Also, there is no express provision on the handling of non-member royalties collected by CMOs and there is no specific provision in the CAB to cure this lacuna. The gaps identified in the existing and proposed regulatory framework for CMOs in SA is not enough to call for withdrawal of the CAB. Such calls will only render worthless the efforts put into bringing copyright law reform in SA to its present state. Indeed, the lacunae identified can be filled by a subsidiary regulation made by the relevant Minister, pursuant to the relevant provision when the CAB is eventually assented to by the President.

3.6 CONCLUSION

This chapter ends part one of the study, which has identified from chapter 1 the current digital era challenges impacting on authors remuneration, in Chapter 2 the relevant utilitarian theoretical framework to guide the research, and this Chapter 3 addressed copyright law legal deficiencies in adapting to the Internet and digital technologies, private copying effects, and necessity for a transparency obligations and thereafter proposed a durable remedy in the form of a private copying levy.

Ostensibly, the development of the Internet and digital technologies has compounded the remuneration plight of authors, which has been a historical issue of concern given the contentious and unsustainable manner in which CMOs have been managing the distribution of royalties. This chapter has sought to highlight the historical developments that gave birth to copyright law and the Internet. Copyright law has previously adapted to suit the historical tensions and exigencies of technological developments. The advent of the Digital Age despite

[889]Copyright Amendment Bill, s 22D (1) (c).
[890] Copyright Amendment Bill, s' 6A and 7A.

presenting challenges should allow copyright law to conform to the dictates of situation. In this regard it has been noted that dwindling remunerations of authors owing to private copying is largely attributable to deficiencies in both the copyright Act and the proposed CAB. This is largely to do with the copyright Act having failed to adapt to the Digital Age, with the Bill not providing an effective transparency remuneration model and a levy to cushion authors from private copying. The proposed solution is a private copying levy that authorises private copying in return for authors' compensation without violating international conventions around the three-step test. This is important because the emergence of digital and information technology are redefining work consumption patterns threatening copyrights protection. The unauthorised sharing of copyrighted material through digital has devastating implications to IPRs. Therefore securing the remuneration right of authors' in the Digital Age through a private copying levy is need of the hour.

PART TWO

CHAPTER 4

ORIGINS OF COPYRIGHT LEVY: LESSSONS FROM THE EUROPEAN UNION AND GHANA

4.1 INTRODUCTION

Part Two of this study's overall objective is to develop principles around an administrative framework and salient fair remuneration right principles that seek to operationalise a private copying levy. This will also entail proposing reforms in the manner in which Collective Management Organisations (CMOs) operate to facilitate the realisation of a remuneration right. This study research methodology identified the European Union (EU) and Ghana: a regional union of developed European States, and a developing African commercial hub respectively to help draw lessons for a similar copyright levy development in South Africa. Therefore Chapter 4 will seek to draw lessons from the salient remuneration right principles developed in both respective jurisdictions, in particular how they introduced and adapted to the copying levy. The EU has a sturdy harmonised copyright levy framework, but caution will be exercised to avoid wholesale duplication of the existing principles given varying historical, cultural and economic factors that have to be considered. Ghana has closer historical, political and economic factors to consider.

In this chapter, an assessment will be made of how EU copyright law historically developed and adapted to changing technologies. The significance of the Germany's *GEMA v Grundig* case which gave birth to the first statutory copyright levy is highlighted. Thereafter, the levy's historical development within the EU is assessed, followed by an evaluation of the salient remuneration principles: fair compensation, appropriate and proportional remuneration, and harm and transparency principles. The role of the EU Copyright Directive exceptions in the implementation of the levy is discussed. At the centre of the management of the levy are CMOs, whose role will be discussed in the administration of the levy. Subsequently Ghana's response to technological developments impacting on its copyright holders' remuneration is discussed, followed by an analysis of its copyright law regime and operationalisation of the copyright levy. The chapter will seek to draw lessons from its transparency principles and levy distribution frameworks.

4.2 THE EU'S RESPONSE TO TECHNOLOGICAL DEVELOPMENTS ON COPYRIGHT

The EU's noteworthy reference point to this study primarily lies in its introduction of a resilient copyright levy whose origins can be traced to the seminal *GEMA v Grundig* precedent[891] in which the Germany court, and later parliament sought to provide some symmetry between the interests of copyright holders' and consumers by aligning both rights through the facilitation of private exploitation of works without compromising the remuneration interests of the latter. The robust copyright levy has lasted almost six decades since its enactment in Germany. There is therefore need to assess the legal circumstances that gave birth to the levy.

4.3.1 The GEMA v Grundig case

The development of the first copyright levy in Germany is linked with the advent of the audiotape cassette recorder after Philips, a Dutch manufacturer first made public in 1963 its unique recording creation. The marketing of the cassette generated tensions with author's exclusive reproduction and make available right of their work. Before the emergence of the audio cassette recorder in the early to mid-twentieth century, there existed subnormal technologies involving the use of reel-to-reel tapes among others.[892] After the introduction of blank cassette recorders private copying became an imminent threat to copyright holders' exclusive rights, making the predominant reproduction exceptions in the Germany statutes redundant. Despite the audiotape cassette offering users with new technological topographies providing seamless reproduction of cultural creations, it also generated copyright law complications. Wright posited that,

> 'this newfound freedom to interact with recorded music had profound implications for the commercial music recording industry. The cassette tape technology produced a huge rise in private home taping of music off the radio, LP records, live performances, and even from other audiotape cassettes. For commercial music producers and copyright owners, the audiotape cassette was the latest battle in the music wars, and its introduction was the opening salvo in a new war against the manufacturers of consumer electronics which allowed the easy, unauthorized copying of copyright works.'[893]

[891] Ibid.
[892] R Wright 'Audiotape Cassette' in C O den Kamp and D Hunter (ed) *A history of Intellectual Property in 50 objects* (2019) 35.
[893] Ibid.

The ramifications of audio cassette's introduction on the copyright holders' exclusive rights left the anachronistic copyright law unable to manage and modify infringing consumer habits. Legal arguments that developed in the *GEMA v Grundig* case challenged the relevance of the authors' exclusive rights and laid the basis for the development of a statutory remuneration right to allow for private exploitation works in return for guaranteed compensation. The audio cassettes were a perceptible threat to rightholders' exclusive rights to reproduce and disseminate their work. The tensions around the introduction of the audiotape recorder motivated the first legislative intervention resulting in the enactment of a statutory copyright levy which is the EU's current embodiment of authors' remuneration right.[894] In the GEMA case, the court held that at the material time the copyright law was drafted, the unanticipated future implications of the manufacture of cassettes were inconceivable for legislators. To override the emerging copyright law dilemma, the legislators upheld the spirit and purpose behind the copyright provision providing that the author of any work has a right to the protection of his personal relationship to the work and ensuing just remuneration.[895] Furthermore, laying the basis for a copyright levy framework the court held that,

> 'Were it to be true that, according to the fundamental idea of copyright law, the private sphere constitutes an unsurpassable barrier for the author's rights … authors of all works, which are predominantly created for the enjoyment in the private realm, … could derive virtually no economic fruits from their labours, as soon as technology makes it possible for the individual to produce [high quality] units of work in the domestic realm without particular costs and effort … This consideration alone shows that it is irreconcilable with copyright law principles to assume that the protection of the private sphere plainly prohibits payment for his creation from accruing to the author when the use of the work happens in the private sphere.'[896]

From the foregoing, it emerged that the right of remuneration could only find scope for enforcement and legitimacy through some statutory intervention that recognised the right to privacy without compromising authors' remuneration right. Further, the court propounded that the right of remuneration is a fundamental legal principle which rules copyright law.[897] In this regard, the court's reasoning unwittingly advanced the utilitarian scope of ensuring

[894] Natasha Mangal 'Opportunities for EU Level Administration of Private Copying Levies' Working paper presented 9 August 2019, (ESR 12) at the Intellectual Property Scholars Conference, DePaul University College of Law in Chicago, IL. 5.
[895] Ibid. See also *GEMA v. Grundig case* (note 27 above).
[896] *GEMA v. Grundig case* (note 27 above).
[897] Ibid.

sufficient economic incentive for authors to produce works. As a result of the court's decision which took note of the manufactures of tape recorders contributory negligence in the violation of the copyright holders' rights, the German parliament subsequently proposed a levy against manufactures of recording equipment.[898] The legal logic behind the levy introduction that prevailed during the period is still relevant in its application to the current Digital Age challenges. The Germany parliament then, and the respective legislature of Ghana[899] realised 'the impossibility of enforcing individual claims against private home taping and noted that it assumed the charge imposed by the levy would ultimately be passed on to consumers anyway.'[900] As a result Germany enacted a new amendment to Copyright Act of 1965 – otherwise known in Germany as the *Urheberrechtsgesetz* (UrhG) - which introduced Article 53 becoming the world's first statutory copyright levy.[901] Gaita and Christie postulate that,

> 'the history of article 53 makes clear that the German statutory licence and levy scheme was a pragmatic solution to the dilemma created by technologies enabling widespread private copying. After a decade of trying to enforce authors' right to remuneration without unacceptable breaches of the private sphere, the statutory license and levy approach seems to have been the last resort.'[902]

Article 53 authorised reproductions facilitated by recording devices for private and personal use and made manufacturers and importers of the devices liable for the copyright levy. Article 53 provided that,

> 'reproductions of a work for private and other personal use are permissible within certain limits. In return - under the law applicable in the contested case … manufacturers and importers of devices which are intended to make reproductions must pay equitable remuneration to the authors for the possibility created by the sale or other marketing of the devices to make such reproductions if it is to be expected from the nature of a work that under it will be reproduced by photocopying or in a procedure with comparable effect. This claim may only be asserted by a collecting society.'[903]

[898] Gaita & Christie (note 267 above) 10.
[899] EJ Collins 'Copyright. Folklore and music piracy in Ghana' (2006) *Critical Arts: A Journal of South-North Cultural and Media Studies Culture, Communication and Media Studies* 4-5.
[900] Ibid
[901] Ibid.
[902] Ibid at 13.
[903] See BVerfG, Order of the Second Chamber of the First Senate of 30 August 2010 - 1 BvR 1631/08 para 2 Available at *http://www.bverfg.de/e/rk20100830_1bvr163108en.html.* accessed 7 December 2022.

This provision made the levy compulsory and its enforceability and constitutionality was affirmed by the German courts.[904] The resultant statutory levy carried enormous international influence as the Statute of Anne in that it created the world's first statutory remuneration right under a levy scheme to compensate copyright owners for private copying related revenue lost,[905] thus reshaping copyright law legislative framework within Europe[906] and beyond, with its effects felt in America[907] and Africa[908] to date. Article 53 also set the normative legal principles foundation for the influential and persuasive EU harmonised copyright levy that followed almost four decades later under the EU Directive 2001/29/EG of 22 May 2001. However, to support the copyright levies introduced in its 27 of close to 30 Member States, the EU introduced salient remuneration right features to ensure that authors of creative content were adequately remunerated, with a transparency model to ensure relevant information on the exploitation works and distribution of remuneration was routinely released. This approach provides useful lessons in its potential implementation in this jurisdiction.

4.3.2 EU Remuneration right model: 'fair compensation' and 'harm' to creators

Private copying is an obstruction to authors' exclusive rights but is nonetheless progressive and in line with the international three-step test benchmarks if it carries an ancillary provision for authors' fair compensation arising from the unauthorised private reproductions of works. The right to fair compensation is provided under private copying exceptions in Article 5(2) (b) of the EU Copyright Directive which states that,

> '[…] Member States may provide for exceptions or limitations to the reproduction right […] in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned.'

The EU Copyright Directive on levies is practical and progressive. Its practicality is based on the fact that it functions through a compulsory levy which is enforceable, and implementable.

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[904]Order of the First Chamber of the First Senate of 19 September 1996 - 1 BvR 1767/92. (Decision of Germany Federal Constitutional Court).
[905] R Wright 'Audiotape Cassette' in C O den Kamp and D Hunter (ed) *A history of Intellectual Property in 50 objects* (2019) 35.
[906] M Kretschmer (note 163 above) 10.
[907] Audio Home Recording Act of 1992. Pub. L. No. 102-563. 106 Stat. 4237 (Oct. 28. 1992), codified at 17 U.S.C. Article 1001 et seq.
[908] Olubiyi (note 161 above) 93.

The need for fair compensation arises from inevitable digital reproduction of creative content, in circumstances in which it is almost impossible to enforce the law where the copying happens in private homes. Besides, it is impractical for copyrightholders' to monitor and enforce copyright against private individuals in private homes. The fair compensation arises from imposing the levy on digital devices that are used to copy works and it is for practice reasons that it is paid by manufacturers, importers and distributors who factor in the levy in the purchase price. Identifying private users or assessing or measuring the effect of private use is a difficult exercise. From the Article, fair compensation is provided ascending from private reproductions by technological devices capable of storing and recording audio-visual material. The fundamental principle guiding the levy is that the private copying exception should apply to the reproductions for private use and non-commercial purposes. Furthermore, the targeted beneficiaries of the private copying exception are not commercial enterprises or industry, but natural persons making reproductions for their personal purposes within the private sphere.[909] Article 5(5) of the same directive invokes the three-step test, drawing from international conventions.[910]

Originally, there was some flexibility required in the application of fair compensation amongst Member States with respect to its content and distribution formulas.[911] As such, the EU parliament did not provide any direction on the calculation and assignment of fair compensation.[912] As a result, a contradiction developed after the court held in the *Padawan* case that in the application of fair compensation concept must be regarded as an autonomous concept of EU law to be interpreted uniformly throughout the region. It further held that 'the notion and level of fair compensation are linked to the harm resulting for the author from the reproduction for private use of his protected work without his authorisation.'[913] Such a contradiction creates confusion as it is a departure from the original desire to allow Member States some flexibility in their application of fair compensation concept. The court in the *Padawan* case precedent ignored this historical context by attempting to harmonise the fair compensation concept.[914] As such this calls for a clarity and consistent application of the fair compensation concept. Fair compensation is evaluated in the context of possible harm

[909] J Poort & J P Quintais (note 192 above) 5.
[910] Art. 13 TRIPS Agreement; Art. 9 Berne Convetion.
[911] R M. Hilty & V Moscon 'Claims to Fair Compensation (Article 12 COM (2016) 593 final)' in Reto M. Hilty & Valentina Moscon (eds) *Modernisation of the EU Copyright Rules* (2017) 91.
[912] Ibid.
[913] Padawan SL case (note 272 above) para 40.
[914] R M. Hilty & V Moscon (note 911 above) 91.

suffered by the copyright holder, under the harm principle which is considered a valuable criterion for determining the form and level of fair compensation.[915]

4.3.3 The 'harm' principle

Fair compensation is also considered as restitution for the possible harm suffered by the copyright holder. The harm arises from the introduction of the exception or limitation lawfully facilitating private reproductions of the works.[916] Fair compensation is to be considered under Recitals 35 and 38 calculated on the basis of the harm criterion – which harm is also caused to authors of protected works by the introduction of the exception. Recitals 35, 38 and 39 in the preamble to Directive 2001/29 state,

> 'In certain cases of exceptions or limitations, rightholders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject-matter. When determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be the possible harm to the rightholders resulting from the act in question. In cases where rightholders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due. The level of fair compensation should take full account of the degree of use of technological protection measures referred to in this Directive. In certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise.'

Further, the ECJ in the *Padawan v SGAE* case bolstered the same harm link to the copying exception.[917] The court did not however provide clarification on what exactly should be understood under the notion of 'harm' providing no guidance on the conceptual framework the notion. Harm is a broad concept, without a settled understanding on how it could be interpreted in the EU. However, harm considerations are taken into account to determine the threshold of fair compensation due. Other considerations for calculating harm could relate to the device's storage capacity, the multifunctional capacity of the device, compression standards, the potentially rewritable character of the carrier and the application or non-application of TPMs.[918]

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[915] Padawan Case (note 272 above) para 42-44.
[916] Poort & Quintais (note 192 above) 8.
[917] Padawan case (note 272 above).
[918] Ibid at 42-44.

Lack of legislative clarity in interpreting the notion of 'harm' as criteria for calculating prejudice to content creators envisaged under the Recitals has unfortunately triggered various interpretations. Recital 35 provides the scope of harm arising from the act of private copying itself, while the Padawan case places harm as emanating from the introduction of the private copying exception. The interpretation arising from the Padawan case is problematic because it eliminates harm where private copying exceptions doesn't exist, yet the Recital envisages harm in both circumstances where the private copying exception exists or not. Nonetheless, Kretschmer provides the scope for harm in both law and economics. He interprets harm as caused by a lost licensing opportunity encouraging a provision for a fee that could have been charged for the exploitation of the work. In law, he argues that with a statutory exception in place there is no infringement because there is no harm in authorised activity.[919] The economic dimension relates to a lost sale that could have been purchased under normal business trade. Lost sales as a result of private copying are not compensated.[920] It is submitted that both interpretations proffered by Kretschmer and Padowan case constitute harm, and the court can consider either depending on the facts and circumstances of each case. This is so because harm can arise from the private copying exception, which facilitates exploitation without compensation as is the current case in South Africa, or simply arises because private copying diminishes purchasing interest creating a lost sale which should have been the corollary accompanying remuneration for the author.

In the *Padawan* case, the concept of fair compensation was held compulsory and calculated on the basis of the criterion of the harm linked to the introduction of a private copying exception.[921] The level of fair compensation is linked to the harm suffered by the author as a result of the introduction of the private copying exception, which is viewed as restitution for the harm suffered by the author.[922] The unauthorised reproduction of the work causes the envisaged harm, and the court qualified the harm as resulting from the facilitative exception or limitation.[923] Recital 31 of the Preamble to the Directive provides for the maintenance of a 'fair balance' between the interests of right holders and end users of copyright works. The rightholders' receive fair compensation, from the cost factored into the purchase price by the manufacturers and distributors of digital devices and paid for by end users resulting in 'fair balance' being established. This is so because the end users are likely

[919] Kretschmer (note 163 above) 28.
[920] Ibid.
[921] Ibid at para 42.
[922] Poort & Quintais (note 192 above) 8.
[923] Ibid.

to cause harm to authors through private copying and should therefore recompense rightholders' for such harmful activity.

However, Digital Europe, representing thousands of EU digital companies is concerned about deviations in the application of EU concepts across its respective jurisdictions. It argued that while national institutions have discretionary powers to determine harm and compensation levels, 'the current fragmentation is caused, to a significant degree, by the divergent practices in the Member States and the lack of clear definition of the "harm" criterion.'[924] While the harm principle is still extant, there is a minimum harm consideration attached to it that applies in circumstances when there is limited or insignificant harm to the authors' remuneration arising from the exploitation of work. Digital Europe further recommended that once a common definitional scope for harm has been established, and to guarantee its acceptance by the EU market it needed to provide for no compensation under the *de minimis*, or minimal harm consideration.[925] As enunciated in the Copydan Bandkopi case, Member States now have discretion to set the minimum harm threshold for when a levy is payable, provided this is applied in a manner consistent with the principle of equal treatment,[926] and Recital 35 provides that in certain situations where the prejudice to the right-holder would be minimal, no obligation for payment may arise. Member States could now set applicable thresholds that determine prejudice caused to rightholders and determine de minimis levels.

4.3.4 The EU transparency model – principles and obligations

A report in 2016 relating to the 'Impact Assessment on the modernisation of EU copyright rules' which accompanied the proposal for a Copyright Directive in the DSM highlighted the impact of absence of transparency obligation provisions on fair compensation and thereafter developed a legal framework for effectively monitoring management of royalties.[927] Previously, authors and performers were hindered from effectively monitoring the exploitation of their works and measure its accruing commercial success and economic value.

[924] DigitalEurope 'DigitalEurope calls for EU action on copyright levies' *DigitalEurope*, 24 June 2019, available at *https://www.digitaleurope.org/resources/digitaleurope-calls-for-eu-action-on-copyright-levies/*. accessed 12 December 2022. DIGITALEUROPE a leading trade association representing digitally transforming industries in Europe, fighting for a regulatory environment that enables European businesses and citizens to prosper from digital technologies.
[925] Ibid.
[926] Copydan Bandkopi Case-463/12. (A European Court of Justice decision).
[927] See EU Commission Staff Working Document (2016), Impact Assessment on the modernization of EU copyright rules, SWD (2016) 301 final, 14.09.2016, Accompanying the Proposal for a Directive on Copyright in the Digital Single Market, COM (2016) 593 Final (14.09.2016).

In some cases, authors were indisposed to challenging existing lopsided contractual terms for fear of possible consequences.[928] Schwope posits that, 'over time, it had become apparent that this legal framework within the EU was neither sufficient nor effective in securing a fair remuneration to authors.'[929] As a result, the EU realised that while ensuring that authors receive fair compensation, Member States were now also obligated to ensure the transparency principle applied to facilitate authors capacity to assess the exploitation of their works and its accruing value. To understand the historical background and implementation context of Article 19, an essential starting point can be found in the preamble to the InfoSoc Directive which provides that, 'if authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work', as that is 'a prerequisite for a sustainable and functioning marketplace of content creation, exploitation and consumption.'[930] The EU's Chapter 3 Directives introduced five compulsory requirements intended to secure copyright holders' fair remuneration in exploitation of their works, which also include the principle of appropriate and proportionate remuneration,[931] transparency obligations,[932] contract adjustment mechanism,[933] and a revocation right.[934] Article 19 of the Copyright Directive was therefore designed to bolster the authors' contractual position by promoting high levels of transparency in the management and distribution of royalties.[935] It provided that,

> 'Authors and performers are entitled to receive relevant information necessary to ascertain the revenues yielded by the exploitation of their works, which should comprise all revenues generated, all financial flows between exploiters as well as expenses occurred. The ECS underlines that Member States should consider the issue of sanction, should the transferees or licensees not comply with their obligation to provide the required information. In addition, the ECS welcomes the possible extension of the transparency obligations to sublicensees when necessary, including to obtain information about the revenues generated by Internet platforms exploiting creative content.'

[928] Xalabarder (note 95 above) 10-11.
[929] Ibid.
[930] Copyright Directive 2001/29/EC of the EU 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.
[931] Art.18 of the EU Copyright Directive.
[932] Art.19 of the EU Copyright Directive.
[933] Art.20 of the EU Copyright Directive.
[934] Art.22 of the EU Copyright Directive.
[935] The EU Copyright Directive: Article 19 Transparency obligations.

The mandatory transparency obligation seeks to reset relations between the stakeholders in the assessment of the economic value of the rights authors' license or assign. The information provided under Article 19 encompasses the modes of exploitation, revenues generated and the remuneration due on those revenues which must be released for authors' assessments on a regular basis. Comparably, Ghana's copyright law has similar approach in the provision for information relating to accumulated and distributed payments. Importantly, the Copyright Directives Article 23 on common provisions provide a clause emphatically providing that any contract seeking to avoid compliance with the application of Article 19 will be unenforceable. Unfortunately, no similar provision is provided for in Ghana's copyright law to avoid the authors' facing a contractual enforcement predicament under the *pacta sunt servanda* principle.[936] Furthermore, Article 19(3) articulated a new principle providing that Member States are entitled to limit the scope of the transparency obligation application where compliance would be disproportionate in view of the revenues generated. EU parliament belatedly appreciated that Article 19 provisions alone could not effectively secure fair remuneration for authors, and reinforced it with the Article 18 principle of appropriate and proportionate remuneration.[937]

4.3.5 The principle of appropriate and proportional remuneration

The EU principles of appropriate and proportional remuneration were designed to improve the authors' fair remuneration by establishing harmonised mandatory principles and rights to strengthen their contractual position.[938] The uneven contractual negotiating frameworks leveraged influential multinational monopolies against authors, unfairly nudging them to drive hard bargains that left authors clinging to disproportionate and prejudicial contracts with uncertain remuneration. The obligation ensuring that authors and performers' compensation meet appropriate and proportionate standard is couched in peremptory terms. Article 18 of the Directive provides that,

> '1. Member States shall ensure that where authors and performers license or transfer their exclusive rights for the exploitation of their works or other subject matter, they are entitled to receive appropriate and proportionate remuneration.

[936] An old contract law principle which means that agreements must be kept. See also *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2018 (2) SA 314 (SCA) para 1.
[937] Ibid.
[938] Xalabarder (note 95 above) 1.

> 2. In the implementation in national law of the principle set out in paragraph 1, Member States shall be free to use different mechanisms and take into account the principle of contractual freedom and a fair balance of rights and interests.'

How the principle should be interpreted is to be determined by the,

> 'actual or potential economic value of the licensed or transferred rights, taking into account the author's or performer's contribution to the overall work or other subject matter and all other circumstances of the case, such as market practices or the actual exploitation of the work.'[939]

Additionally, Article 16.2 established some criteria for the principle which also provides that authors 'shall' receive appropriate remuneration for the use of their rights, which will entail that their agreed tariffs remuneration should be reasonable to the economic value of the work, taking into consideration the economic value of the use of the rights in trade, the nature and scope of the use of the work among other considerations.[940] The economic value of the service provided by the CSOs was to be considered as well.[941]

The legal design of the salient remuneration features was to provide for fair remuneration ex ante, which is at the period of negotiations and conclusion of the contract, and ex post, after the conclusion of the contract where parties have scope to renegotiate the contractual framework after creations have produced unpredicted phenomenal economic returns. As such, Article 18 is ex ante, guiding the contractual negotiations and transfer of rights. According to Xalabarder, Article 18 serves as a beacon in directing the legislature in its national implementation of Article 19 through provisions that are compliant with its original spirit.[942]

Scholars provide other criteria for the 'appropriate' nature of remuneration which could require applying considerations of the revenue generated by the creation, the extent of its use and various marginal contributions of the parties to the whole work.[943] Nevertheless, the implementation of the appropriate and proportionate principle is left to Member States where new approaches emerging from domestic tripartite forums could be effected.[944] The

[939] Recital 17 SCD 93/83/EC.
[940] Art.16.2 CRMD
[941] Ibid.
[942] Xalabarder (note 95 above) 8.
[943] Ibid at 5.
[944] Recital 73 CDSM Directive.

EU principles are meant to guide Member States with a framework from which to develop domestic legislation that is uniform. This is an appreciation of the varying national policy frameworks which would inform how the principles would be tailored to suit development of domestic legislation.

4.3.6 EU growing calls to create Artificial Intelligence levy system

The EU has provided a legal framework through Copyright Directives for levying digital devices capable of storing and recording devices to ensure copyright holders receive fair and adequate compensation for the exploitation of their works. Notwithstanding, the EU currently doesn't have an explicit Artificial Intelligence (AI) levy synonymous with the EU Copyright Directive, with scholars proposing the establishment of a comprehensive regulatory framework.[945] AI is regulated through the AI Act that is responsible for managing digital risks associated with the use and management of AI.[946] The Act establishes three risk categories; AI systems that create unacceptable risk being outlawed; high risk applications being subjected to set criteria of legal requirements, and applications carrying less risk are left unregulated.[947] It therefore creates a framework for a risk based approach in which regulations are applied to minimal, high and unacceptable risks, also addressing AI aspects relating to transparency, accountability, and human oversight. Quintais is concerned that the Act is 'an extremely long and complex legislative text. Even for a highly motivated academic, it is a challenging and tedious read.'[948] This should be avoided in drafting similar South African legislative framework, with accompanying AI levy provisions and transparency principles.

Article 28b(4) of the Act defines generative AI as 'foundation models used in AI systems specifically intended to generate, with varying levels of autonomy, content such as complex text, images, audio, or video.' It is argued that the displacement of human functions creating substitutes for human literary and artistic productions has potential to be deemed

[945] The EU 2001 InfoSoc Directive, also known as Directive 2001/29/EC, and it harmonises copyright and related rights in the information society.
[946] See relevant legislation, The AI Act was published on July 12, 2024, and entered into force on August 1. European Union, "Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008. The EU AI Act defines *TDM* as "any automated analytical technique aimed at analyzing text data in digital form in order to generate information which includes but is not limited to patterns, trends and correlations.
[947] Ibid.
[948] J P Quintais 'Generative AI, copyright and the AI Act'(2025)*Computer Law & Security Review*, Vol. 56,2025, 4, available at *https://doi.org/10.1016/j.clsr.2025.106107*, accessed 4 February 2025.

sufficient to confirm a disruptive effect and require payment of a levy.[949] This principle is important when developing applicable principles for South Africa to determine liability for payment when making a determination on whether the use of AI replaces human creativity and or support human creativity.[950] Displacement of human creativity creates harm to authors' remuneration, especially where the reproductions are mimicking, recreating or copying original works. However, there are proposals by EU politicians to tax AI, given that its functioning system is generating income and is also synonymous with human effort, and outperforming human beings in some instances.[951] Instead of a tax, scholars are recommending an AI levy, with increasing calls to establish remuneration mechanisms from the development and use of AI.[952] Senftleben argues that,

> 'Whenever copyright law measures are proposed to ensure that human authors receive an income, it is normally possible to argue that such income is intended to serve as an incentive and reward for creating literary and artistic works. However, the potential of AI systems to imitate and replace human expression changes the equation. The moment AI systems become capable of flooding the market with literary and artistic productions, the question arises whether any additional incentive or reward for human creativity is still necessary.'[953]

Furthermore, Senftleben provides other justifications for creating a levy, which includes the parasitic use of human literary and artistic works, to broader socio-political objectives and arguments for improving AI.[954] There is also an argument for incentives to foster innovation

[949]M Senftleben 'Generative AI and Author Remuneration' (2023) IIC *International Review of Intellectual Property and Competition Law*, 54(10), 1535-1560, available at https://doi.org/10.1007/s40319-023-01399-454, 1535–1550, available at *https://doi.org/10.1007/s40319-023-01399-4*, accessed 4 February 2025.
[950] Ibid.
[951] Saim Saeed 'EU Parliament Tax Chair Wants New Artificial Intelligence Levy' *Bloomberg Tax*, 16 October 2024, available at *https://news.bloombergtax.com/daily-tax-report-international/eu-parliament-tax-chair-wants-to-tax-artificial-intelligence*, accessed 4 February 2025.
[952] Senftleben (note 949 above); See also M Senftleben 'A Tax on Machines for the Purpose of Giving a Bounty to the Dethroned Human Author – Towards an AI Levy for the Substitution of Human Literary and Artistic Works'(2022), available at SSRN: *https://ssrn.com/abstract=4123309* or *http://dx.doi.org/10.2139/ssrn.4123309*, accessed 4 February 2025. See also Frosio G (2023b) Should we ban generative AI, incentivise it or make it a medium for inclusive creativity? In: Bonadio E, Sganga C (eds) A research agenda for EU copyright law. Edward Elgar, Cheltenham (forthcoming). https://ssrn.com/abstract=4527461. See also Geiger C (2024) When the robots (try to) take over: of artificial intelligence, authors, creativity and copyright protection. In: Thouvenin F, Peukert A et al (eds) Innovation—creation—markets, Festschrift Reto M. Hilty. Springer, Berlin (forthcoming).
[953] Senftleben (note 949 above).
[954] Ibid.

and improve the well-being of creators.[955] Although an AI levy is not yet in place, Senftleben proposes the use of the existing legal obligations under article 8(2) of the Rental, Lending and Related Rights Directive to pay remuneration for the use of phonograms, which potentially could serve as a blueprint for levying of AI technologies.[956] Article 8(2) provides that,

> 'Member States shall provide a right in order to ensure that a single equitable remuneration is paid by the provider of a generative AI system if literary and artistic output generated by the system has the potential to serve as a substitute for a work made by a human author, and to ensure that this remuneration is paid to social and cultural funds of collective management organizations for the purpose of fostering and supporting human literary and artistic work.'

Scholars also propose the collection and distribution of the AI levy to be managed by Collective Management Organisations, (CMOs).[957] The advantage of this approach will be to make AI producers accountable, encourage further innovation, and enhance human authors' chances of competing with generative AI systems.[958] As Senftleben puts it, 'On its merits, the proposed system thus seeks to transform AI content revenue into human content revenue.'[959]

4.4 EU COPYRIGHT DIRECTIVE EXCEPTIONS AND LIMITATIONS

Private copying levies are applicable in circumstances where it is accompanied by a facilitative private copying exception. It is important to note that illegal activities, such as piracy or commercial copying of intellectual creations should not be tolerable because the levy has been paid. The levy only operates to pay for legal sources, and does derive its payments from unlawful activities. The ECJ ruled that downloading from illegal sources was not within the scope of the private copying regulations, and other jurisdictions such as Netherlands had erroneously assumed that copying from illegal sources by end users was within the scope of the private copying exception.[960] Therefore discussions around piracy are outside the scope of this research, except applicable lawful exceptions and limitations. The levy arises from the use of digital devices for private copying exceptions to compensate copyrightholders' for the possible harm arising from private copying.

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[955] C Geiger & V Iaia 'The forgotten creator: towards a statutory remuneration right for machine learning of generative AI(2023) *Comput Law Secur Rev* (forthcoming). 10-11, available at https://ssrn.com/abstract= 4594873, accessed 4 February 2024.
[956]Senftleben (note 949 above) 1549.
[957] Ibid.
[958] Ibid at 1550.
[959] Ibid.
[960] *ACI v Thuiskopie* C-435/12 (A European Court of Justice decision).

Part of the principles guiding the implementation of the harmonised EU Copyright Directive exceptions and limitations emanates from international treaties. The EU jurisdictions endeavour to fashion domestic legislation in compliance with binding international treaties, such as the Berne Convention,[961] Rome Convention,[962] the TRIPS Agreement[963] the Internet treaties namely the WIPO Copyright Treaty (WCT),[964] and the WIPO Performance and Phonogram Treaty (WPPT),[965] Beijing treaty on audio-visual performances,[966] and the Marrakesh treaty.[967] The framework for the harmonisation of EU copyright law exceptions was designed to promote uniformity and certainty of copyright law. The European Copyright Society (ECS)[968] making an analysis of the Deckmyn judgment[969] provided that exceptions and limitations are an essential part of a copyright system helping in securing constitutional values of free speech, expression, and freedom of arts and sciences, while serving the public interest in the cultural life.[970] The EU exceptions accommodate the interests of both creators and end users, securing a viable utilitarian model that balances the protection of, and access to copyright works.[971] While the overall objective of the lawmakers was to create a harmonised legislative framework, unfortunately the EU exceptions and limitations system has not achieved this desired goal because of varying national policy and culture considerations.[972] This has prompted eminent EU copyright scholars to call for a more coherent and comprehensively harmonised copyright law that facilitate increased lawful cross-border online exploitation of works.[973]

[961] The Berne Convention, adopted in 1886.
[962]Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations.
[963]The TRIPS Agreement. available at *https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm*. accessed 30 April 2023.
[964] WIPO Copyright Treaty. available at *https://www.wipo.int/treaties/en/ip/wct/*. accessed 30 April 2023.
[965] WIPO Performances and Phonograms Treaty. available at *https://www.wipo.int/treaties/en/ip/wppt/*. accessed 30 April 2023.
[966] Beijing Treaty on Audiovisual Performances. Available at *https://www.wipo.int/treaties/en/ip/beijing/*. accessed 30 April 2023.
[967] The Marrakesh Treaty was adopted on June 27, 2013, and entered into force on September 30, 2016. available at *https://www.wipo.int/marrakesh_treaty/en*/. accessed 30 April 2023.
[968] The European Copyright Society (ECS) members are renowned scholars and academics from various countries within Europe.
[969] *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others* Case number C-201/13.
[970] European Copyright Society 'Limitations and exceptions as key elements of the legal framework for copyright in the European Union: Opinion on The Judgment of the CJEU in Case C-201/13 Deckmyn' (2014) para 3 and 4. available at *https://europeancopyrightsociety.org/limitations-and-exceptions-as-key-elements-of-the-legal-framework-for-copyright-in-the-european-union-opinion-on-the-judgment-of-the-cjeu-in-case-c-20113-deckmyn/*. accessed 2 May 2023.
[971] Ibid.
[972] Ibid at para 6. See also Recital 32 to the Directive 2001/29.
[973] Ibid at para 7.

4.4.1 Exceptions under international treaties

The 1886 Berne Convention treaty provides provisions limiting in certain circumstances the authors' exclusive right of reproduction of the works to facilitate the unauthorised reproduction of protected works. This comes through Article 9(2) of the Berne Convention which provides that,

> '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.'

The three conditions emerging out in the aforestated provision – otherwise known as the three-step test - still govern exceptions and limitations to copyright and related rights under EU law limiting the authors' exclusive right.[974] Moreover, similar provisions are provided under the TRIPS Agreement which buttressed the three-step test as a barometer for evaluating limitations and exceptions to author's rights, capturing the Berne Convention wording provision in its entirety.[975] The TRIPS Agreement extended the scope of limitations from reproduction rights to covering economic rights and international copyright norms.[976] In 1996, two additional treaties - the WCT,[977] and the WPPT,[978] were adopted to apprise and augment the Berne and Rome Convention[979] responding to Internet and digital technologies developments arising from the online exploitation of works. However, it was left to Member States to determine the nature and form of the exceptions in the digital environment.[980] The three-step test was further bolstered in the Beijing Treaty on Audiovisual Performances (BTAP) signed by several EU countries.[981] The BTAP also incorporates the three-step test extending its application to all rights also applicable to the digital environment. A year later after the adoption of the BTAP, the Marrakesh Treaty to Facilitate Access to Published

[974]F Javier & C Blázquez. et al *Exceptions and limitations to copyright* (2017) IRIS Plus 2017-1, European Audiovisual Observatory, Strasbourg, 2017 9.
[975] Article 13 of the TRIPS Agreement.
[976] Ibid.
[977] WIPO Copyright Treaty, 20 December 1996.
[978] WIPO Performance and Phonograms Treaty, 20 May 1996.
[979]Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations 1961. available at *https://www.wipo.int/treaties/en/ip/rome/*. accessed 5 May 2023.
[980] Both treaties provided that in appropriate circumstances countries are entitled to grant exceptions for uses deemed to be in the public interest. Art. 10 of the WIPO Copyright Treaty reinforces the three-step test.
[981]Beijing Treaty on Audiovisual Performances. Entry into force: April 28, 2020. available at *https://www.wipo.int/wipolex/en/members.* accessed 29 April 2023.

Works for Persons Who Are Visually Impaired (the Marrakesh Treaty) was adopted.[982] They both entered into force seven years apart, but their influence in guiding the EU framework for exceptions remains effective. The Marrakesh treaty objective is to provide Member States with a foundation for projecting mandatory limitations and exceptions for the benefit of the visually impaired by providing guidelines to copyright rules that facilitate reproduction, distribution of works in formats accessible to such persons.[983] Additionally, the treaty facilitates movement of the works across borders to reach the targeted individuals. The gist of such international treaties is captured and reflected in the existing EU principles.[984] The Marrakesh treaty entered into force within the EU copyright law framework in 2017 a year later after it entered into force, giving Member States latitude to implement its provisions taking into account their own legal systems and practices. The EU is signatory to the treaty and its Member States are obliged to ensure its implementation.

4.4.2 EU Copyright Directive exceptions

South Africa has fair dealing exceptions under its Copyright Act, [985]and also carries fair use exceptions under the current proposed Copyright Amendment Bill. [986] While such exceptions to copyright enforcement are applicable to the implementation of a copyright levy, they are similar and can operate to support the same objectives. However, there will be need to make adjustments and accommodate important terms in the application of a levy – such as a broader exception framework that define issues around private copying exceptions, private use and private copies which may not be reflected in the current exceptions context. As such, it is important to interrogate existing EU exceptions and limitations with a view to drawing lessons and supporting a similar implementation framework in this jurisdiction. For example, the current copyright Act fair dealing exceptions discourages home copying of particular types of works, and makes format shifting amount to infringements, yet the proposed private copying levy encourages.[987] Besides, there are striking similarities in text and substance between South Africa intellectual property laws and the EU Directives. [988]

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[982] The Marrakesh Treaty (note 738 above).
[983] Ibid.
[984] Official Journal of the European Union, Directives (EU) 2017/1564 On certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society.
[985] Copyright Act 98 of 78 s 12.
[986] Copyright Amendment Bill s 12A.
[987] O H Dean (note 127 above) para. 9.2.4. Dean writes that effect of the exemption of cinematograph film, sound recording and computer program from the fair dealing exception as it pertains to 'home copying' of such

The EU exceptions and limitations objectives are calculated to accomplish public policy goals captured under its fundamental freedoms. This ordinarily includes but is not limited to education, teaching, research, and news reporting. The provided areas are all subject to the three-step test,[989] and echoed in various international treaties.[990] While some of the exceptions or limitations are optional they are covered under five Copyright Directives, namely the InforDirective,[991] software directive,[992] database directive,[993] rental and lending right[994] and orphan works directive.[995] From the five directives, the InfoSec Directive is considered the most horizontal aimed at harmonising the exceptions to copyright and related rights applicable to all types of works.[996] Such exceptions are important in providing how South Africa should formulate its exceptions and limitations guiding the operationalisation of a levy arising from legitimate lawful sources.

a.) Private copying exception

The remuneration right to fair compensation for private reproductions is covered by a private copying exception.[997] The provision obliges Member States to provide for exceptions in respect of reproductions on recordable devices by a natural person for private use and non-commercial purposes.[998] Where the private copying exception is provided it must be accompanied by fair compensation for the harm caused by the reproductions. The term 'private' is however not defined in the Directive, but Poort and Joost write that,

> 'there is rough consensus that the beneficiaries of this provision must be natural persons making reproductions for their personal purposes and within the private sphere which,

works is unlawful. Format shifting or the reproduction of copyright works like sound recording and cinematograph films amounts to copyright infringement.

[988] See *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* 2006 (1) SA 144 (CC) para 36. See also Provisions virtually identical in text and substance to our Trade marks Act 194 of 1993 s 34(1) (c) and Art. 5(2) of the European Directive.

[989] Article 5(5) InfoSoc Directive 'The exceptions and limitations provided for in paragraphs 1, 2, 3, 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the right holder.'

[990] WIPO Internet Treaties is meant here as an umbrella term for the WIPO Copyright Treaty and WPPT.

[991] EU Directive 2001/29/EC, Art. 5.

[992] EU Directive 2009/24/EC, Art. 5 & 6.

[993] EU Directive 96/9/EC, Art. 6 & 9.

[994] EU Directive 2006/115/EC, Art.' 6 and 10.

[995] EU Directive 2012/28/EU, Art. 6.

[996] Javier.& Blázquez. (note 974 above) 19.

[997] Prescribed under Article 5(2) (b) of the Copyright Directive.

[998] EU Copyright Directive 2001/29/EC of 22 May 2001, Art. 5(2) (b).

depending on the national implementation, may include a broader or narrower circle of (close) family and friends.'[999]

In the application of the exception, the medium on which the copy is made is not relevant but the copy must be made by a natural person to the exclusion of commercial entities or public bodies. TPMs applied by rightsholders' against copying are to be taken into account when applying fair compensation which only remunerates authors for the losses caused by private copying.[1000] There is also an obligation to take appropriate measures limiting the number of permissible reproductions given the quality and the quantity of private copying that is made possible by the devices. Even in circumstances where the reproduction of the copies might be for non-commercial purposes, the production of huge quantities might be prejudicial to the rightholders' pecuniary interest. While the courts[1001] have regularly sought to interpret the private copying exception by ensuring that it is interpreted and uniformly applied in all its jurisdictions, efforts towards harmonisation of tariff levels across the EU have not been successful. The practical implementation of the exception has been different due to varying levy, tariff, collection and distribution schemes because of national jurisdictions discretionary powers to determine thresholds in line with their traditions and policies.[1002]

In the South African context, it will be helpful to incorporate and define such terms as 'private use', harm, and 'private' and highlight the significance of copying for non-commercial purposes which are at the core of the levy implementation. It might also be helpful to define permissible reproductions which even if they are for non-commercial purposes, they could be prejudicial to the rightholders interests.

b.) The InfoSoc Directive 2001/29/EC

The InfoSoc Directive Article 5 provides exception to service providers and operators in the telecommunications sector who are exempted from authorisation for acts of reproduction of technical copies relating to and or forming part of an indispensable technological process occurring during work's transmission in a network.[1003] This exception is obligatory and accompanied by an exhaustive list of non-compulsory exceptions to the reproduction right, right of communication or distribution to the public to which countries should select relevant

[999] Poort & Quintais (note 192 above) 207.
[1000] Javier & Blázquez (note 974 above) 27.
[1001] Padawan case (note 272 above).
[1002] Javier & Blázquez. (note 974 above) 27.
[1003] EU InforDirective Art. 5(1).

exceptions without varying or adding any more exceptions.[1004] Such exceptions transposition into domestic law is left to the discretionary powers of Member States to determine in accordance with their own traditions and policies. Whatever considerations apply to the adoption of the exceptions, fair compensation in the form of adequate compensation linked to the harm caused to authors in line with the three-step test[1005] must not be discarded and jurisdictions have a right to consider applicable compensation thresholds.[1006]

Another consideration applies to rights of authors' exceptions against TPMs circumvention. The rightholder is mandated to have control of TPMs and facilitate use of the work protected by technical encryptions for particular purposes by specifying the necessary decryptions.[1007]

The InfoSoc Directive scope of the exceptions is essentially categorised in three areas, namely public interest access to information considerations, exceptions operating in promotion of fundamental freedom speech, expression and media, and exceptions for the benefit of private use.[1008] Furthering the objectives of freedom of speech and expression also entailed the possibility to seek, gather and disseminate that information promoting the values of a democratic society. The exceptions range from providing for extraction of quotations for review and criticism,[1009] caricature or parody[1010] and are recognised in EU law in furthering freedom of expression.[1011] After the Deckmyn judgment,[1012] the ECS noted that exceptions permitting parody are vital to any copyright system as they ensure access to information and culture, thus stimulating innovation of new works by building on existing works.[1013] This

[1004]Javier & Blázquez (note 974 above) 21.
[1005] EU Copyright Directive, Art. 5(5).
[1006]EU Recital 35 of the InfoSoc Directive provides that the payment of any compensation should take into account: (i) the 'possible harm to the rightsholders' (ii) whether rightsholders 'have already received payment' and (iii) that no obligation for payment arises where there is minimal harm to rightsholders.
[1007] EU Copyright Directive, art. 6(4). The Directive provides that authors should have control of the TPMs and together with domestic institutions provide licensing frameworks that facilitate educational establishments with accessible technical means
[1008] Javier & Blázquez (note 974 above) 22.
[1009] EU InfoSoc Directive, art. 5(3) d.
[1010] Ibid at Art. 5(3) k.
[1011] See also Art. 5(3) c, wherein the InfoSoc Directive covers making available of published articles on current economic, political or religious topics or of broadcast works; see also Article 5(3) f) on the use of political speeches and extracts of public lectures or similar works.
[1012] *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others* Case No. C-201/13 (ECJ Grand Chamber decision).
[1013] European Copyright Society 'Limitations and exceptions as key elements of the legal framework for copyright in the European Union: Opinion on The Judgment of the CJEU in Case C-201/13 Deckmyn' (2014) available at *https://europeancopyrightsociety.org/limitations-and-exceptions-as-key-elements-of-the-legal-framework-for-copyright-in-the-european-union-opinion-on-the-judgment-of-the-cjeu-in-case-c-20113-deckmyn/.* accessed 2 May 2023.

understanding conforms to Deckmyn judgment's call for the uniform application of EU law that embraces parody as an autonomous concept across the EU.[1014] The exceptions arising from quotations must however relate to a work that has been lawfully made available to the public with some accompanying recognition of existing moral rights. Unfortunately, no guidelines are provided under Article 5(3) d in relation to the permitted length of the quotation. LIBER raised concerns that the InforDirective did not appropriately harmonise exceptions to copyright across Europe.[1015] In its report it notes that,

> 'it perpetuated differences in Member States' copyright laws because (other than one exception for computer caching) each country can decide which exception to implement and how to implement it. The directive did however create a static and inflexible list of permitted exceptions with which any new or digital exception has to comply.'[1016]

Such concerns echo similar apprehensions raised by the ECS.[1017] The exceptions were made compatible with EU human rights jurisprudence; in particular freedom of expression and information encapsulated under its fundamental rights provisions. [1018] South Africa has rich body of human rights precedents, which makes constant reference to EU human rights jurisprudence and its accompanying precedents and legislation.[1019]

The InfoSoc Directive scope of the exceptions is essentially categorised in three areas, namely public interest access to information considerations, exceptions operating in promotion of fundamental freedom speech, expression and media, and exceptions for the benefit of private use.[1020] Furthering the objectives of freedom of speech and expression also entailed the possibility to seek, gather and disseminate that information promoting the values of a democratic society. The exceptions range from providing for extraction of quotations for

[1014] See also Padawan Case (note 272 above).
[1015]See LIBER *Limitations and Exceptions in EU Copyright Law for Libraries, Educational and Research Establishments: A Basic Guide* (2022) Association of European Research Libraries 3. available at *https://libereurope.eu/wp-content/uploads/2020/09/A-Basic-Guide-to-Limitations-and-Exceptions-in-EU-Copyright-Law-for-Libraries-Educational-and-Research-FINAL-ONLINE-1.pdf* (accessed 2 May 2023.
[1016] Ibid.
[1017] European Copyright Society (note 47 above).
[1018] Art. 10(1) of the ECHR; Charter of Fundamental Rights of the European Union, available at *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT*, accessed 27 November 2023.Article 11(1) (2) Freedom of expression and information: 'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The freedom and pluralism of the media shall be respected.'
[1019] Laugh It Off Promotions CC case (note 888 above).
[1020] Javier & Blázquez (note 974 above) 22.

review and criticism,[1021] caricature or parody[1022] and are recognised in EU law in furthering freedom of expression.[1023]

c.) Public interest considerations

Public interest considerations in exceptions are expressly provided under the InfoSoc Directive. Given its significance as a value and guiding tool in interpreting the scope of the exceptions, it's prudent to treat public interest separately and provide its widest meaning possible. Public interest is part of the exceptions and limitations recognised under the EU acquis aimed at encouraging the dissemination of knowledge and information within society. In its general legal application operating as a defence, public interest involves a matter which affects the generality of the population at large in which they may justifiably develop a legitimate and substantial vested interest.[1024]

The exceptions reflect the idea that society will benefit from facilitating specific uses of protected works without authorisation from the rightholders under certain specific conditions. This scope of the exception benefits libraries, educational establishments, scientific research, archives and museums, and activities relating to the promotion of culture.[1025] The institutions providing libraries, archival materials and museums are covered under the exceptions given their public interest role in the preservation of and the access to knowledge and culture.[1026]Additionally, several exceptions applicable to the public interest category include people with disabilities,[1027] public security considerations and activities enhancing parliamentary and judiciary proceedings.[1028] The exceptions are however

[1021] EU InfoSoc Directive, Art. 5(3) d.
[1022] Ibid at Art. 5(3) k.
[1023] See also Art. 5(3) c, wherein the InfoSoc Directive covers making available of published articles on current economic, political or religious topics or of broadcast works; see also Article 5(3) f) on the use of political speeches and extracts of public lectures or similar works.
[1024] See also D Wyatt 'The Anaemic Existence of the Overriding Public Interest in Disclosure in the EU's Access to Documents Regime (2020) *German Law Journal* 21(4), 686-701. available at *https://www.cambridge.org/core/journals/german-law-journal/article/anaemic-existence-of-the-overriding-public-interest-in-disclosure-in-the-eus-access-to-documents-regime/8F3FDC72C71789AA4C1555B659A5F039*. accessed 1 May 2023). See also I Currie & J D Waal *The Bill of Rights handbook* (2016) 83.
[1025] Javier & Blázquez (note 974 above) 22.
[1026] Art. 5(2) c of the InfoSoc Directive.
[1027] Art. 5(3) b of the InfoSoc Directive.
[1028] Art. 5(3) of the InfoSoc Directive.

formulated in broad terms to create flexibility in their implementation by national jurisdictions.[1029]

However, scholars note problematic areas with exceptions to acts of reproduction through reprographic activities by public libraries, tertiary institutions for non-commercial purposes.[1030] The concerns are premised on the fact that while the beneficiaries of the Article are provided, there are no detailed requirements in relation to the 'specific acts of reproduction' concerned and the purposes of the acts of reproduction.[1031] Without clearly defined acts of reproduction and the purposes attached to such activities there is vagueness which can be cured under common law. While the development of common law could be left to national jurisdictions the main challenge emerging is that it would defeat the harmonisation, certainty and uniformity of EU law. The objective of exception is to enable libraries to copy works for preservation purposes. However, the preservation of works undertaken by the libraries at the material time did not include the same activities in existence at present in the digital environment.[1032] Another criticism of the exception for educational, teaching and research purposes[1033] is that it is broadly worded without providing any details in relation to its scope, any specific definition of its terms such as teaching.[1034] Scholars posit that without any specification of the notion of 'illustration' –

> 'it is possible to presume that this concept refers to illustration by any means and media and by any technique. As to the works used for illustration, it is assumed that there must be a link between the work that is used and the topic of the teaching. The condition of illustration as well as the length of the work which is used may also be interpreted differently depending on the type of work considered.'[1035]

Another problem identified is that the exception refers to uses of works in the context of scientific research without providing clarity on the definition about the scope of this notion.[1036] It is worth noting that South Africa has ruled that the Copyright Act is

[1029] Javier & Blázquez (note 974 above) 23.
[1030] Article 5(2)c of the InfoSoc Directive
[1031] Javier & Blázquez (note 974 above) 23.
[1032] Ibid. The preservation and archiving can assume varying technical activities including the restoring damaged works, the copying for archives, and format-shifting.
[1033] Art. 6(2) b and 9(b) of the Database Directive.
[1034] Recital 14 of the InfoSoc Directive refers to education and teaching, outlining that 'this Directive should seek to promote learning and culture by protecting works and other subject-matter while permitting exceptions or limitations in the public interest for the purpose of education and teaching.' However, there is no explanation as to the differences between both notion.
[1035] Javier & Blázquez (note 974 above) 24.
[1036] Art. 5(3) a of the InfoSoc Directive.

unconstitutional because of its failure to provide an exception that would allow for the reproduction and adaptation of literary materials to meet the needs of persons who are blind, visually impaired or otherwise print disabled.[1037] This obviously chimes with EU current legislation already compliant with international conventions.[1038] Through exceptions, the intersection between human rights and IP law could be progressively narrowed using copyright law and policies.[1039] The government has already admitted that copyright law must be aligned with both the Constitution and human rights, and as such the CAB introduces a section 19D to allow persons with disabilities, or the people who serve persons with disabilities, to import or convert copyrighted works into accessible formats without the permission of the copyright holder. The CAB would also rectify the problems relating to access to educational materials under copyright.[1040] Such developments point towards harmonisation of international law, which would facilitate trade through existing identical regulatory frameworks.

d.) EU database directive 1996

The EU Database Directive was adopted in 1996 to provide a protection scheme of electronic and non-electronic databases at two different levels for jurisdictions to protect databases by copyright as intellectual creations. As Hugenholtz puts it, 'the Directive provides for a novel *sui generis* right to prevent unauthorized extraction or reutilization of the contents of a database.'[1041] The Directive is an offshoot of the European Commission's 1988 Green Paper on Copyright and the Challenge of Technology, dedicated towards harmonisation of copyright issues around ICTs.[1042] The Green Paper noted that copyright was insufficient to guarantee database producers protection, and proposed its protection extension to databases containing material not protected by copyright.

[1037] See Blind SA v Minister of Trade case (note 744 above).
[1038] Art. 30(3.United Nations Convention on the Rights of Persons with Disabilities (CRPD; United Nations, 2007) requires state parties to ensure, in line with international law, that their intellectual property (IP) legislation does not constitute unreasonable or discriminatory barrier to access by persons with disabilities.
[1039] C B. Ncube, B E. Reid & D O. Oriakhogba 'Beyond the Marrakesh VIP Treaty: Typology of copyright access-enabling provisions for persons with disabilities' (2020) *The Journal of World Intellectual Property,* Vol. 23, Issue 3-4 available at *https://doi.org/10.1111/jwip.12144*, accessed 27 November 2023.
[1040] Clause 13 and 20 of the Copyright Amendment Bill, which facilitates for expanded access to copyrighted material for educational purposes, and for the preservation of copyright works in libraries and archives without the permission of the copyright owner. This would increase access to educational materials, promoting the rights to education, equality, and dignity.
[1041]P. Bernt Hugenholtz 'Implementing the European Database Directive' in Jan J.C. Kabel & Gerard J.H.W. Mom (eds) *Intellectual property and information law: Essays in honor of Herman Cohen J Choram* (1998) 183.
[1042] Commission of the European Communities *Green Paper on Copyright and the Challenge of Technology. Copyright Issues Requiring Immediate Action* (1988) COM (88) 172 final, Brussels, 7 June 1988.

The TRIPS agreement also provides for copyright protection of databases whether in machine readable or other form[1043] while WCT provides copyright protection of compilations of data or other material in whatever form.[1044] The Directive provides a sui generis right protecting content in the database. As such, the creator of the database can prevent the extraction, reuse of the whole or a substantial part of the database's content. Recital 42 provides that the right applies 'to acts by the user which go beyond his legitimate rights and thereby harm the investment,'[1045] and has assumed the legal traits and rights accompanying a property right, which is transferable and subject to licensing.[1046] However, Hugenholtz notes that the users' freedom to extract and reutilise insubstantial parts of the database lack certainty as to what constitutes a substantial part. He finds this questionable, arguing that, 'moreover, the makers of the Directive seem to have overlooked the fact that extracting or reutilizing even substantial parts of a database may constitute a perfectly legitimate use.'[1047] This observation is important because if the quantities are substantial, but all subjected to substantial analysis and or criticism they can perfectly remain within the confines of the permissible exceptions. However, a more precise definition could have clarified the issues. Regardless, common law in relevant jurisdictions could be used to fill the gap. Nonetheless, there may be legitimate temptation to hide behind the freedom of expression and information guaranteed in Convention on Human Rights for unauthorised uses not listed in Article 9 of the Directive.[1048] LIBER acknowledges that the Directive with its accompanying exceptions is appropriate and unique to the EU, providing protection to a large part of a database.[1049] Furthermore, it notes that the Directive is important for researchers with a need to be modernised to allow for data analysis by computers of Big Data through techniques such as Text and Data Mining (TDM).[1050]

The CAB is an attempt at adjusting the copyright law to the digital age, and such exceptions are relevant to creating an appropriate database content protection. The exception parameters help copyright law conform to technological advancements balancing the interest

[1043] Art. 10(2) TRIPS Agreement. Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself.
[1044] Article 5 Wipo Copyright Treaty.
[1045] Hugenholtz (note 1041 above) 190.
[1046] Article 7(3) of the EU Copyright Directive.
[1047] Hugenholtz (note 1041 above) 190.
[1048] Article 10 of the European Convention on Human Rights.
[1049] LIBER (note 1015 above).
[1050] Ibid.

of database creator and end users. A similar exception framework will have to adhere to international benchmarks set by the three-step test, prohibiting extraction, reuse of the whole or a substantial part of the database's content protecting the legitimate rights of the creator to encourage more investment and innovation. It would be appropriate to define substantial or insubstantial parts of the database to create legal certainty which is lacking in this exception.

4.4.2 EU Artificial Intelligence TDM exceptions

The framework for developing AI exceptions to deal with Text and Data Mining (TDM) already exists under the EU AI Act earlier discussed above. The exceptions will be useful to draw lessons for the development of similar compromises in the invention and use of AI within the South African jurisdiction. Notably, the exceptions developed under the AI framework to deal with TDM are identical to the already existing scope of exceptions under South African copyright law regime, in particular fair dealing[1051] and fair use doctrines.[1052]

The AI Act exceptions facilitate TDM for examination by research and cultural organisations,[1053] that are allowed to use reproductions and extractions for the purposes of scientific research, provided they have lawful access to the works.[1054] Already precedents emerging within EU jurisdictions are enforcing such exceptions to justify public interest and cultural heritage research. A German court has already ruled in favour of a research organisation and held that its activities were covered by the TDM exception for scientific purposes under the German law transposing Articles 2(1) and 3 of the CDSMD.[1055] Article 3 of the DSM Directive also provides for limitations regarding TDM mining for the purposes of scientific research.

Article 2 CDSMD exception does not cover subsequent acts of communication to the public or making available of the TDM results, and only restricts to acts of reproduction and extraction. Additionally, Articles 3(2) and 4(2) sets out parameters on the subsequent uses of TDM copies of works or other subject matter. There are opt-out mechanisms or reservations provided for copyright holders provided that the use of their works, 'has not been expressly

[1051] South Africa Copyright Act, s12.
[1052] South Africa Copyright Amendment Bill B13B-2017, 'General exceptions from copyright protection, s12A.
[1053] Germany Hamburg Case, *Kneschke v LAION* Case No. 310 O 227/23, https://drive.google.com/file/d/1A_vnSJUw lrVovhIqA4rKIFaOktR4TvBt/view; See also Netherlands case, see ECLI: NL: RBAMS: 2024:6563 - Rechtbank Amsterdam, 30-10-2024 / C/13/ 737170 / HA ZA 23-690.
[1054] European Union, 2024 (Directive on Copyright in the Digital Single Market, Article 3).
[1055] *Kneschke v LAION* Case No. 310 O 227/23, https://drive.google.com/file/d/1A_vnSJUw lrVovhIqA4rKIFaOktR4TvBt/view.

reserved by their rights holders in an appropriate manner, such as machine-readable means in the case of content made publicly available online.'[1056] The use of reservations or opt-out mechanisms is provided under Recital 18 of the Directive, and refers to material readily available online. In this regard, the copyright holders may opt out using machine-readable means or contractual agreements.

Under the EU copyright law, article 4(1) of the DSM Directive provides a broad exception which allows commercial AI developers and trainers to produce copies of works or databases for the purposes of TDM and retain them as long as necessary for the AI training process. This TDM exception applies to reproductions and extractions of lawfully accessible works and other subject matter. Under the AI Act, authors are not allowed to block such access, but are nonetheless permitted to ensure the security and integrity of the networks and databases and to develop codes of practices.[1057] However, TDM for non-research or commercial purposes can be justifiably prevented to disallow unlawful reproduction of content,[1058] and AI producers are obliged to respect copyright holders' rights.[1059] Nonetheless, it appears there is uncertainty on whether such copyright exceptions cover AI-generated outputs.[1060] Quintais argues this extends to such areas as 'freedom of expression "transformative" use or content exceptions like those for: quotation, criticism, review; or use for the purpose of caricature, parody or pastiche.'[1061]

The transparency framework around TDM also provides an obligation on providers to implement policies complying with the law and any reservation of rights by copyright holders.[1062] Blaszczyk et al posits that,

> 'Importantly, the EU legislation further imposes significant transparency obligations, including the requirement to publish a detailed, comprehensive summary of content used for model training; this summary could include the main data collections or sets that went into

[1056] Article 4(3) CDSMD.
[1057] M Blaszczyk, G McGovern & K D. Stanley 'Artificial Intelligence Impacts on Copyright Law 'Expert Insights, 20 November 2024, available at *https://www.rand.org/pubs/perspectives/PEA3243-1.html,* accessed 4 February 2025
[1058] European Union, 2024 (Directive on Copyright in the Digital Single Market, Article 4).
[1059] European Union, 2024 (Article 53 (1) (c)).
[1060] J P Quintais 'Generative AI, copyright and the AI Act'2025)*Computer Law & Security Review*, Vol. 56,2025, 4, available at *https://doi.org/10.1016/j.clsr.2025.106107*, accessed 4 February 2025
[1061] Ibid. See also Articles 5(3) (d) and (k) InfoSoc Directive and 17(7) CDSMD.
[1062] European Union, 2024 (recitals 104–106).

> training the model, such as large private or public databases or data archives, and a narrative explanation about other data sources used.'[1063]

Transparency requirements will provide for Generative AI to avoid being classified as high-risk, provided they complied with set out transparency requirements which entail disclosure of content generated by AI, providing models that prevent production of unlawful content and disclosure of content protected under copyright law used for AI training.[1064]

4.5 EU COPYRIGHT LEVY ADMINISTRATION

The authors' fair compensation is derived from levying devices that store and distribute content. While leviable devices differ, targeting those capable of storage and recording works appears to be a uniform global standard approach in various regions that have operationalised the levy.[1065] The tariffs are determined by respective national jurisdictions which also explain varying figures and exemptions in different EU jurisdictions. The levies are collected are collected, managed and distributed to beneficiaries by CMOs mandated by rightholders, operating through a license issued by the authorities.[1066] In principle, private persons are liable for the fair compensation payments through a levy factored into the purchase price by the manufacturers.[1067] This levy arises because of the challenges associated with the enforcement of the law in the private sphere which might interfere with the end users' constitutional right to privacy. Moreover, the awkward and digital intricate challenges in identifying millions of infringers create costly administrative, enforcement and prosecution challenges. Recital 38 of the Directive provides a scope for copying levy systems which because of the enforcement challenges highlighted in the foregoing, also imposes direct payment obligations upon intermediaries in the manufacturing and supply chain. As such, liability is imposed upon the manufacturers and importers of recording devices and or suppliers of the products. Precedents emanating from the ECJ have also held that there should

[1063] European Union, 2024 (Article 53 (1) (d))'; See also M Blaszczyk, G McGovern & K D. Stanley 'Artificial Intelligence Impacts on Copyright Law'Expert Insights, 20 November 2024, available at *https://www.rand.org/pubs/perspectives/PEA3243-1.html,* accessed 4 February 2025.
[1064] Article 53(1)(d) states that GPAI model.
[1065] N W Netanel (note 141 above) 4.
[1066] A Vitorino 'Recommendations resulting from the Mediation on Private Copying and Reprography Levies' (2013) 12.available at *https://www.fim-musicians.org/wp-content/uploads/130131_levies-vitorino-recommendations_en.pdf.* accessed 12 December 2022.
[1067] See Padawan case (note 272 above) para 44-45.

not be indiscriminate application of the levies on digital reproduction devices which are not made available to private users, but reserved for different purposes from private copying.[1068] This arose because of some indiscriminate application of the levy on all digital devices, without making a distinction on whether the purchaser of the equipment is a private person or artificial person. The court held that indiscriminate application of the levy on all devices was therefore incompatible with Article 5.2(b), because a link must be provided between the application of the levy and the considered use of the device for the purposes of private copying. Therefore the levy compensates for copying, made by a natural person for non-commercial purposes. This means that copying for commercial purposes is not leviable because it is unlawful under the Directive. The CMOs must therefore determine the lawfulness of the sources before collection and distribution of the levy to beneficiaries. Over and above this, the CMOs ensure that such tariffs and principles are maintained.

4.5.1 The EU collective management organisations

Understanding how the EU administers jurisdictional matters relating to the choice of law, special jurisdiction, harm considerations and use of domicile are critical factors to consider for the South African jurisdiction to help develop its jurisprudence should similar private copying levy disputes occur. While admittedly there is some precedents on jurisdictional jurisprudence on private international law in South Africa, scholars note that there is dearth of precedents to provide guidance and develop this field of law.[1069] Without large scale statutory interventions, scholars note that private international law won't develop empirically.[1070] Therefore, it's worth gleaning how the ECJ is constructing its body of jurisprudence and principles around the levies, given a litany of disputes emerging and shaping the discourse of private international law in that region.

a.) The European Union transparency model

The EU democracy and rule of law jurisprudence is anchored on the need for transparency, integrity, and accountability.[1071] These are largely captured in the Treaty of the European

[1068] Ibid at para 44.
[1069] Hosten et al *Introduction to South African Law and Legal theory* 2 ed (1997) 1347.
[1070] Ibid.
[1071] Briefing for the PETI committee 'Transparency, integrity and accountability in the EU institutions' (2019) European Parliament. available at *https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/608873/IPOL_BRI(2019)608873_EN.pdf.* accessed 23 April 2023.

Union (TEU)[1072] and the Treaty on the Functioning of the European Union (TFEU).[1073] In essence, the treaty principles promote good governance, enhancing the legitimacy and credibility of public institutions, and help in combating corruption and misgovernance practices by forcing public institutions to act publicly.[1074] The EU parliament committee noted that 'transparency requires the disclosure of information on policy-making and spending, while ensuring citizens' access to such information.'[1075] Such principles are already at the core of the relations between EU institutions and its citizens that anchored its treaties constitutional foundation. In general, the EU treaties have constructed democratic credentials of the Member States by promoting open-decision making, citizens' participation, transparency and good administration. This is largely reflected in its EU Copyright Directives articles as well, where the citizens' right to access documents held by its institutions is provided for. [1076]

The EU treaties concurrently inform the development of the transparency obligations within its Copyright Directives which are a direct upshot of a realisation that authors and performers were having challenges monitoring the exploitation of their work and making an informed assessment of its accruing economic value and commercial success. [1077] The incapacity to monitor or get a record of the work's exploitation was more informed by the authors' fear arising from the potential consequences associated with challenging existing lopsided contractual terms.[1078] The other factors accounting for the fear was that authors in general 'lack the financial means, the economic power and the legal expertise to get a fair deal.'[1079] Furthermore, the authors' capitulation in contractual negotiations is in part dictated by their own inability to exploit their works thus subjecting themselves to some economical subservience and enslavement in the contractual terms and arrangements. The Impact Assessment on the modernisation of EU copyright rules,[1080] an EU working document which

[1072]Lexparency.org 'Transparency of European Union' *Lexparency.org* available at *https://lexparency.org/eu/TEU/ART_11/*. accessed 23 April 2023.
[1073] Ibid.
[1074] TFEU, art. 15(1) and (2).
[1075] Ibid. See also TEU Art. 10(3).
[1076] Art.15 (3) TFEU.
[1077] Xalabarder (note 95 above) 10.
[1078] Ibid.
[1079]S Dusollier 'The 2019 Directive on Copyright in the Digital Single Market: Some progress, a few bad choices, and an overall failed ambition' (2020) 57(4) *Common Market Law Review* 979, 1021.
[1080] EU Commission Staff Working Document 'Impact Assessment on the modernization of EU copyright rules'(2016) Accompanying the Proposal for a Directive on Copyright in the DSM, COM(2016) 593 Final (14.09.2016) 173.

complemented the EU Copyright Directives sought to address transparency shortcomings within copyright law. It stated that,

> 'transparency measures would rebalance contractual relationships between creators and their contractual counterparties by providing the creators with the information necessary to assess whether their remuneration is appropriate in relation to the economic value of their works and if the remuneration is deemed inappropriate, a legal mechanism in order to seek out a renegotiation of their contracts.'[1081]

The EU Copyright Directives introduced in April 2019,[1082] carries a landmark transparency provision[1083] which establishes openness and accountability in business relations, putting an obligation on CSOs to provide an annual report on the levy arising from the exploitation of authors' works. Scholars note that this is affiliated to an audit right for authors and performers.[1084] The transparency clause followed earlier referred recommendations by the EU Commission Staff - 'Working Document of the Impact Assessment on the modernization of EU copyright rules'- [1085] and the Antonio Vitorino Commission which formulated mechanisms for the efficient administration of the levy. Vitorino's report proposed that,

> 'The final aim, in my view, should be twofold: to foster tailor-made licensing agreements which allow creators to be remunerated directly, and to reconcile the existing, diverging national levy systems and the principles of the Internal Market. I am also convinced that levy systems must be transparent, more understandable and legitimate for consumers and all concerned operators alike.'[1086]

The transparency provision was also viewed in the context of fostering uniformity within the internal market. Scholars within the EU noted that,

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[1081] Ibid at 190.
[1082] Lexparency.org 'EU Directive 2019/790 Article 19 Transparency Provision' (2019). available at *https://lexparency.org/eu/32019L0790/ART_19/*.accessed 18 January 2022.
[1083] EU Copyright Directive, art. 19.
[1084]Iulia Burbea 'Article 19: Transparency Obligation' in Slobodan Petošević (ed) *EU Copyright Directive 2019 Articles of Concern to Brand Owners A Report by the Copyright Policy of INTA Subcommittee Chair: and the International & Legislative Subcommittee* (2021). available at *https://www.inta.org/wp-content/uploads/public-files/advocacy/committee-reports/20210720-EU-Copyright-Directive-Report.pdf*. accessed 18 January 2022. 1 13 – 14.
[1085] EU Commission Staff 'Working Document of the Impact Assessment on the modernization of EU copyright rules '(2016) Accompanying the Proposal for a Directive on Copyright in the Digital Single Market, COM(2016) 593 Final (14.09.2016) 173.
[1086] A Vitorino 'Recommendations resulting from the mediation on private copying and reprography levies' Brussels, Belgium 31 January 2013.available at *https://www.fim-musicians.org/wp-content/uploads/130131_levies-vitorino-recommendations_en.pdf*. accessed 23 December 2021 7

> ‘‘The goal of more transparency is a step in the right direction as it will help to create a level playing field within the internal market and enhance the control that creators, performers, publishers and other rightsholders have over their rights. The Institute welcomes binding provisions which help harmonise the legal framework regarding governance and transparency of collective rights management.’[1087]

The subsequent enactment of the EU’s Article 19 transparency obligations repositioned relations between the stakeholders in the exploitation of creative content. A profound Article that had far reaching legal and political implications in promoting accountability mechanisms within the administration of levy, Article 19 helped create a framework for the production of current, relevant and comprehensive information on the exploitation of works which included all revenues generated and remuneration due through authoritative principles captured in fewer than six provisions. Article 19(1) provides that,

> ‘Member States shall ensure that authors and performers receive on a regular basis, at least once a year, and taking into account the specificities of each sector, up to date, relevant and comprehensive information on the exploitation of their works and performances from the parties to whom they have licensed or transferred their rights, or their successors in title, in particular as regards modes of exploitation, all revenues generated and remuneration due.’[1088]

The transparency provision also requires a contracting party, such a licensee/assignee to provide comprehensive information to the authors on the exploitation of their works and/or performances. The obligation to provide such required information or records is also extended to sub-licensees should they possess the relevant information required.[1089] The annual production of the report requirement should be within a realistic and reasonable period for the compilation of all the necessary and required information. The ‘annual’ timeframe resonate with periods set out under South Africa’s Companies Act and many other EU jurisdictions for production of reports and disbursements of the levy.

The transparency obligation set out is expected to be proportional and effective in guaranteeing acceptable transparency levels in every sector.[1090] However, its implementation

[1087] J Drexl S Nérisson., F. Trumpke & R Hilty ‘Comments of the Max Planck Institute for Intellectual Property and Competition Law on the Proposal for a Directive of the European Parliament and of the Council on Collective Management of Copyright and Related Rights and Multi-Territorial Licensing of Rights in Musical Works for Online Uses in the Internal Market COM’ (2012) *Max Planck Institute for Intellectual Property & Competition Law Research Paper* No. 13-04 21.
[1088] Article 19(1) of the EU Copyright Directive 2019/790.
[1089] Ibid at Art. 19 (2).
[1090] Ibid at Art. 19(3).

is adjustable in circumstances where the administrative burden resulting from the obligation becomes disproportionate to the revenues generated by the exploitation of the work or performance and the obligation is limited to the types and level of information that can reasonably be expected in such cases.[1091] This also means that the obligations may be waived if the contribution of the author or performer is not substantial.

The transparency provision operates auxiliary to Article 18 of the Copyright Directive which provides that remuneration for copyright holders should be 'appropriate and proportionate'[1092] to the actual or potential economic value of the licensed or transferred rights.[1093] This would apply to the author's or performer's contribution to the overall work and other factors will be included to reflect market practices or the actual exploitation of the work.[1094] The purposes of the provisions were to balance the rights of authors and performers with those of the producers and publishers in their contractual negotiations relating to the licensing or assignments of their works. Furthermore, the authors and performers required necessary statistical data of the exploited works to facilitate enforcement of their best-seller rights under Article 20.[1095] Smith writes that,

> 'the rationale behind Article 19 is that authors and performers (especially individuals) need information to assess the economic value of the rights they license or assign. Due to a current lack of transparency, and the typically weak bargaining power of authors and performers, so the analysis goes, they are unable to compare the continued economic value of their rights to the remuneration received for the original transfer or licence of them.'[1096]

Another captured indispensable principle of the Copyright Directives provided under Article 23(1) - common provision - provides that any contractual provision in Member States domestic legislation seeking to avoid compliance with the application of Article 19 will be

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[1091] Article 19(3) of the EU Copyright Directive.
[1092] EU Directive CDSM, Article 18 Principle of appropriate and proportionate remuneration.
[1093]T Kempas 'Article 18: The Principle of Appropriate and Proportionate Remuneration' in Slobodan Petošević (ed) *EU Copyright Directive 2019 Articles of Concern to Brand Owners A Report by the Copyright Policy of INTA Subcommittee Chair: and the International & Legislative Subcommittee* (2021) 11. available at *https://www.inta.org/wp-content/uploads/public-files/advocacy/committee-reports/20210720-EU-Copyright-Directive-Report.pdf*. accessed 18 January 2022.
[1094] Ibid.
[1095]W Kreft 'Article 20: Contract Adjustment Mechanism' in Slobodan Petošević (ed) *EU Copyright Directive 2019 Articles of Concern to Brand Owners A Report by the Copyright Policy of INTA Subcommittee Chair: and the International & Legislative Subcommittee* (2021) 18. available at *https://www.inta.org/wp-content/uploads/public-files/advocacy/committee-reports/20210720-EU-Copyright-Directive-Report.pdf.* accessed 18 January 2022.
[1096]Will Smith 'The EU Copyright Directive: Article 19 Transparency Obligations' *Media Rights*, 3 May 2019. Available at *https://mediawrites.law/the-eu-copyright-directive-article-19-transparency-obligations/* accessed 19 January 2022.

unenforceable.[1097] The teleological consideration behind this approach is to dissuade entities that seek to circumvent accountability mechanisms by arm-twisting authors into signing contractual agreements without transparency obligations. This provision is eloquent, unequivocal and progressive in the realisation of the authors' remuneration right.

a.) Reproduction Rights Organisations (RROs).

The Reproduction Rights Organisations (RROs) are responsible for the management of reproduction rights, and they licence the use of works distributed through mediums such as CDs, audiocassette, or computer files on behalf of rightsholders. Ordinarily copyright levies on recordable devices that can store, copy text or image is collected by RROs.[1098] In this context, the RROs automatically become relevant to this study. The RROs within the EU were first introduced in the 1970s, but their rapid worldwide increase in the 1980s and 1990s purely reflects 'the power of collective action in response to the challenges of technology,' impeding rightsholders' remuneration rights.[1099]

The RROs license the reproduction of copyrights because of the impracticalities around rightsholders' licensing individual end users and their normal licensing frameworks authorises copying a portion of publications for internal use by institutions. The licensing frameworks can be extended to other copyright uses relating to electronic distribution via networks, and cable retransmission. In some instances fee-based licences for the reproduction of copies, reprography or digital copies of works are provided for uses outside permissible copyright exceptions parameters.[1100]

An analysis of the RROs in Europe is important to draw lessons on their management of rights, and transparency mechanisms. This is so because a study conducted on RROs in Africa revealed that most organisations remain weak in the areas WIPO's Toolkit best

[1097] Article 23 of the EU Copyright Directive - Common provisions: '1. Member States shall ensure that any contractual provision that prevents compliance with Articles 19, 20 and 21 shall be unenforceable in relation to authors and performers.'
[1098] WIPO *International Survey on Text and Image Copyright Levies* (2016) 20.
[1099] John-Willy Rudolph 'The establishment and the role of a Reproduction Rights Organization (RROs)(2005) WIPO National seminar on copyright and related rights for lawyers and judges organized by the World Intellectual Property Organization (WIPO) in cooperation with the Ministry of Culture 2.
[1100] Ibid.

practices.[1101] South's Africa's RROs effectiveness in relation to implementing transparency management frameworks will be adjudged on the basis of international best practice. The role of RROs is key in the copyright levy management because the emergence of mutating innovative technologies further intensifies the importance of organised and balanced timely responses to the needs of both users and rightsholders. In this regard, the role of the International Federation of Reproduction Rights Organisations, (IFRRO) supporting EU's and other global RROs becomes relevant in facilitating the creation of development committees to assist rights holders particularly Africa.[1102] The IFRRO's links together global RROs, and its objective is promoting effective CMOs management systems that ensure that rightsholders are adequately remunerated. Its membership realises that the emergence of digital technologies has intensified the importance of organised and timely responses to the needs of both users and rights holders.[1103] Moreso, many EU RROs are, in addition to dealing with reprography, actively licensing digital copying.[1104] Furthermore, IFRRO monitors 'the challenges and opportunities presented by the rapid advance of digital technology [which it] constantly monitor[s] and assesse[s].'[1105] Its role in coordinating the management of global RROs cannot be ignored in their envisaged management of copyright levies. The exercise of the right of reproduction by rightsholders, and its interference by end users creates the basis of the RROs interventions to ensure a delicate balance of rights and create market equilibrium.[1106] There is a recognition that, 'Photocopying and similar reproduction of copyright protected works today takes place on a scale, which clearly conflicts with the normal exploitation of works.'[1107] RROs relevance to copyright levies emanates from the fact that,

> 'reproduction for private and personal use is a special case. Traditional licensing systems would not be workable. In many countries the legislation states that copying for private use is free. However, reproduction for private use can be compensated indirectly. Equitable

[1101] D O Oriakhogba & D Kawooya (note 825 above) 2. See also WIPO *WIPO Good Practice Toolkit for Collective Management Organizations (The Toolkit) A Bridge between Rightholders and Users* (2021) available at *https://www.wipo.int/edocs/pubdocs/en/wipo_pub_cr_cmotoolkit_2021.pdf*, accessed 26 January 2024.
[1102] John-Willy Rudolph (note 1099 above).
[1103] Ibid.
[1104] Ibid..
[1105] Ibid.
[1106] Ibid at 7.
[1107] See Henry Olsson, formerly one of the Directors of WIPO, and Special Government Adviser on Copyright in the Ministry of Justice in Sweden in John-Willy Rudolph's 'The establishment and the role of a Reproduction Rights Organization (RROs) (2005) WIPO National seminar on copyright and related rights for lawyers and judges organized by the World Intellectual Property Organization (WIPO) in cooperation with the Ministry of Culture 6.

remuneration through levies on equipment is one possible solution. There can, in addition, be a levy on the underlying material, i.e. paper.'[1108]

Central to this study, are also issues to with copying and CMOs transparency. Given the RROs monopoly in the administration of rights, it is important to address issues of transparency, good corporate governance, and government oversight mechanisms. The IFRRO's Code of Conduct (the code) sets out standards of service that rightsholders and users can expect to receive when dealing with RROs, some of which are captured verbatim in the WIPO Toolkit setting good governance principles.[1109] The Code also promotes access to information about copyright and function of RROs promoting best practice. The Code aspires to distribute[1110] efficiently payments, and create accountable, and transparent and best practice in the conduct of RROs.[1111] The Code dovetails with WIPO Toolkit covering transparency good practice set out in Articles 9, 28, 33, 33,[1112] 45[1113], 46,[1114] 47,[1115] 48,[1116] 58,[1117] 59,[1118] 62,[1119] and 63.[1120] The WIPO Toolkit is a compilation of global examples of legislation, regulation and codes of conduct around CMOs in the management of copyright and related rights and distilled into examples of good practice.[1121] The Toolkit should guide this jurisdiction to formulate an appropriate approach in creating copyright levy transparency statutory guidelines for collective management. Adhering to such defined transparent parameters are important for the RROs in ensuring that transparency mechanisms are in place and adhered to ensure that rightsholders have the necessary information to exercise their

[1108] John-Willy Rudolph (note 1099 above) 8.
[1109] See WIPO Toolkit, 77 available at https://www.wipo.int/edocs/pubdocs/en/wipo_pub_cr_cmotoolkit_2021.pdf, accessed 26 January 2024.
[1110] Article 5, Distribution Policy.
[1111] Article 2, Representation of Rightsholders.
[1112] WIPO Toolkit, Article 33.
[1113]WIPO Toolkit, Article 45 In respect of each financial year, a CMO should distribute or make available an Annual Report to its membership well in advance of its General Meeting.
[1114] EIPO Toolkit, Article 46.
[1115] WIPO Toolkit Article 47. The financial records of a CMO should be inspected annually by at least one external auditor appointed by the General Meeting.
[1116] WIPO Toolkit 48 A CMO should maintain and publish a Distribution policy, as approved by the General Meeting.
[1117] WIPO Toolkit Article 58. A CMO should provide information to the other CMO that is complete, consistent, clear and easy to understand
[1118] WIPO Toolkit Article 59. A CMO should provide the other CMO with the most recent Annual Report and other relevant information including data-management information.
[1119] WIPO Toolkit Article 62. A CMO should, upon request, make available to the other CMO accurate and up to date documentation relating to its Repertoire, the rights which it is mandated to administer in respect of such Repertoire and the territory in which it is mandated to administer in respect of its Repertoire.
[1120] WIPO Toolkit Article 63. A CMO should provide a User/Licensee (where possible electronically) with relevant background information regarding licenses and licensing schemes, where appropriate.
[1121] WIPO Toolkit 6, available at *https://www.wipo.int/edocs/pubdocs/en/wipo_pub_cr_cmotoolkit_2021.pdf*, accessed 26 January 2024.

rights. The resultant copyright levy statutory framework will ensure that such international best practice emanating from the WIPO Good Practice Toolkit for CMOs (The Toolkit),

b.) Right to sue where applicant is domiciled

The administrative position of CMOs is central in the realisation of the authors' remuneration right given its monopoly position in ensuring efficient licensing frameworks between authors and end users. The court in the *Austro-Mechana v Amazon EU Sàrl* case held that CMOs managing copyright levies can institute litigation on behalf of authors for non-payment of royalties in their jurisdiction as opposed to where the defaulting party is domiciled.[1122] The main copyright levy administrative jurisdictional principle emerging around the concept of harm articulated by the courts followed an Austrian collecting society, Austro-Mechana suing various Amazon companies domiciled in different jurisdictions for unpaid private copying levies. The CJEU held that 'if the harmful event at issue in the main proceedings occurred or may occur in Austria, which is for the national court to establish, the courts of that Member State have jurisdiction to hear Austro-Mechana's claim.'[1123] From the foregoing, EU CMOs can bring their claims in their domestic courts rather than undergoing the inconvenience and cost of having to sue in a foreign jurisdiction. This precedent provides the CMOs administrative authority to act on behalf of authors in the realisation of their remuneration right. To realise this right, the CMOs collects the levy introduced under varying circumstances on several digital technologies that are capable of recording, storing and distribution works.

c.) Jurisdiction of courts in copyright infringement: The Austro-Mechana v Amazon EU Sarl case

Another important principle to consider emanated from the reasoning proffered by the court in the *Pinckney v Mediatech* case, wherein the CJEU confirmed that a Member State court has jurisdiction at the place where a copyright is protected and at the place where copyright material is reproduced without permission.[1124] The first scenario establishes a cause of action because such rights can be exercised in that jurisdiction where the copyright is protected, and the second scenario where the unlawful activity happened is designed to facilitate realisation of a right where copyright protection and online copyright infringement transcend national

[1122] *Austro-Mechana v Amazon EU Sàrl* Case C-572/14 (A decision of the ECJ).
[1123] Ibid. See also R Woulfe, P Bolger & R Haniver 'Ireland: IP Update: Failure to Pay Private Copying Levy Is a Tort' (2016) available at *https://www.mondaq.com/ireland/copyright/501532/ip-update-failure-to-pay-private-copying-levy-is-a-tort*. accessed 12 December 2022.
[1124] *Pinckney v Mediatech* [2013] ECR at para 26.

borders.[1125] Gillies posit that this means that both protection and online infringement can occur at the same time and in the same or different places. In the *Pinckney* case, a claimant initiated litigation in France against Austrian based defendants for breach of copyright on CDs sold online, wherein the music contained in the disks in Austria were subsequently marketed for sale in the through United Kingdom domiciled companies using Internet sites. Such cross border multifaceted exploitation of copyright content often raises complex jurisdictional issues.

4.5.3 Areas of the copyright levy application

The copyright levy is implemented in several distinct areas, some of which remain contentious despite binding ECJ interpretations. Court interventions to expand the scope of the levy application have been necessitated by lack of legislative clarity, mutating digital technologies and the manufacturers of recordable and storage devices seeking to keep their administrative burden of implementing the levy low, and distributors attempting to keep their profit margins high. There are many areas and devices covered by the levy, but this study will narrow down to at least four noteworthy distinct parts.

a.) Leviable devices

The original copyright levy introduced 1965 in Germany was on sound and video recording equipment. The same principle and approach has been followed four decades later within the EU jurisdictions which has expanded the scope of leviable devices due to new emerging digital technological devices. The levy is targeted at technology used for storing, recording and distributing works, encompassing some of which are now obsolete CDs, DVDs, memory cards, smart phones, MP3 players, hard disk DVD recorders, and cloud storage services.[1126] The Copyright Directive is not applicable to software, and game consoles are specifically excluded.[1127] There is fragmentation of levies on the recordable devices across Europe. Often, the levies are implemented in accordance with the storage capacities of the devices.[1128] For example, for devices such as MP3-players, nominal levies often depend on the storage capacity and for a 32 GB player, copyright levies range from € 1.42 in Latvia, to € 22.52 in Hungary. The incorporation of devices into the copyright levy framework has often been

[1125] L E Gillies 'Conceptualising Special Jurisdiction for Receipt Orientated Torts on the Internet: Lessons from CJEU Jurisprudence (2019). available at SSRN: *https://ssrn.com/abstract=3416218* or *http://dx.doi.org/10.2139/ssrn.3416218*, accessed 27 November 2023.
[1126] Poort (note 183 above) 3-4.
[1127] WIPO (note 1109 above) 13.
[1128] Poort (note 183 above).

determined by the EU courts with new jurisprudence being developed to determine the levy's operationalisation framework.

b.) Memory cards

The introduction of the copying levy had many unexplained grey areas which ultimately required the ECJ's regular interventions to provide legal certainty and binding interpretations that facilitated both levy payments and enforcement mechanisms. Several EU binding principles guiding the implementation of the levy were fashioned out of the *Copydan Båndkopi v Nokia Danmark* case involving the applicability of memory cards to the copyright levy.[1129] The dispute was between the Danish collecting society, Copydan and Nokia, wherein the former had argued that it was not liable for paying copyright levies as mobile telephone memory cards are rarely used exclusively for copied material which may not be lawful or authorised by the copyright holder.[1130] However, the court held that fair compensation in principle was obligatory with respect to memory cards regardless whether a medium is unifunctional or multifunctional, and whether copying capabilities are ancillary to other functions. Furthermore, it held that if it is unclear whether the media sold at the end of the supply chain is for private use and had been intended solely for business customers, and the Member States are obliged to establish a levy chargeable to the businesses but not to the private persons.[1131] The manufacturer, importer or supplier could be exempted from the levy if he proves that the supply has been made to entities for purposes divorced from private use. Nokia was eventually held liable to pay levies for the reproduction of works through memory cards which were imported and distributed in Denmark.[1132] While Member States retained discretionary powers to determine where liability applies for compensation purposes, the principle remained extant that digital reproduction equipment capable of reproduction of works for private use is sufficient justification for the levy's application.

c.) Levies are to be made only from lawful sources

Whereas the Copydan precedent was instrumental in developing principles around leviable multifunctional devices, the *ACI Adam BV and Others v Stichting de Thuiskopie* case provided clarity around the application of the levy to copies obtained from unlawful

[1129] Copydan Båndkopi Case (note 202 above).
[1130] Ibid.
[1131] See Padawan Case (note 272 above).
[1132] Copydan Båndkopi Case (note 202 above).

sources.[1133] The court held that copyright levies within EU are only applied to reproduction of copies from lawful sources. This binding EU interpretation was informed by the Berne Convention three-step test.[1134] ACI Adam, a Dutch company manufacturing importing recordable media devices argued that Stichting de Thuiskopie (SONT) - a CSO - collected levies including copies obtained from unlawful sources. The court held that Article 5(2)(b) of the Copyright Directive cannot impose on rights holders that they tolerate infringements which may accompany the making of private copies. Furthermore, it asserted that by allowing reproductions from unlawful sources, SONT was indirectly sanctioning piracy and reducing revenue from lawful sources thereby conflicting with the creator's normal exploitation of works. Prejudice to the legitimate interests of creators also arose because allowing copies from unlawful sources forced rightholders to tolerate infringements in the reproduction of private copies. As such, the court persuasively further reasoned that a levy system which does not distinguish lawful from unlawful sources fails to respect the fair balance between the rights and interests of authors and users that the Copyright Directive intends to safeguard, irrespective of the availability of TPMs.

d.) Cloud computing services

In practice, cloud services provide access and storage of portable data and are considered one of the most effective digital storage systems and software application platforms facilitating dissemination of content which include copyright works.[1135] Generally cloud computing content is deposited into a centralised database reachable to identified patrons. In another ECJ ground-breaking levy associated interpretation, the court in the Austro-*Mechana v Strato AG Case*,[1136] ruled that it is permissible to levy cloud storage services. The court held that,

> 'Member States may introduce a private copying levy chargeable to the producer or importer of the servers by means of which the cloud computing services are offered to natural persons. That levy will be passed on economically to the purchaser of such servers and will ultimately be borne by the private user who uses that equipment or to whom a reproduction service is provided.'[1137]

[1133] *ACI Adam BV and Others v Stichting de Thuiskopie and Stichting Onderhandelingen Thuiskopie vergoeding* Case C-435/12 ACI (A European Court of Justice decision).
[1134] Ibid.
[1135] Allan Paul Jackson *Legal concerns arising from the use of cloud technologies* (Unpublished LLD thesis, University of Pretoria, 2017) 245.
[1136] Ibid.
[1137] *Austro-Mechana v Strato AG Case* C-433/20. (A European Court of Justice decision).

This arose after a collecting society, Austro-Mechana had argued that the provision of storage space in the cloud from Germany to Austria constitutes a distribution of storage media in Austria and is therefore subject to the levy. The logic behind this emanates from the Copyright Directive providing that the private copying exception applies 'on any medium made by a natural person for private use,' which may entail incorporating cloud storage services.[1138] Furthermore, the court held that the levy could apply to 'all media on which a protected work may be reproduced, including servers used in the context of cloud computing.' [1139] A clear distinction was made that the private copying exception is not limited to physical means but equally applied to private copies of works stored in a cloud. The interpretation of copyright 'reproduction' – was extended to mean saving of a copy of a work in the cloud and uploading of the work conformed to storing a copy. This interpretation was dictated by the original purpose of the Copyright Directive which was designed to prevent copyright protection from being overrun by mutating technological advancements. As a result, bespoke cloud storage services levying frameworks will be determined by national jurisdictions that now have an opportunity to set up the fee to be paid by the provider who invariably passes the cost to the customer. The same approach could be initiated in this jurisdiction which is to be discussed in the forthcoming chapter dealing with the levy administration and operationalisation.

e.) Tariffs

There have been criticisms in the manner in which the copyright levies are managed by CMOs within the EU. Digital Europe recommended a more efficient system of good governance and transparency by CMOs and an accompanying objective tariff setting process that provides legal certainty for all stakeholders involved.[1140] This, notwithstanding the effect and import of Article 19 on transparency obligations, Digital Europe noted that,

> 'the current arbitrary process of deciding the applicability of levies and the tariff level is lengthy and burdensome and can take up to 10 years for an agreement to be reached. In addition, the practice in some countries of claiming levies retroactively makes it impossible to pass the levy on to the end-user, who is the beneficiary of the copyright exception as intended

[1138] Ibid.
[1139] Ibid.
[1140] DigitalEurope 'DigitalEurope calls for EU action on copyright levies' *DigitalEurope*, 24 June 2019, available at *https://www.digitaleurope.org/resources/digitaleurope-calls-for-eu-action-on-copyright-levies/*. accessed 12 December 2022.

> or to collect the documentation that is demanded by the collection societies to exculpate sales to commercial users from private copying levies (e.g. Sweden).'[1141]

There are concerns that information is also not regularly available to improve transparency levels where the end users paying the levies are not informed of reasons accounting for why they make levy payments, and the benefits derived from such payments, and the percentage of their purchase price going towards the same. There have been calls to ensure that Member States advise consumers of the levy provided in the purchase price and accompanying penalties for non-compliance.[1142] This provides the levy's operational clarity, creating a fair understanding by consumers of how much they have contributed towards the levy as a result of their private copying activities. [1143] However, the levies are not subject to Value Added Tax, and this emanating from the CJEU ruling that fair compensation does not constitute the direct consideration for any supply of services because it is linked to the harm resulting from the reproduction of the right holders' works, and therefore the copying levy should not be subject to such tax.[1144] This would be an important point to consider for a developing jurisdiction like South Africa should it, as per this study's recommendations implement the levy given its predilection towards expanding revenue streams.[1145]

4.4 GHANA'S RESPONSE TO DIGITAL DEVELOPMENTS ON COPYRIGHT

4.4.1 Ghana's copyright law regime

The Constitution of Ghana embraces a utilitarian scope that specifically guarantees remuneration for authors as an economic incentive to spur innovation. Article 36(2) provides that,

> 'The State shall, in particular, take all necessary steps to establish a sound and healthy economy whose underlying principles shall include:

[1141] Ibid.
[1142] Ibid.
[1143] Ibid.
[1144] CJEU ruled that under the VAT directive 2006/112, 2017.
[1145]Drikus Greyling 'South Africa's tax rates of the highest in the world – and should be lowered' *Daily Investor* 13 January 2023, available at *https://dailyinvestor.com/south-africa/7025/south-africas-tax-rates-of-the-highest-in-the-world-and-should-be-lowered/*. It reports that, 'In the past decade, South Africa has seen many high-net-worth individuals leaving South Africa. Many large South African businesses have also left South Africa and based themselves in more tax-friendly jurisdictions like Mauritius and The Isle of Man.'

(a) the guarantee of a fair and realistic remuneration for production and productivity in order to encourage continued production and higher productivity;
(b) affording ample opportunity for individual initiative and creativity in economic activities and fostering an enabling environment for a pronounced role of the private sector in the economy.'[1146]

The utilitarian thrust of the constitutional remuneration provision is in tandem with the Berne Convention three-step principle as it provides scope for establishment of mechanisms to provide compensation for authors for the exploitation of their works.[1147] Ghana has ratified international Internet related treaties, namely the WCT, and WPPT which are vital in establishing a framework for copyrights protection in the digital environment.[1148] Given the advent of the Internet, the ratification should influence the development of creativity within the digital environment promoting and protecting creative industries.

The background to Ghana's copyright law development is relevant to South Africa's respective copyright law growth patterns. In particular, the centrality of the colonial power Britain provides a historical reference point that significantly shaped both jurisdictions' copyright law from colonisation to independence. As a starting point, both countries' earliest copyright law was modelled around the British Copyright Act of 1911. The Act influenced Ghana's first copyright legislation, the Copyright Ordinance of 1914 [Cap 126], which was later repealed by the Copyright Act, 1961 (Act 85).[1149] Subsequent amendments were later made through the Act of 1985, which was also repealed by the Provisional National Defence Council Law (PNDC Law 110). The significance of the PNDC Law 110 is that it was considered landmark legislation because it, inter alia, generally conformed to the standards of the Berne Convention.[1150]

[1146] Art. 36(2) of the 1992 Constitution of the Republic of Ghana.
[1147] Indicate how it embraces the three-step test
[1148] WIPO 'WCT Notification No. 62 WIPO Copyright Treaty Ratification by the Republic of Ghana' *WIPO* 18 August 2006, available at *https://www.wipo.int/treaties/en/notifications/wct/treaty_wct_62.html.* accessed 17 September 2022. See also WIPO 'WPPT Notification No. 83 WIPO Performances and Phonograms Treaty Ratification by the Republic of Ghana' WIPO 16 November 2012, Available at *https://www.wipo.int/treaties/en/notifications/wppt/treaty_wppt_83.html*. accessed 17 September 2022. WCT Notification No. 62, WIPO Copyright Treaty, Ratification by the Republic of Ghana. available at *https://www.wipo.int/treaties/en/notifications/wct/treaty_wct_62.html.* See also, WPPT Notification No. 83 WIPO Performances and Phonograms Treaty, Ratification by the Republic of Ghana, available at *https://www.wipo.int/treaties/en/notifications/wppt/treaty_wppt_83.html*. The treaty will entered into force in Ghana, on February 16, 2013.
[1149] P Adusei (note 266 above) 10.
[1150] Duncan (note 293 above) 15.

The rapid technological developments of the 1990s rendered the PNDC110 obsolete prompting domestic pressures for the copyright law to conform to the international Internet copyright treaties. Of great significance to the Copyright Act 2005 and its implementing regulations [1151] are the provisions which are considered novel in the administration of copyright,[1152] encompassing enhanced economic rights for copyright owners, performers, stiffer penalties for copyright infringement, a liberalised collective management system and institutionalised levy on devices used for copying copyright protected works, and the establishment of the Copyright Monitoring Team and Copyright Tribunal to adjudicate royalties disputes and voluntary registration of copyright.[1153] Basically, Ghana was through the Act introducing global standards applied within the EU to provide further protection for works emerging in the Digital Age. [1154] Ghanaian authors under section 5 of the Act are provided with scope for monetisation of their work and accompanying exclusive rights and reproduction of the work, including moral rights.[1155] Private copying exceptions exist under sections' 19 to 23 of Act 690 with permissible uses for private and personal purposes, teaching, research and current news reporting.

4.4.2 Private Copying levy

a.) Background to Ghana's copying levy

The first introduction of a copyright levy begun in 1988 with a 40 percent levy on imported blank cassettes and was distributed to authors as compensation for what was referred to as 'home taping piracy losses.'[1156] While in the EU jurisdiction the copyright levy is linked to private copying exceptions, Ghana's levy was linked to rampant piracy which was affecting rightholders' remuneration. This obviously creates some confrontation with the legal reasoning proffered in the *ACI Adam BV v. Stichting de Thuiskopie*, case that while reproduction of private copies using digital devices for private use is allowed, it may not be allowed if copies are made from unlawful sources. Therefore, it is recommended that a copying levy system must make a distinction between reproduction from a lawful source and

[1151] Copyright Regulations, 2010 (L.I. 1962). Act 690.
[1152]South Africa Copyright Act 1978 s 21, is similar to Ghana's Copyright Act of 2005 (Act 690) with its expanded scope for copyright protection under Section 1 of Act 690.
[1153] Duncan (note 293 above) 16.
[1154] Copyright Act 690 of 200 s 13,
[1155] Act 690 and Duncan (note 277 above) 18. Similarly see s 20 of South Africa's copyright Act which provides that credit to works of an author as a right must be given, and it applies to literary, musical and artistic works, cinematograph films and computer programmes, but excludes sound recordings, broadcasts and published editions. It also a right to paternity and the right to integrity of the author's work.
[1156]Collins (note 899 above) 5.

unlawful source.[1157] The Ghana government further in 1992 introduced the anti-piracy banderole stamps which were affixed to every cassette, CDs and VCRs. This reportedly reduced piracy from 90 to 15 percent.[1158] Piracy is regarded as one of the complex problems affecting copyright holders' remuneration in Ghana and this perhaps explains why it cannot be delinked from the levy. Piracy is however predictable given that Ghana has a diverse arts and cultural heritage providing a reservoir for blending and assimilation of various ethnic groups that provide unique creative works which are sadly, in some cases subject to indiscriminate copying.[1159] Adams writes that after 2009 piracy worsened in the main urban centres affecting the commercial sales of legitimate works on the formal market.[1160] She writes that, 'the literary industry has also been pirated across the borders. This problem has been compounded with advancement in technology which makes it easier for copyrighted works to be copied and pirated unimpeded by time, space and boundary.'[1161] Beukelaer also confirms this pointing out that the advent of digital technologies facilitated extensive piracy that made similar products cheaper and easily assessable.[1162] While the digital technology's disruptive phenomenon in the form of USB sticks, MP3-players, bluetooth-enabled smartphones, and YouTube streaming of music have eroded weak distribution networks, Beukelaer adds that piracy can be attributed to the global shifts in technology now offering new opportunities, challenges, prompting legal interventions and strategies.[1163]

In Ghana the introduction of the copyright levy is linked to both development of digital technologies and fight against piracy. Nonetheless, the levy and piracy are informed and regulated by totally separate legal foundations. The copyright levy is designed to compensate authors for private copying under a private copying exception. It is unrelated to piracy, which is often attracts criminal sanctions. Several jurisdictions that had previously used private copying levies mechanisms to create compensation deriving from online piracy have since discontinued this practise as a result of a precedent set by the ECJ.[1164] The dangers

[1157] ACI Adam BV case (note 181 above). The court held that a national law or legal system of a Member State must differentiate between private use copies from lawful and unlawful sources in line with the strict interpretation of the Copyright Directive.
[1158] Ibid.
[1159] Duncan (note 293 above) 10.
[1160] S Adams *Intellectual property rights and copyright protection in Ghana* (2018) para 2.10.5
[1161] Ibid.
[1162] Christiaan Michael De Beukelaer *From Cultural Development to Culture for Development: The Music Industries in Burkina Faso and Ghana* (Unpublished PhD thesis, University of Leeds, 2015) 109.
[1163] Ibid.
[1164] See ACI Adam BV Case (note 181 above).. The Neatherlands legislation legalised the financing copyright levies and remunerating rightsholders from illegal sources. This has been discontinued; see https://radiobruxelleslibera.com/2014/04/10/piracy-and-private-copy-levy-the-european-court-of-justice-makes-

of using levy from unlawful sources are that it blurs the difference between legal and illegal content, and indirectly legitimises illegal conduct. Besides it conflicts with the purpose behind the introduction of the levy and moreso, 'it creates a contradiction [in that]. if pirated content is illegal it should be stopped, not remunerated, both things together are not possible.'[1165] This distinction eluded both legislators and governments who erroneously believed combining the levy with piracy would help stop and channel piracy funds into the mainstream economy and remunerate rightsholders. Copyright levies lawfully cohabitate private copy exceptions that only encourage lawful reproduction of private copies for non-commercial purposes. Legalising illegal content and funds emerging from the same will sanitise the piracy business, and such illicit activities will blossom. From a public policy perspective, this must be discouraged. However, Ghanaian scholars write that the copyright levy was introduced as a solution to, and also help reduce the devastating effects of piracy.[1166] Scholars Beukelaer and Fredriksson also link piracy to private copying and further illustrate the hopelessness of fighting piracy in Ghana in their research on the political economy of IPRs. Given the extent of the unavoidable unlawful copying or piracy, the authors progressively arrive at the same statutory resolution this study is propagating which is that

> 'the solution is probably less glorious than hoped for: a levy on all blank discs (as is the case in Burkina Faso), USB-sticks, and smartphones and a sincere attempt to turn the 'illegal' street vendors into 'legal' entrepreneurs by creating either a blanket fee for street vendors (akin to the attempt to regularise cassette sales in the 1980s), a digital platform that tracks sales, or unique download codes (following the model of phone credit). Such measures may not eradicate piracy at once, but no single measure will. This is not a romantic argument, but a pragmatic one: With the rise of digital piracy, history is merely repeating itself, since "constructing the unauthorized commercial copying of music as piracy destroyed the beginnings of a vibrant local music production industry [in the 1980s]."'[1167]

The reasons advanced by the authors' necessitated debate around levying digital devices to provide compensation frameworks for authors given the challenges associated with

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an-important-ruling/, accessed 26 January 2024. See also International Survey on Private Copying Law & Practice 2015(2015) 120, available at https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1037_2016.pdf, accessed 26 January 2024.

[1165] Innword 'Piracy and private copy levy: the European Court of Justice makes an important ruling'WordPress.com blog, 10 April 2014, available at *https://radiobruxelleslibera.com/2014/04/10/piracy-and-private-copy-levy-the-european-court-of-justice-makes-an-important-ruling/* accessed 26 January 2024.

[1166] Collins (note 899 above) 5.

[1167] Ibid.

monitoring and enforcements of private home copying of works. Developments in neighbouring Burkina Faso were also compelling after a copyright levy was introduced efficaciously providing royalties to authors.[1168] While Ghana's creative content is rich in books, music and films, paintings, and crafts, it also imports recordable technological goods and devices which are available albeit at higher prices. The digital devices also originate from South Africa and have an impact in private copying. The introductions of TPMs have not proved useful to combat unlawful online exploitation of works either. Sections' 42 and 43 of the Copyright Act provides for TPMs anti-circumvention and penalties for circumvention related offences. Adusei argues that protecting online copyright content through TPMs is difficult to develop and maintain and the downside of using TPMs to protect copyright works could hinder certain uses which were originally non-infringing.[1169] This provided a sound justification for the introduction of the private copying levy. As a result, authors pressured the government to enact legislation that guarantees an alternative compensation scheme to provide remuneration relief against private copying. The Ghanaian government subsequently introduced the Copyright Act, 2005 (Act 690), which imposed a copyright levy on devices used for reproducing copyright works and collected by the Ghana Revenue Authority (GRA). The Copyright Regulations, 2010 (L.I. 1962) set out the leviable devices and the procedure for the distribution of royalties. Currently, the levy constitutes the largest source of income for the CMOs in Ghana.[1170] Already, there is growing literature favouring levy-based statutory licenses for private digital copying.[1171]

Ghana carries a private copying exception with accompanying private copying levy paid for the lost sale. The levy tariffs for recordable devices are set at 20 per cent of the total cost of insurance, freight and value of the devices to benefit rightsholders of music, audio-visual, and literary works, targeting manufacturers and importers.[1172] The copyright levy or blank tape levy as it is known is provided for under Article 27 of the Copyright Act 2005 (Act 690) which imposes a levy for reproduction of copyright works by recordable electronic devices.[1173] The reproduction exception has the same parameters set out under the EU

[1168] See Burkina Faso 'Trade Policy Review' (2005) WTO available at *https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/TPR/S236-03.pdf&Open=True*. accessed 7 July 2023.
[1169] P Adusei 'Cyberspace and the dilemma of traditional copyright law: an assessment of the impact on the legal community' (2004) 22 *University of Ghana Law Journal* 202.
[1170] Duncan (note 293 above) 50.
[1171] CISAC (note 159 above) 8.
[1172] Ibid at 120.
[1173] Ghana's Copyright Act, 2005 (Act 960), s 27—Levy on devices used for reproducing copyright materials.

Copyright Directive, which provide for copying exceptions to facilitate the use of protected content in certain circumstances. The scope of the exceptions largely mirror the body of EU Copyright Directives, where a mandatory exception to the right of reproduction for certain temporary acts to facilitate lawful copying by private persons for private use. Section 19 of the Copyright Act provides for compensation in return for private copying, and the exceptions are further extended under section 20 and 21, to provide for permitted use for other purposes such as personal purposes, quotation, teaching, media use and the reproduction of a single copy.

While the Ghanaian copyright Act has not identified the exceptions as either fair use or fair dealing, scholars note some resemblances of the captured exception with the the Anglo-Saxon copyright jurisprudence. This is so because in certain instances the Actn Act specifies that a permitted use 'is subject to the use being compatible with fair practice.'[1174] However section 19 while it restricts copying for personal use, it does not however, permit the reproduction of a whole or a substantial part of a book, without providing guidelines on what constitutes substantial copying.

The scope of the exceptions and limitations to copyright are narrower than the EU Copyright Directives. There is still need for improvement of its exceptions framework under public interest considerations applicable under the EU. Similarly, Ghana under section 19 of the Act provides for permitted use of work protected by copyright in relation to use of a literary or artistic work either in the original language or in translation. Echoing the EU private copying exception, it provides under section 19(1)(a) for the reproduction, translation, adaptation, arrangement or other transformation of the work for exclusive personal use of a person, if the user is an individual and the work has been made public. This is not covered under reprographic reproductions, the whole or a substantial part of a database in digital form and a computer program. Section 21 provides for permitted use of protected copyright work by library and archives. The reproduction must solely be for study, scholarship or private research. Unlike the EU copyright directives, Ghana's copyright exceptions scope regrettably fails to provide provisions for the user exceptions of caricature and parody. Under public interest considerations, the Act ill-advisedly fails to address the user exceptions of criticisms and reviews. This unfortunately limits the exercise of free speech expression as end users' legitimately interacts with online content under public interest considerations. This is

[1174] E M Darkey & H Akussah 'Academic Libraries and Copyright Issues in Ghana: The University of Ghanain Focus' (2008) *International Journal of Legal Information* : Vol. 36: Iss. 3, Article 5.

important because Ghana is listed has having some unfavourable restrictions on uses of works, as opposed to other jurisdictions which are most open to text and data mining research.[1175] South Africa, seeking to draw lessons on the levy implementation from Ghana has ironically most open exceptions.[1176]

a.) Application of copying levy in Ghana

The copyright levy targeted devices are those which are essentially capable of storing and copying copyright works,[1177] falling within the same EU framework for similar applicable gadgets.[1178] This includes devices capable of storing, reproducing or disseminating works, either manufactured in Ghana for export, or imported into the country. The regulations set out a number of leviable devices but tactlessly omitted mobile phones which could be generating significant remuneration for rightsholders.[1179] Statistics show that in the third quarter of 2021, 99.7 percent of internet users in Ghana aged 16 to 64 years owned a mobile phone.[1180] This is surprising given that the minister has powers under regulations 15(f) to expand the scope of targeted devices. This has justifiably provoked artists to agitate for expansion of the leviable list to include mobile phones.[1181]

A manufacturer or importer of any of the specified devices shall after every three months intervals beginning the 31st of March of every year send a copy of the statements of accounts to an authorised officer within the revenue collection department.[1182] Progressively, institutions representing disabled persons are exempted.[1183] This is in line with the Marrakesh treaty obligations in which similarly jurisdictions like the EU and Ghana ratified in 2018. Another crucial aspect is the visibility consideration in which manufacturers and distributors

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[1175]S Flynn M Palmedo & A Izquierdo 'Research Exceptions in Comparative Copyright Law' (2021) *PIJIP/TLS Research Paper Series* No. 72 29.
[1176] Ibid.
[1177] Regulation 14 & 15. Copyright Regulations, 2010 (L.I. 1962).
[1178] CISAC (note 159 above) 10.
[1179] Copyright Levy Regulation 15—Devices to be levied For the purpose of regulation 14.
[1180] Doris Dokua Sasu 'Ownership rate of selected digital devices in Ghana 2020-2021' *Statistica* 12 April, 2022.available at *https://www.statista.com/statistics/1171486/ownership-rate-of-selected-digital-devices-in ghana/#:~:text=In%20the%20third%20quarter%20of,17.8%20percent%20owned%20feature%20phones.* accessed 3 May 2023.
[1181]Erica Nana Arthur 'Papa Owusu-Ankomah shocked over Stonebwoy's GHC2k royalties' *Ghana/Starrfm.com.gh/103.5FM*/ 27 August 2021. available at *https://starrfm.com.gh/2021/08/papa-owusu-ankomah-shocked-over-stonebwoys-ghc2k-royalties/*. accessed 9 February 2023. It reported that, 'The royalties system is not too easy to put up, the blank levy isn't working out, because nobody is using CDs any longer, nobody is using cassette and the importation is minimal or absent, now we are into pen drives, phones and hard disc etc., and the law hasn't been amended to include those, so those monies we are not getting,'
[1182] Regulation 16(3) Copyright Regulations, 2010 (LI.1962).
[1183] Regulations 17(1) (b) Copyright Regulations, 2010 (LI.1962).

are obliged to place levy on invoices. Ghana's copyright law regime regrettably does not provide for a provision that places obligations on manufacturers to place the levy on the invoices. The EU provides transparency mechanisms that ensure that consumers are aware of the levy provided in the purchase price.[1184]

GHAMRO represents musicians' interest[1185] and its major role is to distribute needletime royalties and the copyright levy. Commendably, GHAMRO has come up with a system called AGRIMS (Age, Right holders Monthly Stipend) which supports retired authors incapacitated from crafting creative content by old age.[1186] The Reprographic Rights Organisation of Ghana (CopyGhana), which is involved in the management of literary works,[1187] raises its royalties through licensing reprographic rights and digital copying to protect the professional and economic interests of members.[1188] Reprographic rights licensing frameworks are an attractive source for guaranteeing remuneration rights worth considering in this jurisdiction. Copy Ghana has successfully negotiated with four private universities to charge about US$4 per annum per student as fees for a blanket royalty scheme.[1189] This is an alternative remuneration stream applied within the EU,[1190] from which this jurisdiction could draw lessons. Research work on the functions of African RROs has revealed that Ghana is among many countries with weak areas in the implementation of the WIPO's Toolkit best practices.[1191] This is an opportunity for a mandated CMO in this jurisdiction to manage the copyright levies in such a manner as it ensure that the management systems comply with international best practice, drawing from system failures in Ghana. The operator levy in Ghana is paid by large-scale users, such as schools, universities, research institutes and copy shops and the tariffs are on both the equipment levy and the operator levy are determined in the legislation.[1192] Ghana is required by law to submit annual reports to its members and the Minister, but research findings show that no information on this is available. However, the first distribution of CopyGhana royalties was in 2012 and the last was in 2020, with no

[1184] DigitalEurope (note 840 above).
[1185] Ghana Music Rights Organization (GHAMRO) is the collective administrative society that is statutorily mandated, by virtue of section 49 of 690 and L.I. 1962 to collect and distribute royalties accruing to beneficiaries.
[1186] ARIPO *Comparative Study on Copyright Laws of ARIPO Member States and their Adherence to International Instruments on Copyright and Related Rights* (2016) 10.
[1187]GHAMRO (note 1185 above).
[1188] Ibid.
[1189] Ibid.
[1190] *Verwertungsgesellschaft Wort (VG Wort) v Kyocera & Ors* C-457/11 to C-460/11 (A decision of the ECJ).
[1191] D O Oriakhogba & D Kawooya (note 825 above) 2. Authors write this excludes a few countries, notably Botswana, Cameroon, Côte d'Ivoire, Malawi, Senegal, and South Africa.
[1192] The German RRO, Verwertungsgesellschaft WORT, collects the levy on behalf of all authors and publishers of different types of materials.

available figures to explain the eight year period it has not submitted.[1193] Besides, there is evidence of growing domestic interest in the state of RROs in Africa, in terms of their effectiveness, given their role in improving the livelihoods of a critical constituency in the implementation of IPRs.[1194]

While the EU has expanded the scope for remuneration streams in the digital era to include cloud computing services, Ghana is yet to consider this approach. This is also crucial for Ghana in expanding its remuneration and compensation streams for its authors, as it did with levying reprographic rights. Ghana's Constitution expressly guarantees a fair remuneration right, but it has not expressly entrenched intellectual property law rights as part of fundamental rights provisions. This is important in safeguarding IP as a property right as new global technologies emerge threatening copyrights. Several jurisdictions have pursued this approach in developed and developing economies such United States,[1195] and Kenya.[1196] In its current form, Kenya's Constitution is regarded as 'one of the best in the world in terms of the attention it pays to IP … the concept of IP in Kenya is now at the heart of a number of policy and legal frameworks in both the public and private sectors.'[1197] Constitutionalising IP property in both Ghana and South Africa should be followed because such recognition already exists under international law,[1198] and the growth of the IP industry, innovations, Internet and piracy demands such constitutional recognition to adequately insulate the remuneration right of authors.

a.) Development of Ghana's IT industry

The success and implementation of the copyright levy is predicated upon the growth of Ghana's IT industry and accompanying national policies. Ghana is making a huge transition into developing ICTs with industry experts estimating that the ICT sector in Ghana currently

[1193] D O Oriakhogba & D Kawooya (note 825 above).
[1194] WIPO Report on Regional Seminars and International Conference on Limitations and Exceptions (September 2020: SCCR/40/2) 73, available https://www.wipo.int/edocs/mdocs/copyright/en/sccr_40/sccr_40_2.pdf , accessed 29 May 202.
[1195] Copyright clause: Art. I, s 8, Clause 8, of the United States Constitution.
[1196] The Constitution of Kenya, 2010. Art. 11(2) & 40(5).
[1197] Festus Mbuimwe 'Strengthening Kenya's IP Landscape' (2016) *WIPO Magazine*, August 2016. available at *https://www.wipo.int/wipo_magazine/en/2016/04/article_0007.html#:~:text=Kenya's%20leading%20IP%20institutions&text=Intellectual%20property%20is%20given%20high,the%202001%20Industrial%20Property%20Act.* accessed 9 September 2022.
[1198] Art. 27(2) of the Universal Declaration of Human Rights provides: 'Everyone has a right to the protection of the moral and material interest resulting from any scientific, literary or artistic production of which he is the author.'

valued at about $1 billion and may reach $5 billion by 2030.[1199] In 2016, Ghana produced a IPRs policy and strategy, the Intellectual Property Policy and strategy (NIPPS) to foster innovation and technology transfer, and enhance the country's competitiveness through exploitation of IPRs accelerating economic growth.[1200]

The digital private exploitation of creative content without compensation for producers hastened the introduction of Ghana's blank tape levy, and South Africa for the advantages to be highlighted in the forthcoming chapters should follow suit. While the operationalisation of the levy is key to understanding how Ghana managed to increase its creative content producers' remuneration streams, its role in IT sector development to leverage support for its industry is important. Of late, Ghana has been building its IT sector, producing copyright and tech-focused products and services that are fuelling growth.[1201] This comes against the background of the opening in 2019 of Google's first African Artificial Intelligence (AI) laboratory in Ghana,[1202] and Twitter's establishment of its African headquarters creating a regional IT hub.[1203] Ghana has strategically oriented its strategic growth path towards innovation and start-ups.[1204] South Africa's IT policy trajectory is similar, with big tech companies making huge investments projections that could also influence copyright industries growth patterns.[1205] As earlier indicated, the unfortunate scenario is that Ghana, unlike the EU has not extended its copyright levy to mobile phones. It should maximise on the growth of mobile services penetration to boost private copying levy remuneration. South Africa should monitor and draw lessons given that its infrastructure is growing, with telecoms giant, the MTN Group aiming to provide 4G coverage to 98% of the country by the end of 2022.[1206] While exploring how the political and economic policies of Ghana inform the development of cultural creations, the fundamental objective remains

[1199] United States International Trade Administration 'Ghana - Country Commercial Guide' (2022) *USITA* 22 July 2022, available at *https://www.trade.gov/country-commercial-guides/ghana-information-and-communications-technology-ict.* accessed 25 April 2023.
[1200] Ghana Business News 'Ghana develops first National Intellectual Property Policy' *Ghana Business News*, 17 May 2012. available at *https://www.ghanabusinessnews.com/2012/05/17/ghana-develops-first-national-intellectual-property-policy/*. accessed 7 December 2022.
[1201] Ibid.
[1202] Aanu Adeoye 'Google has opened its first Africa Artificial Intelligence lab in Ghana' *CNN*, 16 April 2019, available at *https://edition.cnn.com/2019/04/14/africa/google-ai-center-accra-intl/index.html*, accessed 5 February 2025.
[1203] Ijeoma Ndukwe 'Ghana basks in Twitter's surprise choice as Africa HQ' *BBC Business*, 25 April 2021, available at https://www.bbc.com/news/world-africa-56860658, accessed 5 February 2025.
[1204] Ibid.
[1205] Loni Prinsloo 'Google to Build South African Cloud in $1 Billion Africa Plan' *Bloomberg*, 5 October 2022, available at *https://www.bloomberg.com/news/articles/2022-10-05/google-to-build-south-african-cloud-in-1-billion-africa-plan?leadSource=uverify%20wall*. accessed 6 February 2023.
[1206] Ghana Business News (note 1143 above).

addressing problems around remuneration rights and evaluating the solutions utilised in the country. The highlights of such technology oriented policy thrust are informed by tapping into the benefits of technology through levying devices. Should South Africa introduce the levy, the rightholders would immediately embrace the benefits of technology. But importantly, unlike Ghana, it should not miss the benefit of levying mobile phones should it embrace the copyright given that its mobile penetration rate and Internet usage is far greater than Ghana.[1207]

b.) Management of copyright levy in Ghana

The department of Customs & Excise is responsible for the levy collections and distributions to a specified fund or account directed by the minister. The Act provides that the fund shall be subject to an annual audit by the Auditor-General or an auditor appointed by the Auditor-General, whose audit report shall be submitted to the minster and the CMOs established under section 49 of the Act, before the levy is distributed to the rightsholders. The auditing processes and production of the audit report is not an entirely independent process, with the minister directing where the funds are deposited and audited before distribution to beneficiaries by a mandated collection society. The CMOs only have access to the final audit report produced by the Auditor-General appointed by the minister operating within the state administrative frameworks. Historical lessons suggest that the Copyright Society of Ghana (COSGA), the first CMOs in Ghana failed because it was not independent, and transparent with no regulatory oversight while operating under direction and control of the government.[1208] In Ghana, transparency challenges in the distribution of levy are a source of frequent friction between government, CMOs and rightsholders. The royalty management challenges facing Ghana's authors against CMOs are an all-familiar management and transparency concerns identified in other African jurisdictions, namely South Africa, Kenya,[1209] and Tanzania.[1210] The last two jurisdictions are however not part of the study to

[1207] See Simon Kemp 'Digital 2023: South Africa' *Datareportal.com*, 13 February 2023. available at *https://datareportal.com/reports/digital-2023-south africa#:~:text=Mobile%20connections%20in%20South%20Africa%20in%202023&text=GSMA%20Intelligence's%20numbers%20indicate%20that,percent)%20between%202022%20and%202023*, accessed 27 November 2023. It reports that digital statistics showing South Africa having 43.48 million Internet users by January 2023, representing an Internet penetration rate stood at 72.3 percent of the total population with 25.80 million social media users , and a total of 112.7 million cellular mobile connections active in the same period representing 187.4 percent of the total population

[1208] C De Beukelaer & M Fredriksson 'The political economy of intellectual property rights: the paradox of Article 27 exemplified in Ghana' (2018) *Review of African Political Economy* 4.

[1209] V Nzomo 'Music, Money and Middle Men: Changing Dynamics between Collecting Societies, Rights Holders and the Public' (2016) *Strathmore University, Centre for Intellectual Law, and Information Technology*

draw lessons but are following in Ghana's legislative footsteps in introducing the copying levy.[1211]

Ghana's CMOs are mandated under section 27(7) of the Act to distribute the royalties twice annually to beneficiaries.[1212] Ghana's musicians had problems with their CMOs over non-accountability and transparency concerns, following litigation which sought the dissolution of GHAMRO's interim board after allegations that over Cedi 1 million (local currency) was misappropriated, leading to a court judgment that dissolved its interim board.[1213] While the transparency obligations exist in the copyright framework, there are no adequate background checks of people who sit in the management of CMOs before and after registration. For several years Ghanaian artists have been complaining about CMOs not enforcing the royalties' collection law, although their songs are registered.[1214] The other concern is that Ghanaian music industry is not consistent in effective organisation, and that me musicians end up resigning from the system creating a dysfunctional music industry that cannot voice concerns against misappropriation of funds.[1215] Another factor to consider is that there is a clear infrastructural problem that makes revenue streams quite narrow and artists end up not having sufficient returns from their investments.[1216] For South Africa, transparency obligations must be followed by a robust and efficient representational music industry that effectively champions their remuneration interest.

c.) Copyright levy transparency obligations

Part of the fair remuneration right salient features is ensuring transparency in the administration of royalties for copyright holders by CMOs, which is aptly captured in Article 19 of the EU Copyright Directive. However, Ghana copyright law regime doesn't have equivalent and comprehensive transparency obligation provision. Section 17 of the Act only

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Law, 22 available at *https://cipit.strathmore.edu/music-money-and-middle-men-changing-dynamics-between-collecting-societies-rights-holders-and-the-public/.* accessed 10 September 2022.

[1210] The Creative Industry Network Tanzania 'Artists call for fair distribution of royalties according to the law' Press Release, 19 February 2022. available at *https://twaweza.org/wp-content/uploads/2022/02/RoyaltiesPressRelease18022022-FINAL.pdf.* accessed 25 September 2022.

[1211] See also Kenya's Copyright Act, 201. Chapter 130, s 28. See Joyous Edifonce (note 101 above).

[1212] Ibid.

[1213] J Baloyi & Pistorius T 'Collective Management in Africa' in Daniel Gervais (eds) *Collective Management of Copyright and Related Rights* 3 ed (2015) chap 12.

[1214] O M Acquah & M Acquah-Nunoo 'The state of royalties in the music industry in Ghana' (2021) 2:2 *QJSSH* 66.

[1215] Ibid.

[1216] Ibid.

provides an annual auditing framework without a detailed manner in which the copyright holders can access the results. It provides that,

> '(4) The levy shall upon collection by the Customs, Excise and Preventive Service be deposited in a fund established for the right holders by the Minister.
> (5) The fund shall be subject to an annual audit by the Auditor-General or an auditor appointed by the Auditor-General.
> (6) The Auditor-General or an auditor appointed by the Auditor-General shall submit the audit report to the Minister and the appointed collective administration society established under section 49 of this Act.
>
> (7) The Minister in consultation with the executive officers of the appropriate collective administration society shall cause the distribution of the levy to the right holders.'[1217]

The Act doesn't provide for an audit meeting between respective stakeholders to assess the collections and distribution of the royalties. The audit report produced by a government appointed Auditor General as provided for within the Act is simply submitted to the Minister and CSOs without any oversight from the authors. For South Africa, there is need to delink government interventions in the management of the copyright levy by the CMOs. It is recommended that Customs must distribute the funds directly to the mandated CMO to cut on bureaucracy, and promote efficiency in the management and distribution of the funds. The government must however retain its regulatory oversight and registration responsibilities. Beukelaer and Fredrikssson make an observation that,

> 'copyright revenues across African countries are both limited and hard to gauge. There is a regulatory context that exists on paper, but it does not sufficiently nor adequately capture and reward the use of copyrighted works. Where [CSOs] exist, they do not always communicate their revenues, operating costs and payments in a transparent and accountable manner.'[1218]

This has affected the ability of authors to monitor and have proper assessment of their creative content's commercial success. Despite some musicians work receiving significant airplay, which often enhanced their popularity levels the royalties distributed was not consistent with such fame and corresponding success of the work.[1219] This is illustrated by an

[1217] Ghana's Copyright Act s 17(4)-(7).
[1218] Beukelaer & Fredriksson (note 1208 above) 4.
[1219] Ibid.

open letter penned to the President of Ghana, Nana Akufo-Addo by a popular musician Terry Asare Boamah providing insights into the artists' predicament. Boamah highlighted that,

> 'Ghanaian musicians don't get what is rightly due us in royalty because Ghamro, the body in charge of this claims they do not have what it takes to operate properly. Though they always speak of being a private entity, they have on numerous occasions accused the government of not helping them achieve what they have to do. They may be right in a way because, in your last manifesto, the government promised to put in measures to make royalty collection in terms of airplay viable. No action yet! Mr. President, I know the government gives Ghamro monies (blank levy) to be disbursed amongst musicians, etc., please when was the last time the government checked to see if these monies are even going to the right owners? For how long can musicians rely on the blank levies, which in itself declines year in year out? And need I mention the blanket royalties the media houses pay?'[1220]

This underscored artists' predicament proves that mere provision for a copyright levy does not always correspond with realisation of an elusive remuneration right. There is need for transparency, improved management oversight, and an effective music industry. Another artist, rapper Guru, quoted in a Musik Africa website report also criticised the country's music industry's royalty structure.

> 'If you can go round and collect royalties in my name and you cannot give it to me, then you have committed a crime … The taxes and monies being collected from hotels, pubs and other places are collected in my name, but I don't get it. Music is one business that can fetch you money overnight. I get paid daily due to streaming, but our royalties' system is wrong.'[1221]

It is against the background of such concerns that GHAMRO Chairman Rex Omar revealed that his organisation was revamping the royalty collection system through collaboration with an Irish company to put software that locate and identify songs played on the broadcasting channels, and create a new payment system that facilitate effective realisation of the remuneration rights. The software will provide requisite information around the,

> 'name of the artiste, the time it was played, how long the song was played, the radio station that played the song and every other detail… the system will aggregate the number of songs

[1220] Terry Asare Boamah 'Our acts, our arts and the act! An open letter to President Nana Akufo-Addo'*GH Headlines*, 28 January 2021 available at *http://www.ghheadlines.com/agency/citifm/20210128/143354126/our-acts-our-arts-and-the-act-an-open-letter-to-president-akufo-addo-article.* accessed 11 August 2022.
[1221]Gabriel Myers Hansen 'Ghana: GHAMRO announces dates for distributing royalties' *MusikAfrica* 22 December 2021 available at *https://www.musicinafrica.net/magazine/ghana-ghamro-announces-dates-distributing-royalties.* accessed 11 August 2022.

> of each registered artiste that were played and then from the logging, we know which artistes to pay and how much to pay them…. [and] the number of songs from an artiste that is played will determine how much money they will earn as royalties.'[1222]

This new digital system is similar to the software applied within EU jurisdictions, particularly in the Netherlands by SONT, a collection society.[1223] If operated efficiently, it can deliver positive copyright levy results. While this approach might have been long overdue, GHAMRO signed a deal with a new digital royalty collection body, CAPASSO aimed at digitalising its operations to facilitate realisation their remunerations rights.[1224] In an interview with JoyNews, Omar explained that this deal ensured that GHAMRO provided monitoring systems that tracked songs of Ghanaian right owners on digital platforms.[1225] However, the efficiency of this new approach and operationalisation is still to be tested.

4.4 CONCLUSION

This chapter provided a historical background to the global development of the copyright levy. The foundation Germany laid towards the development of the levy provided a useful baseline towards its enactment across the globe. There is obvious need to draw lessons in its implementation within the EU and Ghana and help inform the operationalisation of a similar durable and robust copyright levy within the South African jurisdiction. At the crux of the matter was how both regions introduced the levy which has become a durable apparatus for compensating authors for the harm arising from copying exceptions and lost sales. The levy's implementation within both the EU and Ghana is however not without challenges. Despite the levy's operationalisation, authors in Ghana are still crying foul over its administration. Ghana's drawbacks remain around the management of royalties, which as previously suggested, could be addressed through incorporation of effective transparency obligations without intruding government oversights, and tight CMOs registration and licensing statutory frameworks. However there is still scope for more lessons to help develop a more effective

[1222] J Baloyi & T Pistorius 'Collective Management in Africa' in Daniel Gervais (eds) Collective Management of Copyright and Related Rights 3 ed (2015) chap 12. See also Beukelaer & Fredriksson (note 1149 above) 4.

[1223] SONT Decree on Private Copying Levies 2023 – 2024, available at *https://www.onderhandelingthuiskopie.nl/About-the-SONT,* accessed 5 February 2025, The Stichting Onderhandelingen Thuiskopievergoeding (SONT) (Foundation for Private Copying Levy Negotiations) in the Netherlands is charged, pursuant to Section 16e of the Copyright Act and Section 10(a) of the Neighbouring Rights Act, with determining the amount of the private copying levies as referred to in Section 16c of the Copyright Act.

[1224] Gabriel Myers Hansen 'Ghana: GHAMRO announces dates for distributing royalties' *MusikAfrica* 22 December 2021 available at *https://www.musicinafrica.net/magazine/ghana-ghamro-announces-dates-distributing-royalties.* accessed 11 August 2022.

[1225] Ibid.

levy that creates additional benefits for authors. It is noticeable that several African jurisdictions are also due to operationalise the levy. Such adoptions depict its global success, as a practical remedy to the current digital challenges.

The EU and Ghana's approach to implementation of the levy's fair compensation features differs, but lessons drawn demand that should South Africa attempt to introduce the same, a careful approach that take into considerations its peculiar socio-economic environment should apply. Given the technological advancements that have occurred over the years, the EU legislation has been modified and or developed to address the arising legal lacuna and uncertainty. This has been assisted through the EU's preliminary opinions which have been useful in providing legislative clarity. As new technologies emerge, copyright law has persistently adapted to address the exigencies of the Digital Age, with new precedents evolving providing expedient guidelines for stakeholders. This remains copyright law's developmental drift as the world adjusts to new competing technologies providing complex contests around the digital exploitation of creative works. This is how both the EU and Ghana's copyright laws have adapted to changing technologies.

CHAPTER 5

RATIONALE FOR A PRIVATE COPYING LEVY IN SOUTH AFRICA

5.1 INTRODUCTION

This chapter provides the justifications for a private copyright levy enactment in South Africa. There are several motivating factors which are of a legal nature, accompanied by economic incentives considerations grounded on utilitarianism, and the complexities of the Digital Age that have facilitated a ubiquitous online availability of copyrightable content, its inevitable seamless and easy unauthorised appropriation, reproduction, and distribution. The legal impracticalities of enforcing the authors' reproduction rights, and the need for a private copying exception in return for compensation arising from a private copying associated harm inform the thrust of a practical, manageable copyright levy framework that ensures a fair balance of rights between rightsholders and end users. Its durability, as an effective answer to the remuneration challenges created by the digital age, persuasively provides some animation for its introduction. While the thrust of this chapter is to provide the rationale for the levy's introduction, there is need to provide a historical context to what informed its abortive historical developments in this jurisdiction, so that lessons can be drawn from the previous setbacks.

5.2 SOUTH AFRICA PRIVATE COPYING LEVY HISTORICAL DEVELOPMENTS

Since the early 1990s, several South Africa government appointed commissions set up to investigate the remuneration plight of copyright holders' have insistently recommended the introduction of a 'blank tape levy' or 'private copying levy' - following controversy over the effect of recordable blank tape cassettes on the authors' exclusive rights.[1226] Nonetheless, not much public debate and government copyright levy considerations have been evident to lay the groundwork for its implementation,[1227] which explains the objective of this study in providing a levy that responds to Digital Era challenges broadening the remunerations streams for the authors benefit. The government since the 1990s to date has not executed its own appointed commissions' recommendations for the levy's introduction.

The November 1993 Advisory committee on the 'Copyright Report on Needletime and Blank tape levy' was the first government appointed Commission to provide private

[1226] O Dean 'Sound recordings in South Africa. The Cinderella of the copyright family' (1993) *De Rebus* 917.
[1227] Ibid.

copying levy recommendations following the impact of blank cassettes on the authors' exclusive rights.[1228] While the consultations leading to the levy recommendation might have been made during a turbulent political period towards the establishment of a new democratic Constitution and political order from apartheid, there are no clear reasons advanced as to why the recommendations were never implemented. The Advisory Committee's report was later followed by the November 1998 report commissioned by the Department of Arts Culture, Science and Technology, (DACST), which conducted research on the cultural industries and proposed strategies for their growth and development.[1229] The consultations on the feasibility of the levy that followed the report revealed that the lethargic approach in the levy's implementation was a result of mixed feelings around its effectiveness in combating piracy, and providing adequate remuneration for authors.[1230] However, the DACST report did not necessarily recommend the levy, but acknowledged that, 'in South Africa there are mixed sentiments regarding a blank tape royalty, whilst some respondents felt that it would be positive for the industry … others felt that it would have little impact on piracy which is one of the key problems facing the SA music industry.'[1231] The debate was not explored further after a conclusion was drawn that the levy would have less impact in combating piracy.[1232] It is submitted that the notion that royalties from the levy can have little effect on piracy is misdirected. The idea behind the levy is generally to cushion the authors from the debilitating effects of private copying exceptions unaccompanied by ancillary compensation frameworks. In its origin the levy was specifically created to run concurrent with a private copying exception, not to address piracy. The exclusive rights of authors are relaxed in favour of compensation for the loss in sales, thus providing incentives for further innovation, production of creative and cultural goods.[1233] Another reason that perhaps explains the government's lethargy could lie in fears of a potential backlash given the public's strong aversion towards taxes and levies.[1234] While taxes and levies are by their nature contentious and compulsory, an outreach programme through existing relevant branches of government,

[1228] Advisory Committee on the Copyright Report on 'Needle Time' and 'Blank Tape Levy' 5 November 1993 quoted in Olumuyiwa Oluwole Popoola *Statutory limitation of liability of internet service providers in decentralized Peer to Peer file sharing* (Unpublished LLM thesis, University of South Africa, 2012) 214.
[1229] Department of Arts Culture, Science and Technology 'The South African Music Industry: The Cultural Industries Growth Strategy (CIGS)' *DACST*, November 1998. 79. available at *https://www.gov.za/sites/default/files/gcis_document/201409/musicreport0.pdf*. accessed 23 January 2023.
[1230] Ibid.
[1231] Ibid.
[1232] Ibid.
[1233] Olubiyi (note 161 above) 90.
[1234] See *Opposition to Urban Tolling Alliance and Others v The South African National Roads Agency Ltd and Others* [2013] 4 All SA 639 (SCA). See also *National Treasury and others v Opposition to Urban Tolling Alliance and others* 2012 (6) SA 223 (CC).

and public discussions forums, explaining the policies and objectives behind the levy could help address such concerns. Some of the main beneficiaries of the levy are the creative content industry, disadvantaged by the advent of the Internet and digital technology. Many have died in abject poverty, while others are struggling to make ends meet. The levy can be statutorily managed and distributed by the CMOs outside the framework of state control and supervision. If this framework is statutorily provided and effectively communicated, it could help dispel public fears of potential abuse of the levy given growing misapprehension of the government's handling of public funds.[1235]

In 2000, seven years later after the Advisory committee on needletime and blank levy's recommendation, the Ministry of Arts, Culture, Science, and Technology commissioned the Music Industry Task Team (MITT) to conduct extensive consultations on the remuneration plight of copyright holders.[1236] Its final report estimated that at least 90 per cent tapes bought in South Africa were used for illegal purposes, and that the Value-added Tax (VAT) lost through blank cassette piracy was conservatively estimated at R42 million per annum.[1237] Considering the foregoing, the MITT recommended the implementation of a blank tape levy to deal with piracy and provide additional revenue to the copyright holders.[1238] While the consultations emerging from the 1998 DACST report proffered a view that the levy would not be effective in addressing piracy, the idea behind the levy's introduction in the MITT was ironically, and to the contrary proposed to 'deal' with piracy by cushioning authors from the losses accumulated from authorised exploitation of their works.[1239]

Another projected positive offshoot of the levy was to facilitate the creation of a social security fund for artists in the music industry.[1240] Just like the 1993 recommendation from the Advisory committee on the 'Copyright Report on Needletime and Blank tape levy' –

[1235]Staff Writer 'South Africans think corruption is getting worse under Ramaphosa' *BusinessTech*, 16 September 2021. Available at *https://businesstech.co.za/news/trending/521918/south-africans-think-corruption-is-getting-worse-under-ramaphosa*/. (Accessed 29 May 2023). It reported that 'Three years into his tenure, not only do South Africans believe that corruption is getting worse, but they also see large portions of elected officials and civil servants as involved in corrupt activities, the survey showed. Society says the government is handling the anti-corruption fight badly, while channels to report corruption are increasingly seen as unsafe," the report's authors said.

[1236]Department of Arts, Culture, Science & Technology 'The Music Industry Task Team (MITT) Report' (2000). available at *http://www.concertssa.co.za/wp-content/uploads/2016/06/DACST-Music-Industry-Task-Team-MITT-2001.pdf*.accessed 5 November 2021.

[1237] Ibid at 7.

[1238] Ibid at 8.

[1239] Ibid.

[1240] Ibid.

the MITT blank tape levy recommendation was similarly never implemented. The MITT had further recommended in its report that in future, a similar fact-finding body should be appointed to conduct further consultations and provide a comprehensive analysis making a case for the proposed levy. In 2011 - the Copyright Review Commission (CRC), which also made extensive national public consultations primarily focusing on the workings of CMOs, also incorporated the MITT report as an annexure to its final report.[1241] The net effect and relevance of the MITT's levy recommendations in the CRC report remains profound and significant given the national attention and profile given to the latter's public inquiries, and subsequent grave concerns from parliament why its report commendations were never implemented.[1242] Unfortunately, while the scope of CRC inquires related to CMOs, it missed an opportunity in its report to provide an emphatic comprehensive copyright levy recommendation given that its terms of reference also included to 'assess the nature and extent of the use of music by mobile telephony companies and whether these companies are paying copyright royalties to the rightful owners,' and the 'efficiency of legislation in South Africa to deal with the concerns.'[1243]

The CRC report however unhelpfully acknowledged that the copyright levy had been dealt with in previous reports, without extensively addressing the levy's scope and necessity, apart from regurgitating MITT earlier brief recommendations.[1244] Half a decade later, the levy issue kept emerging in public forums. During the August 2017 Copyright Amendment Bill (CAB) public consultations, stakeholders in the copyright industries sought clarity on the long-proposed introduction of the copying levy to safeguard the remuneration of copyright holders.[1245] The stakeholders drew lessons from the EU and African jurisdictions where the

[1241] CRC Report (note 47 above) 164-179.
[1242] Ibid at 171. See also, Parliamentary Committee on the Copyright Amendment Bill 'Copyright Amendment Bill: Farlam Copyright Review Commission: briefing by DTI' 14 March 2018, available at *https://pmg.org.za/committee-meeting/25998/*. accessed 1 February 2023. The Department of Trade and Industry briefed the Sub-Committee on the Copyright Amendment Bill on the Farlam Commission on Copyright Review. It reported that: 'The Chairperson was displeased that DTI had not implemented the recommendations of the Farlam Commission. She indicated that DTI was supposed to present how the recommendations were to be implemented and highlight areas in which it failed or experienced challenges. …. Members asked who was responsible for the ratification; an explanation was needed why nothing had been done about implementing the Farlam non-legislation recommendations; how to implement the Farlam recommendations to assist artists swiftly.'
[1243] CRC Report (note 47 above) 7-8.
[1244]Ibid at 171.
[1245] Department of Trade and Industry: Copyright Amendment Bill: Public Hearings, 3 August 2017. Submission by the Cultural and Creative Industry Federation of South Africa (CCIFSA). available at *https://pmg.org.za/committee-meeting/24762/*. accessed 7 November 2021. It was submitted that: 'In section 12A (copyright amendment Bill) on the introduction of the private copy exception for sound recording, CCIFSA proposes that the DTI should seriously consider this proposal (copying levy), especially if such private copying

levy was efficaciously implemented.[1246] Regrettably, the Department of Trade and Industry committee never considered, adopted, and incorporated the private copying levy provision in the subsequent CAB after the public consultations.

The last known government attempt was in the form of a feasibility study supported by the EU grant for the department of Arts and Culture to conduct consultations with stakeholders, including blank tape producers and provide an analysis on the existing copyright law to determine the extent to which digital devices are affecting creative content producers, before exploring opportunities and challenges in implementing a blank tape levy. [1247] While the research was conducted and completed by August 2011, its recommendations were never reflected in the CAB that emerged six years later. The scope of the feasibility studies was also to develop a pragmatic approach towards future effective implementation of the levy. Evidently, there are growing arguments and contestations on the necessity, and applicability of a copying levy in South Africa, with no clear headway taking shape or form since 1993 despite numerous recommendations for its adoption. Against this background, the rationale and benefits associated with the enactment and operationalisation of the levy in South Africa are now demonstrated.

In South Africa, the levy's necessity can in part be illustrated by the surging digital music content consumption patterns facilitated by Internet connectivity expansion, and production of devices with huge storage facilities.[1248] South Africa does have a private copying exception, but it is not supported by a remuneration system.[1249] The CAB seeks to introduce a fair use provision without accompanying private copying levy for the exploitation of the works. [1250] The existing legal framework without compensation undercuts

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exceptions was not accompanied by private copy levy as is the case in Europe, US and in some parts of Africa such as Burkina Faso, Ivory Coast and Senegal. '

[1246] Ibid.

[1247]Department of Arts and Culture 'Conduct a Feasibility Study on the Impact and Effectiveness of the Introduction of a Blank Tape Levy in South Africa to Mitigate Copyright Violations' *DAT*, August 2011. available at *https://proman.lu/project/conduct-a-feasibility-study-on-the-impact-and-effectiveness-of-the-introduction-of-a-blank-tape-levy-in-south-africa-to-mitigate-copyright-violations/.* accessed 23 January 2023.

[1248] Natalie Cowling 'Internet usage in South Africa - statistics & facts' *Statista.com*, 10 January 2024, available at *https://www.statista.com/topics/10252/internet-usage-in-south-africa/#topicOverview*, accssed 5 February 2025. It reports that, 'South Africa ranked third among the countries with the largest number of internet users on the African continent. As of early 2022, there were around 41.2 million active South African internet users, only following the more populous Nigeria and Egypt. Furthermore, the country had the second fastest internet in Africa, with a speed of 28.62 megabits per second (Mbps). South Africa also topped the continent's internet freedom ranking, scoring 73 points as of 2022.'

[1249]Copyright Act, s 12(1) copyright shall not be infringed by any fair dealing with a literary or musical work.

[1250] Fair Use factors include (a) the purpose and character of the use; (b) the nature of the work; (c) the amount and substantiality of the portion of the work used; (d) the effect of the use on the copyright's holder's potential

rightsholders' remuneration right. The International Confederation of Societies of Authors and Composers, (CISAC) noted in its study that, 'this situation undermines the interests of rightsholders whose rights are eroded without receiving any compensation for the harm they suffer or having the possibility of not monitoring the use of their work.'[1251]

As of January 2022, figures show that there were 41.1 million active internet users, with 28 million of the same statistics using social media, representing around 46 percent of the total population.[1252] Axiomatically, Internet penetration growth in South Africa will consequently accelerate an interest and further development of the digital entertainment industry. As such, corrective legal measures are required because digital consumption of works through features such as file sharing, among other available digital platforms, overrides the author's exclusive reproduction and making available right. Several global precedents have demonstrated the relentless nature of the rapid rise and effects of digital innovations technologies facilitating private copying and copyright infringements without associated compensation frameworks.[1253] South Africa as an emerging economy also relies on domestic investment to spur economic growth. Therefore, providing creators with economic incentives for their works encourages innovation, stimulating domestic investment. Already, research findings demonstrate that copyright-based industries make a significant contribution to South Africa's economy. Pouris and Inglesi-Lotz write that copyrights-based industries contribute as much as 4.1% to the total South African economy.[1254]

A private copying levy, accompanying such a copyright national economic contribution as an authors' alternative source of income should further stimulate innovation, and economic growth, complementing a well-articulated South Africa intellectual property (IP) policy based on national development objectives. Moreover, there is a strong nexus between IP, innovation, and development.[1255] Previously, the South African government acknowledged in its 2018 draft white paper on science, technology, and innovation that

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market; and in the case of Australia alone, (e) the possibility of obtaining the work within a reasonable time and at a ordinary commercial price.

[1251] CISAC (note 159 above) 28.

[1252] Statistica 'Digital population in South Africa as of January 2022' *Saifaddin Galal*, 2 August 2022, available at *https://www.statista.com/statistics/685134/south-africa-digital-population/#:~:text=South%20Africa%3A%20digital%20population%20as%20of%20January%202022&text=As%20of%20January%202022%2C%20there,percent%20of%20the%20total%20population*. accessed 14 August 20220.

[1253] See CISAC (note 159 above) 8. See also *Sony Corp. of America v. Universal City Studios, Inc*., 464 U.S. 417 (1984). Also known as the 'Betamax case'. (A United States Supreme Court decision)

[1254] Pouris & Inglesi-Lotz (note 110 above) 6.

[1255] A Sattar & T Mahmood 'Intellectual property rights and economic growth: evidences from high, middle and low income countries' (2011) *Pakistan Economic and Social Review* Vol. 49, No. 2 163-186.

modern technologies are important enablers of development because they are readily adaptable to foster economic growth across the spectrum of society.[1256] While this acknowledgment is important, a balance must be struck between facilitating technological penetration and growth, protecting the remuneration right of creators and encouraging accessibility of the digital devices to end users through a copyright levy. This is important because studies by CISAC have revealed that the levies if properly implemented can be a vital source of income for creators and rights holders across the world.[1257]

Despite the recognised growth and economic impact of private copying levies in Europe, there are still to be firmly established in Africa. A year 2020 study on levies revealed that the EU grossed over a billion euros in levy collections, compared to 21 million euros from Africa, highlighting concerns that the situation on the continent regarding private copying remuneration was poor overall, despite several countries having explored implementing levy.[1258] CISAC has also blamed most dominant companies in the IT industry for campaigning against the implementation of the levy across the African continent.[1259] This adverse campaign negates the demonstrated levies' utilitarian potential for spurring innovation, with an enhanced appropriate, relevant legislation and effective royalties' collection mechanisms.[1260] Nevertheless, South Africa should take note of, and heed the growing recognition in Africa for providing private copying exceptions with accompanying compensation to authors by influential regional bodies. The African Regional Intellectual Property Organization, (ARIPO) Article 36 of its Model Law on Copyright and related rights,[1261] reflects the need for a private exception to be followed with compensation, while the West African francophone countries amended their 1977 Bangui Agreement in 1999 to

[1256] Department of Science and Technology, 'Draft White Paper on Science, Technology and Innovation Science, technology and innovation enabling sustainable and inclusive South African development in a changing world' (2018) Government Gazette, No. 41909 17-19. available at *https://www.gov.za/sites/default/files/gcis_document/201809/41909gon954.pdf*. accessed 3 June 2022.

[1257] CISAC, BIEM & Stichting de Thuiskopie study 'A policy manual for governments on how to implement effective levy systems: Global Collections Report: Resiliart Africa Harmonised Cue-sheets - New Private Copying Global Study shows potential for better remuneration of rightsholders' *CISAC, BIEM & Stichting de Thuiskopie* 23 November 2020. available at *https://www.cisac.org/Newsroom/news-releases/new-private-copying-global-study-shows-potential-better-remuneration*. accessed 4 January 2022.

[1258] See CISAC Report (note 159 above).

[1259] See CISAC 'Creators to benefit as Malawi implements private copying levies' *CISAC,* 7 May 2019. available at *https://www.cisac.org/Newsroom/articles/creators-benefit-malawi-implements-private-copying-levies*. accessed 23 January 2023.

[1260] See CISAC Report (note 159 above).

[1261] See of the ARIPO Model Law on Copyright and related rights, s 36 Private Copying Levy (1) The rights of an owner of a work, sound recording, fixed performance or audiovisual work are not infringed by the making of a single copy of the work or recording for the personal and private use of the person making the copy.'

provide the same.[1262] This is in the context of registered digital and technological growth on the continent, in which the World Population Review noted that,

> 'Africans are starting to catch up with the rest of the world technologically as well: Every day, more than 90,000 residents of sub-Saharan Africa log on to the internet for the first time. Africa may be the least developed of the major continents—even the richest African countries lag far behind the wealthiest countries in the world—but its potential is both substantial and undeniable.'[1263]

This elaborated Internet and digital context should therefore provide scope for South Africa to consider the implications of not providing statutory copyright remuneration safeguards given the extent of Internet penetration and advancement in digital technologies that axiomatically interfere with IPRs. It is important to first address the misconceptions around the application of copyright levies, before providing detailed rationale for its implementation in this jurisdiction.

5.3 THE RATIONALE AND BENEFITS FOR IMPLEMENTING THE COPYRIGHT LEVY

The private copying levy, as distinct from a tax, will operate as a statutorily compulsory payment charged on purchases of digital devices capable of storing and distributing works. It shall be collected, managed and distributed by a private entity in the form of a mandated collection society. The rationale for enacting a private copying levy is captured by Blázquez in a treatise that seeks to illustrate its equitable nature. He writes,

> 'If you can't beat them, join them, says the proverb. Or better than joining them, make them pay. Even though acts of private copying cause economic harm to rightsholders, these acts can neither be controlled or licensed nor effectively banned. Therefore, the best way of compensating rightsholders is to authorise private copying through an exception to the

[1262] See also Agreement of February 24, 1999, Revising the Bangui Agreement of March 2, 1977, on the Creation of an African Intellectual Property Organization (Bangui (Central African Republic) Bangui Agreement, 'Article 11 Free Reproduction for Private Purposes, (1) … it shall be permitted, without the consent of the author and without payment of remuneration, to reproduce a lawfully published work exclusively for the private use of the user…. (v) any other reproduction of a work that would prejudice the normal exploitation of the work or would cause unwarranted prejudice to the legitimate interests of the author.

[1263] World Population Review 'Richest African Countries 2022' (2022) available at *https://worldpopulationreview.com/country-rankings/richest-african-countries,* accessed 10 June 2022.

> exclusive right of reproduction and to couple this exception with the obligation to indemnify rightsholders.'[1264]

The primary objective of the copyright levy is to offset an assumed loss emanating from the private and unauthorised exploitation of copyright content by end users. The copyright levy operational framework provides no confrontation with the three-step test retaining its durable, efficient and cost-effective nature that guarantees an enduring fair balance socio-economic pact between authors and end users. The copyright levy is deliberately hoisted into the Digital Age considering that consumers now make private copies on an unmatched scale using connected devices and services.[1265] Copyright levies implementation can generate authors substantial remuneration at a low cost without imposing an undue financial or administrative burden on end users or industry. Several detailed benefits and rationale are provided below.

5.3.1 Difficulties in controlling or monitoring copying

Before the advent of the Internet, creative content producers had an interest in seeking to control and determine the exploitation of their works because of the explicable fear arising from the unauthorised access to, and use of their works.[1266] However, the Digital Age advancements have created the ability to control or monitor the exploitation of their works a nightmare. Ideally, since copyright is a private right, it is the duty of right owners to identify infringement cases and prosecute the same in the enforcement of their rights.[1267] However, in practice, private copying is difficult to identify, prosecute and licence.[1268] Forere posits that,

> 'since it is impossible to police end-user behaviour in their private homes, the levy becomes an appropriate form of compensation, despite some of its negative consequences. Against this background, therefore, the author [Forere] laments that South Africa failed to create a levy system in its new Copyright Amendment Bill. This omission will forever be costly to the music industry.'[1269]

[1264]F J C Blázquez (note 164 above) 9.
[1265]Society of Audiovisual Authors 'Making Private Copying Levies Work in the Digital Age Proposals for a European Framework' *Society for Audiovisual Authors*, September 2013. available at *https://www.saa-authors.eu/file/57/download*. accessed 1 February 2023.
[1266]See The WIPO Copyright Treaties Implementation Act, Hearing on H.R. 2281 Before the Subcomm. on Telecomm., Trade, and Consumer Protection, House Comm. on Commerce, 105th Cong. 43–45, 56 (1998) (statements of Hilary B. Rosen, President and CEO, Recording Industry Association of America and Steven J. Metalitz, on behalf of Motion Picture Association of America asserting that copyright industries will not put their content online unless assured that it is secure from unlicensed copying).
[1267] Olubiyi (note 161 above) 93.
[1268] A F Christie (note 162 above) 4.
[1269] Ibid.

Currently, the complications in copyright holders managing, controlling or monitoring the exploitation of their works arises from their content's often private and seamless digital reproduction which often defies geographical boundaries away from the relevant law's reach. Netanel writes that, 'the ubiquity and decentralized character of P2P file-swapping capability makes that control extraordinarily, if not prohibitively, costly.'[1270] Even if there was to be any content protection system through TPMs, it can be circumvented leading to the same unauthorised exploitation of works. A Microsoft computer security team, quoted by Netanel, concluded that,

> 'any content protection system will leak popular or interesting content into the darknet [i.e., the Internet], because some fraction of users — possibly experts — will overcome any copy prevention mechanism or because the object will enter the darknet before copy protection occurs.' [1271]

The incapacity of technology to protect copyrightable material online and even let authors monitor and authorise its exploitation to millions of users renders the levy an admissible plausible Digital Age solution particularly in South Africa where content is being exploited online without compensation.[1272] What compounds the difficulty in identifying private copying infringements is that, unlike analogue physical copies that can be easily reproduced or duplicated, identified and confiscated, works that are exploitable online are difficult to monitor or identify, confiscate and in some cases, a challenge to decrypt and collect from the software stored in such technologies as the cloud storage system. Olubiyi writes that this is a complex and tedious zone to regulate, and paying levies to the benefit of copyright owners is the only resilient right enforcement mechanism.[1273]

Application of analogue statutory enforcement mechanisms in the Digital Age presents a complex challenge. As such, it is easier to enforce a copyright levy designed for the digital devices that are used for such digital infringements in the Digital Age. An anachronistic Copyright Act or CAB that refuses to recognise such digital developments is irrelevant to the dictates of the contemporary software politics of the Digital Age. Moreover, it is difficult to dedicate enormous resources towards enforcement and monitoring of private

[1270] N W Netanel (note 168 above) 7.
[1271] Ibid at 10.
[1272] Jan Vermeulen 'How SA's first online pirate was caught' *BusinessTech*, 9 June 2014. available at *https://mybroadband.co.za/news/internet/103875-how-sas-first-online-pirate-was-caught.html.* accessed 6 January 202).
[1273] Olubiyi (note 162 above) 93.

copying transpiring in the private sphere. Additionally, it is almost impossible to dedicate enormous administrative resources and mechanisms that identify unauthorised cloistered copyright infringements and enforce those rights. Generally, and in practice, it is strenuous to identify, prosecute and physically license every individual involved in private copying activities.[1274]

Over and above the difficulties in controlling and monitoring what happens in the private homes and on the web, the South African law is even more problematic in ensuring that owners can protect their work or enforce rights online. First, as earlier indicated, the copyright Act is outdated and incompatible with the exigencies of the digital era. It doesn't carry provisions that address the effects of digital copying and the corollary harm it carries on copyright holders' remuneration by providing compensation frameworks. Furthermore, the Act carries no provision for TPMs to regulate circumventions of online copyright content. Nonetheless, the CAB was drafted to specifically address such digital challenges, and hence incorporated TPMs provisions to provide for controlling the online exploitation of works, and help safeguard the rightsholders remuneration right. Sections' 26 and 28 of the Bill criminalises circumvention of the TPM through abuse or tampering with information managing copyright. The circumvention of the TPMs is permissible by end users through fair use exception provisions carried under sections 12A and 12B. Regardless, TPMs continue to be circumvented. Besides, there appears to be a head-on collision between legislation that should be complementing each other. First, the Bill provides for 'fair use' exception and allows for circumvention of TPMs to make a private copy. Secondly, the Electronic Communications and Transactions Act (ECTA) prohibits and criminalises under sections' 86(1), 86(3) and 86(4) the circumventions of TMPs. Legitimate circumventions provided under the CAB fair use provisions are taken away by provisions within the ECTA. Such contradictions are unhelpful and fail to provide legislative clarity, besides even failing to monitor or control of the exploitation of online works. Notwithstanding, TPMs continue to be circumvented by emerging sophisticated decrypting digital devices, which renders both the CAB, the ECTA ineffective and ill-equipped to guarantee the rightsholders' remuneration in the absence of a statutory levy that recognises the inevitability of private copying and the accompanying harm it creates.

[1274]Christie (note 162 above) 4.

The continued online streaming of copyrightable works, and the protection of Internet Service Providers, (ISPs) against liability for the activities of third parties exploiting the works online places rightsholders in a vulnerable position in that they can't adequately enforce their rights. The ECTA provides a safe harbour for ISPs which through section 73 provides under certain circumstances that it is not liable for providing access, operating information systems facilities, transmitting, routing or storage of data messages. Under section 78 of the ECTA, the ISPs are also not obliged to monitor the data transmitted, stored or required to inquire on unfolding unlawful activity. Given the continuous online streaming, speed and volumes of downloading activities, it is impractical for the ISPs to monitor all the content flowing over its systems. Another ISPs content controlling and monitoring challenge is created by the Constitution's section 14 right to privacy provision; data protection under the Protection of Personal Information Act of 2013 and also read with Regulation of Interception of Communications Act 70 of 2002 which may make such conduct unlawful.

5.3.2 Private copying levy reduces administration costs

Cost and time benefit considerations apply in the levy's implementation. Its application does not involve administrative pressures associated with negotiating licensing frameworks for mechanical and needletime rights between stakeholders. Once the levy is statutorily set on devices, tariffs and beneficiaries are stipulated, and it becomes compulsory for CMOs to enforce them without further negotiations. Therefore, administrative pressures associated with negotiating contracts, assignment or licensing of rights with end users who are broadly scattered and seldom available are evaded. The CMOs mandated with managing the copyright levy are only devoted to its collection, management and distribution excluding the exhausting licensing of rights mechanisms. The transaction and administration costs associated with licensing and using copyright works are significantly reduced.[1275]

Olubiyi provides a detailed administrative pattern that is advantageous to the authors, whose burden is reduced through the levy imposition. Generally, the administration of other royalties is cumbersome as it involves the CMOs having lengthy negotiations in the licensing, management and distribution of royalties.[1276] The levy reduces the CMOs costs associated with managing copyright transaction costs which typically involve, 'identifying and locating the owner, negotiating a price (this includes information and time costs), and monitoring and

[1275] Kretschmer (note 163 above) 59.
[1276] Olubiyi (note161 above) 91.

enforcement costs.'[1277] This is underscored by the Grower's Review of Intellectual Property perceptions of exceptions purposes to copyright designed to reduce burdensome transaction costs associated with having to negotiate licences.[1278] As such, the levy management does not involve CMOs identifying, monitoring and licensing individual end users, accompanied by exhausting lengthy tariffs and contract negotiations. This is so because leviable devices are identified beforehand and mutually acceptable tariffs are set after negotiations with stakeholders. This approach reduces potential misunderstandings and scope for acrimonious complex crippling litigation that has often characterised implementation of other royalties.[1279] One of the practical and expedient natures of the levy's operational framework is rooted in its time and cost-effectiveness, which allows a mandated authority such as revenue authorities to collect the prescribed amount of the levy at the onset of the distribution chain emanating from either the manufacturer or the importer, and timeously passing it on to a mandated CSO.[1280]

5.3.3 Ineffectiveness of Technological Protection Measures (TPMs)

Technological Protection Measurers (TPMs) are software or devices created to block or limit access to a work through private copying and encompass, inter alia, encryptions, passwords and access controls. While TPMs are useful in safeguarding exclusive rights for creators, continuous technological advancements makes them susceptible to new devices that are capable of decryptions and circumventions.[1281] Conroy writes that, 'although encryption is presently the only technology that prevents the first unauthorized use, it is not infallible.'[1282] Every technological decryption of work makes it vulnerable to exploitation and continuous abuse as it becomes easily accessible, leading further to its alteration and interference with its moral rights and or its integrity. Conroy further writes that, 'encryption also does not protect the integrity of a work - material can be decrypted, altered, and then re-encrypted using the same key.'[1283] The introduction of TPMs to bolster online content protection is designed to

[1277] Ibid quoting Kretschmer (note 163 above) 59.
[1278] A Gowers *Review of Intellectual Property* (2006) 47.
[1279] *See South Afican Music Performance Rights Association v Foschini Retail Group (Pty) Ltd* [2016] 2 All SA 40 (SCA) (30 November 2015). See also EyeWitness News 'Court orders nu metro to pay Samro R5 million for defaulting on licence fees' *Eyewitness News*, 17 November 2022. available at *https://ewn.co.za/2022/11/17/court-orders-nu-metro-to-pay-samro-r5-million-for-defaulting-on-licence-fees.* accessed 23 January 2022.
[1280]Society of Audiovisual Authors 'Making Private Copying Levies Work in the Digital Age Proposals for a European Framework' *Society of Audiovisual Authors*, September 2013. available at *https://www.saa-authors.eu/file/57/download.* accessed 1 February 2023.
[1281] Marlize Conroy *A comparative study of Technological Protection Measures in Copyright law* (Unpublished LLD Thesis, University of South Africa, 2006) 28.
[1282] Ibid.
[1283] Ibid.

disable end users from availing themselves of some of digital copying technology's potential for reproducing and redistributing copyright works.[1284] And as it was pithily put, 'the answer to the machine lies in the machine.'[1285] Conroy's assessment of TPMs is important, especially coming against a background where strong reliance and faith had been placed on digital rights management systems to secure exclusive rights, with further recommendations suggesting the need for more effective tools and a tighter legislative framework accompanied by punitive measures against technological circumventions, which were erroneously assumed to be an effective deterrent.[1286] Punitive damages cannot however stop circumventions as technology continues to advance and it ignores the fact that TPMs, regardless of their technical capacity will remain vulnerable to hacking and a rapid increase in the processing capabilities of computer hardware and software.[1287] A popular South African film, 'Four Corners', a gang film set in Cape Town, South Africa, which was also the country's official entry to the 86th annual Academy Awards for best foreign language film was uploaded and leaked online.[1288] Forere argues that despite TPMs existing in national legislation, 'unfortunately, TPMs are not sufficient because they can be circumvented. This makes the private copying levy the most appropriate form of compensation for content owners against private copying. Equally, even if TPMs could not be circumvented, the challenge for developing countries is that access to such advanced technology is costly for artists. The majority produce content independently instead of signing up with the major record labels.'[1289]

It's been argued further that TPMs basically just 'keep honest people honest.'[1290] Matzukis writes that a commercially sustainable digital music sector needs an environment in which the industry can effectively enforce its rights against illegal or free downloads, which are attracting many end users and undermining the rightholders capacity to reap from their

[1284]J C Ginsburg 'Legal protection of technological measures protecting works of authorship: International obligations and the US experience' (2005*) Columbia Public Law & Legal Theory Working Papers*. 3.
[1285] C Clark 'The answer to the machine is in the machine' in PB Hugenholtz (ed) *The future of copyright in a digital environment* (1996). 139.
[1286] See *Nintendo of America Inc. v. Go Cyber Shopping* (2005) Ltd., 2017 FC 246. (A Canada Federal Court decision). In this case, Nintendo sued Go Cyber Shopping (2005) Ltd. for circumventing its TPMs.
[1287]D S. Marks & B H. Turnbull 'Technical protection measures: The intersection of technology, law and commercial licenses' (1999) Workshop on the WCT & WPPT Geneva, December, 1999 3.
[1288] Jan Vermeulen 'How SA's first online pirate was caught' *BusinessTech*, 9 June 2014. available at *https://mybroadband.co.za/news/internet/103875-how-sas-first-online-pirate-was-caught.html*. accessed 6 January 2022. A first for South Africa, the man, whose name was later revealed to be Majedien Norton, pleaded guilty to illegally distributing copyrighted content online, and received a five year suspended 5-year prison sentence. Technology lawyers have previously said that for illegally distributing copyrighted content, first-time offenders can look at a maximum penalty of 3 years in jail and a R5, 000 fines per item.
[1289] Forere (note 52 above) 46.
[1290] Ibid.

copyright investments.[1291] The solution now rest in creating a balance between authors and consumers interests. The right balance lies in first acknowledging that the unremitting Digital Age's disruptive developments are inescapable. Furthermore, that protected works remain vulnerable to unauthorised and unavoidable exploitation. Finally, that the creative industry will be impoverished due to lack of incentives if the utilitarian balance is missed and legal intervention measures are not taken to guarantee remuneration for copyright holders. Already, statistics provided from the MITT report on the revenue generation shortfalls to both the fiscus and creative industry is indisputably grim.[1292] It shows that authors cannot in the Digital Age effectively assert their remuneration right. Therefore, a sustainable solution would be to devise a levy that is collected and distributed by CMOs to beneficiaries as adequate compensation creating some market equilibrium. As an alternative diction to the retort that an answer to a machine is a machine, the answer to a machine, now lies in the copyright levy.

5.3.4 Constitutional rights considerations

Certain exceptions and limitations provided for by law to the reproduction right may be justified under public interest considerations. There are also practical and constitutional barriers associated with enforcement of the reproduction right in the private sphere. Section 14 of South Africa's Constitution guarantees the right to privacy and against unlawful infringements relating to arbitrary searches, seizures of an individual's possession or property and interference with private communications.[1293] The right to privacy is also recognised under common law and the breach can be remedied through an action - *actio iniuriarum* - but the constitutional conception and interpretation of the right is broader.[1294] This protection scope is further bolstered under the Protection of Personal Information Act 4 of 2013 (POPI) regulating data protection. However, the right to privacy is subject to limitations whether the infringement is justifiable.[1295] Privacy as a fundamental human right is also enshrined in numerous international human rights instruments.[1296] The problem with authors' exclusive rights enforcement mechanisms under the Act and CAB on private copying are that they can't be enforced without impeding the right of privacy, or POPI's private data protection because

[1291] Conroy thesis (note 1281 above).
[1292] MITT Report, as contained in the CRC Report (note 47 above) 7.
[1293] South Africa Constitution, s 14.
[1294] I Currrie & J de Waal *The Bill of Rights Handbook* (2016) 295.
[1295] Ibid.
[1296]Universal Declaration of Human Rights, Art. 12; African Charter Art. 10.

often the unauthorised private copying of works occurs in private homes, and the infringing gadgets ordinarily contained personal information.

The right to privacy was held in *Financial Mail (Pty) Ltd v Sage Holdings Ltd* to occur either by way of an unlawful intrusion upon the personal privacy of another, or by way of unlawful disclosure of private facts about a person.[1297] The exclusive right copyright enforcement mechanism could ordinarily entail entry into a private residence, gaining access to private gadgets or documents while gathering evidence.[1298] Privacy creates an autonomous domain entailing cognates of individual right to dignity.[1299] Practically, it is difficult for authors to enforce their copyright exclusive rights occurring in the private domestic sphere without violating the right to privacy and dignity. Moreover, copyright is a private right and the obligation is upon authors to locate cases of private copying and facilitate prosecution, through either the civil litigation route seeking liability for damages, or criminal law in search of justice and punishment.[1300] The applicable practical remedy to this is a copyright levy with an accompanying private copying exception which authorises and facilitates the exploitation of work in private homes in return for compensation, thereby relaxing the need for enforcing the burdensome search and seizure operation that often interferes with the right to privacy and dignity.[1301]

5.3.5 Private copying levy promotes free expression

The existing copyright law has a pro-author leaning approach that safeguards exclusive rights in the reproduction of the work and make available right.[1302] The end users unauthorised exploitation is limited to the provided exceptions under either a fair dealing in the copyright Act,[1303] or fair use provisions envisaged under the CAB.[1304] Scholars however argue that authors' exclusive right itself is hardly compatible with the notion of copyright as 'the engine of free expression' as it obstructs end users' interference with the work and preventing

[1297] *Financial Mail (Pty) Ltd. and Others v Sage Holdings Ltd. and Another* 1993 (2) SA 451 (AD). See also a seminal precedent on the right to privacy in *Bernstein v Bester NO* 1996 (2) SA 751 (CC) [71].
[1298] A Hughes *Human dignity and fundamental rights in South Africa and Ireland* (2014) 261.
[1299] A Chaskalson 'Human dignity as a constitutional value' in D Kretzmer & E Klein (eds) *The concept of human dignity in human rights discourse* (2002) 140.
[1300] A F Christie (note 162 above) 248-258.
[1301] See *Universal City Studios Inc and Another v Network Video (Pty) Ltd* 1986 (2) SA 734 para 14.
[1302] Copyright Act s 6 to 11 provides a distinct pro author scope of exclusive rights, by granting the holder thereof the right to do or authorise others to do any of the restricted acts.
[1303] Copyright Act, s 12.
[1304] Copyright Amendment Bill's s 12A.

availability through often a restrictive licensing structure.[1305] In the process, it is further argued the artistic creativity is limited, particularly where creators of derivative works seek exploitation of the work for artistic purposes. Hull writes that proposals have increasingly been advanced to submit creative uses to a statutory remuneration right.[1306]

The danger of entrenched exclusive rights also lies in fears that it would lead to the strengthen authors' position leading to resistant monopolies, stifling the work's accessibility and derailing society's development. In the context of literal works in a developing country like South Africa, this would have an adverse impact in preventing users from accessing indispensable educational material, impacting on the freedom of information useful for people in their exercise of freedom of expression.[1307] While digital devices have brought enormous industry disruptions, there are also positive aspects that are geared towards innovation and creativity, as the end users or consumers interact with online content. Scholars argue that there is need to applaud,

> 'the online collecting, swapping, reworking, and remixing of music, films, television programs, art, and stories. P2P file sharing is not just downloading music and movies for free. It is a vehicle for finding works that are otherwise not available, discovering new genres, making personalized compilations, and posting creative remixes, sequels, and modifications of popular works.'[1308]

Such digital interaction motivates users to depart from being passive consumers to more assertive individuals who can define themselves, and create more productive derivative works from the original content. Netanel proposes that with private copying exceptions in place and a levy framework, the law would provide copyright immunity for non-commercial copying and distribution of any expressive content. If derivatives works are produced, there would be need for acknowledgment to protect the integrity of the work and the moral rights inherent in the work.[1309] This is important because adaptations and modifications of work are often a gross interference with IP rights. The levy facilitates that freedom and interaction with online

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[1305]C Geiger 'Implementing Intellectual Property Provisions in Human Rights Instruments: Towards a New Social Contract for the Protection of Intangibles' in Chirstopher Geiger (ed.) *Research Handbook on Human Rights and Intellectual Property* (2015) 676.
[1306] C Geiger & O Bulayenko 'Creating Statutory Remuneration Rights in Copyright law: What Policy Options under the International Framework?' in A Metzger and H. Grosse Ruse-Khan (eds) *Intellectual Property Ordering Beyond Borders* (2021) 7.
[1307]Nomvuyo Siphepho *Copyright and Developing Countries* (Unpublished LLM thesis, University of KwaZulu-Natal, 2014) 7.
[1308] N W Netanel (note 168 above) 3.
[1309] Ibid.

works. As such, digital technology is another vital form of cultural expression which encourages and promotes shared interests and creativity. Lessig crisply puts it, 'This is the art through which free culture is built.'[1310]

5.3.6 Rationale for introducing an AI presumltive levy in South Africa

Artificial Intelligence (AI) is largely unregulated in South Africa. The country still carries an obsolete Copyright Act, 1978 enacted prior to the birth of the Internet. The Copyright Amendment Bill, 2017 (CAB) was proposed to specifically deal with challenges and tension brought by the Internet or 4IR. The CAB however makes no reference to AI. As such, no laws or regulations exist to expressly regulate AI. Organisations using AI are however regulated by other legislation such as the Patents Act,[1311] Copyright Act[1312] and Protection of Personal Information Act (POPIA).[1313] The government in August 2024 released its AI policy framework containing ethical, social, and economic considerations applicable to the exigencies of the 4IR.[1314] The policy framework sets out transparency, accountability and inclusivity mechanisms that are designed to build trust and enable developers and organisations to be accountable for their actions and outcomes of AI systems.[1315] The policy framework further notes that by embracing AI's transformative potential, it seeks to address pressing national challenges and leverage opportunities across all sectors in our economy.[1316] The strategy is to ultimately position South Africa as a leader in AI innovation and development.

Nonetheless, the impact of AI on copyrights has implications on the remuneration patterns for South African authors. Legal practitioners in South Africa have cautioned that 'AI and ML technologies have not merely left their mark on the creation and protection of IP rights but have also instigated a seismic shift in the enforcement of these rights.'[1317] This arises from the 'proliferation of digital platforms and the ever-expanding online space, [and]

[1310] L Lessig *The future of ideas: The fate of the commons in a connected world* (2001) 9.
[1311] Patents Act 57 of 1978.
[1312] Copyright Act 98 of 1978
[1313] POPI Act No. 4 of 2013.
[1314] Dept. Communications and Digital Strategies 'South Africa National Artificial Intelligence Policy Framework - Towards the Development of South Africa National Artificial Intelligence Policy, available at *https://fwblaw.co.za/wp-content/uploads/2024/10/South-Africa-National-AI-Policy-Framework-1.pdf,* accessed 5 February 2025.
[1315] Ibid 10.
[1316] Ibid page 1.
[1317] Amani Patel and Juli Hopf 'Is AI Sufficiently Contained by Intellectual Property Laws?' *Spoor & Fisher*, 7 September 2023, available at *https://spoor.com/is-ai-sufficiently-contained-by-intellectual-property-law/,* accessed 5 February 2025.

the challenges in enforcing intellectual property laws have reached an exponential magnitude.'[1318] Furthermore they warn that, 'the scale and intricacy of IP infringements, encompassing counterfeiting, piracy, and online violations, have escalated in the digital age. Conventional manual detection and enforcement mechanisms now find themselves struggling to keep pace with the deluge of online content.'[1319] Such challenges are global in nature, with EU scholars proposing an AI levy to cushion copyright holders from such ramifications.[1320] The proposals are arising because of the AI systems mimicking human literary and artistic creations, which undermine their capacity to recuperate income from their works. Calls for the imposition of a new legal obligation to pay a single equitable remuneration have thus globally emerged.[1321] Senftleben argues that the AI levy,

> 'would serve the overarching purpose of creating a new revenue stream to support the creative work of authors of flesh and blood. Revenues accruing from remuneration payments for the use of AI systems would be channelled to collecting societies which use the money for the purpose of fostering human literary and artistic productions.'[1322]

AI can memorise works in their training data, and transcend beyond the fair use or fair dealing parameters set out under section 12 of the Act and section 12A of the CAB. The copyright based industries make a significant contribution to South Africa's economy accounting for 4.1% to the GDP.[1323] The industry also employs 4.08 per cent of the country's workforce accounting for 4.07 per cent exports.[1324] The ramifications of AI TDM exploitation of works can easily undermine the industry and disincentivise the huge workforce. This is so because generative AI can mimic the style of artists, such as singers, illustrators, or writers, and reproduce content at speed, and also duplicating identical works that can harm remuneration prospects for copyright holders.[1325] Such technological advancements can easily displace human creativity, substituting it with AI technology. Already calls abound from the South African legal fraternity to amend the copyright Act to recognise AI systems, and create a new category of IP rights specifically for AI-

[1318] Ibid.
[1319] Ibid.
[1320] M Senftleben 'A Tax on Machines for the Purpose of Giving a Bounty to the Dethroned Human Author – Towards an AI Levy for the Substitution of Human Literary and Artistic Works' (2022), available at SSRN: *https://ssrn.com/abstract=4123309* or *http://dx.doi.org/10.2139/ssrn.4123309,* accessed 5 February 2025.
[1321] Ibid.
[1322] Ibid.
[1323] Pouris & Inglesi-Lotz (note 110 above).
[1324] Ibid,
[1325] Senftleben (note 949 above) 1535-1536.

generated works, which would distinguish them from traditional artistic works.[1326] Such legislative reform will help South Africa navigate AI challenges.[1327] Part of the legal reform is to also create AI compensatory frameworks for the mining and usage of copyright works. The legal reforms will also ensure that TDM data used to train AI systems is unbiased and collected with proper consent. This is the context in which Marwala writes that South Africa should,

> 'consider the ethical and social implications specific to South Africa. AI systems must be designed and deployed in ways that reflect our societal values, promote fairness, and prevent discrimination. We need robust frameworks to govern the use of AI, ensuring transparency, accountability, and inclusivity. AI must not become a tool for reinforcing existing power structures or creating new forms of exclusion.'[1328]

This study also proposes an AI presumptive levy that enables producers and users of AI to compensate copyright holders. Similar proposals are being mulled by academics such as Senftleben within the EU, who has posited that there is need for a mechanism for remunerating human authors to serve as an incentive and reward for creating literary and artistic work arising from AI systems capacity to imitate and replace human expression, and flooding the market with literary and artistic productions.[1329] The resultant AI presumptive levy to be incorporated in the proposed copyright amendment Bill levy framework and accompanying ministerial regulations in Annexures One and Two, will also address aspects of joint ownership, human authorship, AI authorship, derivative works and attribution to guarantee fair and equitable remuneration. Already, numerous AI copyright infringements lawsuits globally explain the anxieties and fears of copyright holders in the face of AI, and

[1326] Patel and Hopf (note 1317 above).
[1327] Ibid.
[1328] Marwala (note 697 above).
[1328] Ibid,
[1328] Senftleben (note 979 above) 1535-1536.
[1328] Patel and Hopf (note 1317 above).
[1328] Ibid.
[1328] T Marwala 'Artificial Intelligence and the Future of Work'Medium.com, 30 August 2024, available at https://medium.com/@tshilidzimarwala/artificial-intelligence-and-the-future-of-work-324a5f76864c, accessed 3 February 2025.
[1329] Senftleben (note 979 above).

provide a compelling need to mitigate authors against such threats to their remuneration rights.[1330]

5.5 CONCLUSION

The private copying levy has been proposed as an effective solution for the authors' remuneration harm arising from lost sales and private copying exception. Under the proposed levy and its escort - the private copying exception - end users would continue to enjoy the privilege of private copying in digital format for non-commercial distribution over digital networks, while paying authors compensation through a levy priced in their purchase of infringing digital devices. A private copying levy remuneration system operating efficiently provides a realistic chance for authors to achieve their financial independence, spurring their creativity and artistic freedom, giving them an opportunity to adequately devote on their innovative skills generating more creative content. Several dynamics justifying the levy's implementation in South Africa have been proffered. The rationale and benefits arising from its implementation mainly lies in the complexities emerging from the digital era that have rendered authors' exclusive rights under the analogue regime unenforceable without balancing them with end users' exploitation and accompanying levy compensation frameworks. This means the current copyright law must adapt to the mutating digital environment or the authors will die destitute from the private unauthorised exploitation of their work without compensation. The presently constituted copyright law does not correspond with the three-step test that in part emphasizes compensation for the exploitation of works. The rationale and benefits of the levy's enactment have been provided, and a statutory framework supporting the levy's administrative infrastructure and operationalisation must be designed.

[1330] Blake Brittain 'Tech companies face tough AI copyright questions in 2025' Reuters, 27 December 2024, available at *https://www.reuters.com/legal/litigation/tech-companies-face-tough-ai-copyright-questions-2025-2024-12-27/,* accessed 5 February 2025. It reports that, 'The lawsuits from authors, news outlets, visual artists, musicians and other copyright owners accuse OpenAI, Anthropic, Meta Platforms (META.O), opens new tab and other technology companies of using their work to train chatbots and other AI-based content generators without permission or payment. Courts will likely begin hearing arguments starting next year on whether the defendants' copying amounts to "fair use," which could be the AI copyright war's defining legal question. Tech companies have argued that their AI systems make fair use of copyrighted material by studying it to learn to create new, transformative content. Copyright owners counter that the companies unlawfully copy their works to generate rival content that threatens their livelihoods.'

CHAPTER 6

PRIVATE COPYRIGHT LEVY PRINCIPLES FOR SOUTH AFRICA

6.1 INTRODUCTION

The purpose of this chapter is to propose private copying levy principles that dovetail with potential amendments to the existing copyright law, and help develop an administrative framework for its operationalisation. The principles will guide and facilitate the end users' authorised exploitation of digital hosted creations for non-commercial use under a private copying exception, to be accompanied by the levy's fair compensation priced in the purchase price of the digital devices capable of recording and storage of works. The principles shall be developed drawing lessons from existing domestic jurisprudence around compensation frameworks for damages arising under the law of delict, common law, and the Constitution. Complementing this, further lessons from the European Union (EU)'s Copyright Directives and Ghana's Copyright law respectively will be drawn and developed in this chapter. The principles set out in this chapter are proposed as standards upon which legal rules around the copyright levy should be based. They are captured as basic general norms upon which the entire proposed domestic private copying levy-legal system should be built. Additionally, the chapter will extensively outline the levy's targeted beneficiaries, specify recordable media and storage devices for levying purposes, propose tariffs frameworks and penalties for non-compliance with levy obligations.

This chapter begins by setting out the significance of principles as vital legal rules setting normative standards to be followed in the implementation of the levy, and how they create a value system around which the created statutory frameworks will operate. Thereafter, a host of twelve proposed principles are set out to provide, inter alia, the fair compensation and harm principle; institutions, companies and individuals responsible for the levy contribution, the de minimis principle, double payments , private copy and exceptions, the levy's targeted beneficiaries, cultural funding, how to conduct leviable e-commerce and cross border transactions. Thereafter, the recommendation will be made for a mandated CMO to tender, engage and commission a private entity to use the creative content Internet sampling and metering software which classifies end users' consumption patterns of digital works, providing a measurement of a particular work's popularity levels to determine the relevant authors' remuneration due. The commissioned company will be a data and evidence-based

agency that digitally filters and extract consumer private copying patterns. It will help provide information on leviable devices, providing insights and actionable recommendations which will guide compensation levels for authors. The success of the copyright levy will largely depend on the efficiency and reliability of the private entity's digital tracking and sampling technologies. Importantly, parameters will be set out on how to conduct such a digitally intrusive mechanism sensitive to the constitutional right to privacy. Alternatively, a consumer survey of the exploitation of digital content could be used, as is the case in the Netherlands. In this case, private copying behaviour is measured via consumer surveys, but such an approach is cumbersome, expensive and prone to reporting errors.

6.2 DEFINING PRINCIPLES IN DRAFTING A SOUTH AFRICAN COPYRIGHT LEVY

This chapter seeks to recommend a body of principles to help draft and develop a domestic copyright levy for this jurisdiction drawing lessons from the existing jurisprudence and recommend further legal adoptions around the same flowing from the principles developed in the EU and Ghana. Wholesale adoption of the foreign principles will be avoided because the EU – a regional body of developed sovereign states – has different economies, demographics, value systems and national policies. Even the South African judiciary is wary of wanton unapprised reference to foreign legislation and principles. Berger AJ, in the copyright related *Moneyweb* case expressed reservations around incorporating foreign law in the adjudication of domestic disputes, insisting copyright law must be interpreted through the prism of the South African constitution and in a manner consistent with its principles.[1331] Berger further held that there are implications in adopting foreign law because 'each jurisdiction has its own particular history and, in many cases, is bound or influenced by domestic statutory precepts' before resorting to focusing on English precedents under historical considerations.[1332] This approach was adopted because of understandable British historical colonial ties that shaped the development of domestic copyright law.[1333] In his copyright studies, a Ghanaian scholar Kow also observes that,

> 'a copyright regime that has been tailored to suit a union of several individual states, like the EU, will be hard to be referenced and strictly adopted by a single nation like Ghana. This is

[1331] Moneyweb Case (note 9 above) para 106.
[1332] Ibid at 103.
[1333] R D Nicholson 'Copyright Reform in South Africa from a Librarian's Perspective: A Case Study Approach' in Jessica Coates, Victoria Owen & Susan Reilly (ed) *Navigating Copyright for Libraries: Purpose and Scope* (2022) 319.

> informed by differences in respect of population, technological advancements, among other inherent element as a pertained to developed system versus a developing system.'[1334]

However, certain elements and principles could be adopted taking cognisance of its relevance, adaptability, quality, peculiar circumstances and teleological considerations behind its enactment. Therefore, the domestic applicability of certain principles will be considered in implementing the copyright levy to monetise the filesharing access and exploitation of copyrighted online content. The significance of legal principles as one of the most fundamental sources of law is well recognised and grounded in legal theory.[1335] In this study, the proposed principles in Chapters' 6 and 7 shall lay the normative basis for the development of the copyright amendments affixed to this thesis as Appendix 1-4, and are to be considered as general legal norms and standards upon which South Africa's copyright levy could be based. A principle is generally considered to be a,

> 'fundamental truth, a comprehensive law or doctrine, from which others are derived, or on which others are founded; a general truth; an elementary proposition; a maxim; an axiom; a postulate; The collectivity of moral or ethical standards or judgments; A basic truth, law, or assumption; A settled rule of action; a governing law of conduct; The collectivity of moral or ethical standards or judgments.'[1336]

The principles remain effective and one of the most useful legal sources given their wide use and important role as a generalised standard used for interpreting the law, both written and unwritten, constitution, enabling legislation and regulations. The principles are also a source of law creating for the judiciary some interpretation basis when dealing with a dispute and relationships not regulated by any positive written law. The principles will therefore set prevailing standards in the operationalisation of the levy. Other amendments and regulations associated with the copyright levy could be derived from the proposed principles to promote uniformity and certainty in the interpretation of the disputes. However, principles are in their general application broad and do not take into account specific legal facts.[1337] They could also assume a fundamental function in providing a substantive form of procedural principles. In essence, they set the base, direction and interpretation trajectory of existing law or law to

[1334] Abekah-Wonkyi Kow (note 205 above) 6-9.
[1335] J Daci 'Legal Principles, Legal Values and Legal Norms: are they the same or different?' (2000) *Academicus - International Scientific Journal* 109.
[1336] Ibid at 110 referring to the People's Dictionary.
[1337] See Klaus Gunther cited by J R Muniz 'Legal Principles and Legal Theory' (2000) *Ratio Juris.* Vol. 13 No. 3 September 2000 294-304.

be formulated in an existing dispute providing legal clarity, and in some instances creating a base for dispute adjudication.

Using relevant principles, the judiciary must make an informed determination even if there isn't sufficient clarity provided by domestic legislation. This is so even in circumstances where the judiciary is confronted with an analogue law overridden by technology and Internet advancements.[1338] In the Ancient Rome, the judiciary were bound to deliver justice regardless of the fact that no law was in existence regulating the relationship in dispute. In modern times, it matters not that the law is unclear, or contradictory, justice must be delivered. In this regard, where the law is vague or unclear, principles set the tone for the adjudication of the dispute.[1339] In international law, principles are some of the main primary sources of law carrying peremptory norms of general international law.[1340]

In this study, the principles are significant and relevant to the introduction of the copyright levy because they are an offshoot of the desire and aspirations of creative content producers [1341] arising from several public stakeholders' consultations conducted by government appointed commissions. The concerns for a copyright levy that emerged from public consultation meetings lay the basis for a clear legislative action to bring about the authors aspirations. The levy and its robust principles will strengthen the legal protection of authors' remuneration right by creating a lawful basis for private copying of their works in return for compensation, thereby fulfilling South Africa's obligations under international law.[1342] After all, the greatest enduring genius that the ancient Romans bequeathed to present generations has been their law and legal principles.[1343] 2' This fact may be no less true when it comes to copyright. Therefore, this section shall provide a comprehensive template for a body of copyright levy principles.

[1338] See also Moneyweb case (note 9 above).
[1339] See *Austro-Mechana v Strato AG Case* C-433/20. (A European Court of Justice decision).
[1340] See M Wood 'Customary International Law and the General Principles of Law Recognized by Civilized Nations' (2019) *International Community Law Review*, *21*(3-4), 307-324.
[1341] As captured in paragraph 6.3.1 of the preceding Chapter Six. See also MITT Report (note 919 above). See also Department of Trade and Industry: Copyright Amendment Bill: Public Hearings, 3 August 2017. Submission by the Cultural and Creative Industry Federation of South Africa (CCIFSA). available at *https://pmg.org.za/committee-meeting/24762/*. accessed 7 November 2021.
[1342] See Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works. See also Article 5(5) of Directive 2001/29/EC.
[1343] See J A C Thomas *Textbook of Roman Law* (1976) wherein he suggest that Roman Law was the great cultural legacy of the ancient western world to its descendants.

6.3 THE PROPOSED PRIVATE COPYING LEVY FRAMEWORK PRINCIPLES

As earlier indicated the copyright levy framework principles shall be guided by both domestic jurisprudence and existing principles arising from the EU and in some respects Ghana. The EU's rich harmonised jurisprudence on certain aspects of copyright and related rights around the levies has shaped copyright legislations in various global jurisdictions. Its persuasive nature, just like other various aspects of domestic law will help inform drafting the proposed principles and resultantly amendments for this jurisdiction.

6.3.1 Fair compensation and harm principles

The EU's profound 'fair compensation' and 'harm' principles discussed in Chapter 4 of this study and fashioned out to realise the copyright holders' remuneration right are correspondingly captured within South Africa's jurisprudence. They are developed around the law of delict, and under common law's pronounced delictual requirements for liability which can be tested to secure realisation of fair compensation arising from damages as a result of harm caused through private copying. The harm caused to authors and subsequent damages for unauthorised use is primarily replicated through Roman-Dutch law introduced into South Africa by the Dutch in the seventeenth century.[1344] The South Africa law of delict is therefore a mix of English common law and Roman-Dutch law, making South Africa a hybrid system.[1345]

From the outset, it is important to highlight how the 'harm' effects of private copying exceptions impact on rightsholders if unaccompanied by compensation frameworks, especially given the extensive exploitation of works by the emerging digital technology. CISAC noted with concern that South Africa has a private copying exception without an accompanying remuneration framework.[1346] The Copyright Act has a fair dealing provision under section 12[1347] and a proposed fair use provision under the CAB's section 12A.[1348] CISAC in its 2018 copyright levies research posited that providing exceptions without

[1344] K Zweigert & H Kõtz *Introduction to Comparative Law* (1998) 231.
[1345] Ibid.
[1346] CISAC (note 159 above) 8.
[1347] Copyright Act of 98 ss 12, 15(4), 18 and 19A; Act contains a fair use provision in section 12 for literary and musical works. In addition, section 13 allows for further unlicensed copying (such as in educational institutions). Subsequently, sections 15-19B extend the fair use provision of section 12 widely to artistic works, cinematograph films, sound recordings, broadcasts, published editions, and computer programs.
[1348] Copyright Amendment Bill, 2017 - It seeks to insert a new section 12A after section 12 of the extant Copyright Act.

compensation has negative implications on authors' remuneration rights.[1349] Exceptions, or limitations of exclusive rights, are part of the copyright law permitting use of works without authorisation from the rightsholder. Copyright law exceptions are designed to maintain a balance between the interests of rightsholders and users of protected works. In instances where the provision for exceptions is not supported by compensation for rightsholders, this creates 'harm' and market disequilibrium. In general, when the issue of copyright protection is raised, Karjiker notes that, 'the standard response is inevitably an appeal to the notion that such protection is required to provide the necessary incentives for authors to create such works, and to do so others must be prevented from exploiting (or 'free-riding' on) the efforts of authors by giving authors a 'monopoly' over their creations.'[1350] Compensated exceptions mean that rightsholders are entitled to a payment when the exception is used. The end user who does not ordinarily request permission indirectly remunerates the rightsholder for the use of the work. In the circumstances, the rightsholders are suffering harm because under the existing legal framework there is no provision for end users to provide ancillary compensation for using their works.. Geiger notes that the digital age has **'**radically disturbed the balance contained in copyright law,'[1351] prompting rightsholders to persistently highlight the dangers for the exploitation of their rights created by new technical opportunities, right holders have constantly challenged the free zones within copyright.[1352]

The concept of harm[1353] therefore arises from the lost licensing opportunity, which could have been a fee charged for the use of the work.[1354] The exception provides no scope for copyright infringement, and therefore unremunerated private copying activities will continue unabated to the rightsholders continued harm. This is so because harm is also considered in economics parlance as a lost sale because such copying replaces a purchase that otherwise would have been made.[1355]

In essence, the principle of fair compensation should be expressly captured in the levy provision to bolster the authors' remuneration right. In evaluating fair compensation, the preferable criterion is the possible or actual 'harm' caused to the copyright holders for the

[1349] CISAC (note 159 above) 8.
[1350] Karjiker (note 118 above) 17-18.
[1351] C Geiger 'Right to Copy v. Three-Step Test'(2005)*Computer Law Review International*, Vol. 6, no. 1, 2005, 7-13.
[1352] Ibid.
[1353] See M Kretschmer (note 163 above) 8. Refers to harm in law (delictual damages jurisprudence).
[1354] Ibid.
[1355] Ibid.

unauthorised exploitation of the work.[1356] Under the levy, copying will be authorised provided it is accompanied with compensation. The existing remedial damages or compensation systems designed for 'harm' caused to authors could be replicated under copyright law to help develop applicable principles for determining fair compensation frameworks arising from private copying under the proposed levy. Recompense for 'harm' caused in South Africa is largely informed by the jurisprudence in the adjudication of claim for damages under delict.

The private copying of works unaccompanied by compensation interferes with the authors' normal exploitation of works, and prejudices his legitimate expectations therefor constituting harm to the rightsholders. As such, a rightholder who suffers harm may have a claim based on delict against a person who wrongfully caused the harm if the outlined delictual requirements are met. An infringer under copyright law, is defined in delict as a wrongful and culpable a person who causes harm to another. Under copyright law, a copyrightholder suffers harm, and under delict, the plaintiff seeks damages but both terminologies express the same prejudicial effect. Correspondingly in both circumstances, the plaintiffs suffer economic loss caused through wrongful conduct by another person.

South Africa's law of delict reflects circumstances in which one person can claim compensation from another for harm that has been suffered.[1357] Under the law of delict the harm must be real and proved, rather than assumed under private copying. There is no need for proof of infringement in the application of a private copying levy. The ultimate remedy for a delict is compensation of damages for the harm caused.[1358] The contexts of harm are both the patrimonial and non-patrimonial damages whose principal objective is to compensate the person whose work has been exploited without compensation. Patrimonial refers to the direct economic loss or harm as a result of private copying, and non-patrimonial is the distress and impact on the well-being of copyright holders as a result of the exploitation of their work without compensation. However, private copying levy is recommended as an adequate replacement for the economic loss and distress caused for rightsholders.

Under delict, the claims for damages are financial dues that are brought to compensate a plaintiff because of the fault of the defendant. The fundamental departure with the copyright levy is that while in delict the payment is for damages suffered, the levy arises as a

[1356] Ibid at 22.
[1357] Loubser *et al The Law of delict in South Africa* (2009) 4.
[1358] Ibid at 43.

result of harm caused through some lawful and authorised private copying exception. The harm is for the lost sale or diminished purchasing interest. While the harm element must be proven in delict to justify damages, the different approach with a private copying levy is that the harm is assumed, once a device that is capable of reproduction, storage and distribution of works is manufactured, and distributed to end users. Presently, the delictual damages can be sustained unless the following elements are proved,

> (a) The defendant must have committed an act, or an actionable omission;
> (b) that is 'wrongful';
> (c) that caused;
> (d) harm, in the form of damage or loss, to the plaintiff;
> (e) because of the fault (whether intentionally or negligently) of the defendant.'[1359]

The elements can fit the existing prejudicial implications arising from private copying. In this regard, assuming there isn't a private copying exception, end users act of private copying is wrongful to the extent that it is unauthorised, causing harm to the author, in the form of a lost sale, because of the intentional fault of the end user. This therefore warrants payment of compensation as 'damages' for the harm caused. However, where a private copying exception exists, the previously purported 'wrongful' private copying act is made lawful provided compensation is paid in compliance with the three-step test consideration which discourages interference with the normal exploitation of work, and conduct that is prejudicial to the legitimate interest of the rightholder.[1360]

A litigant who sues on delict seeks to recover the loss which he had sustained because of the wrongful conduct of another, and therefore pursues restoration of the diminished patrimony.[1361] The suitability of the delictual requirement arises in the context of the wrongful conduct, which is accompanied by compensation or restoration of the patrimonial loss. As a matter of principle, private copying must be accompanied with a levy, to operate as fair compensation, for the harm caused thereby offsetting the losses arising from private copying.

[1359] See *Country Cloud Trading CC v. Member of the Executive Council, Department of Infrastructure Development, Gauteng* 2014 (12) BCLR 1397 (CC) para 40.
[1360] Berne Convention, Art 9(2).
[1361] *Trotman v Edwick* 1951 1 SA 443 (A) 449B-C.

6.3.2 Targeted levy contributors

As is the norm in many developed and developing jurisdictions, the copyright levy is designed to be paid by the manufacturers, distributors, and importers of devices that can record, store and distribute content.[1362] The manufacturers are ordinarily expected to pass the cost to the consumers by pricing the levy in the purchases. For imported devices, the levy is paid at the point of entry - customs department and if the production is within the jurisdiction, by the manufacturer at the point of manufacture, or assembly. Various other jurisdictions have followed this approach.[1363]

In other jurisdictions such as Germany and Slovakia, there is deliberate expansion of liable entities beyond the manufacturer or importer in circumstances where they are unknown, or information is withheld to justify liability.[1364] This is considered an important safeguard to enable CMOs to administer the levy effectively where records have not provided adequate information. As a principle, this study also proposes that liability should extend to a retailer where the manufacturer of the device is not specified for liability purposes. The retailer, as is the form with the manufacturers of the leviable devices could advisedly factor in the levy in the purchase price of the device. This approach is important because this study is also proposing to levy on refurbished devices which in many instances may have blurred manufacturers in the supply chain. With many imported and undocumented electronic goods from unknown destinations, this ordinarily presents challenges in identifying manufacturers. In his recommendations, Mr Vitorino suggested it would be impracticable and greatly increase administrative costs to switch the liability to retailers.[1365] This is disputed. It is submitted that if for tax purposes retailers have been previously compliant in meeting their obligations, nothing stops them from honouring the levy by having such payments reflected in their sale records. However, in principle, it is the manufacturers and importers that are liable and where circumstances are such that records of the devices don't provide any evidence of the levy ever having been paid, for effective administration of the levy purposes, liability should lie with the retailer.

[1362] See within the EU: - Belgian Copyright Act, Art. 55 and 59; French CPI, Art. L. 311-4; German Copyright Act, s 54(2); See within Africa: - See also Ghana's Copyright Regulations, 2010 (L.I. 1962) Regulation 16. See also Malawi Copyright Act Chapter 49:03 s 102(3).
[1363] Olubiyi (note 161 above) 94. See also in Nigeria, it's provided under Copyright (Levy on Materials) Order 2012, Section 1(2).
[1364] WIPO (note 1266 above) 17.
[1365] Ibid.

In Ghana, manufacturers, and importers are obliged at three months intervals, beginning from the 31st March of each year to send a statement of account to revenue authorities.[1366] A levy of twenty per cent of the cost of insurance and freight value of the devices is paid and four per cent of the collections are deducted upfront by the revenue authorities. While the approach within the EU is fragmented, Ghana has replicated the fixed ratio approach in levy collections from some of its jurisdictions. It is proposed that South Africa adopts the same because the administrative nature of dealing with a fixed ratio approach is not cumbersome. The period of forwarding statement of accounts submissions by manufacturers and importers is fairly reasonable for accounting purposes and the logistics costs are reasonable and not prejudicial to the remuneration interest of authors.

a.) Exemption of material for the visually impaired

The copyright law regime in Ghana at present has no special mention of copyright exception for people with disability,[1367] and the proposed South African levy framework will depart from this approach. As a principle, institutions representing people with disabilities should be exempted from the levy and this approach should be reflected in the domestic copyright law. In South Africa, vision loss is a significant public health concern. Recent studies reported a 0.90 per cent prevalence of blindness, representing about 880 000 of the total population.[1368] Yet, as Blind SA suggests, only around 0.5 per cent of all published works in South Africa are available in accessible formats for the visually handicapped creating what was termed a 'book famine'.[1369] The unfortunate reality is that South Africa has not yet signed the Marrakesh Agreement which as a humanitarian and social development treaty is seeking to create a set of mandatory limitations and exceptions for the benefit of the visually handicapped. The South Africa government indicated that it will only accede to the treaty after amending its current copyright laws.[1370] Nonetheless, the Constitutional Court in *Blind SA v Minister of Trade, Industry and Competition and Others* Case, has already held unconstitutional sections' 6 and 7 of the Copyright Act to the extent that it failed to make

[1366] Copyright Regulations, s 16(1).
[1367]U Osuigwe 'The Doctrine of Fair Use/Dealing in The Digital Dissemination of Copyright Works' (2021) *JIHRCLI* Vol. 1 108.
[1368] E K Addo, K O Akuffo & R Sewpaul, *et al.* 'Prevalence and associated factors of vision loss in the South African National Health and Nutrition Examination Survey (SANHANES-1)' (2021) *BMC Ophthalmol* 21, 1 (2021) available at *https://doi.org/10.1186/s12886-020-01714-4*. accessed 30 May 2023).
[1369] *Blind SA v Minister of Trade, Industry and Competition and Others* [2022] ZACC 33.
[1370] S Samtani 'The Domestic E The Domestic Effect of South Africa ect of South Africa's Treaty Obligations: The treaty Obligations: The Right to Education and the Copyright Amendment Bill ' (2020) PIJIP/TLS Research Paper Series 8.

provision for exceptions that would facilitate persons with visual and print disabilities access to reading materials.[1371] There are many people living with disabilities studying at South African in schools and tertiary institutions, battling with 'book famine' where less than 1% of educational materials in developing countries are in accessible formats. The CAB carries progressive provisions under section 19D to cater for people living with disabilities. Already, the court in the Blind SA case had proposed a provision under section 13A to operate until an amendment had been effected by parliament, in line with the Marrakesh Treaty Articles 3, 4(2) and (4) and (5). The court was guided by the three-step test that is adopted when formulating exceptions and limitations to the exclusive rights of copyright holders, which provides that exclusive rights of copyright holders may be interfered with in certain special cases without impeding the normal exploitation of the work and unreasonably prejudicing the legitimate interests of the author. The nature and scope of the copyright levy legislative framework facilitates unimpeded access to work, however section 19D of the CAB if enacted will address the constitutional concerns raised in the Blind SA case.

6.3.3 The de minimis principle

While fair compensation for the harm caused is an important approach in realising an author's remuneration right, not all circumstances should allow for the payment of the proposed levy. Where the envisaged harm is minimal, there are guiding principles within the EU, Ghana and South Africa captured under both civil and criminal law that should help guide formulating principles to dictate considerations that should apply when levy obligations arise where minimal harm occurs.

A long-established principle of the common law is the *de minimis non curat lex* which translates as 'the law does not concern itself with trifles.'[1372] The principle which in South Africa is activated as a defence in both civil and criminal proceedings does not operate to exclude unlawfulness of the defendant or an accused person, but it is a decision of the court to allow unlawful conduct to go unpunished on account of its triviality.[1373] The practical effect of the principle is an acquittal or discharge because the allegations are inconsequential.[1374] The precedent that captures this principle is *S v Kgogong*[1375] where the

[1371] Blind SA case (note 744 above) 33.
[1372] J Burchell & J Milton *The principles of criminal law* 3 ed (2005) 355.
[1373] Ibid.
[1374] Ibid.
[1375] *S v Kgogong* 1980 (3) SA 600 (A).

court refused to convict theft of a worthless piece of paper. Similarly, the rule will apply in copyright cases where the reproduced work is of some small insubstantial part.[1376] The value of the reproduced item is also considered. While value is an open-ended term, it is frequently evaluated in monetary terms, distance, weight, time or other quantitative terms. This is so because of the challenges in designating value.[1377] In its application to the copyright levy, the principle must be informed by practical and speedy administration of justice. Snyman submitted that 'from the point of view of policy it is undesirable that the administration of criminal justice, [likewise civil law and administration of levies] which is already overloaded, should be burdened with the adjudication of trivial charges.'[1378]

The principle was formalised into the EU private copying levy to discourage fair compensation payment where the harm caused to the author through private copying is negligible. Recital 35 of the Copyright Directive states that where fair compensation is required, the consideration for compensation levels should take account of the damage done by the limitations to the author's remuneration right. Compensation might be gratuitous if the damage is minimal. For example, the de minimus rule is applied to 'porting' which refers to private copying of lawfully acquired content to other devices.[1379] Time or format shifting which facilitates conversion of sounds recordings from one format to another is unlawful under the current Copyright Act. However, the proposed CAB legal framework will legalise conversion of music from one format to another under certain circumstances relating to creation of back-up copies, for personal use, and to store the works in a durable format. The CAB under the section 12A fair use exception clause provides for format shifting exception and in section 12C (1) (b) it legalises to 'adapt the work to allow use on different technological devices.' The format-shifting exception applies to lawfully obtained copies by the person exercising the exception. This obviously disqualifies infringing copies. This approach chimes with the ruling in the ECJ's *ACI Adam BV and Others v. Stichting de Thuiskopie, Stichting Onderhandelingen Thuiskopie vergoeding* case,[1380] which outlawed national legislation providing for a levy system which makes no distinction between private copies made from lawful sources and those made from counterfeited or pirated sources.

[1376] A Sirois and SE Martin 'United States copyright law and digital sampling: Adding color to great area' (2007) 15 *Information & Communication Technology Law* 11.
[1377] J M T Labuschagne 'De Minimis Non Curat Lex (1973) *Acta Juridica* 291.
[1378] C R Snyman *Criminal Law* 4 ed (2002) 139-141.
[1379] P.Bernt Hugenholtz, L Guibault and Svan Geffen *The Future of Levies in a Digital Environment* (2003) iii.
[1380] See ACI Adam BV and Others case (note 181 above).

The application of the de minimis rule has its complications in the digital era where the lines between actual infringement and trifling infringement have become indistinct. As such, there is need for the judiciary to exercise caution in the application of the de minimis principle to safeguard the interests of all parties involved and ensure that its applicability does not undermine the ownership of the rightholders. Against this background, there are challenges around determining what level of infringement creates actual infringement and what should be permissible as fair use or disregarded as de minimis.

This principle is worth considering in the application of the copying levy because negligible harm or damages are not worthwhile considering that they incur unnecessary administrative costs and inconvenience. This approach should not distract CMOs from considering and applying leviable circumstances where real harm or damage is ascertainable given the complex administration demands associated with implementing the levy. Another crucial consideration to make in adjudicating civil proceedings where the de minimis principle is central to the copyright levy dispute is for the judiciary to exercise caution and avoid sending end users a direct or indirect message that slight infringements of copyright are always excused. As such, each case will be treated with its own surrounding facts and circumstances.

The ECJ has held that EU Member States, as enunciated in Recital 35 have a wide discretion to set the minimum threshold for when a levy is payable provided this is applied in a manner consistent with the principle of equal treatment. In this regard, there is also scope for South Africa to exercise discretion and determine its de minimis threshold taking into consideration that whatever levels it sets should not compromise the authors' right to remuneration given their economic historical deprivation plight.[1381] The deminis rule also has context to the provision under Article 19 of the EU Copyright Directives providing for transparency obligations in providing information around the distribution of royalties. It states that,

> 'Member States may provide that in duly justified cases where the administrative burden resulting from the obligation … would become disproportionate in the light of the revenues

[1381] Chulumanco Mahamba 'Parliament hears how SA actors die poor as they're can't claim royalties' *The Star*, 13 August 2021. available at *https://www.iol.co.za/the-star/news/parliament-hears-how-sa-actors-die-poor-as-theyre-cant-claim-royalties-98b05c5d-c97a-4908-b729-4911f18e167f.* accessed 4 April 2023. It reported that, 'The SA Guild of Actors (Saga) has told Parliament that famous actors are dying in poverty in South Africa because they are not allowed to claim their royalties.'

> generated by the exploitation of the work or performance, the obligation is limited to the types and level of information that can reasonably be expected in such cases. […]
>
> Member States may decide that the obligation … does not apply when the contribution of the author or performer is not significant having regard to the overall work or performance, unless the author or performer demonstrates that he or she requires the information for the exercise of his or her rights under Article 20(1) and requests the information for that purpose.'

The transparency obligation therefore many be limited in cases where it is considered disproportionate or if the author's contribution to the overall work is not noteworthy. The justification for providing the information sought should therefore be proportionate to the revenue expected or generated, 'such that where the obligations are burdensome in comparison to the revenue generated, they may be relaxed.'[1382] The CMO may justifiably waive the reporting obligations if the contribution of the author or performer is not trivial.[1383] This procedure will entail make an assessment of the overall economic value of the authors contribution. This may entail an objective test, or exercise of a value judgment that should be accompanied by justifiable considerations. As such, the copyright levy statutory framework should accordingly guide the CMO on reporting measures and transparency.[1384]

6.3.4 Double payments

Copyright holders have varying licensing frameworks in the reproduction and assignments of their rights. Their embargoed or strictly reserved works for particular publishers, producers, record labels or film industries are restricted from unauthorised access without payments or a license. Private copying is thus discouraged. In this regard, as a principle, where copying is subject to an existing license, a levy fee should not apply.[1385]

To ensure the credibility of the levy in cross border transactions, efforts must be made to avoid double payments which may result in end users or purchasers having to pay twice for the same device. Recital 35 confirms that the teleological premise of the directive was designed to protect end users from avoiding making double payments. To avoid such double payments, an EU parliament resolution recommended that, 'private copying levies for the same product should only be able to be collected once by a collective management

[1382] Copyright Directive, Art 19(3).
[1383] Copyright Directive, Art 19(4).
[1384] Copyright Directive, Art 19(5).
[1385] See *Amazon.com v Austro-Mechana Case* C-521/11. Judgment clarifying double payments of the private copying levy in the context of a cross-border transaction.

organisation of a Member State, and that levies unduly paid in a Member State other than that of the end user should be reimbursed.'[1386] The EU Directives also recommend that in cross-border transactions, the levies must be collected in jurisdictions in which the end user or purchaser of the device resides. The EU parliamentary resolutions and precedents have given effect to this authoritative position.[1387] It is therefore proposed as a principle that the proposed levy should also outlaw cross border double payments. The CMOs must therefore provide an administrative framework that gives effect to this principle. Disapproving double payments is not a principle confined to the EU jurisdictions alone. Double payments entail considerations of equity and social justice within South Africa's jurisprudence. While the terms may differ, the approach is generally the same that an entity or individual should not be subjected to double payments of the same object arising from the same transaction. The principle takes different wordings and forms in its application under tax law, contract or delictual remedies. In South Africa it emerges as either *indebiti payments*,[1388] double payments under tax law[1389] or as inequitable conduct under contract law.[1390] In all the circumstances, the courts have held that risk of placing a party to double jeopardy or payment must be avoided as this is contrary to the interests of justice and invariably inequitable.[1391] In this regard, as a matter of principle double payments in the implementation of the levy must be avoided because they create inequitable trade imbalances and prejudice. Clear administrative guidelines to guard against double payments must be enunciated in the CMO policy framework, and a mandated South African collection society must therefore:

a.) Guarantee that no double payments occur around cross-border transactions.
b.) Administratively, the CMOs must ensure that levy for the same digital leviable device is collected once so that consumers don't pay twice for the same device;
c.) The CMO must guarantee that levies unduly paid by consumers or entities are reimbursed.

[1386] EU Committee on Legal Affairs 'Motion for an EU Parliament Resolution on private copying levies' (2013) para 12. available at *https://www.europarl.europa.eu/doceo/document/A-7-2014-0114_EN.html.* accessed 7 June 2022 para 13.
[1387] Ibid para 12.
[1388] Nedbank Ltd v Forbes unreported case no (2020/41706) [2022] ZAGPJHC 364 of 30 May 2022.
[1389] I du Plessis 'The incorporation of double taxation agreements into South African domestic law' (2015) *PER / PELJ* 2015(18)4 1198.
[1390] Andrew McCrae v ABSA Bank Ltd unreported case no 08/42229 of 7 April 2009 at 27.
[1391] Ibid.

d.) The CMO must set a reasonable period within which to effect reimbursements for double payments to avoid in extreme circumstances, disruptive and burdensome litigation for restitution, and;

e.) Routine audit reports that must be encouraged to ensure that double payments are determined and books balanced and,

f.) Where double payments concerns are raised, internal accounting standards to confirm and repay where necessary must be expedited.

g.) CMOs must investigate in certain circumstances to ensure that digital services avoid licensing private copies covered by a private copying exception.[1392]

h.) As a principle, the CMO must take note and consider that levies are due in the country of residence of the private user since that is where the harm arises.

i.) The CMO must ensure that in relation to cross-border transactions, the copyright levy must be collected once in the jurisdiction resided by the final end user/consumer because in line with precedents, that's where the rightholders suffer harm and this helps eliminate prospects for double payments.[1393].

j.) Where the government undertakes to pay fair compensation after distributing recordable digital devices to carry out reproductions for commercial purposes may not be excluded from making copyright levy payments even if a comparable levy has already been paid in another jurisdiction. The responsibility rests with the respective Member State to provide reimbursements.[1394]

6.3.5 Fair compensation must arise for lawful sources

There is ostensible failure to appreciate the distinction between piracy, and the private copying levy amongst diverse sections of South African society.[1395] This has inopportunely led to calls for discontinuing efforts at implementing the levy because of perceptions that the copyright levy doesn't address piracy.[1396] The same inaccurate sentiments were echoed in

[1392] Society of Audiovisual Authors 'Making Private Copying Levies Work in the Digital Age: Proposals for a European Framework ' *SAA*, September 2013, available at *https://www.saa-authors.eu/file/57/download* accessed 29 November 2023.
[1393] Austro-Mechan CJEU ruling (C-521/11)11
[1394] Ibid..
[1395] Department of Arts Culture, Science and Technology 'The South African Music Industry: The Cultural Industries Growth Strategy (CIGS)' *DACST*, November 1998. 79. available at *https://www.gov.za/sites/default/files/gcis_document/201409/musicreport0.pdf*. accessed 23 January 2023.
[1396] Ibid.

Ghana, albeit it with different results in that the jurisdiction eventually introduced the levy to fight piracy and raise remuneration for rightholders, while in South Africa it was discouraged because of reservations of its opposite effect to piracy.[1397] However, there is need to delink piracy from the copyright levy, because the private copying exception is designed to escort and support the introduction of the levy. As a principle, the copyright levy cannot be associated with combating piracy because its foundation is based on supporting compensation for rightholders because of a private copying exception which facilitates copying in return for fair compensation. Such existing misconceptions that link piracy with the levy convolute the spirit behind its implementation, and the motivating legal considerations around it. The dissimilarity between piracy and the copyright levy is that: the former is enacted to address private copying by authorising such conduct in return for compensation while the latter, is by its very nature criminal and would entail unauthorised IP reproductions for commercial purposes.

As a principle, the copying levy payable for making private copies of a protected work should take illegal copies into account.[1398] Before some international precedent[1399] outlined the unlawfulness of conflating the copyright levy with payments from unlawful sources, righholders were being compensated from a levy on devices to compensate authors for the unlawful reproductions of their work. In this jurisdiction, it should be noted that allowing reproductions for private use from unlawful sources promotes trade in unlawful activities and therefore any copyright levy statutory outlook must make distinction between private copies made from lawful sources and those made from unlawful sources because it inadvertently legalised piracy.[1400] Perhaps, the misperception arises because the analogue period witnessed piracy on a massive scale, which is now invalidly associated with downloading of online content happening between essentially negligible numbers of users for non-commercial purposes.[1401]

While downloading for non-commercial purposes is protected under private copying exceptions, infringement might occur where uploading of copyright works to websites and file-sharing networks might invert the make available right, an exclusive right constituting

[1397] Collins (note 899 above) 5.
[1398] ACI Adam BV & Others case (note 181 above).
[1399] Ibid.
[1400] Ibid.
[1401] F J C Blázquez (note 164 above) 17.

the right of communication to the public.[1402] The international treaties[1403] have not provided guidance on an exception to the making available right for non-commercial/private uses because uploads and their distribution to varying networks on a wide scale even for non-commercial purposes might infringe the reproduction right.[1404] Therefore, as a principle the copyright levy should set parameters for the distribution extent permissible for uploads to fall within the scope of the exception. It is proposed that the extent of uploads and reproduction right must not prejudice the legitimate interest of the rightholders, as proposed under section 4 of Appendix 1.

Additionally, Appendix 1 further defines a private copy for personal use as any copy made by a natural person for non-commercial purposes provided that rightholders received compensation.[1405] This therefore requires that the copy cannot be used in a transaction for the financial benefit of the natural person engaging in private copying. Under the EU Copyright Directive, this automatically excludes companies, enterprises, and public bodies from the scope of the exception. However, as shall be briefly discussed in the next section the scope of the South African levy proposal will specifically include business entities, as reflected in Annexure 1, section 7. The framework of the exception which authorises private production of work for non-commercial purposes is the fundamental premise of the levy proposal. An individual does not infringe copyright in the work provided the copied work is for that individual's own private use. This exception should also be regarded as an autonomous concept of the copyright levy.[1406]

6.3.6 Levying copy shops reprographic activities

In South Africa, there are numerous copyshops involved in the reprographic activities for commercial purposes and the amount of infringement and remuneration prejudice to rightholders is phenomenal.[1407] In some cases copyshops owners lack understanding of copyright law and different forms of accompanying infringements.[1408] Such copyshops are viewed as both 'enemies' of publishers, and small book factories, while entrepreneurs

[1402] Ibid.
[1403] TRIPs Agreement, nor the WIPO treaties.
[1404] F J C Blázquez (note 164 above).
[1405] CISAC (note 159 above) 9.
[1406] Padawan case (note 272 above).
[1407] See Rebecca Davis 'The man turning copy shops into publishers' Daily Maverick, 27 May 2013, available at *https://www.ru.ac.za/perspective/2013archive/themanturningcopyshopsintopublishers.html*, accessed 1 December 2023. (The article appears on Rhodes University website, but was originally published by the Daily Maverick).
[1408] Ibid.

venturing into such business boast that the economics of the business allow you to print books and make money.[1409] The Dramatic, Artistic and Literary Rights Organisation has indicated that South Africa's copyright law is vague because it fails to specify how much an individual is allowed to copy.[1410] While it's almost impossible to quantify how much rightholders have been harmed by reprographic activities, the solution lies in levying such copyshops to provide the elusive fair compensation from such wrongful infringements, instigated by the physical act –reprography- causing harm to the interest of copyrightholders. In principle, double payments should be avoided when implementing the copyright levy. In this case, copyshops are charged a levy already priced into the photocopiers purchase price when they procure such machines. However, given the nature of the copyshop business, in principle it is explicable to effect a copyright levy against them given the unremitting harm tangled in reprographic activities. In some jurisdictions, such as Germany under Copyright Act of September 9, 1965, section 54, it imposed on copying equipment, such as photocopiers, and scanners, and further on operators of such equipment for commercial purposes. In the implementation of the levy on Copyshops, it is proposed that they should compulsorily register with the relevant CMO to operate such a business. The registration exercise must be accompanied by the production of a tax clearance certificate to ensure tax compliance. Operating the copyshop business without a CMO certificate shall carry penalties outlined in Appendix 1 s 14A (b) of either a fine or imprisonment term proportionate to the extent of the contravention. At all material times, the registration certificate must be displayed within the commercial premises reprography area.

The EU has imposed reprography levies either on the sale of reproduction equipment; proportional to the amount of copies realised in a year; proportional to the number of students or employees; and or a combination of either one of the three preceding systems.[1411] There are cost-effective challenges for a CMO to dedicate its resources and administrative machinery towards monitoring the amount of copies made annually by every copyshop to help determine the copyright levy due. A copy-shop cannot be expected to ascertain the amount of reproductions of copyright works to facilitate levy payments calculated in proportion to the amount of pages copied annually.[1412] Therefore, to address such a challenge in South Africa, it will be ill-founded for the CMO to pass an arbitrary statutory levy with a tariff set that may be disproportionate to the investment returns. Therefore this study proposes that a CMO shall meet the stakeholders: the manufacturers and importers, copyshop business operators to discuss and agree on an acceptable tariff that takes full cognisance of the

[1409] Ibid.
[1410]The Dramatic, Artistic and Literary Rights Organisation, available at *https://www.dalro.co.za/copyright/protection/*, accessed 1 December 2023.
[1411] L Guibault *The Reprography Levies across the European Union* (2003) 1.
[1412] Ibid at 21.

business environment they are operating in and interests of rightholders to resultantly provide a realistic tariff that facilitates the realisation of fair compensation due. Failure to reach an agreement of which the matter should be referred to a commercial arbitration forum for a final and binding tariff that should be gazetted through ministerial regulations set out in Appendix 2. Alternatively, a national statistical consumer survey could be initiated to determine the extent of copyshops' liability.

6.3.7 Targeted levy beneficiaries

The distribution of the copyright levy to different categories of rightsholders by the proposed CMOs follows a set criteria developed by the members following negotiations, and subsequently decreed by the relevant minister in the accompanying regulations. There is need to consider and identify creative works rightsholders' that should be targeted beneficiaries of the levy and identified as such in the accompanying ministerial copyright levy regulations as proposed and captured in Appendix 2. A posteriori, rightholders' involved in the creative content production that should benefit from the proceeds of their creative content are, inter alia, musicians, artists, filmmakers, authors, journalists, and performers. Fiscor writes that, 'the basic principle may hardly be anything else but that the remuneration collected by joint management organizations should be distributed to those individual owners of rights whose works or objects of related rights have been used.'[1413] Ordinarily, the identified members are listed in the CMOs registered membership directory to facilitate levy disbursements. The idea behind the levy's introduction was primarily informed by that creative forces needed protection and incentives to finance their creativity and further innovation due to digital infringements unaccompanied by fair compensation.[1414] Article 2 of the EU Copyright Directive sets out different categories of rightholders provided to benefit from the levy and the criterion is based on capacity to make or produce distinctive and unique creative content, perform from the work, fix the work, and distribute the work.[1415]

[1413] M Fiscor *Collective management of copyright and related rights* (2002) 148.

[1414] S Nikoltchev 'Foreword' in Susanne Nikoltchev (ed) *Who Pays for Private Copying?* (2011) 3.

[1415] Article 2 provides that, 'Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part: for authors, of their works;

(a) for performers, of fixations of their performances;
(b) for phonogram producers, of their phonograms;
(c) for the producers of the first fixations of films, in respect of the original and copies of their films;
(d) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.'

The proposed copyright levy regulations lists various beneficiaries in Annexure 2 of the proposed ministerial regulations. These include the CMOs itself, which funds would be earmarked for administration costs; Cultural purposes (which may mean the use of certain amounts for the promotion of creativity, competitions, fellowships), and social purposes may also involve health insurance or pension funds;[1416] musical works; audio-visual works and literary works.

a.) Administration costs

Oriakhogba & Kawooya posit that there is a general expectation that CMOs operating in developing countries, particularly in Africa, 'should be willing to put in a lot of hard work and sacrifice to develop their collective management systems and be willing to deduct lesser percentages as administration fee at the early stages of their establishment.'[1417] This approach is considered important because the CMOs are generally non-profiting making institutions and therefore administrative fees should not a road to riches for the management.[1418] There have been concerns around CMOs abuse of royalties, accompanied by unexplained huge administrative costs which could not correspond with royalties' collections and distribution. While administration fees vary amongst South African CMOs, they ranged on average around 25 per cent of total collections.

Insights and trends showing how South Africans use digital devices and services in 2023, highlight potential huge copyright levy inflows should it implement the copyright levy.[1419] Data from GSMA Intelligence shows that there were 112.7 million cellular mobile connections January 2023, with 42.9 percent of the total population exploiting social media in the same period.[1420] With over 43.48 million Internet users, there is potential for huge copyright levy collections, based on the provided statistics alone.[1421] So, it will help to raise the current administrative fees, where excessively higher collection returns are anticipated, and use of technology and human capital is increased. However, the extant 2006 needletime regulations provide that CMOs must keep not more than 20 per cent of rights revenue to

[1416] M Fiscor (note 1413 above) 148.
[1417] Oriakhogba & Kawooya (note 825 above) 5.
[1418] Ibid. See also Dewald Van Rensburg and Ntombizodwa Makhoba 'Samro's rocky place' *News24*, 23 September 2018, available at *https://www.news24.com/fin24/samros-rocky-place-20180923-2*, accessed 30 January 2024.
[1419] Ibid.
[1420] Ibid.
[1421] Simon Kemp, 'The state of digital in South Africa in 2023' *DataReportal*, 11 February 2023, available at *https://datareportal.com/reports/digital-2023-south-africa*, accessed 28 November 2023.

cover administration costs.[1422] It has however been proposed that a maximum of 30 per cent has been crusaded as appropriate where CMOs are newly established, as opposed to well-established jurisdictions where deduction should not go beyond 20 per cent.[1423]

The advent of digital technology behoves upon CMOs to adapt to changing circumstances and invest in emerging technologies and expand its collection base. Given the costly investments involved in purchasing such digital equipment, it may justify increasing the 20 per cent threshold set by the current 2006 CMOs Regulations. Therefore it may be necessary to provide CMOs with some latitude to invest and broaden its collection base, which means purchasing latest technology and investing further in human resource capital. As such, it is recommended that the administration fee be increased to 25 per cent because the current restrictive 20 per cent cap might hinder the CMOs capacity to exploit existing digital technologies and improve on collections. Other organisations such as the International Federation of the Phonographic Industry (IFPI), provides in its Code of conduct for Music Licensing Companies (MLCs) that,

> 'Each MLC is to deduct from the collected sums only the appropriate costs of operating the MLC. No additional deductions for whatever reason should be made unless the right holders have agreed to such deductions or they are stipulated by law. MLCs are to provide details of such deductions to members and indicate whether these are statutory or voluntary.'[1424]

It is implied in this provision that caps on administrative costs are not necessary, serve for deduction of only appropriate costs of operating the MLC. It is understandable that some South African CMOs might be concerned about the placing of administration caps, given its restrictive nature in hindering collection and technological modernisation avenues. Given the background to unearthed CMO improprieties, this might not be advisable at this stage. A proviso would be captured in the Appendix 2 regulations providing for CMO members to be granted scope for increasing the administration costs at an instigated extraordinary Annual General Meeting (AGM) should exigencies of the situation demand. Given the background of allegations of mismanagement of royalties and lack of transparency by CMOs,[1425] members

[1422] Regulation 6(2) of the Collection societies regulations dictate that collecting societies shall distribute at least 80% of rights revenue and this automatically places a cap of 20% for management fee.
[1423] Oriakhogba & D Kawooya (note 752 above) 5.
[1424] See The International Federation of the Phonographic Industry, Code of Conduct for Music Industry Music Licensing Companies ("MLCs") (2021), V(4) available at *file:///C:/Users/User/Downloads/MLCs-Code-Of-Conduct-May-2021.pdf*, accessed 28 January 2024.
[1425] Dewald Van Rensburg and Ntombizodwa Makhoba 'Samro's rocky place' *News24*, 23 September 2018, available at *https://www.news24.com/fin24/samros-rocky-place-20180923*-2, accessed 28 January 2024.

may be tempted to refuse increasing administrative costs, as this may tap into their income given their already unsatisfactory financial situation. Such a position will impact on the CMOs capacity to respond proactively to situations and increase spending in the interest of rightsholders and increase scope for revenues. A 25 per cent cap with the CMO adhering to proper accounting standards should help create efficiency in the collection, management and distribution of the copyright levy.

Any breach of the 25 per cent cap must attract appropriate penalties against specific persons in the CMOs management found guilty, in line with provisions of the Companies Act.[1426] Therefore, it is not recommended that CMOs should be suspended nor have accreditation withdrawn as this may affect its operations and prejudice members. This will not be in synch with the overall CIPC objectives to protect members. The penalties meted out by the CIPC against CMOs management must be implemented only after procedures in line with the Administrative Justice Act 3 of 2000 have been followed.[1427] This would apply in circumstances where such breaches of the 25 per cap would have occurred without being sanctioned by at an AGM by a properly constituted membership.

Overall, the private copying levy regulations must therefore prescribe a 25 per cent administrative fee costs.[1428] Given the demonstrated tendencies by CMOs to manipulate royalties towards excessive administration fees, the allocations for such work must be set according to law, as provided for in Romania,[1429] and in Poland where the limit is 20 per cent and Belgium 15 per cent respectively.[1430] In Ghana 30 per cent is allocated for administration costs,[1431] and however this triggered authors concerns that CMOs are directing excessive royalties towards administration costs in lieu of artists remuneration. SAMRO has been accused of the same,[1432] motivating the need in this study to create statutory safeguards by prescribing administration costs fees by law to help secure the authors remuneration interests.

[1426] Companies Act 71 of 2008, Liability of directors and prescribed officers, s 77(1) (2) (3) (6).
[1427] Administrative Justice Act 3 of 2000: Procedurally fair administrative action affecting any person section 3(1) 'Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.'
[1428] See for example in Poland, the maximum 20% administrative fee is prescribed by law. In Belgium, it is 15%.
[1429] WIPO (note 1266 above) 22.
[1430] Ibid.
[1431] It's established in terms of s 29(3) and 19(1a) of the Copyright Regulation 2010, L.I 1962 as follows: (1) deduction in terms of administrative costs - 30%.
[1432] Niki Moore 'SA music industry exposed: the money is not going to the artists: One of many grim statistics: of R200 million in royalties collected by SAMPRA in 2020, R41 million went on "administrative costs' *GroundUp*, 26 November 2021. available at *https://www.groundup.org.za/article/sa-music-industry-exposed-money-not-going-artists/*. accessed 18 February 2023.

This must be accompanied by strong monitoring regulatory frameworks. Where difficult natural circumstances, such as COVID-19 prevent the CMOs from collection and carrying out its mandate and distribution royalties, the minister and or members must be empowered to effect some regulatory 25 per cent adjustments for the collection society to effectively meet its commitments given minimal collections that may occur.

b.) Cultural/Social funds

The 2006 regulations provide a 10 per cent fee for cultural activities and given existing global trends and this are laudable.[1433] Similar to this study recommendation, Ghana allocates 10 per cent towards cultural activities.[1434] It is therefore recommended that the copyright levy regulatory framework follow the same approach. However, there is need to demonstrate the necessity for a cultural fund incorporated within the levy, which serves the same purpose as provision within the Regulations. This is important because there will be need to justify the 10 per cent provision for cultural fund should the levy regulations take effect and therefore its background and rationale must be provided and justified.

While the overall objective of the levy is to benefit specified rightsholders, there are accompanying social and cultural deductions to help develop the cultural industry and support aged or incapacitated authors of work. They may also come in the form of health insurance and cultural purposes to fund cultural events or the publication of meritorious works.[1435] There have been arguments, in other jurisdictions that socio-cultural activities to groups other than creators should not fall within the scope of the levy.[1436] The principle and justification guiding such socio-cultural activities' levy contribution is that – their value is innately connected to the cultural works and content they,

> 'allow us to listen to, view, read, contemplate and appreciate… [the works] the levy is a fair, virtuous and equitable remuneration mechanism in the service of diversity and cultural

[1433] See Collecting Society Regulations, Distribution 8(5) '(c) A collecting society may provide in its distribution plan that, with the approval of the highest executive organ of the society, a portion of the 1 proceeds may be set aside for the promotion of the creative arts, and culture and for welfare purposes (including pension benefits) of performing artists. Such portion shalt not exceed 10% of the amount to be distributed in any one year.'

[1434] CS Regulations 2010, s 19 (1).

[1435] WIPO (note 1162 above) 20-22.

[1436] Grzegorz Tylec 'Private Copying Levy for Social Purposes – Draft Changes in Poland and Compatibility with EU Law – Part II' *Kluwer Copyright Blog*, 16 July 2021 available at *https://copyrightblog.kluweriplaw.com/2021/07/16/private-copying-levy-for-social-purposes-draft-changes-in-poland-and-compatibility-with-eu-law-part-ii/*, accessed 28 November 2023.

> vitality. The private copying levy is vital to the cultural diversity … and more broadly to the cultural dynamism of all its territories.'[1437]

This understanding of the value and support for cultural activities found support in a persuasive ECJ judgment, in which the court held that,

> 'fair compensation […] does not constitute an obstacle to the indirect payment to those entitled, through the intermediary of social and cultural establishments set up for their benefit, of a part of the revenue intended for fair compensation is intended for social and cultural establishments set up for the benefit of those entitled to such compensation is not in itself contrary to the objective of that compensation, provided that those social and cultural establishments actually benefit those entitled and the detailed arrangements for the operation of such establishments are not discriminatory.'[1438]

Any authorised fund allocation by CMOs that is separate from covering actual costs and distribution of remuneration to rightsholders is either cultural or social. The distinction between cultural and social purposes is that, the latter is geared towards promotion of creativity such as competitions and fellowships while the former involves the transfer of the money to health cover or pension funds.[1439] The principle that informs cultural and social allocations is the express, implied or tact intentions of the rightsholders that CMOs should be authorised to allocate a particular percentage of the levy collections towards a scheme that enhances cultural projects and well-being.[1440]

In EU jurisdictions, national cultural policy considerations often inform the levy's percentage allocation for cultural purposes. This explains why countries such as France provide a 25 per cent allocation towards developing its rich culture and heritage at the expense of providing greater remuneration percentages for its authors.[1441] France is in general excessively proud of its culture and heritage, because its art, architecture, music and literature, the courts and monasteries played a pivotal role in the development and refining of western culture.[1442] Funding towards cultural purposes in this jurisdiction will be limited to per cent and similarly as under the EU copyright levy framework will be channelled towards

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[1437] CopieFrance 'What is the private copy levy for? The principle: a right and its compensation' *Collective Management Organisation, France*, available at *https://www.copiefrance.fr/en/private-copying/what-is-the-private-copy-levy-for*, accessed 28 November 2023.
[1438] *Amazon.com International Sales Inc.,v Austro-Mechana* Case C-521.
[1439] Fiscor (note 1417 above) 150.
[1440] Ibid.
[1441] Ibid at 15.
[1442] The local 'France ranked world's top cultural trendsetter' *The local*, 20 January 2016, available at *https://www.thelocal.fr/20160120/france-is-worlds-top-trendsetter/*. accessed 6 February 2023).

clearly defined cultural and social activities.[1443] These funds could compliment the Department of Arts and Culture contributions towards financing cultural activities creating breakthroughs for upcoming authors.[1444] It should be noted that in some jurisdictions such as Turkey, the entire levy budget is used to finance cultural purposes, while in Austria and Burkina Faso, half the budget is used for the same.[1445] The promotion of cultural activities encourages talent development, marketing authors' work and stimulating innovation. A similar EU approach in promoting cultural activities was noted in the *Amazon v Astro-Mechana* ruling by the CJEU in that,

> 'such a system of indirect compensation meets one of the objectives of the appropriate legal protection of intellectual property […] which is to ensure that European cultural creativity and production receive the necessary resources to continue their creative and artistic work and to safeguard the independence and dignity of artistic creators and performers.'[1446]

The same would apply to South Africa in its implementation of the same objectives captured in its IP policy framework.[1447] In this proposal, the CMOs levy allocations should prioritise and be sensitive to the remuneration plight of rightsholders' in a developing country requiring greater allocations to support their livelihoods, health insurance and pension benefits. CISAC, in its unstinting support for the copyright levy noted that in several African countries 75 per cent of the royalties collected under the levy are distributed to creators to allow them affording a decent living to work and create new artworks, while the remainder 25 per cent is reserved for cultural purposes.[1448]

[1443] See Austro-Mechana ruling (note 837 above) regarding the Austrian law stipulating that 50% of the private copying levies collected must be used for social and cultural purposes, that such distribution of part of the private copying remuneration to social and cultural institutions is compatible with EU law.

[1444] UNESCO defines the Cultural and Creative Industries (CCIs) as 'sectors of organised activity whose principal purpose is the production or reproduction, promotion, distribution and/or commercialisation of goods, services and activities of a cultural, artistic or heritage-related nature.' available at www.unesco.org.

[1445] CISAC (note 159 above) 15.

[1446] *Amazon.com International Sales Inc. and Others v Austro-Mechana* C-521/11. para 52 (A European Court of Justice Decision).

[1447] Department of Department of Trade and Economic Development 'Intellectual Property Policy of the Republic of South Africa' (2018) 4. available at *https://www.gov.za/sites/default/files/gcis_document/201808/ippolicy2018-phasei.pdf*. accessed 5 January 2022. It provides 'To nurture and promote a culture of innovation, by enabling creators and inventors to reach their full potential and contribute towards improving the competitiveness of our industries … to promote South African arts and culture.'

[1448] CISAC 'Creators to benefit as Malawi implements private copying levies' *CISAC*, 7 May 2019. available at *https://www.cisac.org/Newsroom/articles/creators-benefit-malawi-implements-private-copying-levies.* accessed 18 February 2023.

At present, there is no dedicated social security provision for South African artists should they suffer ill-health and other physical incapacities.[1449] This study has illustrated several instances where creative content producers have died indigent owing to poor health challenges while other prominent artists are presently living in abject poverty without royalties being paid despite their indisputable enormous contribution to the cultural industry.[1450] In Ghana, GHAMRO developed a system called AGRIMS (Age, Right holders Monthly Stipend) which provides financially support for its members who have reached advanced age and incapacity to produce songs to enable them to sustain themselves in retirement.[1451] It also has a welfare system that provides members with personal pensions and an established life insurance policy covering its members and four family dependents.[1452] The levy has potential in South Africa to generate huge revenue inflows that could deliver pensions for the cultural industries content creators, through disability, retirement, and dependents benefits.

As a principle, it is proposed as per Appendix 2 section 11, that the percentage allocated for the benefit of rightsholders must be higher in proportion to other beneficiaries because the gist of this study is to bolster the legal framework that ensures that rightsholders receive adequate compensation for their work. This is contrary to the fact that in Turkey, 100 per cent of the levy allocation is distributed towards cultural purposes administered by the ministry of culture,[1453] while Austria provides 50 per cent to cultural purposes, and France 25 per cent. These are exceedingly high percentages that will defeat the purposes of the levy towards improving the rightsholders standard of life. It is therefore recommended that at least 10 per cent of the levy should be allocated for cultural purposes, while the leading budgetary allocation and responsibility of ensuring the development of the cultural industry and national heritage must be provided through an annual government budget, administered through a

[1449] Department of Arts, Culture, Science & Technology 'The Music Industry Task Team (MITT) Report' (2000) para 3.3 . available at http://www.concertssa.co.za/wpcontent/uploads/2016/06/DACST-Music-Industry-Task-Team-MITT-2001.pdf. accessed 5 November 2021.A recommendation was made that part of the blank tape levy should go towards creating a social security fund for artists, acknowledging that many die destitute without regular royalties payments.

[1450] Kyle Zeeman 'Our artists are dying poor and something needs to be done, says Eugene Mthethwa' *The TimesLive*, 27 May 2019. available at *https://www.timeslive.co.za/tshisa-live/tshisa-live/2019-05-27-our-actors-are-dying-poor-and-something-needs-to-be-done-says-eugene-mthethwa*/. accessed 7 July 2023.

[1451] ARIPO *Comparative Study on Copyright Laws of ARIPO Member States and their Adherence to International Instruments on Copyright and Related Rights* (2016) 19.

[1452] O M Acquah-Nunoo & E Acquah-Nunoo 'The state of royalties in the music industry in Ghana' (2022) Quantum Journal of Social Sciences and Humanities 2(2), 70.

[1453] See Turkey's Copyright Law 1951 as amended: Article 44 provides for an equipment levy to be paid to the Ministry of Culture and Tourism: (Amendment: 21.2.2001 – 4630/23).

relevant ministry or cultural department as is the case in this jurisdiction at present.[1454] A major government intervention is warranted because of its huge national budget supported by ancillary national policy objectives. Having a government investing in cultural sectors is imperative because of the accruing direct and indirect benefits to national economy, and ensuring fair countrywide access to culture. While as is the norm CMOs can fund cultural activities,[1455] it should only be considered as complementary to what the government can do.

c.) Musical works, audio-visual works and literary works

The CMO members will determine the share to be distributed between creative content rightsholders, namely amongst musical, audio-visual and literary works. There are already in existence distribution rules by CMOs, but however this is a new unique remuneration stream that will require some adjustments from the current norms. The distribution rules must relate to the popularity of the content and usage as determined by the national survey statistics and or metering software to be discussed later in this chapter. The targeted beneficiaries, other than the CMO administration fee and cultural activities, are the creative content authors for the musical, audio-visual and literary works. The percentage share for each segment will be determined by either the number of people employed in the particular sector or contribution to the national economy. Either way, figures will show that there are many employed producers and performers in the music industry, than in the audio-visuals and literary arts sector, respectively.[1456] As is the approach in other African jurisdictions implementing the levy, it therefore makes sense to allocate more copyright levy funds to musicals, followed by

[1454] See Minister of Arts and Culture, Estimates of Expenditure: 2020. /21 Financial Year Arts and Culture National Budget, Vote 37. available at *https://www.treasury.gov.za/documents/national%20budget/2018/ene/Vote%2037%20Arts%20and%20Culture.pdf.* accessed 18 February 2023. Vote of ZAR 4 882.8m dedicated to 'contribute to sustainable economic development and enhance job creation by preserving, protecting and developing South African arts, culture and heritage to sustain a socially cohesive and democratic nation. … Broadly, this legislation mandates the department to, preserve, develop, protect and promote the cultural, heritage and linguistic diversity and legacy of South Africa … provide leadership to the arts and culture sector so as to accelerate its transformation.'

[1455] Ghana Copyright Regulations , 2010 s19 (1) The Minister shall distribute the levies collected in furtherance of regulation 14 as follows: (a) ten percent for cultural activities to be collectively administered by the collective administration societies.'

[1456] See South African Cultural Observatory (Saco) 'Measuring and Valuing SA's Cultural And Creative Industries'(2020) Capstone Report, Nelson Mandela University, available at *https://www.southafricanculturalobservatory.org.za/article/the-sa-cultural-observatory-measuring-and-valuing-sa-s-cultural-and-creative industries#:~:text=Books%20and%20Press%20made%20up,already%20slowing%20before%20the%20pandemic),* accessed 29 January 2024. The South African Cultural Observatory was established to undertake economic research for the cultural and creative industries in South Africa. It noted that, 'Performance and Celebration decreased from 5% in 2017 to making up 4% of cultural occupations in 2019. Audio-visual and Interactive Media remained at 2.7%, and Cultural and Natural Heritage at about half a percent.'

at audio-visuals and literary arts.[1457] Tentatively, it is therefore proposed that, musical works should receive 30 per cent, audio-visuals 20 per cent, and literary works 15 per cent.

d.) Journalists: Proposed beneficiaries of the copyright levy (part of literary works)

Journalists have not been listed as beneficiaries in all the global jurisdictions implementing the copyright levy, despite being classified in certain circumstances under literary work.[1458] It is proposed in this study that they benefit alongside other members in the literary sector. Similar to musicians and filmmakers, journalists have also suffered from online appropriation, copying and distribution for their work. Several publications have closed shop as advertising dwindled, while unlawful news appropriations reached alarming detrimental levels to the news business.[1459] The journalists content has been repeatedly copied online without compensation, often prompting copyright lawsuits, this after media copies were distributed on WhatsApp platforms, which the publisher averred it affected the sales of the publications and livelihoods of employees.[1460]

The RROs have represented rightsholders including journalists, and it is therefore not a unique issue that they could receive some remuneration stream through existing collection societies. [1461] The journalists' rights are sheltered and protected under copyright literary and

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[1457] See Malawi Copyright Act, 2016 (No. 26 OF 2016) Copyright (Levy on Storage Devices) Regulations, 2018, s 7. '(I) The Society shall pay appropriate remuneration due to an author or an association entitled thereto out of the levy collected under these regulations.

(2) The remuneration shall be distributed in accordance with procedures for distribution of royalties or other remuneration set by the Society as follows –

(a) 10% for administration distributed as follows-

(i) 5% to the revenue collection authority: and

(ii) 5% to the Malawi Government through Ministry of Finance;

(b) the remaining 90% shall be distributed as follows-

(i) 20% for the Society's enforcement activities and administration;

(ii) 10% to the Fund;

(iii) 30% for musical works:

(iv) 15% for audiovisual works; and

(v) 15% for literary works;

See also Ghana Copyright regulations, 2010, distribution of levies section 19.

[1458] See Moneyweb case (note 9 above) para 5. *Express Newspapers Pic. v News (UK) Ltd* [1990] 1 WLR 1320 (A Chancery Division of the English High Court). See also *Ashdown v Telegraph Group* [2001] EWCA Civ 1142; [2001] 4 All ER 666 (CA) 683g to 684c, par [70] (A United Kingdom Court of Appeal decision).

[1459] See D Ardia, E Ringel & V Smith et al 'Addressing the decline of local news, rise of platforms and spread of mis- and disinformation online' (2019) Center for Information, Technology, and Public Life (CITAP) available at *https://citap.unc.edu/news/local-news-platforms-mis-disinformation/*. accessed 30 May 2023.

[1460] Cebelihle Bhengu 'Media24 launches legal action against two women for copyright violation' *News24*, 12 December 2023, available at *https://www.news24.com/news24/southafrica/news/media24-launches-legal-action-against-two-women-for-copyright-violation-20231212*, accessed 14 January 2024.

[1461] See EIFL 'How to negotiate with your national Reproduction Rights Organization (2013) available at *https://www.eifl.net/system/files/resources/201408/eifl-ip_how_to_negotiate_with_your_national_rro_guide_final.pdf*, accessed 25 January 2024.

broadcasting rights within the EU,[1462] Ghana[1463] and South Africa.[1464] Their work fall under the private copying exception which varies across many jurisdictions either under fair dealing or fair use. The rampant reproduction of journalists work online for private use without compensation infringes three-step test to which the EU member states, and Ghana and South Africa are signatory to. A priori, high-quality dependable journalism is expensive to produce and also difficult to control under TPMs once it is published online. If the media is covered similarly like authors of literary works and musicians under copyright law, they legally have a claim or entitlement to the copyright levy. CISAC acknowledges in its 2020 report that journalists are persuasively legitimate levy beneficiaries.[1465]

Instead of incorporating journalists and publishers into the copyright levy, the EU Commission opted to introduce neighbouring rights for press publishers as part of its proposals.[1466] The essence of the new rights are designed to give publishers additional remuneration in the form of royalties from online services, such as search engines for displaying snippets of news in search results. Already, a Spanish law[1467] creates a levy on online services for the display of snippets of news content and scholars note that 'while this is not a neighbouring right, it creates a "fair compensation" mechanism for press publishers and limiting the exceptions to copyright for quotations from news content.'[1468] Besides, copyright legislation should be a tool for creators to receive compensation for the reproduction of their work and thus the envisaged copyright levy should provide journalists with incentives to boost their creativity and innovation in their respective literal constituency.[1469]

It is therefore proposed that this jurisdiction incorporate journalists as beneficiaries of the copyright levy. The beneficiaries of a private copying levy should be first registered as an entity or individual beneficiaries under a mandated CMO. As in Burkina Faso, the Copyright

[1462]Copyright is itself a right protected by Article 1 of the First Protocol of the European Convention of Human Rights ('Protection of Property'). The EU Member States signed the Berne Convention for the Protection of Literary and Artistic Works.
[1463] The Copyright ACT of Ghana covers literary, artistic, and musical works; See also L Nyantakyi-Baah & E Afachao 'Reducing copying and copyright infringement: the case of Ghana institute of journalism' (2019) *Journal of Communications, Media & Society (JOCMAS)* Vol. 6 No.1 2019 65-80.
[1464] Copyright Act of 1978 s12. See also Moneyweb case (note 9 above) para 4-9.
[1465] CISAC (note 137 above).
[1466] F Zuleeg, I Tasheva & D Associés 'Rewarding quality journalism or distorting the Digital Single Market? The case for and against neighbouring rights for press publishers' (2017) Discussion paper 29 May 2017 European Policy Centre. available at *http://aei.pitt.edu/87760/1/pub_7712_rewardingqualityjournalismordistortingthedsm.pdf*. accessed 24 April 2023.
[1467] Entered into force 1 January 2015. Real Decreto Legislativo 1/1996, de 12 April.
[1468] Zuleeg, I Tasheva & D Associés (note 1169 above) 10.
[1469] Ibid at 5.

Act explicitly recognise and elevate journalists content to works of creative content[1470] becoming ipso facto creative writers and upon registration with a CMO they receive accreditation as literary creators to facilitate getting provision for the copyright levy. This would be relevant to freelance journalists, with publishers registering themselves as part of the writers or producers of creative content on behalf of their entities. This approach is important to facilitate the media getting copyright levy benefits.

e.) Proposed distribution plan: Appendix 2

From the foregoing, this study as per Appendix 2 section 11, therefore recommends a framework of the proposed beneficiaries and levy allocations as such;

a.) 25 per cent should go towards administration fee;
b.) 10 per cent for cultural activities;
c.) 30 per cent for musical works;
d.) 20 per cent for audio-visual works and,
e.) 15 per cent for literary works.[1471]

However, the CMO upon consultations with stakeholders or representations from relevant cultural societies and the minister in charge of the Copyright Act could expand the scope of beneficiaries amending the proposed copyright regulations under justifiable considerations.

6.3.8 Targeted devices for levying purposes

Considerations for recordable media levying purposes were initially focused on those devices whose primary function related to the 'primary use' function. This meant that if the device's primary use is not to copy or reproduce works, performances, or phonograms for private purposes, then levying it would not be justified.[1472] This approach should not be followed in South Africa given the difficulties associated with distinguishing between 'primary use' equipment subject to levies from multipurpose devices that may not be subjected to the same

[1470] Burkina Faso Fourth Republic: National Assembly Law No. 032-99/AN on the Protection of Literary and Artistic Property : Article 5: This Law shall protect works of the mind that are original intellectual creations in literary and artistic areas, such as: - ….books, audiovisual works; - radio works; - works of drawing, … photographic works; - The provisions of this Law shall protect the rights of authors of works of the mind irrespective of their kind, form of expression, merit or purpose.' Article 8: The protection of copyright shall not cover: - … daily news; - simple facts and data.'
[1471] See Appendix 2, s 11.
[1472]P B Hugenholtz L Guibault & S van Geffen 'The Future of Levies in a Digital Environment' (2003) *Institute for Information Law*, 40.

levy. The Digital Age is providing multipurpose devices that can likely blur the primary use function creating confusion, and in some cases generating endless litigation premised around the interpretation of the 'use' function. As such, a dragnet approach is required to encompass all recordable media capable of copying, storing, performing and or transmitting copyrightable material. This principle has been persuasively followed in various precedents, where it has been held that any device used as part of a reproduction process can be subject to a levy to compensate authors for the unauthorised reproduction of their copyright works.[1473] Furthermore, it was also held that a levy may be imposed on multi-functional media even if its primary function is not copying.[1474]

In this jurisdiction, it is therefore not a defence to seek escaping levy liability by suggesting that the intention is not to indulge in private copying. The levy should be obligatory only because of its potential capabilities in the reproduction of works. Intrinsically, the levy would constitute fair compensation if the recordable and storage devices are liable to be used for copying.[1475] In principle there is a presumption that in all probability, the end user will exploit the digital device in making private copies of copyrightable material. As such rightholders' get compensation not on the basis that their creative content has been actually exploited, but on the potential legal possibilities of that envisioned enjoyment in the exploitation of their content.

Nevertheless, the de minimis considerations would apply if the copying function is minimal. In this regard, the minister in the regulations may define the extent of minimal harm threshold given that in other regions this has been left to national jurisdictions to decide. This approach, which South Africa should adopt is now followed within EU jurisdictions particularly France,[1476] and the United States (U.S).[1477] The method has been generally to make any multifunctional devices such as mobile phone that have telephonic, radio, television and music downloading, storage and transfer capabilities fall within the entangling grasp and grip of the levy. There are an increasing number of different manufactured devices capable of copying works.[1478] Therefore, as technology advances the CMO should define, determine and list all leviable reproductive devices that should be forwarded to the minister

[1473] In the *Wort (VG Wort) v Kyocera*, C-457/11 to C-460/11 (Decision of the ECJ court).
[1474] *Copydan Båndkopi v Nokia Danmark A/S*. Case C-463/12 (A decision of the ECJ).
[1475] Olubiyi (note 161 above) 101.
[1476] See Modifications to Article L. 311-1(2) of the French Code de la Propriété Intellectuelle.
[1477] See in the United States, remunerated private copying is allowed under US Digital Home Recording Act, which requires payment only in relation to digital recording devices and media.
[1478]WIPO (note 1266 above).

for gazetting in the regulations. In so doing, the CSO can rely on the data provided by the national survey entity.

a.) Cloud storage services

Copyright law is famed for its pragmatic adaptations to technology.[1479] Of late, its capacity to acclimatise has been tested by the emergence of cloud storage devices. The cloud storage services are a digital phenomenon creating tensions in the administration of remuneration rights for copyright holders because of the technical complexities around its management of data. The persuasive judgment in the Austro-Mechana case,[1480] made a ground-breaking interpretation on whether the storage of content in the cloud computing services falls within the exception for private copying captured in the EU Article 5(2) (b) of Directive.[1481] The exception allows for private copying if authors are provided fair compensation for the private reproduction of their works. The court held that the reproduction notion should not be given a narrow interpretation, and held that uploading the work to a storage cloud space technically amounted to reproduction of that work. This because work stored in the cloud can be subjected to more reproductions through downloading. Therefore, the making of a back-up copy of a work in storage accessible to the user in cloud computing amounted to reproduction of the work. Furthermore, the court interpreting the notion of 'any medium' held that it included all the media on which the protected material may be reproduced, including servers such as those used by cloud computing services. The above considerations confirm an interpretation consistent with the principle of technological neutrality, designed to promote IT growth, and ensuring the protection of copyright in the Digital Age. The ruling made providers of cloud storage services liable to fair compensation levy payment, but deferred to national jurisdictions within the EU to exercise their wide discretionary powers to determine the form, method, and level of the compensation. In this regard, the following considerations for the form, method and level of compensation framework are made for the South African jurisdiction.

Local cloud storage services (providers) store local content in the form of copyright works, such as music, films, and photographs, among others. The rightholders surrender their works to the cloud providers for storage and distribution to the final consumer. Ultimately, the provider exercise control over the storage, distribution and consumption of the stored

[1479] Oduor (note 1 above) 504.
[1480] *Austro-Mechana v Strato AG Case* C-433/20. (A European Court of Justice decision).
[1481] EU Article 5(2) (b) of Directive 2001/29/EC.

content, i.e. works. The provider is then privy to the details relating to such storage, distribution and consumption patterns. The material is stored in the form of computer bytes, mainly gigabytes and terabytes which form the basis on which levies can be evaluated to determine compensation levels for rightholders. The gigabytes help determine the storage levels, distribution and rate of consumption. The gigabytes are the unit of measure of content stored, distributed and consumed. The server – which is a medium of storage and distribution – is programmed to identify the rightholder of the consumed content. It accurately measurers the levels of consumption, and provides such statistics as, demographics, geographical locations and the number of consumers. This data is important in determining the amount of the copyright levy due to the mandated CMO, for onward distribution to rightholders. In this regard, the CMO must engage the cloud provider to provide consumption details per artist quarterly or within such a reasonable period of the consumption patterns and payments due arising from such statistics or data available. The second engagement is that the Cloud provider pays the lump-sum to the CMO within such recommended schedule carrying the consumption patterns and payments accrued. The CMO will then distribute the levy to the rightholders having deducted any taxes payable.

There are instances in which cloud service providers have no relationships with rightholders, but still store copyrights. The principle there is that the copyright levy shall be paid by any entity or device capable of storing and distributing copyright works. In this instance, the copyright levy shall be determined by their storage capacities with levels ranging from terrabytes, petabytes up to yottabytes. A terabyte is a fraction of petabyte, and petabyte is a fraction of a yottabyte in their order. As such, to determine the copyright levies due, the amount shall be determined according to the bands or threshold into which any of these classes would fit. The exact figures – should be reasonable and affixed after consultations between the stakeholders: the CMO, rightholders and cloud storage provider. The principle behind this approach is that creators are entitled to specific tariffs where their works are transmitted or made available online or offered on a commercially made storage medium. If the work is stored or copied for private use, the levy must be enforceable.[1482]

France has now amended its law to include cloud storage under the private copying levy,[1483] with other EU Member States following suit.[1484] The Netherlands has already

[1482] See Austrian Copyright Act, s 42b.
[1483] Stichting de Thuiskopie *International Survey on Private Copying: Law and Practice 2016* (2017) 7.

provided for levying cloud storage technologies after a finding that private copies are increasingly stored in the cloud, and hence incorporated it on the devices that are mainly used for this purpose such as PC/laptop, tablet, and smartphone.[1485] Levying cloud storage services is important particularly when statistics are reflecting that 48 per cent of entities in South Africa are driving innovation by exploiting such platforms services. About 61 percent of South African organisations were spending more on cloud solutions in 2021 than 2020.[1486] Furthermore, the public cloud services market alone is expected to surge at a rate of investment return of 24.5 per cent through 2025, up from $1.6 billion in 2021.[1487] This context is important in considering the extent to which the levy could tap into the vast global ecosystem, connected with servers that operate as a single data ecosystem with some ubiquitous worldwide presence. Levying cloud storage services is a potential remuneration boon for rightsholders if emerging investments into the sector are also to be considered. Already, Google is seeking to create through cloud storage services 40,000 jobs by 2030 in South Africa.[1488] The technology behemoth confirmed that the cloud service is to be exploited with huge business returns for the South African economy, and was part of its $1 billion investment plan for the continent that will allow users to store their data in the country.[1489] The levy considerations have a plausible pull factor given that the cloud infrastructure will be based in South Africa giving consumers options of where to store their data. Research work confirm that cloud services have the potential to counter some of the challenges faced by business sector given its cost effective nature that operates outside the framework of software licenses and ICT infrastructure support.[1490] As cloud computing services are easily accessible on the Internet, they can also provide business opportunities by

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[1484] Ibid. Nandal writes that the Netherlands, SONT has agreed on levies for cloud storage in the next few years (2018-2020). In France, cloud technology has likewise been addressed through legislative action on behalf of Copie Privee, a society established for the particular management of private copying levies. From July 2016, Network Personal Video Recorder (nPVR) services 'offering cloud storage now fall within the scope of remuneration for private copying.'

[1485] Stichting Onderhandelingen Thuiskopievergoeding 'SONT Decree on Private Copying Levies 2018 – 2020' (2020) Available at: *https://www.cedar.nl/uploads/15/files/file/Thuiskopie/Persberichten/Press_release_new_private_copying_levies_the_Netherlands_24-10-2017.pdf* 2.

[1486] Microsoft Newscentre 'Microsoft expands cloud services in South African data centres to drive growth and competitiveness' *Microsoft News*, 15 November 2022. available at *https://news.microsoft.com/en-xm/2022/11/15/microsoft-expands-cloud-services-in-south-african-data-centres-to-drive-growth-and-competitiveness-2/.* accessed 6 February 2023.

[1487] Ibid.

[1488] Loni Prinsloo 'Google to Build South African Cloud in $1 Billion Africa Plan' *Bloomberg,* 5 October 2022, available at *https://www.bloomberg.com/news/articles/2022-10-05/google-to-build-south-african-cloud-in-1-billion-africa-plan?leadSource=uverify%20wall*. accessed 6 February 2023.

[1489] Ibid.

[1490] M Mohlameane & N Ruxwana 'The Awareness of Cloud Computing: A Case Study of South African SMEs' (2014*) International Journal of Trade, Economics and Finance*, Vol. 5, No. 1, 2014.

facilitating access to the same at any time.[1491] The introduction of the levy could therefore harness this business cloud services scope and leverage rightsholders remuneration right.

6.3.8 Refurbishments

CISAC in its 2020 survey considered whether to have refurbished devices levied in national jurisdictions.[1492] Refurbished goods are previously levied, and later discarded or revamped and given a fresh lease of life. This new dimension to private copying will depend on several factors. While refurbishing devices might not be common practice in developed economies where such devices are manufactured, it is commonplace in developing economies where the prices of such devices might be high creating a thriving market for cheaper refurbished goods. CISAC researchers however left the issue to respective national jurisdictions to determine how to approach the matter, despite proffering a persuasive argument that refurbishment can be classified as manufacturing thus falling within the scope of the private copying exception.[1493] In France, a decision by the committee for the private copying levy established a specific rate scale on refurbished multimedia mobile phones and touch tablets.[1494] It considered that a reconditioned or refurbished device is a second-hand device[1495] and as its functionalities meet consumers' expectations after restoration of its capacities, and it is therefore liable for the levy contribution, albeit at a different scale than new devices.

As a principle, it is therefore proposed that a refurbished device that is resold constitute a new sale from which levy liability should arise. A company that refurbishes devices is in the business of manufacturing and or assembling products which factors are considered in determining liability for levy payments as in Ghana[1496] and other EU Member countries.[1497] This is also to avoid the temptation of traders escaping liability by falsifying records and devices as old and refurbished in circumstances where such levy is not applied for refurbished goods. The refurbished device, just like a new manufactured device is also capable of storage and reproduction of works. The essence of the domestic copyright levy

[1491] Ibid at 10.
[1492] CISAC (note 159 above) 10.
[1493] Ibid.
[1494] France: Decision No. 22 of June 1, 2021 of the commission provided for in Article L. 311-5 of the Intellectual Property Code.
[1495] Ibid.
[1496] See Ghana, Copyright Regulations, 2010 (L.I. 1962) Regulation 16—Liability to pay levy.
[1497] Under Sections 54 sub-section 1 and 54b subsection 1 of the German Copyright Act (UrhG), manufacturers and importers of devices and storage media which can typically be used for private copies are obliged to pay copyright levies.

should recognise the authors' financial predicament, and that many have died indigent without pension and health insurance policies despite remarkable creative contributions in promotion of the country's cultural identity and heritage,[1498] leaving dependents in impoverished. Therefore, any deliberation that seeks to boost the authors' remuneration should be considered and effected.

6.3.9 Levy tariffs

The manufacturers and importers are expected to pay the levy, which is ordinarily priced in the purchase. However, there are varying tariff setting models within the EU involving different levels of interventions in setting them up. In Ghana there is direct state intervention in setting the tariffs, collection, and initial auditing of the levy to the exclusion of copyright holders and the CMO.[1499] This is in contrast to EU Member States such as Germany, France and the Netherlands where negotiations between the stakeholders outside the state framework occur before the tariffs are set. The levels of the tariffs principles were set out in the Padawan case where the court held that

> 'the levy scheme should provide for fair compensation inter alia for the potential harm suffered by rightholders as a result of the copying of or from their copyright works. … Fair compensation should take into account the volume of reproductions of copyright works within the national territory (assessed on the basis of a statistical survey). … Leviability of devices and media under an equipment levy scheme should be based on the potential use thereof. … Tariffs for the equipment levy on the other hand should be based on the actual use of the type of device or media to copy text and image works.'[1500]

In some cases, public bodies are however created to set the tariffs. It is recommended in this study that a nominated CMO shall set the tariffs after consultations with rightholders' and industry (importers and manufactures), and thereafter make recommendations to the relevant minister for gazetting.[1501] There are various global approaches to setting the tariffs which includes a flat fee per unit for all devices;[1502] The tariff set in accordance with the speed or storage capacity of devices; The tariff as a percentage of the import or retail price of the device or medium

[1498] See Kyle Zeeman (note 1460 above).
[1499] See Ghana's Copyright Act, 2005 (ACT 690), s 27.
[1500] WIPO (note 1266 above) 15.
[1501] See Padawan case as provided in WIPO *International Survey on Text and Image Copyright Levies* (2016) 16.
[1502] The fixed levies apply to fixed prices determined by the storage capacity of the device. This is the approach by Germany, France, Netherlands, amongst a few EU jurisdictions.

and the tariff is set as a combination of the tariffs to include a fee that varies with the speed of the device but with a percentage of the retail price serving as a cap on the levy.[1503]

For South Africa, it is proposed that the tariff should be a percentage of the import or retail price of the device or medium.[1504] Similarly, Ghana follows the same approach of setting a percentage.[1505] Other African countries such as Botswana[1506] and Malawi have followed the same approach structuring their levies as a percentage of the price.[1507] As noted by CISAC, the advantage of this approach is that,

> 'it ensures a fixed ration between the levy and the value of a device for the end user and makes sure levies respond to price developments for the devices. By doing so, negative effects of relatively high levies on consumer demand can be avoided. At the same time incentives for importers, retailers and consumers to circumvent the levy system can be

This is an important consideration because the South African rand has been relatively volatile because of domestic and external disturbances, which has an implication for food supply shocks driving double-digit inflation.[1508] A fixed percentage tariff shall respond to inflationary pressures and exchange volatility without the need of a constant adjustment of a fixed price in local currency which however works well for stable developed economies. The percentage tariff also limits the possibility of industry circumventing the levy system by manipulating prices taking advantage of an unstable currency – given the effects of currency fluctuations on imports and exports.

6.3.10 Levy visibility

An introduction of a private copying levy must be accompanied by a CMO management style that evinces transparency in business conduct. In this regard, it is important that those liable to pay the copyright levy should have access to all the relevant information relating to the levy amount applicable to all digital devices falling within the scope of the levy. It is

[1503] WIPO (note 1266 above) 16.
[1504] See Hungary and Romania – all devices levied.
[1505] Ghana's Copyright Regulation 14—Imposition of levy There is imposed on the devices specified in regulation 15, capable of being used to copy copyright works, a levy of twenty percent of the cost, insurance and freight value of the devices.
[1506] See Botswana Copyright and Neighbouring Rights, (s 37) (16th March, 2007) Chapter 68:02 – s 8. Levy on technical devices The levy imposed on all imported and locally manufactured blank sound and audio visual carriers and equipment in accordance with section 35G of the Act shall be as set out in the Fourth Schedule.'
[1507] See Malawi s 7(2) Copyright (levy on storage devices) regulations, 2018.
[1508] Evelyn Smail 'Rising food prices in South Africa: Here's what we know' *Green economy Journal* 22 February 2023, available at *https://greeneconomyjournal.com/explainer/rising-food-prices-in-south-africa-heres-what-we-know/*, accessed 30 November 2023.

therefore proposed that such information should be readily available on the CMO website, and covered within the gazetted ministerial copyright regulations. While such an approach should be standard practice, it conforms to corporate good governance custom. This is important for manufacturers, importers and consumers to plan their business. The publication of tariffs and leviable devices enable stakeholders to properly plan. In essence, this conforms to the rule of law principles which provides that laws should be sufficiently clear and predictable.[1509] Publication of the tariffs and devices and any other relevant levy material online is important for those liable to pay the levy to have information they need and make business plans.

This does not only apply to people in business alone. Consumers have a right to know that when they purchase a digital device, there is levied price for rightholders. This is important because within the EU, consumers are not aware that they are making payments towards the copyright levy every time they purchase recordable and storage digital devices.[1510] The significance in principle of such a transparent obligation is that end users will know what they are paying for, the reasons behind the payment and the rights accrued to them for making such a payment and what they gain from it. The advantage of making such information available is that it will bring more transparency to the copyright levy system and provide more understanding of how the levy operates vis-à-vis fair compensation for the acts of private copying. This is part of consumer awareness and CMOs transparency obligations.

6.3.11 Cross border transactions

The application of the copyright levy in cross border transactions is complex and requires clarity in its implementation. This is so because South Africa is a regional commercial hub for the SADC region enjoying huge import and export trade across the region and beyond which often entail trade of leviable devices.[1511] Implementation of the levy in the cross-border transactions will also require refunds of the levy and exemptions tailored around the import and export agreements. The levy provisions should therefore articulate applicable principles designed to create a coherent administration of the transactions.

[1509] *Qwelane v South African Human Rights Commission and Another* 2021 (6) SA 579 (CC) para 148.
[1510] See Digital Europe 'DIGITALEUROPE calls for EU action on copyright levies' *DigitalEurope* 24 June 2019, available at *https://www.digitaleurope.org/resources/digitaleurope-calls-for-eu-action-on-copyright-levies/*, accessed 30 November 2023.
[1511] A Saurombe 'The Role of South Africa in SADC Regional Integration: the Making or Braking of the Organization' (2010) *Journal of International Commercial Law and Technology*, Vol. 5, No. 3 124.

Pertinent questions ordinarily emerge relating to levy liability on devices whose levy has been already paid by the manufacturer prior to export, and the importer sending the same device as part of a consignment to a distributor in a country with a similar private copying levy and exception. The South African courts persuasively stand guided by the principles around the law of delict. This is so because if harm is created through private copying by the consumer in the jurisdiction of the importer, compensation should follow. As such, the device remains liable for the levy payment in the country of import because the levy compensates harm suffered in the consumer's jurisdiction. Where damage or harm is created, through the acts of the wrongdoer or an individual, compensation should follow as a matter of law.

South Africa enjoys huge commercial seaports through mainly, Durban, Cape Town, Richards Bay, East London, Ngqura, Port Elizabeth, Mossel Bay, and Saldanha along its vast coastline. Its enormous port infrastructure links trade freights to landlocked SADC jurisdictions such as Botswana, Zambia, Zimbabwe, Democratic Republic of the Congo, Swaziland, and Lesotho. The aforementioned ports provide huge business potentialities and are provided to demonstrate the extent to which imports of devices could be managed to leverage the copyright holders' remuneration right in the shipments passing through and entering the jurisdiction.

Nevertheless, the port shipments present challenges in the levy implementation where the devices subject to the levy are imported and not placed on the South African national market but remain in transit to other regional countries such as Zimbabwe. Such devices are normally inspected at the seaport, and paperwork should formally exempt them. It is therefore proposed that the levy provision for clarity purposes should be reflected in the national legislation through an 'ex ante' exemption scheme - exempting the products in question from the levy. As such, the CMOs managing the levy should enter into prior exemption agreements with importers to avoid the administrative pressures associated with ascertaining leviable devices at the ports which has the regressive effect of delaying shipments. It is also recommended that the CMOs should ensure that a simple, clear, and effective ex ante exemption scheme is implemented. Such exemptions are important to avoid double payments and or in some circumstances taxation. The principle behind such ex ante exemption scheme is to facilitate the smooth flow of trade and business.

6.3.12 Principles guiding the - AI levy- in the copyright amendment

Artificial Intelligence levy (AI levy) is to be incorporated in the proposed Model private copying levy provisions under the copyright amendment Bill,(CAB) proposed under Annexure One and the Model copyright (levy on digital storage devices) regulations, 2024, under the proposed Annexure Two. It is accepted that there is no common definition of AI.[1512] However, it is important to draft an acceptable definition that largely meet the definition of AI to help in creating a certain legislative and regulatory framework for AI manufacturers, trainers, users, producers, law enforcement regime, policymakers, legal fraternity, legislature, judiciary, Collection Management Organisations (CMOs), copyright holders and policymakers. This is important because without a clear definition of AI, 'it is difficult for policymakers to assess what AI systems will be able to do in the near future, and how the field may get there. There is no common framework to determine which kinds of AI systems are even desirable,' [1513] and therefore create challenges in the drafting and interpretation of the law.

The proposed definition hinges on a scholarly framework proposed by Detoux and Leon,[1514] which is supported in a seminal AI research by Collins et al.[1515] AI levy is targeted at any human computer that meets the definition of - Artificial intelligence – that is - 'the capacity of computer to engage in or perform responsibilities requiring or associated with human intelligence, through texts data mining – or otherwise using AI systems incorporating algorithms, data, and computational power to simulate human intelligence.' The AI computer targeted for levying purposes must largely meet the above definition.

The levy targets developers, trainers or users of AI systems that must pay every six months a presumptive levy, under section 9(1) of the copyright levy (Annexure One), to be prescribed by the relevant minister in charge of administering the copyright Act. The presumptive levy must constitute some form of equitable remuneration for copyright holders to sufficiently cover for the harm caused as a result of the recreation or reproduction of their works without in some instances consent, compensation and attribution. It shall be presumed that the development of AI system substitute for a work made by a human author and in some

[1512] C Collins et al 'Artificial intelligence in information systems research: A systematic literature review and research agenda' (2021) International Journal of Information Management, Vol. 60, 2021, available at *https://doi.org/10.1016/j.ijinfomgt.2021.102383*, accessed 5 February 2025.
[1513] Bhatnagar et al 'Mapping intelligence: Requirements and possibilities' in V.C. Müller (Ed.), *Philosophy and theory of artificial intelligence* (2017) Springer, Berlin (2018), 117.
[1514] C Dejoux & E Léon *Métamorphose des managers* (2018).
[1515] Collins et al (note 1512 above).

instances copy and distribute the work. This may come across as rough justice, but such an approach is important to maintain some market equilibrium and prevent market failure as a result of dwindling or lack of human creation innovations. The idea behind the presumptive levy while cushioning the copyright holders for the harm created, it is also important to note that AI systems have become sophisticated to the extent of displacing genuine creative human content.

The levy shall be paid to the CMOs, for the purpose of fostering and supporting human literary and artistic productions. This revenue stream shall therefor support the creative work of authors, national heritage and cultural organisations. The proposed levy also operates on the assumption that it is necessary to promote and maintain human creativity. Senftleben has noted that human creativity has so many added values for society in comparison with algorithmic processes of content generation. This therefore justifies his proposition for an AI levy.[1516] Human creations, which must not be unreasonably and prejudicially compromised by AI, are perceived as 'catalysts paving the way for an ethical and free society. .. to challenge reality and suggest necessary societal changes … in contrast to machine productions, human literary and artistic productions are thus capable of evoking alternative visions of society.'[1517] There exist genuine fears that with time AI may become refined and substitute human creations.[1518]

a.) The AI presumptive levy

The AI presumptive levy employs indirect means to establish levy liability on producers, users and trainers of AI. This approach is borrowed from the presumptive tax within the scope of fiscal revenue generation and compliance.[1519] In general, the idea behind the presumptive tax is to create a simplified tax regime by reducing tax compliance costs for business and enforcement costs for the tax administration.[1520] Thuronyi notes that, 'there is a legal presumption that the taxpayer's income is no less than the amount resulting from

[1516] Senftleben (note 949 above) 1535-1536.
[1517] M Senftleben 'A Tax on Machines for the Purpose of Giving a Bounty to the Dethroned Human Author – Towards an AI Levy for the Substitution of Human Literary and Artistic Works(2022) *Institute for Information Law (IViR),* 11.
[1518] Ibid.
[1519] V Tanzi & M Casanegra de Jantscher 'Presumptive Income Taxation: Administrative, Efficiency, and Equity Aspects'(1987) IMF Working Papers 1987, 054 (1987), available at *https://doi.org/10.5089/9781451969375.001*, accessed February 5, 2025,
[1520] V Thuronyi 'Presumptive Taxation' in V Thuronyi (ed) Tax Law Design and Drafting (1996) vol.1 International Monetary Fund 1-2.

application of the indirect method [and] this presumption may or may not be rebuttable.'[1521] This approach is also used to combat tax avoidance or evasion, by providing objective indicators for tax assessment.[1522] Like drones, AI models may proliferate in future, with a corollary increase in copying and or reproduction of copyrightable online content. It will be difficult to determine the extent of mined data and copyright works. Besides, it is also challenging to rely on users, producers and trainers to honestly disclose the amount and nature and form of the content mined or used. To reduce the compliance costs and ascertain the business turnover, a presumptive levy becomes more convenient. The AI producers, users and trainers will have to pay a fixed amount twice a year, or some such period fixed by the minister without having to maintain detailed accounts and records. This reduces the compliance burden and allow for an expedited payment of levy to meet the expectations of copyright holders. This will also reduce the overheads associated with maintaining book of account for trainers, users and producers of AI.

6.4 THE COPYRIGHT LEVY NATIONAL STATISTICAL & DIGITAL SURVEY

The main question emerging in the implementation and disbursements of the levy to CMOs' beneficiaries is what are the criteria to be used to determine proportions of the levy for artists, and tariffs for devices? This study has already demonstrated the effectiveness of the levy in various jurisdictions and practical realities validate the use of empirical statistical and digital surveys conducted by private entities commissioned by the CMOs to help provide helpful information on creative work consumption patterns to establish appropriate tariffs and remuneration due to rightholders.[1523] There are a number of applicable principles that should apply to the CMOs in the monitoring of the use, collection and distribution of the levy. The first principle is that the monitoring of uses by the commissioned entity and the collection of the levy by the CMO must be comprehensive and strive to keep the costs of such administrative oversight at a reasonable level. Fiscor writes that,

> 'this is an indispensable condition for ensuring that rights owners enjoy their rights and receive remuneration as much in conformity with the actual use of their works as possible. … it is unacceptable to give up monitoring uses and collecting remuneration in certain fields where these activities could still be managed with reasonable costs, just for the purpose of

[1521] Ibid.
[1522] Ibid.
[1523] WIPO (note 1266 above) 16.

> decreasing the general cost level and increasing the remuneration for other categories of uses.'[1524]

This principle is important, especially coming against a background of demonstrated excessive CMOs administrative costs that caused some outrage from rightholders.[1525] While the first principle strives to advance the cost versus benefit analysis, the second principle provides that categories of all right owners specified as beneficiaries should enjoy equal treatment. The principle seeks to strike a fair balance and avoid having efforts towards monitoring and collection of the levy operating in a manner that prejudices the interests of particular categories of right owners.[1526] The final third principle provides for the setting up of statutory and administrative mechanisms to facilitate effective monitoring of uses and collection of the levy by CMOs.[1527] The full realisation of the remuneration right will involve providing deterrent measurers in the form of penalties for non-compliance or violations by end users. Fiscor posit that, '[t]he fullest possible cooperation of users in these fields should be prescribed as an obligation and enforcement measures and sanctions should be available against users who create any unreasonable obstacles to such activities of joint management organizations.'[1528] Ancillary to this is the principle that seeks to provide justifiable costs of the levy management. Providing a coherent framework for what might be justifiable costs for management is subjective and therefore potentially problematic. Scholars' postulates that it will be only workable to provide for costs that should be reasonable and indispensable deducted from the remuneration collected. As CMOs seek to balance the costs and management of the levy, the principle of equal treatment of listed beneficiaries which has two considerations apply in the deductions of costs. Fiscor dissects it in the following manner,

> 'The first element [in the principle] is that, in respect of owners of rights whose works or objects of related rights are utilized in the same manner, and, thus, the costs of the management of the rights concerned are the same, the same percentage should be deducted for the costs of management. The second element is that if, in the case of certain categories of uses, the management costs are higher, in general, the higher costs should be deducted from

[1524] Fiscor (note 1413 above) 147.
[1525] See Niki Moore (note 97 above).
[1526] Fiscor (note 1413 above) 147.
[1527] Ibid.
[1528] Ibid.

> the remuneration destined for the rights owners concerned and other categories of rights owners should not be unreasonably burdened by such high costs.'[1529]

Such guiding principles will provide an efficient CMO management structure that doesn't compromise the rights of copyright holders and provide a cost-effective administrative structure. From the foregoing, it is now imperative to provide how a commissioned entity responsible for data collection of online copyright work consumption patterns will operate, to help guide the CMO with relevant national statistical surveys of copyrights to determine appropriate payments due for copyright holders.

a.) How the national online survey and digital software to measure consumption of works through private copying will operate

A commissioned entity carrying out a national online consumer survey will operate to provide the CMO with creative work consumption statistical patterns to help determine appropriate remuneration for registered beneficiaries. The commissioned entity will collect survey data for analysis and enforcement of a remuneration right. This is an involving national survey exercise and may not be most perfect but will help provide approximates consumer tastes, digital devices in use and help determine the popularity of works. Nonetheless, royalty is expected to be distributed fairly among members based on the actual usage of works, 62 determined by usage data supplied by users or by sampling, as the case may be. In addition the commissioned entity will provide an online website with a link for consumers to log in. It will then monitor consumer use of creative expressions and devices in use that are capable of private copying. It's an annual exercise whose statistical data is used to prepare and distribute levies for the following year. New technological devices and changes in consumer creative content consumption habits will be detected, as well as popular creative content to facilitate evidence-based decision-making. While the link to provide necessary information will be available on the CMO website, such a link can be prominently provided at South African business and social entities where people customarily gather to log in and provide prompt and well-considered responses. For consideration are restaurants, discotheque, record companies, tertiary institutions, night clubs, movie theatres, pubs, libraries, taverns, art and cultural centres, and programmed important annual musical events. South Africa hosts several musical festivals throughout the year catering for a variety of genres that could help gauge consumer tastes to facilitate providing near accurate national

[1529] Ibid at 148.

survey statistical data. Often, the same musical festival will provide different musical genres to cater for different crowds at once helping in providing a near accurate data of musical tastes across varying popular musical genres. When consumers purchase online tickets for such festivals, they can be referred to the link after purchasing the tickets. The Model online questionnaire carrying registered rightholders' with dropdown of every genre is provided in Appendix 5. The link could be advertised at festivals or carnivals hosting tens of thousands of people over several days to different crowds of every genre to have a satisfactory representational statistical data.[1530] Such a digital survey in principle should be a consistent and dependable formula to set fair and equitable tariffs for rightholders' arising from pragmatic empirical surveys.[1531] Its modus operandi is that,

a.) A user friendly online questionnaire with a dropdown of rightholders and their works is provided online throughout the year covering all areas as represented in the CMO register.

b.) The link survey is provided on CMO website and popular social events and gatherings.

[1530] Targeted festivals include:

a.) Cape Town International Jazz Festival: The event happens over three days, and attracts huge crowds in their thousands. Its only disadvantage is that it is confined to one genre of music. However, it so happens that people have different tastes and could provide responses that could be equally representational.

b.) The Afropunk festival: An outdoor festival normally hosted in Johannesburg involving both domestic and international artists within the first half of the year, provides the same nature and form of crowds and it could similarly like the Cape Town Jazz festival provide reliable statistical data.

c.) The Bush Fire festival happens in neighbouring Swaziland. While Swaziland is a different station, it is highly dependent on South Africa's economy. Its own repertoire including Lesotho is played within the South African jurisdiction. Since both jurisdictions are surrounded within South Africa sharing identical cultures, their musicians could also register for a private copying levy subject to satisfying the necessary reciprocal regulatory frameworks.

d.) Another festival full of festivities is the Rocking The Daisie, which comprises of music, art, and culture activities annually in October. The benefit of having a questionnaire covering such a festival is that it covers various rightholders' interests covered under the copyright levy. There are also literary works, art, culture covered at the event that could be used to measure the interest and remuneration frameworks for other rightholders.

e.) Similar to the Rocking The Daisie in taste is the Splashy Fen festival that takes place annually in April. It is the considered the biggest and longest-running festival in South Africa and offers both music and art over eleven days, offering most forms of art including music, sculptures, and performing arts - drama. Established in the nineteenth century, it carries a rich history of music, performing arts, arts attracting crowds in excess of 200 000 both local and global. It could provide reliable realistic data across registered copyright levy beneficiaries.

f.) The Klein Karoo National Arts Festival is hosted in the Eastern Cape and its advantage is that its hosts new upcoming artists across the country.

[1531] WIPO (note 1266 above) 17.

c.) The consumers are directed to provide information on their, inter alia, favourite songs, movies, books, arts, performances.

d.) At the end of the year, the CMO shall produce evidence based research with relevant data to guide in formulating remuneration thresholds for registered rightholders.

e.) The calculation of the tariffs and figures for beneficiaries shall be determined through consensus between the CMO, rightholders, publishers, producers, consumer council representative body before distribution. The formula must be reflected in the gazetted ministerial regulations.

f.) The CMO will disburse the levy following the statistical survey and the likely level of private copying for each work.

The proposed consumer survey approach is however not new and has been effective in the Netherlands' levy implementation, where a consumer survey is conducted by Kantur Public, a private entity commissioned by a CMO, The Stichting Onderhandelingen Thuiskopievergoeding (SONT).[1532] SONT negotiates with rightsholder groups of copyright protected data, and with Kantur carries monitoring study in which it measures how much copyright protected data people store on various devices, such as smartphones, PCs, laptops, smartwatches, and external hard drives. The copyright protected data can be music, television of radio programs, podcasts, and e-books, among others. Based on the amount of data provided by Kantur it measures per device, SONT then set the levies per device. The levy set on the purchase price is then used to compensate artists.

Another proposed alternative is almost similar to the recommended digital formula to levy cloud storage services proposed earlier in this chapter. The envisaged software functionalities should fit the desired objectives of providing efficient, reliable, cost-effective digital tracking, metering, and sampling data for the exploitation of digital creative expressions. For digitally consumed works, the software must have the capacity to scan and extrapolate online data, and measure popularity levels of each work to help the CMO

[1532] SONT, the Foundation for Private Copying Levy Negotiations, is charged, pursuant to Section 16e of the Copyright Act and Section 10(a) of the Neighbouring Rights Act, with determining the amount of the private copying levies, under Section 16c of the Copyright Act.

determine threshold of rightholders remuneration due. Results produced must reflect the popular trends to help guide the CMO in providing equitable remunerable based on popular public tastes of creative content. There are various metering and sampling technologies in global use, but the desired objectives and results of the digital metering and sampling should achieve the following considerations,

a.) The commissioned entity's digital and sampling technology must be capable of providing digital results based on metering downloads, uploads, production of private copies and streaming activities.

b.) The software should be able to track consumer habits, and detect popular contents produced between a particular period of time during the year.

c.) The metering software must be able to track uses of recordable digital devices – such as mobile phones, PCs, radio, television, and streaming.

d.) Any relevant data collected is fed onto the data centre of the entity for evaluation of consumption patterns and help determine popularity of works for setting tariffs and remuneration payments.

e.) The calculation of the tariffs and payments for disbursements must be based on a recognised formula negotiated between the CMO, rightholders, producers, publishers and a consumer council representative council. The value of each work as per the consumption rate should be determined in accordance with the tariffs set. Such a formula must be reflected in the ministerial regulations gazetted by the Minister of Trade and Industry.

f.) CMO levy disbursements are distributed to rightholders' in proportion to the popularity of the downloads, streams, and other relevant assessment formula that achieves the objectives of fairness in the distribution the levy.

g.) The metering software entity must adhere to the PAIA and POPIA regulatory frameworks guiding the processing of personal information, access to information and the right of privacy.

h.) The statistical data produced by the metering software could be used by the CMO to negotiate new agreements based on irrefutable empirical survey statistics.

The electronic metering technology scans the vast Internet infrastructure and provides credible data on usage by end users.[1533] The software will be designed for digital copying, file sharing and distribution. It can monitor, track, and provide metering for the extent of creative content consumption.[1534] The metering process and the usage calculations will help determine the popularity of digitally based creations disposed to private copying. The advantage of the sampling software is that it engages restricted human resource capital requirements providing reliable copyright levy implementation data for CMOs.[1535] In a proprietary copyright regime, Goldstein writes that payments to authors should reflect market prices relating to the work's consumer popularity, with detailed information of how end users value their creations and guiding them towards various consumer tastes to spur innovation, production, increasing scope for incentives.[1536] Such digital metering and sampling system is nothing new and the approach here is simply to provide how it should be designed to operate in the South African setting, meeting the desired copyright levy objectives without compromising the right to privacy and data protection legislation. The CMO should therefor advertise, tender, and commission a private entity to conduct the digital metering that lawfully monitor consumer private copying habits and electronic developments to help in updating leviable electronic devices on the market, monitoring existing changes in consumer works consumption patterns to determine compensation levels for authors. The distribution of the levies to individual rightsholders' by the CMOs would be under the framework provided in the regulations, as per Appendix 2.

While various options remain available, there is a good reason why this jurisdiction should also consider as an alternative, the metering digital technology. Simply put, it is tried and tested, with greater results for authors and has achieved greater success than the software

[1533] Geoff Keighley 'Game Development à la Mod: Hacker Minh Le's Counter-Strike Is the Stuff of Media Execs' Dreams — An Over-the Transom Blockbuster' *BUSINESS* 2 October 2002. 66–7. Reporting that '[o]ver 1.7 million players spend more than 2.4 billion minutes a month in the [Counter-Strike multiplayer action] game.
[1534] N W Netanel (note 168 above) 37.
[1535] Ibid at 36.
[1536] P Goldstein *Copyright's highway: From Gutenberg to the celestial jukebox* (2003) 216.

for calculating television viewing hits, and radio musical hits.[1537] Netamel, who drafted and proposed a similar levy framework for implementation advanced that the private entity would provide a mechanism similar to a pricing system that help inform CMOs audience tastes and interests and structured for authors to receive payment commensurate with consumer demand for the copyright owner's works.[1538]

However, the metering software developers ought to be alive to mutating technologies that can override its tracking operational scope and interfere with its overall scanning abilities and distort data production. The metering and tracking software's reliability should withstand the taste of time. As circumstances demand, software replacement should accompany novel reliable technologies to execute the same metering and tracking tasks depending on their reliability and relevance to the emerging technological digital ecologies. With reliable digital exploitation data, the copyright levy will continue to provide fair compensation from digital reproduction equipment.[1539] In principle, to guarantee the entity's independence and efficiency, it is submitted that it should operate outside state influence or control to avoid a potential collision of the interests of the state and that of consumers. This is so because state interests are often demonstrably politically motivated trespassing beyond the framework of formal legal processes, especially where private data of citizens is readily available.[1540]

6.4.1 The statistical survey, digital software and constitutional right to privacy

The Constitution of South Africa guarantees the right of privacy[1541] and dignity.[1542] The constitutional provisions are given effect through an enabling Act, the Protection of Personal Information Act (PoPIA), also known as the PoPI Act, which was enacted to safeguard the privacy and information of South African citizens. PoPIA is largely based on the EU's General Data Protection Regulation (GDPR), in particular to its material scope, key definitions, data subject rights, and general approaches to personal data protection, according to the OneTrust DataGuidance's research institute preamble, in its work 'Comparing private laws: GDPR v POPIA'. The Research institute provides privacy solutions designed to help organisations monitor regulatory developments, mitigate risk and achieve global compliance in privacy laws among others. The EU is used in this study to draw lessons in the

[1537] Ibid.
[1538] Ibid.
[1539] M Boyer 'The economics of private copying' (2017) *Jean Jacques Laffont policy papers*. 3.
[1540] See *AmaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others* 2021 (3) SA 246 (CC) (4 February 2021) para 13-22.
[1541] Bill of Rights, Constitution of the Republic of South Africa, 1996, s 14.
[1542] Ibid, s 10. See also Neethling, Potgieter & Visser *Law of Personality* (2007) 76.

implementation of the levy. As such for this reason it will be used considerably as a reference point in this section.

The teleological spirit behind POPIA is data protection from theft, misuse, and malicious activities. It applies to persons or entities that handles or processes personal information – receiving, recording, organization, retrieval, use, dissemination, or distribution of personal information. It provides that personal information should only be collected and processed for a specific purpose that is lawful, justified, and compatible with the reason it was collected. The software designed for the purposes of implementing the copyright levy will have a metering management system with real-time vast data processing and storage facilities. The technical designs of the metering system may violate the right to privacy and personal data protection. While the right to privacy offers a broad protection of individual interests, the rights are however not absolute and section 36 of the Constitution provides limitations.[1543] The metering and tracking framework will involve personal data collection therefore care must be taken to avoid the same data being used for unrelated purposes outside the scope of its mandate provided by the employer, the CMO. Similar concerns were raised by litigants in the AmaBhungane case where the state conducted illegal surveillance operations on citizens in pursuit political considerations that violated the right to privacy.[1544]

The Internet is a fast-growing industry providing ample opportunities that can protect and or alternatively ruin the reputation of individuals, and infringe the right of privacy and dignity. The metering software designed to track and monitor the usage of digital content in private copying scans through the cosmic scope of the Internet horizon for private related data. Through a survey, private interests or information could be unlawfully and inadvertently disclosed. Any deliberate infringements by licenced entities outside the scope of their mandate may attract delictual damages arising from right to privacy and or personality rights violations.[1545] Liability may extend to the mandating CMOs either vicariously, and or for either negligence or collusion. Therefore, care should be taken in the collection, storage, and

[1543] Constitution of the Republic of South Africa Act 108 of 1996 s 33(1), the limitation clause.
[1544] See AmaBhungane case (note 1542 above) para 13-22.
[1545] Nate Raymond 'Facebook parent Meta to settle Cambridge Analytica scandal case for $725 million' *Reuters*, 23 December 2022. available at *https://www.reuters.com/legal/facebook-parent-meta-pay-725-mln-settle-lawsuit-relating-cambridge-analytica-2022-12-23/*. accessed 27 January 2023. It reported that 'Facebook owner Meta Platforms Inc. (META) has agreed to pay $725 million to resolve a class-action lawsuit accusing the social media giant of allowing third parties, including Cambridge Analytica, to access users' personal information. The proposed settlement, which was disclosed in a court filing … would resolve a long-running lawsuit prompted by revelations in 2018 that Facebook had allowed the British political consulting firm Cambridge Analytica to access data of as many as 87 million users.'

usage of data in the levy's implementation. This must involve a delicate balancing act in the protection and use of personal private information that ordinarily arises in the execution of the software. The EU has a corresponding Directive geared towards protecting and safeguarding privacy arising from similar technological surveillance of consumer preferences. Recital 57 preceding the EC Copyright Directive underscores the importance of implementing privacy safeguards in digital rights management systems to avoid a conflict with EC data protection law. It reads in part,

> 'Any such rights-management information systems … may, depending on their design, at the same time process personal data about the consumption patterns of protected subject-matter by individuals and allow for tracing of on-line behaviour. These technical means, in their technical functions, should incorporate privacy safeguards in accordance with [EU Directive] on the protection of individuals with regard to the processing of personal data and the free movement of such data.'[1546]

The statutory framework on EU data protection law will only allow for the identification of users or monitoring usage if it conforms to contractual parameters set, or in accordance with the law as directed by a court process.[1547] Netanel argues that privacy and dignity concerns can be allayed if,

> 'Metering could be subjected to strict technological and legal guarantees against any tabulation or use of the information other than as an aggregate measure of all users downloads and uses of each work. There are already rough precedents for such guarantees in current laws prohibiting disclosures of electronic communications, the viewing habits of cable subscribers, telephone customer information, and video rental records.'[1548]

It is submitted, that the levy must capture an express statutory provision that mandates the entities commissioned to carry out the data sampling and metering technology to ensure legal protocols are followed in the protection of private information secured during and after conducting the national survey. The defined role of the CMO in the monitoring and implementation of the same will be clearly tabulated in the subsequent chapter.

[1546] EU Directive, Recital 57.
[1547] EC Data Protection Directive, art. 7 (b).
[1548] Netanel (note 1412 above) 55.

6.5 CONCLUSION

An administrative framework for the implementation of the privacy copying levy has been provided with auxiliary principles proposed to advance the remuneration right of copyright holders. The significance of this chapter is that it has proposed principles drawing from both domestic and rich EU jurisprudence which are designed to set standards for the implementation of the levy. The principles should be understood as basic norms from which to derive statutory levy enactments. If the copyright levy is efficiently executed, the principles will endure providing a durable levy framework. A levy as recommended would provide the authors' economic incentive necessary to stimulate further innovation, creativity, and production of more works without violating three-step test principles under international treaty obligations. The principles and administrative scope of the levy as provided is important in laying a predictable and certain management of the levy, involving the remuneration distribution criteria and patterns, with established beneficiaries and clear tariffs. The role of the CMOs and the private entities mandated to provide software and relevant works usage data will be useful in guaranteeing the levy success, drawing lessons from varying jurisdictions, in particular the EU and Ghana, with limited other important aspects drawn from a few African jurisdictions implementing the copyright levy.

CHAPTER 7

TRANSPARENCY OBLIGATIONS FOR COLLECTIVE MANAGEMENT ORGANISATIONS

7.1 INTRODUCTION

The Collective Management Organisations (CMOs) were beset with allegations of running their entities in an opaque manner covered by mismanagement, a host of other corporate governance deficiencies including failure to remit copyright rightholders' royalties due. Against this background, this chapter shall propose mandatory transparency obligations covered under the private copyright levy to help authors make informed appraisal of the economic value of the work they license or assign. A deliberate advancement of transparency principles will help minimise the risk of the levy's misappropriation, thereby safeguarding the rightholders' remuneration interest. The principles around transparency under the Constitution, enabling legislation and common law have been in existence for copyright holders to exercise their rights in pursuit of remedies for access to information. Unfortunately, the same principles are not expressly provided within the Copyright Act and the Copyright Amendment Bill (CAB) across the broad spectrum of rightholders to effectively exercise their rights. It is therefore imperative to provide an assessment of how the transparency principles have been fashioned out within South Africa's constitutional, statutory and common law legal framework and explore how they can be coherently and effectively infused to administer the copyright levy. Therefore, this section of the study will set out transparency principles to guide the accounting modalities for the CMO's management of the copyright levy.

This chapter shall initially discuss South Africa's transparency principles set out within its Constitution's right of information provisions and its enabling Promotion of Access to Information Act, No. 2 of 2000 (PAIA) enacted to give effect to the constitutional right of access to information and common law jurisprudence will be explored to help develop a domestic copyright levy. Afterwards, the transparency principles guiding the CMOs to help facilitate the realisation of the author's remuneration right will be set out.

7.2 TRANSPARENCY PRINCIPLES IN SOUTH AFRICA'S JURISPRUDENCE

The formulation of post-apartheid South Africa's 1996 Constitution and its Bill of Rights was considerably informed by deep historical contestations rooted in the apartheid system's socio-

economic political alienation of the majority black population from the mainstream economy, social life and its accompanying privileges.[1549] Relevant to this study is a constitutional provision creating the right of access to information either protected by the State or private bodies, thus facilitating both the vertical and horizontal application of the constitution. This approach was informed by South African lawmakers experience under apartheid where the private sector was complicit, operating hand in gloves with the State in orchestrating gross human rights violations.[1550] However, traditionally, constitutional rights were invariably applied in the public sphere and not in the private sphere.[1551] A provision providing for the transparency principle embedded in the right of access to information[1552] is important given that secrecy was an administrative political weapon of the apartheid government.[1553] The South African parliament has noted that the secretive and unresponsive culture in public and private bodies of the past frequently resulted in abuses of public power and violations of human rights.[1554] In contemporary South Africa, Klaaren argues that the right of access to information should be viewed as the right to have the mechanisms in place that facilitate access to the information any person requires.[1555] Consequently, in its reaction the new South African government implemented transparency and accountability principles which were offshoots of political clarion demands emanating from reformers. This was important for regulatory oversight.[1556] Providing for such a transparency model within the copyright law can be construed as one such mechanism of facilitating access to information, which is now recognised as a distinct fundamental right, separate from the freedom of expression.[1557] Of late, CMOs have been accused of operating in secrecy without accountability mechanisms in their management of royalties. Gilfillan writes that CMOs have for almost fifty years

[1549] K E Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146. See also D Moseneke 'The Fourth Bram Fischer Memorial Lecture: Transforming Adjudication' (2002) 18 *SAJHR* 309; F I Michelman 'Elegy to transformative constitutionalism' in H Botha, AJ van der Walt & J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) 57; P Langa 'Transformative Constitutionalism'(2006) 17 *Stell LR* 351 351-360.

[1550] R J. Peltz-Steele 'Access to Information in the Private Sector: African Inspiration for U.S. FOIA Reform' (2019) 63 *VILL. L. REV.* 907 (2019) 908.

[1551] D M Chirwa 'The horizontal application of constitutional rights in a comparative perspective' (2006) 10 (2) *Law, Democracy and Development*: 21 21.

[1552] P Sewpersadh & J C Mubangizi 'Using the Law to Combat Public Procurement Corruption in South Africa: Lessons from Hong Kong' (2020) *PER / PELJ* 2017(20) 7

[1553]Peltz-Steele (note 1550 above) 908.

[1554] A van Heerden A Govindjee & D Holness 'The constitutionality of statutory limitation to the right of access to information held by the state in South Africa' (2014) (1) *Speculum Juris* 29.

[1555] J Klaaren 'A Right to a Cellphone? The Rightness of Access to Information' in Richard Calland and Alison Tilley (eds) *The Right to Know, The Right to Live: Access to Information and Socio-economic Justice* (2002) 17–26.

[1556] R J. Peltz-Steele (note 1550 above) 908.

[1557]J Klaaren 'The Human Right to Information and Transparency' in Andrea Bianchi and Anne Peters (eds) *Transparency in International Law* (2013) 229.

operated in a private, unregulated and secret environment insulated from timeous government scrutiny, creating a monopoly that now required regulation.[1558] In the *Clutchco (Pty) Ltd v Davis* case the court noted that 'in extending the fundamental right of access to information to records held by private bodies, the Constitution and the statute have taken a step unmatched in human rights jurisprudence.' [1559] While this should provide scope for accountability mechanisms on private bodies guaranteeing copyright holders unimpeded access to information, a lot of information on investments, payments, and collections by CMOs is escaping occasional copyright holders' scrutiny.[1560] Nevertheless, the right of access to information relating to the production of public or private records in the interest of transparency is guaranteed under section 32 of the Constitution which provides that,

> '1. Everyone has the right of access to -
>
> a. any information held by the state; and
>
> b. any information that is held by another person and that is required for the exercise or protection of any rights.'

The Promotion of Access to Information Act (PAIA)[1561] was thus enacted in 2001 to give effect to section 32 of the Constitution. Copyright holders can still exploit section 32 of the Constitution and the enabling PAIA to exercise their right to information from the CMOs, any public body, or another person required for the exercise or protection of any rights and in the public interest.[1562] However, this is subject to the limitations rights clause, in the Constitution.[1563] The limitations import of the provision,

> 'Constitutionalizing ATI [access to information] meant that legislative limits on access—even for the legitimate aims of privacy, confidentiality, national security, and law enforcement—

[1558] G Gilfillan (note 131 above).
[1559] *Clutchco (Pty) Ltd v Davis* 2005 (3) SA 486 (SCA) para 10.
[1560]Charl Blignaut 'Gospel shocker: How black musicians got screwed' *City Press* 1 April 2018, available at *https://www.news24.com/citypress/news/gospel-shocker-how-black-musicians-got-screwed-20180401.a*ccessed 13 April 2023.
[1561] Promotion of Access to Information Act 2 of 2000.
[1562] See also *Nortje and another v Attorney-General, Cape* 1995 (2) SA 460 (C), at 474G, Marais J held that 'required' meant not 'needs', but 'reasonably required' in the particular circumstances. See also *Van Niekerk v Pretoria City Council* 1997 (3) SA 839 (T) at 848G; *Le Roux v Direkteur-Generaal van Handel en Nywerheid* 1997 (4) SA 174 (T) emphasised the need for an applicant for information to 'lay a proper foundation for why that document is reasonably "required" for the exercise or protection of his or her rights' (the quotation is from the English headnote). In *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC* 2001 (3) SA 1013 (SCA) as per Streicher JA at paras 28 and 29.
[1563] Ibid. Sections' 63 or s 64 provides limitations where the information sought could be denied under *inter alia* trade secrets, legal privilege, research integrity, prejudice to prejudice that third party and commercially sensitive information.

would be constrained by necessity and proportionality, with the burden on the government to justify the exemption.'[1564]

PAIA is also read together with the Protection of Personal Information Act (PoPIA) No. 4 of 2013 which provides for data protection to safeguard privacy and information giving effect to the Constitutional provision. The Act creates the Information Regulator, an agency enforcing the Act's compliance. The primary objective of the Act is to protect personal data from theft, misuse, and malicious activities, providing for ensuring compliance with the law, and taking appropriate measures to protect integrity and confidentiality personal information,[1565] and providing that access to personal information should be determined by a specific purpose that is under section 13(1) lawful and justified. However non-compliance with the Act can attract severe penalties for breach of private information.[1566] Pursuant to this, a person may request records from both the public and or a private body if the requester can demonstrate that the information is required for the exercise or protection of any rights.[1567] The CMOs perform a fundamental function in facilitating the realisation of a remuneration right for copyright holders – which is a considerably huge constituency of the population making an enormous 4.1 % contribution to the total South African economy, employing 4.08% of the country's workforce.[1568] Given the organisational profile of the CMOs, it therefore follows that where access to information is sought from it by a rightholder, or another person in the public interest it can be treated as a public body given that the Constitutional Court has held that

'when an entity – even a private one – performs a function that is fundamentally public in nature, it can be regarded as an organ of state and thus is unable to "walk away" from its constitutional duties. The Court thus affirmed a broad understanding of organs of state based on the definition in s 239 of the (Final) Constitution of the Republic of South Africa, 1996.'[1569]

Given the widening scope of business and constant liaisons between state and private entities in contemporary South Africa, it has become a consistent pattern that private entities perform many roles that were historically taken on by the state. Finn notes a piecemeal jurisprudential

[1564] Ibid at 924.
[1565] POPIA s 19(1).
[1566] POPIA s 107 (a)-(b).
[1567] South Africa Constitution s 32(1) (b).
[1568] Pouris & Inglesi-Lotz (note 110 above) 1-7.
[1569] M Finn 'AllPay Remedy: Dissecting the Constitutional Court's Approach to Organs of State' (2014) *Constitutional Court Review* 2014 Volume 6, 258. See also *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (4) SA 179 (CC).

approach in which both 'constitutional and administrative law is developing to accommodate this fact, both in an expansive understanding of what constitutes a public function or power and by casting the definitional ambit of "organ of state" broadly.'[1570] PAIA marked a noteworthy departure by constitutionally guaranteeing direct access of information to the private sector domain, which are defined as a 'private body' to include natural persons and partnerships, engaged in 'any trade, business or profession,' and 'any former or existing juristic person.'[1571] Furthermore, in the public sector, the transparency obligations have additional force and effect under section 195(1) (g) of the Constitution which provides that 'transparency must be fostered by providing the public with timely, accessible and accurate information.' The transparency principle is further buttressed through section 217 of the Constitution which provides the legal basis for public procurement in South Africa. Section 217(1) sets out five constitutional principles on which all procurement practices must be based: fairness, equity, transparency, competitiveness and cost-effectiveness.[1572] Authors Sewpersadh & Mubangizi note that,

> 'the interpretation of the constitutional principle of transparency is critical in any evaluation of laws aimed at combating corruption in the public procurement sector, because transparency is universally recognised as being indispensable in the fight against corruption … transparency must take into account the secret and clandestine nature of procurement corruption. A transparent procurement system, in addition to ensuring that procedures are open to scrutiny, should ensure that actual reasons and underlying principles in terms of which decisions are made are fair, lawful, rational, and free of any venal intent'[1573]

While these principles apply to public administration, they are reinforced with equal measure in the manner in which private corporations must operate.[1574] Peltz-Steele writes that if such power has been exercised horizontally, it compels a private actor to positive action in responding to a request under access law. Such modes of access, the scholar further notes the

[1570] Ibid at 258.
[1571] South Africa's Promotion of Access to Information Act, s 9(a).
[1572] See also *Transnet SOC Ltd v Total South Africa (Pty) Ltd and Anor* 2023 (3) BCLR 333 (CC) para 20.
[1573] P Sewpersadh & J C Mubangizi 'Using the Law to Combat Public Procurement Corruption in South Africa: Lessons from Hong Kong' (2020) *PER / PELJ* 2017(20) 7.
[1574] *Allpay Consolidated Investment Holdings (Pty) Ltd* v *Chief Executive Officer of the South African Social Security Agency* 2014 (1) SA 604 (CC) - Underscored in the case *Minister of Finance v Afribusiness NPC* 2022 (4) SA 362 (CC) para 78.

relocation of such power to private entities and not just public bodies, thus restoring the balance and establishing such entities within the accountability orbit.[1575]

The CMOs also operate under the ambit of the new Companies Act which has embedded access to information and transparency principles.[1576] Some CMOs such as SAMRO are registered as a limited guarantee company whose corporate designation is commonly used by non-profit societies.[1577] As such, the corporate governance principles captured under the Act will effectively apply in the CMO's management of private copying levy. Section 26 provides a right to individuals, in particular copyright holders with a beneficial interest in the affairs of the CMO to access company records. The provision runs complimentary to provisions set out under section 32 of the Constitution and PAIA.[1578] This is another avenue that is exploitable to enhance the levy management transparency levels. In demanding access to information and transparency levels using the Companies Act of 2008, courts have advised litigants to approach the Act's provisions holistically, whose many provisions are designed to protect the interests of shareholders.[1579] The Act's statutory outlook is designed to ensure scrutiny and compliance with the company's accounting records and financial statements under sections 284[1580] and 284(4).[1581]

7.2.1 Development of transparency common law principles

South African judiciary has developed transparency principles that assist in interpreting constitutional and enabling legislation provisions surrounding the right of access to information. The common law principles will apply should copyright holders litigate, demanding access to information held by the CMOs. The common law principles could also assist fashion copyright levy transparency obligations, through which authors can request information on the exploitation of their works by CMOs.[1582] The judiciary has sought to

[1575]R J. Peltz-Steele 'Access to Information in the Private Sector: African Inspiration for U.S. FOIA Reform' (2019) 63 *VILL. L. REV*. 907 (2019) 922.
[1576] Companies Act of 2008.
[1577] SAMRO's NPC Memorandum of incorporation registered under the Companies Act, 2008. available at *https://www.samro.org.za/wp-content/uploads/2022/11/AMENDED-SAMRO-MOI-Signed.pdf.* accessed 13 April 2023.
[1578] Companies Act 71 of 2008 s 26.
[1579] *Clutchco (Pty) Ltd v Davis* 2005 (3) SA 486 (SCA) para 15.
[1580] The Companies Act of 2008 s 284 Duty of company to keep accounting records.
[1581] Companies Act of 2008 s 284(4).
[1582]Records held by official or independent contractor of public or private body, PAIPA s 3. This Act applies record whenever it came into existence (a) a record of a public body; and (b) a record of a private body, regardless of when the record came into existence.

interpret provisions within section 32 of the Constitution and key elements around section 50 of PAIA. Section 50 of the PAIA provides that,

> '(1) A requester must be given access to any record of a private body if—
>
> (a) that record is required for the exercise or protection of any rights;
> (b) that person complies with the procedural requirements in this Act relating to a request for access to that record; and
> (c) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.'

The request for access to a record of a private body for the exercise or protection of any rights, other than its rights must conversely be in the public interest.[1583] The right of access in this context appears untrammelled. The judiciary has attempted to define key words emerging out of the provisions. The word 'required' – in relation to access to information or record is capable of several meanings,[1584] and jurists have postulated that the information sought must generally be 'required'. [1585] In *Gumede and others v Attorney-General, Transvaal*, Cloete J said that required 'conveys an element of need: the information does not have to be essential, but it certainly has to be more than "useful" ',[1586] relevant[1587] or simply desired. Furthermore in the *Nortje and another v Attorney-General, Cape* Marais J held that 'required' meant not 'needs', but 'reasonably required' in the particular circumstances.[1588] Cameron J in *Van Niekerk v Pretoria City Council*[1589] and in *Le Roux v Direkteur-Generaal van Handel en Nywerheid* emphasised the need for an applicant for access to information to 'lay a proper foundation for why that document is reasonably "required" for the exercise or protection of his or her rights.'[1590] A more elaborate interpretation of section 32 of the Constitution is captured in *Cape Metropolitan Council v Metro Inspection Services* case where Streicher JA held that,

> 'Information can only be required for the exercise or protection of a right if it will be of assistance in the exercise or protection of the right. It follows that, in order to make out a case

[1583] PAIA s 50(2).
[1584] See *Shabalala v Attorney-General, Transvaal* 1994 (2) SACR 361 (W)] at 224G-225E (SA) and 367d-368a.
[1585]See also *Gumede and others v Attorney-General, Transvaal* 1995 (1) SA 608 (T) Cloete J said at 624C: 'In addition, s 23 postulates that the information must be "required". The word "required" is capable of a number of meanings ranging from "desired" through "necessary" to "indispensable"
[1586]*Gumede and others v Attorney-General, Transvaal* 1995 (1) SA 608 (T) 624C.
[1587] *Khala v Minister of Safety and Security* [1994 (3) SA 218 (W) 238D-F.
[1588] *Nortje and another v Attorney-General, Cape* 1995 (2) SA 460 (C) 474G.
[1589] *Van Niekerk v Pretoria City Council* 1997 (3) SA 839 (T) 848G.
[1590] *Le Roux v Direkteur-Generaal van Handel en Nywerheid* 1997 (4) SA 174 (T).

> for access to information in terms of s 32, an applicant has to state what the right is that he wishes to exercise or protect, what the information is required and how that information would assist him in exercising or protecting that right.'[1591]

Furthermore, assistance from the aforegoing passage indicates that 'required' does not mean necessity, let alone dire necessity, but is understood to connote a substantial advantage or an element of need, which interpretation Streicher JA believes correctly reflected the intention of the legislature in PAIA under s 50(1)(a). While copyright holders with potentially the same interest as shareholders in a company can exploit the same remedy under the Companies Act, [1592] it was noted in *Clutchco* case that the court did not hold the companies Act to override PAIA, but because the legislature had expressly provided for disclosure of only selected data, the court demanded of plaintiffs a 'substantial foundation' for access to be permitted. This was necessary because in enacting PAIA, it was argued that parliament did not contemplate that 'the books of a company, great or small, should be thrown open to members on a whiff of impropriety or on the ground that relatively minor errors or irregularities have occurred.'[1593] Therefore a far more substantial foundation would be required.[1594] Common law provisions are supportive of constitutional and statutory interpretations of key words that are deployed to enhance the provisions. The legislature did not define them, hence the courts have gone out of their way to provide yardstick of which to measure necessity for access to information in either a private or public body.

Chapter Three under paragraphs 3.5.1 – 3.5.2 extensively discussed transparency obligations shortcomings within the copyright Act and the CAB. It also detailed authors' historical concerns around lack of access to records and misappropriation of royalties by CMOs. Furthermore, it detailed investigations and recommendations raised by the CRC report, Music Industry Task Team (MITT), which raised concerns around transparency gaps and poor corporate governance practices. Briefly, the shortcomings around transparent obligations discerned were that in some instances they are inferred and not expressly provided for. Despite transparency principles having been well articulated within the Constitution, statutes, common law, and the EU's Article 19 framework, they are not profoundly and expressly provided for either within the Copyright Act or the proposed CAB

[1591] *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC* 2001 (3) SA 1013 (SCA).
[1592] Companies Act of 2008.
[1593] *Clutchco (Pty) Ltd v Davis* 2005 (3) SA 486 (SCA) para 17.
[1594] Ibid.

except for audio-visuals.[1595] The transparency provisions are assigned for audio-visuals under the CAB without any express and comprehensive reference to copyright owners of literary and musical works, and artistic works.[1596] Therefore, this chapter intends to provide express and more effective transparency principles that ties down the CMOs' to binding statutory provisions drawing lessons from domestic jurisprudence.

7.3 THE PROPOSED SOUTH AFRICA PRIVATE COPYING LEVY TRANSPARENCY PRINCIPLES (MODEL)

Jurisprudence around transparency principles developed in various jurisdictions has been explored. Its relevance in promoting access to information is indisputable. There is therefore need to incorporate them into the copyright law framework designed to develop a South African private copying levy. The proposed framework for the development of statutory transparency principles is partly home grown, supported by access to information jurisprudence developed following the enactment of the 1996 Constitution, PAIA, POPIA legislation, and common law. Additionally, the main pillars of the principles shall be informed by the persuasive EU Copyright Directive Article 19 provisions which were crafted to support the development of the copyright levy. The fusion of both the domestic and EU jurisprudence should help create effective transparency obligations. At the centre of the levy administration are the CMOs.

7.3.1 The role of Collective Management Organisations

The use of CMOs in the management of the copyright levy and other royalties is a global standard because it is almost impossible for rightholders/owners to negotiate contracts, license and monitor innumerable end users exploitation of their works. However, as is the norm it is ideal that one CMO be appointed for the levy's management and this will also limit bureaucracy associated with the levy's distribution because this expedites audit and promoting effective accountability mechanisms.[1597]

The statutory provision mandating the CMO to administer the levy should provide reference to the spirit espoused in PAIA in relation to need for the right of access to information, subject to the limitations espoused in POPIA. Such an express provision widens the scope for interpretation of access to information rights. This is important because such a

[1595] Ibid at 16.
[1596] Ibid at 10.
[1597] CISAC (note 159 above) 13.

transparency levy provision supporting the role of the CMOs can be used to interpret other related copyright law transparency obligations. Besides, the Companies Act under which the CMOs operate also makes explicit reference on the need to the right to information contained in both the Constitution and PAIA, but carrying its own limitations similarly provided under POPIA. [1598] The copyright levy, must espouse a provision dictating that rightholders contractual frameworks and reflect the transparency obligation in their contracts. As a principle, it must be stated that any contract provision that seeks to circumvent or defy the transparency obligation provision will be unenforceable. This is also in line with the same emphatic principle providing that any contractual provision seeking to avoid compliance with the application of Article 19 spirit under the EU Copyright Directive will be unenforceable.

As earlier indicated, there several gaps within the Act and the CAB that require attention. While the right to remuneration is unequivocally guaranteed within the CAB, what is lacking for transparency purposes are express provisions covering the whole gamut of rightsholders compelling CMOs to provide detailed or comprehensive record of exploitation of their works.[1599] Production of such records are a form of a transparency obligation without which the capacity for authors to enforce their right is limited in evidential scope due to lacking proper accounting records to appraise them of the extent of the exploitation of their work in order for them to assert their rights. Given the inexorable CMOs administrative monopoly, it is therefore proposed that the regulatory framework include a transparency provision that compels them to ensure free and unimpeded access to records to facilitate and make accountability and auditing of records feasible. There isn't an effective transparent clause in the CAB except for audio-visuals and this could be attributable to the fact that copyright works are not registered in South Africa except for audio-visuals, Forere posits that it might be burdensome to expect registration of exploitation if the underlying work itself is not registered, and argues further that reporting in a transparent manner is important for rightholders to fully enjoy the right of remuneration and therefore whether copyright works are registered or not, all forms of exploitation must be registered to facilitate their access to data of the exploitation of their work.[1600] This is important because it has been argued that the copyright levy system in general is,

[1598] Companies Act 71 of 2008 s 26(4) (c).
[1599] Forere (note 52 above) 10.
[1600] Ibid at 16.

> 'opaque and it will be difficult to justify it as long as some transparency criteria have not been set. If a system of private copying levies should apply, it is necessary to establish a relationship of trust with consumers and to clearly and explicitly display the amount of the levy.'[1601]

Belliard pithily posited that,

> 'Transparency should also be promoted in the redistribution of the money collected. Although it is possible to know approximately how the amounts are distributed (the percentage distributed directly to the artists and the percentage used for the promotion of culture), it is nevertheless difficult to know on what basis this redistribution is calculated both for the separation between direct redistribution and use in culture, but also how the amount allocated to promote artists is redistributed among them. In addition, a large portion of these amounts is lost in the administrative costs. Redistribution mechanisms must be made transparent, otherwise such system loses legitimacy in the eyes of citizens.'[1602]

The transparency provision proposed must be guided by corporate governance principles which are ideal in the administration of either private or public funds. The CMO is not an exception in this regard. The need to have access to records reflecting the exploitation of rightholders' work, has enforceable good corporate governance implications. The new King III Report articulates that key principles to good corporate governance are leadership, sustainability and corporate citizenship,[1603] and it further state that effective leaders are characterised by the values of responsibility, accountability, fairness and transparency.[1604] Additionally, the Companies Act 2008 espouses transparency principles, elevating it from a Code of Best Practice to a legislative requirement under section 26(1) of the Act for effectiveness. Dealing with general transparency and accountability requirements,[1605] the

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[1601] R Belliard 'Private copying levies' (2010) *European Digital Rights* 2. available at *https://www.edri.org/files/privatecopyinglevies.pdf*. accessed 9 June 2022.
[1602] Belliard (note 1601 above).
[1603] King 111 Report para 8 of the introduction and background part in the report).
[1604] Ibid para 8.1.
[1605] Companies Act No. 71 of 2008 s16(1) Access to company records provides that:
' (1) A person who holds or has a beneficial interest in any securities issued by a company— (a) has a right to inspect and copy the information contained in the records of the company (b) has a right to any other information to the extent granted by the Memorandum of Incorporation, as contemplated in subsection (2); and
(c) may exercise the rights set out in paragraph (a) or (b… or (ii) in accordance with the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000).
(2) In addition to the information rights set out in subsection (1) (a), the Memorandum of Incorporation of a company may establish additional information rights of any person, with respect to any information pertaining to the company, but no such right may negate or diminish any mandatory protection of any record, as set out in Part 3 of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000).…

Companies Act specifically makes reference to POPI, as the guiding legislation to the interpretation of access to information right. Another vital barometer for establishing for transparency rules benchmarks and also guide the formulation of copyright levy good corporate governance frameworks is the previously alluded to WIPO Good practice Toolkit for CMOs.[1606] The WIPO Toolkit is a compilation of examples of global CMOs legislation, regulation and codes of conduct that could be used to benchmark this jurisdiction's particular circumstances. The relevant toolkit provisions are Rule 5, 6, 9, 28, 29, 30, 45, 58 and 62, as provided in chapter 4. These provisions constitute international best practice that should be adhered to, and to some extent reflected in the copyright levy statutory framework.

7.3.2 CMOs period for levy information submission

As a principle, the CMOs records of collection, administration, management and distribution of works must be made available to rightholders at least once a year before the distribution of royalties to beneficiaries. This enables rightholders to make an informed assessment of the royalties due and what the records suggest. During the initial stage of the copyright levy implementation, it is advisable for the CMO to start with annual record distributions given the huge population and market of rightholders spanning literary works, audio-visuals and music. With the copyright levy collections being managed by a single CMO as proposed, the administrative set up of ensuring and providing annual collections will provide scope for production of timeous audits to promote accountability of the copyright levy infrastructure,. Management of the copyright levy, with a huge repertoire and digital work consumption patterns, will also require a more comprehensive audit after a thorough audit assessment of the annual levy collections and distributions. Another principle supporting this approach is to avoid committing administration budgets towards several audit reports whose objectives can be realised through an annual mandatory review. CMOs are also regulated through the Companies Act which is desirous of annual production and distribution of records to stakeholders with a beneficial interest. Section 31(1) of the Act - Access to financial statements or related information - provides that, 'a person who holds or has a beneficial interest in any securities issued by a company, is entitled— (a) without demand to receive a notice of the publication of any annual financial statements of the company required by this Act, setting out the steps required

(4) The rights of access to information set out in this section are in addition to, and not in substitution for, any rights a person may have to access information in terms of— (a) section 32 of the Constitution; (b) the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000); or (c) any other public regulation.

[1606] WIPO *WIPO Good Practice Toolkit for Collective Management Organizations (The Toolkit) A Bridge between Rightholders and Users* (2021).

to obtain a copy of those statements; and (b) on demand to receive without charge one copy of any annual financial statements of the company required by this Act.'

However the CAB does not provide timeframes for distribution of records relating to the exploitation of works. In section 22D (1) A(c) it provides that a collecting society is subject to the control of the performers or copyright owners and it shall collect and distribute royalties in accordance with the constitution of the collecting society and 'provide to each performer or copyright owner regular, full and detailed information concerning all the activities of the collecting society in respect of the administration of the rights of that performer or copyright owner.' The CMO's vast repertoire and database of rightholders with the potentially huge amounts close to R1 billion would require a wide-ranging audit and proper management. To demonstrate this point, South Africa's audio-visual and Interactive media sector witnessed significant increase in both domestic and international appeal, enjoying one of the highest growth rates within the creative content industries generating US$600-750 million in production value annually.[1607] The sector, reportedly as old as Hollywood, creates around 60,000 full time equivalent and freelance jobs,[1608] Outside the film industry, in the music sector, the CMOs had a cumulative R1.5bn in 2020 royalties as they closed off their respective financial years, with more than R760m generated in publishing revenue across the industry.[1609] Managing such complex industries – in the collections and distributions to targeted rightholders requires diligence, care and patience to ensure remuneration due is efficiently managed by a single CMO, and diligently audited. This is so because management of rights in the Internet environment is a complex endeavour especially if the licensed rightholders are in multitudes, and all adjusting to a new legislative framework such as a copyright levy with its multifaceted enforcement mechanisms.[1610] The identification and protection of digital content is a challenging endeavour in the management of rights.[1611] Koskinen & Lowe write that, 'The digital environment entails a real mass use situation for protected works and without effective rights management there would be less legal alternatives. CMOs need, however, to evolve and adjust their activities to serve in the

[1607] UNESCO *The African film Industry: trends, challenges and opportunities for growth* (2021) 214.
[1608] Ibid.
[1609] See Butchie Seroto 'SA music industry valued at R2bn in 2020 – SOTS report' *MusikAfrica*, 20 September 2022, available at *https://www.musicinafrica.net/magazine/sa-music-industry-valued-r2bn-2020-sots-report*, accessed 1 December 2023.
[1610] T Koskinen & O N Lowe *Educational Material on Collective Management of Copyright and Related Rights Module 1: General aspects of collective management* (2012).
[1611] Ibid.

new media landscape.'[1612] However, the copyright levy information provided by the CMO must be a complete, true and accurate report to the rightholders in the prescribed manner. The information distributed must relate to the exploitation of the works, administration and distribution of the levy to the identified beneficiaries as prescribed under the copyright law

7.3.3 Locus standi to access levy information

Access to information is a fundamental right provided under the Constitution, and enabling legislation, The Promotion of Access to Information Act (PAIA) but subject to limitations under the Protection of Personal Information Act (POPIA). The three relevant legislations, namely PAIA; POPIA, Companies Act of 2008 and the Copyright Amendment Bill (CAB) help provide some framework of the persons, who in certain circumstances, could be provided with the right to access to information. While giving effect to the constitutional right to privacy, POPIA under section 2(1) provides justifiable limitations that balances,

> 'the right to privacy against other rights, particularly the right of access to information; and protecting important interests, including the free flow of information within the Republic and across international borders … regulate the manner in which personal information may be processed,… provide persons with rights and remedies to protect their personal information from processing that is not in accordance with this Act; and establish … the establishment of an Information Regulator, to ensure respect for and to promote, enforce and fulfil the rights protected by this Act.'.

However, not everyone has a right to CMO exploitation of works records, save for those persons specified under law. The CAB under 22D (1) (c.) provides that a CMO is subject to the control of the performers or copyright owners whose rights that collecting society administers, and it shall provide to each performer or copyright owner regular, full and detailed information concerning all the activities of the collecting society in respect of the administration of the rights of that performer or copyright owner. It is envisaged that broader sections of rightholders' registered with the CMO for the purposes of copyright levy collections will equally have a right to such records of the exploitation of works subject to meeting certain requirements to assert their rights. The PAIA provides under section 11(1) (a) for the right of access to records of public bodies to a requester who must be given access if that requester complies with all the procedural requirements in the Act. While this Act relates to public bodies, given the private CMO functions it can also assume the status of a

[1612] Ibid.

public body given its national profile and role in the administration of funds of an important national constituency regulated by statute.

The extant of the regulatory framework for CMOs is found in the Companies Act where the principles of corporate governance are applicable. The Companies Act provides under section 31(1) for access to financial statements or related information to a person who holds or has a beneficial interest in any securities issued by a company is entitled without demand to receive a notice of the publication of any annual financial statements of the company. The rightholder automatically have a beneficial interest in the company, and as such are entitled to the CMO's records to assert their rights.

It is submitted that member of the public or journalist can request CMO records in the public interest and/or where such information is required and important for the exercise of a right. In this instance, public interest considerations apply. These principles are set out under South Africa's access to information constitutional provision,[1613] supporting enabling legislation and a host of other considerations under common law.[1614] To establish an individual's interest in the access to information sought real and substantial interest must be established. The constitutional provision providing for the right of access to information was 'motivated by a desire not to repeat the mistakes of the [apartheid] past'[1615] which deliberately created a brickwall against access to public records because information control and a culture of secrecy were designed to protect state excesses under the apartheid government.[1616] The principle supporting the provision for access to information is supported by the fact that, 'public access to information is the life-blood of any meaningful democratic participation. Without the right of access, the affirmation, and more concretely the realisation, of all other rights is fundamentally compromised.'[1617] While the provision for access to information has defined parameters, the copyright levy main intended beneficiaries are primarily those whose rights are immediately impacted by the transparency obligation provision. The relevant constituencies with some locus standi to the relevant information sought are the authors, filmmakers, journalists, musicians, artists, producers of literary works, and the minister or identified public officials in charge of the department of trade, industry

[1613] Constitution of South Africa s 32.
[1614] Companies Act 71 of 2008 s 26(2) provides for the public's right of access to information trumps the shareholders', directors' and companies' rights to privacy.
[1615] I Curry 'South Africa's Promotion of Access to Information Act' (2003) *European Public Law*, 9, (1), 60.
[1616] D T. McKinley 'The State of Access to Information in South Africa' (2003) Prepared for the Centre for the Study of Violence and Reconciliation 1.
[1617] Ibid.

and competition, and other organisation/institution or individual with demonstrated real and substantial interest or right.[1618]

7.3.4 Audit report(s)

The Copyright Amendment Bill does not provide a provision for a CMO audit framework and period within which it can be carried out. Such information is important for the implementation of a copyright levy, and in supporting a proposed transparency obligation provision in which records of the exploitation of creative content must be submitted to rightholders' to have an appreciation of the collection, management and distribution of their work. However, in section 22D(1)(c.) of the CAB the CMO is compelled to provide to each performer or copyright owner regular, full and detailed information concerning all the activities of the collecting society in respect of the administration of the rights of that performer or copyright owner. This is however an internal accounting initiative to account for its management of the levy. The CAB also compels the CMO to make submission of returns and reports in section 22E.(1). In this regard, a collecting society shall submit to the Companies and Intellectual Property Commission (CIPC), such returns, reports and records to check if the affairs of the CMO are conducted in a manner consistent with the accreditation conditions and also if the royalties collected in respect of rights and utilised or distributed in accordance with the provisions of the CAB. The CMO is inferred from section 22B. (1) to operate under the conditions set out in the Companies Act, wherein it is compelled to comply with relevant provisions of the Companies Act.

The audit of the CMO must therefore comply with audit provisions set out in the Companies Act. The compilation of the records or information contemplated for use by rightholders must be a result of an audit by a registered accounting firm mutually agreed and approved by the board and stakeholders. Prior to an institution of the mandatory audit, the CMOs must keep an accurate and complete accounting records,[1619] either in written or electronic form concerning its financial affairs, in any of the official languages of South Africa. The accounting records must be necessary to provide sufficient accounting information required to satiate all obligatory reporting requirements. Incomplete or

[1618] See *Hlophe v Freedom Under Law In re: Freedom Under Law v Hlophe; Mosoneke & Ors v Hlophe In re: Hlophe v Judicial Services Commission & Ors* 2022 (2) SA 523 (GJ) at para 34. Citing the Constitutional Court in *SA Riding for the Disabled Association v Regional Land Claims Commissioner & Ors* 2017 (S) SA 1 (CC).

[1619] Section 1 Companies Act 71 of 2008.

unavailable records, without any convincing justification may attract adverse inferences of improper administration or mismanagement of the levy. The accounting records must be kept at, or be accessible from the CMOs registered offices.

The CMOs must carry out a statutory annual audit,[1620] with their audit report provided prior to the end of each financial year.[1621] They are also required to rotate engagement of auditing partners every five years to ensure efficiency, and reducing independence risk. The audit report must be available online, through an official and acknowledged website of the respective collection society. In the event of the collection society having failed or unable to meet the deadline set out, some communication must be made available to all stakeholders through the available online database, and a press statement to appear in at least one national newspaper publication, and one weekly Sunday publication providing details of the constraints. The obligations set out must be effected, in ensuring a high level of transparency to the satisfaction of all rightholders.

7.3.5 Period for the distribution of royalties

Established practice for the CMOs distribution of royalties is at the end of each financial year.[1622] The distribution process should follow strict statutory guidelines approved by rightholders' or in some cases ministerial decrees. The funds are split between categories such as audio, video, written works and interactive works. The allocations, as suggested in the preceding chapter, are based on the results of market research on the type of works copied on the various media. The idea of annual distribution of collections can be inferred from the EU Article 19(1) – which provides that Member States shall ensure that authors and performers receive on a regular basis, 'at least once' a year relevant and comprehensive information on the exploitation of their works and performances from the parties to whom they have licensed or transferred their rights. This should be the authors' claim to protection of their creative work and their right to equitable remuneration for that work which must exist in the digital age.[1623] The ARIPO Model law, although South Africa is not a member to

[1620] Companies Act of 2008, s 30. Annual financial statements, '(1) Each year, a company must prepare annual financial statements within six months after the end of its financial year, or such shorter period as may be appropriate to provide the required notice of an annual general meeting in terms of section 61(7).'
[1621]EU Committee on legal affairs 'REPORT on private copying levies' EU, 17 February 2014, (2013/2114(INI)), Committee on Legal Affairs. available at *https://www.europarl.europa.eu/doceo/document/A-7-2014-0114_EN.html*. accessed 15April 2023.
[1622] D O. Oriakhogba (note 136 above) 210.
[1623] EU Committee on legal affairs 'REPORT on private copying levies' EU, 17 February 2014, (2013/2114(INI)), Committee on Legal Affairs. available at *https://www.europarl.europa.eu/doceo/document/A-7-2014-0114_EN.html*. accessed 15April 2023.

ARIPO, on copyright and related rights does not however provide for timeframe within which a CMO must distribute collected levy.[1624]

In line with established annual royalties' distribution routine, it is therefore recommended that the CAB provision that requires CMOs under section 22D (3) to within a three-year period provide for the distribution of royalties should be modified.[1625] The wording that it be distributed 'as far as may be possible'[1626] be deleted and replaced by 'within a year of collection.' The section 22D(3) three year proposed distribution framework is contrary to good practice as reflected in the domestic approaches in numerous countries that have copying levies such as Switzerland, where distribution to CMOs is quarterly and or annual to rightholders or beneficiaries.[1627] However several jurisdictions follow annual production of reports and these include Ukraine, [1628] Sweden,[1629] Slovak Republic,[1630] Serbia,[1631] the Russian Federation,[1632] Norway,[1633] Hungary,[1634] and Belgium.[1635] In Africa, distribution patterns vary, with Malawi making monthly distributions[1636] Ghana twice a year[1637], Carbo Verde [1638]and Algeria making annual distributions.[1639] The EU jurisdictions provided are among many that have an annual levy distribution model for rightholders. It is in this context that Oriakhogba proposed a revised CAB that facilitates royalties' distribution at the end of each financial year arguing that 'there is no clear justification for such three-year deadline**.** Moreover, the three-year deadline is against the established practice by CMOs: distribution at the end of each financial year.'[1640]

[1624] ARIPO Model Law on Copyright and Related Rights, s 37.
[1625] Copyright Amendment Bill s 22D (2).
[1626] Copyright Amendment Bill s 22D (2) (a).
[1627] CISAC (note 159 above) 480.
[1628] Ibid at 487.
[1629] Ibid at 472.
[1630] Ibid at 451.
[1631] Ibid at 443.
[1632] Ibid at 439.
[1633] Ibid at 411.
[1634] Ibid at 362.
[1635] Ibid at 299.
[1636] Ibid at 128.
[1637] Ibid at 121.
[1638] Ibid at 117.
[1639] Ibid at 104.
[1640] D O. Oriakhogba (note 136 above) 210.

7.3.6 Royalties for non-members

The proposed Copyright Amendment Bill section 22D (3) does not sufficiently address how CMOs should deal with royalties' accumulated in its accounts belonging to non-members copyright owners.[1641] The provision provides that,

> 'Where the collecting society, for whatever reason, is unable to distribute the royalties within five years from the date on which the royalties were collected, that collecting society shall— (a) invest the royalties in an interest-bearing account with a financial institution, the rate of which may not be less than the rate applicable to a savings account with that financial institution; and (b) upon demand by the performer or copyright owner, or their authorised representatives, pay over the royalties together with the interest earned on the investment contemplated in paragraph (a).'

The problem with the provision is that it doesn't provide sufficient period within which the copyright owner can be identified and remunerated. The practice is however three years across the world which is often tied to prescription laws. The five year period is not sufficient enough to warrant the CMO redirecting the money towards an investment account. The beneficiaries of the royalties – which generates interest at a rate not less than a savings account – after the money had been deposited with a financial institution, are not specified. It appears the money will remain held in the investment account in perpetuity. The royalties are only transferred to the rightholders' together with interest once they have been identified. The CMOs operate under a blanket license, in which they are allowed to facilitate the exploitation of a copyrighted works without having to obtain individual licenses for each work. Such a blanket license, often results in the CMOs collecting royalties belonging to non-members not registered under its management.[1642]

Once the copyright levy is operationalised, there is need to provide a coherent and certain legislative framework that defines how such collections can be dealt with to avoid their misappropriation.[1643] This is important for other the levy management and other royalties coming against a background of CMO mismanagement of the same.[1644] Given the

[1641] Ibid.
[1642] See D O Oriakhogba *Strengthening the regulation regimes for Collecting Societies in South Africa and Nigeria: Any room for competition law?* (Unpublished PhD thesis, University of Cape Town 2018) 210.
[1643] Ibid.
[1644] See Sibusiso Mnyanda 'Theft of royalties in SA music history, musicians not benefitting from revenue' *City Press*, 20 August 2023 available at: *https://www.news24.com/citypress/trending/theft-of-royalties-in-sa-music-history-musicians-not-benefitting-from-revenue-20230820*, accessed 2 December 2023. See also Copyright Review Commission (CRC) (note 47 above) 52-53.

above, an appropriate transparency approach as an amendment to the Act is proposed under the CAB in relation to section 22D (3). In this regard, to enhance transparency mechanisms, a distribution period for the non-members of accumulated royalties is proposed. While investment of the royalties into an interest-bearing account with a financial institution, the rate of which may not be less than the rate applicable to a savings account with that financial institution is a principled idea, there is need to have that money invested for a specified particular period of time before it can be reallocated to a specified beneficiary, because the CMO is after all a non-profit making organisation. It is therefore proposed that it be invested for a maximum period of seven years, which is arguably reasonable. The CMO must during the period – diligently seek to identify the rightholders' and failure of which the funds must be retained into the CMO account for distribution towards cultural activities specified in Appendix 2, section 11(ii). This is important to avoid rightholders' benefiting from the fruits and labour of others, and hence have the unaccounted funds providing a social service towards cultural activities that collectively benefit the nation.

7.3.7 Transparency obligations shall be proportionate to the revenue expected or generated

Rightholders are entitled to receive appropriate and proportionate remuneration, arising from the exploitation of their work. This operates in circumstances where a private copying levy has been introduced to their benefit. They are therefore entitled to know how much of their works has been exploited, in order for them to exercise such a right. This dovetails with the principles behind the introduction of the Protection of Access to information Act, which articulates the necessity for access to information however subject to limitation conditions set out in POPIA. If the rightholders' enjoy access to records, such a transparency obligation facilitates their corollary enjoyment of the right. The EU Copyright Directive provides that,

> 'Member States shall ensure that authors and performers receive on a regular basis, at least once a year, and taking into account the specificities of each sector, up to date, relevant and comprehensive information on the exploitation of their works and performances from the parties to whom they have licensed or transferred their rights, or their successors in title, in particular as regards modes of exploitation, all revenues generated and remuneration due.'[1645]

The implementation of the copyright levy will cater for different rightholders' such as filmmakers, performers, writers, musicians, whose tariff distribution patterns differ. In light of the foregoing, the mandatory transparent reporting obligations as a principle should be

[1645] EU Copyright Directive, Art 19(1).

equally proportionate to the revenue expected or generated to over reporting conditions becoming burdensome. This means that the reporting or access to information condition is relaxed if the contribution is insignificant because it is needless to dedicate resources towards inconsequential outcomes.

The principle that emerges and should be incorporated in copyright levy provision is that in duly justified circumstances, where the administrative burden resulting from the transparency obligation set out would become disproportionate to the revenues generated by the exploitation of the work or performance, the CMOs reporting obligation should be limited to the level of information that can reasonably be expected and is necessary. The relevant CMO has in principle discretionary powers that ought to be exercised reasonably and may decide in writing that the transparency obligations do not apply when the contribution of the author or performer is not significant having regard to the overall work or performance. The principle is also articulated under Article 19(3) of the EU directive. However, such an approach is not new in the administration of royalties in this jurisdiction. However, SAMRO uses a similar approach, but it is dedicated to accumulated royalties and necessity for distribution. SAMRO's royalty distribution rules provides that if no performances are reported and,

> 'where a reasonable financial threshold below which SAMRO judges that the expense of making a Royalty Distribution outweighs the financial benefit of making a Royalty Distribution is not reached, the Net Distributable Amount received from such sources will be allocated to similar sources from which performance returns have been received.'[1646]

In general, the transparency provision helps determine from the information accessed on the exploitation of works whether the received disbursements are 'appropriate and proportionate' to the actual or potential economic value of the licensed or transferred rights. Accessed records are helpful in the making of the assessment whether the authors' or performer's contribution to the overall work reflect market practices or the actual exploitation of the work.[1647] The aim of the provision seeks to balance the rights of the authors and performers in the exploitation of their work and enable them to get appropriate and proportionate remuneration for their exploited content. However the CAB carries no reporting conditions save for audio-visuals. This approach should be corrected in the implementation of the

[1646] SAMRO Performing rights royalty distribution rules, available at *https://assets-global.website files.com/641d55c4d3455bd939321315/64387bc3eb8eab3dcca22ee7_SAMRO-Performing-Rights-Royalty-Distribution-Rules.pdf*, accessed 2 December 2023.
[1647] Ibid.

copyright levy because a transparency obligation is meant to strengthen the contractual position of authors and performers and assist them in obtaining appropriate remuneration for the exploitation of their works and performances. Given the growing digital markets generating new economic revenues, there is need for authors to make provision for this remuneration right.

7.3.8 Transparency obligations to apply across the copyright law spectrum

As a principle, the CMOs must be peremptorily required to apply the transparency provision across the administration of all copyright royalties provided for in domestic copyright law. This will automatically bind transparency obligations across the entire collection and management of the copyright royalties. Such uniformity is helpful in promoting certainty and predictability of copyright law. Given the advancement of technologies and the need to continuously reform copyright law, the ministerial regulations must be punctually adapted to suit changing circumstances and cover emerging devices that are capable of reproduction and storage of works, and introduce new applicable tariffs. Such common legal regulatory adjustments must automatically fit into the robust transparency framework that shall apply across copyright law. The CMOs in particular, must provide relevant data on new developments that are factored into the financial records and make them accessible to rightsholders in fulfilment of the PAIA objectives that are intended to give effect to the right of access to any information held by the State and any information that is held by another person and that is required for the exercise or protection of any rights. This also important in fostering a culture of transparency and accountability in both the private and bodies by giving effective access to information to enable rightsholders' to more fully exercise and protect all of their rights.

RROs are important constituency in the management of royalties, even the levy. Rudolph writes that, 'RRO members of IFRRO generally accept supervision and control by the state because they by nature are committed to transparency and they also find that this gives the RRO legitimacy with users as well as rights holders.'[1648] Notwithstanding, the IFRRO holds the view that RROs should be firmly planted in the private sector and be owned and managed by national rights holders. While it holds the view that in emerging economies the government role in regard of funding, promotion and management of rights can be encouraged, rightsholders should also play an active role in the management of such

[1648] John-Willy Rudolph (note 1029) 9.

bodies.[1649] The government involvement in the management would apply to countries with weak copyright industries' however IFRRO doesn't recommend this approach in developing countries with relatively strong economies.[1650] Given huge membership of rightsholders benefiting from the copyright levy, statutory interventions become necessary because 'rights given by law can only be administered collectively, typically when vast numbers of rights holders and users are involved. Rights holders will in such cases authorize a collective management organization to do so.'[1651] The RROs will operate under minimal state supervision, given their monopolistic position which can be abused.[1652]

At present, institutional reprographic activities are licenced through DALRO, whose mandate could be developed and incorporated into a CMOs mandated to collect levies. DALRO is a private for profit RRO that operates the agency-type multi-purpose function. It simply collects and transfers royalties to rightsholders. However, DALRO operates outside the government mandate, at the control and direction of single shareholder.Rudolph writes that, 'RRO members of IFRRO generally accept supervision and control by the state because they by nature are committed to transparency and they also find that this gives the RRO legitimacy with users as well as rights holders.'[1653] Notwithstanding, the IFRRO holds the view that RROs should be firmly planted in the private sector and be owned and managed by national rights holders.

7.3.9 Copyright levy transition and transparency obligations

If the transparency obligation is to have some effective transitional adjustment with existing contractual arrangements, then a particular period of time must be set in which all rightsholders' contracts are brought in line with the proposed comprehensive copyright provision. The transparency provision is proposed to apply across all rightsholders' comprehensively, as the CAB provision only expressly covers audio-visuals. Should the

[1649] Ibid at 9.
[1650] Ibid. See in Togo and Malawi, where IFRRO has already included BUTODRA and COSOMA both as parastatal societies.
[1651] Ibid.
[1652] Ibid. It provides that, 'One of the shared characteristics of copyright management organizations is that they often operate as *de facto* monopolies. State supervision, which varies in level from country to country, is regarded as justified by this "monopolistic" position. In some countries, especially where legal licenses are in operation, this may even translate into a control on tariffs by an autonomous government body. In other countries, the state provides support mechanisms for mediation when RROs and users cannot agree on licensing terms.'
[1653]Ibid.

transparency provision have a retroactive application, the parties must be given sufficient period within which to bring their contracts in compliance with new copyright amendment. Appendix 1 leaves such a period open for consideration by the legislature to be effected after public consultations. However should retrospective application of the provision be proposed, lessons must be drawn from the CAB provisions whose retrospective provisions led to arbitrary deprivation of rights that enriched authors and performers who had been adequately paid already before the enactment. Reservations were raised by the President with several CAB sections' 6A (7), 7A (7) and 8A (5), whose retrospective was arbitrary, depriving of copyright owners of property without justifiable reason. Drawing lessons from this, it is therefore important to ensure that when deprivation of property occurs, it is not arbitrarily done but constitutionally justifiable.

It is also important for this jurisdiction to draw lessons from the EU Member States mandatory transposition of the Article 19 provisions into their national legislation within 24 months of adoption. The implementation of the principle has not been without its own legal complications and it is important for South Africa to draw lessons from the initial implementation drawbacks. Lukas Schwope notes that,

> 'there are also substantial legal challenges, ranging from legal uncertainties in relation to its scope (such as the question whether a right to audit is encompassed or to which contracts it applies to) to potential enforcement issues (in particular, a lack of consequences for failure to comply with the obligation). In the light of copyright contract law previously being a sole matter of the Member States and the thin wording of Article 19 DSMD leaving them a wide margin of discretion, the transparency obligation along with the whole scheme of Articles 18-23 DSMD might also be transposed in very different ways, and potentially without addressing these legal challenges accordingly throughout the EU.'[1654]

The transposition is ostensibly a challenging task, with scholars indicating that Member States require a detailed analysis of the transparency obligation, clarification of the transparency obligation's legislative efficacy and provide the right legal approach to the countries working on its implementation.[1655] Additionally, the challenges remain in its implementation with concerns that Article 19 is a statement of general principles lacking in

[1654] Ibid.
[1655] Lukas Leon Schwope *Transparency in European Copyright Contract Law after Article 19 DSM Directive Evaluation of the content and effects of the new transparency obligation* (Unpublished LLM thesis, Stockholm University, 2022) 2.

detail as to how those principles should operate.[1656] How it should be implemented remains a domestic policy issue within respective national jurisdictions. The complexity of implementation also arises in Article 19(3) which provides scope for limiting the application of the transparency principle in circumstances where compliance would be disproportionate in view of the revenues generated. Determining the scope of what is disproportionate or not is subjective, and without clearly defined parameters legal contestations would remain around this aspect in its implementation.[1657] There is therefore need to properly define the relevant terms in the copyright amendment to facilitate the smooth transposition process. The definitions of applicable terms arising from the Article 19 were missing creating interpretation challenges. Such legal uncertainty should be avoided by this jurisdiction in its implementation of the same. Terms captured must be clearly defined to avoid vague and ambiguous terms because if they are not clarified before the enactments they create endless litigation around stated cases.[1658]

Schwope noted that lack of specifications under Article 19 related to what exactly was the information sought to fulfil the criteria of 'up to date, relevant and comprehensive information'[1659] and the 'modes of exploitation, all revenues generated and remuneration due' [1660] and how that information must be transmitted wasn't clarified. [1661] Such specifications are important given the complex management of the levy which also requires administrative infrastructures to be set up to immediately respond to such information requirements. Therefore the transposition of the Article must be accompanied by infrastructure that supports it to evade such administrative challenges. Furthermore, to insulate Article 19 from being overridden by contractual agreements, rightholders are advised to avoid incorporating non-disclosure agreements that will thwart the teleological scope for the provisions. Influential partners to agreements can subject parties to duress to have non-disclosure agreements signed and in ignorance fail to exercise their rights under the Article 19's direct effect principle. Some EU jurisdictions such as Ireland did not provide transposition details and explicit mechanisms for enforcing transparency and imposing

[1656]Will Smith 'The EU Copyright Directive: Article 19 Transparency Obligations' *Bird & Bird*, 3 May 2019. available at *https://mediawrites.law/the-eu-copyright-directive-article-19-transparency-obligations*/. accessed 20 April 2022.
[1657] Ibid.
[1658] Ibid at 67.
[1659] EU Copyright Directive art. 19(1).
[1660] Ibid.
[1661] Lukas Leon Schwope (note 1655 above) 8.

consequences for failure to comply.[1662] Penalties for non-compliance must be clearly set out, with accompanying clear mechanisms for enforcement of the provision. Therefore the outlook of a South African transparency framework should carry statutory penalties for non-compliance with obligations to act as deterrent given potential enforcement challenges that may emerge.

The domestic legislation should also help provide clarity, on who can obtain information, either as individuals or collective entities. The implications of this were noted with respect to copyright industries carrying different stakeholders, such as films or audio-visuals where a number of people operate collectively to produce the work.[1663] Any of the stakeholders may want information to exercise his or her right, so clarity and legal certainty are important. In the EU, such challenges were addressed through compiling a catalogue listing the minimum content of information in each sector receives in the exercise of its right to information.[1664] This would invariably reduce the administrative burdens involving providing information thus ensuring the feasibility of compliance. Also to avoid disputes over format of information transfer, the statutes should provide and specify the information transmission format either electronical or other acceptable means.[1665]

7.3.10 Access to Information through the copyright Act and CAB

The parameters through which rights holders' seeking access to information in the implementation of the copyright levy have been outlined, and some emphasis on how the transparency provision can facilitate the realisation of that right has been provided. This necessitates an analysis of the extent to which copyright law guarantee excess to information, reflected in the transparency obligations proposed under the copyright levy.

The Copyright Act in general curtails public access to information, and this explains a host of current amendments under the CAB to facilitate access to information. The amendments are laudable because the Act was not aligned and in some respects in conflict with the Constitution, and discriminatory in nature. For instance, the Act failed to protect the rights of disabled persons by making no provisions to convert material into alternative accessible formats. As such, the visually impaired were deprived of their rights to exercise fair dealing under section 12 of the Act. Should the visually impaired seek to exploit creative

[1662] Ibid.
[1663] Ibid at 29.
[1664] Ibid.
[1665] Ibid at 82.

content under conditions covered by the CAB exceptions, the amendments are express and provide more latitude than before.

This study discussed provisions for TPMs, which are missing in the Act but provided for in the CAB. The Act has no provisions for anti-circumvention technologies, however section 86 of the Electronic Communications and Transactions Act No. 25 of 2002 (ECTA) provides for them, without any exceptions for 'fair dealing' or for library functions or access by visually-impaired persons.[1666] The fact that section 86 prevents end users from circumventing TPMs, this automatically inhibits the visually impaired from accessing material and an infringement of section 32 of the Constitution and fair dealing exceptions. However, it is commendable that the CAB caters for persons with disabilities protection under section 19D, which provides that any person may make an accessible format copy for a disabled person without the authorisation of the author.[1667] This amendment is commendable for promoting access to information for people with disabilities, because this approach in part fulfils the objectives of PAIA.[1668]

The national Library of SA Act 92 of 1998 provides that the National Library of South Africa shall be responsible, 'for collecting, preserving, making available and promoting awareness of the national documentary heritage.' [1669] The functions of the library as set out under section 491 relate to access and preservation which inter alia seeks to promote optimal access to published documents, nationally and internationally. However the Copyright Act impedes access to information through inhibiting the National Library from digitization for preservation purposes. This is so because accessibility and digital curation are not permitted without copyright authorisation. The copyright levy, seeks to allow private copying, provided under the private copying exception. Furthermore, the fair use doctrine can operate to cover various permissible conditions. Copyright deliberately offers authors limited exclusive rights, and proscribes copying of original material, while digitisation embraces the

[1666] See Article 86(4) states: 'A person who utilises any device or computer program mentioned in subsection (3) in order to unlawfully overcome security measures designed to protect such data or access thereto, is guilty of an offence.' See Article 86(5) states: 'A person who commits any act described in this section with the intent to interfere with access to an information system so as to constitute a denial, including a partial denial, of service to legitimate users is guilty of an offence. Ironically, this is exactly what this Act does to persons with sensory-disabilities, since they are prohibited in terms of sub-clause 3 and 4 above from circumventing technologies to access electronic books and other works for legitimate access purposes. In this instance, this Act overrides 'fair dealing' provisions in the Copyright Act.'

[1667] Section 19D of the Copyright Amendment Bill 2017.

[1668] S Karjiker & Cobus Jooste 'Commentary on The Copyright Amendment Bill' (2017) The Anton Mostert chair of Intellectual property law 34. available at *https://blogs.sun.ac.za/iplaw/files/2017/06/CIP-Comments-Copyright-Amendment-Bill-2017.pdf, a*ccessed 6 December 2023.

[1669] National Library of South Africa Act No. 92 of 1998, s 4(1).

act of copying.[1670] Dunning writes that the challenges arises in, 'developing a digital surrogate from a physical original, and secondly, in putting this surrogate on the Internet which thousands of uses can then access and copy onto their own computers.'[1671] The copyright complexities emerge because digital formats assume a new copyright, because there is also copyright in the original and the substitute arising from the digitization process.[1672]

For practical purposes, while section 32 of the Constitution anchors the right of access to information, the claim is primarily instituted under the PAIA. The challenge with PAIA is that it is limited to recorded information, as opposed to that information which is not on record, thus ipso facto inverting the essence of section 32 of the Constitution providing that everyone has the right of access to any information.[1673] Nicholson and Kawooya posits that the requesting process and two-tiered appeals process in PAIA are cumbersome and generally prohibitive to many South Africans and therefore if the legislation is to be effective and particularly in favour of vulnerable communities and groups, it is essential that its enforcement procedures are inexpensive, quick and easy to use.[1674] Furthermore, PAIA provides for certain grounds for refusal of information yet there aren't any precise guidelines that should guide an information officer to draw a distinction between that which is mandatory and that which is optional. This provides wide latitude for grounds to refuse access to information which is vital in asserting rights.[1675]

A host of other national legislation set their own parameters that interfere with information transparency frameworks. The Protection of Information Act 84 of 1982; The Intelligence Services Oversight Act 40 of 1994 among others set strict parameters for access to information. In these circumstances, not all people requesting access to information under PAIA get equal treatment as it all depends on your background which could be discriminatory. The Memorandum on the objects of the Copyright Amendment Bill sets out the legal context giving birth to the CAB. It provides that the CAB seeks to make copyright

[1670] A Dunning 'Copyright and Other Rights Issues in Digitisation' (2008) Arts and 23 Humanities Data Service [Online]. available *http://ahds.ac.uk/creating/information-papers/copyright-introduction,* accessed 6 December 2023.
[1671] Ibid.
[1672] Ibid.
[1673] D R Nicholson & Dick Kawooya 'The Impact of Copyright on Access to Public Information in African Countries: a perspective from Uganda and South Africa'(2008) World Library and Information Congress: 74th IFLA General Conference and Council 10-14 August 2008, Québec, Canada available at *https://archive.ifla.org/IV/ifla74/papers/087-Nicholson_Kawooya-en.pdf,* accessed 6 December 2023.
[1674] Ibid at 18.
[1675] Ibid at 16.

consistent with the digital era, and enhance access to and use of copyright works, and to promote access to information for the advancement of education and research and payment of royalties to alleviate the plight of the creative industry.[1676] The CAB also aims to modernise the Act, and provide more protection of copyrights in the digital era.

There are perceptions that with the incorporated fair use doctrine, provisions of the Bill would provide for a greater flexibility in accessing information in copyrighted works in particular for libraries and educational facilities.[1677] The adoption of a fair use doctrine, considered a more flexible approach to the exploitation of copyright works will promote the fair use of copyrighted works for information, educational and non-profit purposes.[1678] Under the CAB section 12B certain acts regarding the use of copyrighted works will not infringe copyrights so long as these acts fall within the ambit of fair use.[1679] Furthermore, section 12C provides for temporary reproduction and adaptation which allows a person to make transient and incidental copies of a work to enable transmission of the work in a network between third parties by an intermediary or any other lawful use of that work. Additionally, it also permits adaptation of work to allow for use on other devices, such as mobile devices.[1680]

One of the reasons why the transparency provision akin to the EU Copyright Directive's Article 19 covers only audio-visuals in the CAB is because copyright is not registrable except for such copyrights.[1681] The elements from which copyright can subsist in a work carry formidable common law factors that include originality and substantiality.[1682] This copyright scope criterion determines authorship of work, and create copyright protection measures that helps guarantee that work originating from such authors receive protection. It would appear that the Act elevates the interests of authors above individuals to access information.[1683] This is considered in the context of numerous copyright infringements which cannot match the equal protection received by authors under the Act. It is therefore

[1676] Memorandum on the objects of the Copyright Amendment Bill (note 13 above) 60.
[1677] 'Exceptions in 2017 Bill for Libraries, Education & Related Sectors' accessed at https://libguides.wits.ac.za/Copyright_and_Related_Issues/SA_Copyright_Amendment_Bill_2017.
[1678] S Karjiker 'Commentary on The Copyright Amendment Bill' (2017) *South African Intellectual Property Law Journal* 18.
[1679] Section 12B of the Copyright Amendment Bill 2017.
[1680] Section 12C of the Copyright Amendment Bill 2017.
[1681] Forere (note 163 above) 16.
[1682] Moneyweb Case (note 92 above) para 54 on originality and para 78 on substantiality.
[1683] Banele Mhlongo *Balancing the Protection for Intellectual Property Rights of Copyright Holders against the Constitutional Right to Freedom of Expression: A Comparison of The South African Approach and The United States of America's Approach* (Unpublished Mini-thesis, Master of Laws (Business Law), University of KwaZulu-Natal, 2018)

submitted that copyright Act should consider amendments to optional registration of copyrights. This is important because IP is already considered some form of property right,[1684] classified as such within the ambit of section 25 of the Constitution, which views have received scholarly recognition.[1685] As such, IP may not be expropriated unless under specific considerations determined by law after payment of compensation. Therefor some legal registration framework will guarantee a clear right to the author and provide an explicit framework for the establishing a claim against infringements.

7.4 CONCLUSION

Historically, authors have always occupied weaker bargaining positions and were thus prone to exploitation by big industry. Without access to records reflecting exploitation of works and accompanying revenues generated, it was difficult to bargain for best seller royalties adjustments in relation to the commercial success of their works. Such commercial enslavement of authors necessitated the introduction of the transparency obligations, which under EU were mandatorily transposed into national legislations. This chapter has set out to provide ideal transparency principles to provide for stronger protection of authors and realisation of their statutory remuneration right. This approach is important in the introduction of the proposed copyright levy. The objective of the provision under review is also to effectively monitor the performance of the CMO, facilitate their production of records that precisely quantify the economic value of the work produced which may still accrue over time. The chapter also recognised the transparency principles as promoting good governance in line with the Bill of Rights' right to access to information that promotes administrative efficiency and accountability mechanisms. Through financial accountability and transparency, the rightholders', CMOs, producers and publishers can achieve congruence between section 32 of the Constitution, section 50 of PAIA, EU Article 19 Copyright Directives, and common law principles. Deficiencies in financial accountability systems encourage inefficiency, waste, and pilferages whose consequential effect is to impede the functioning of a modern economy and fostering social well-being. Transparency obligations also assumes a rule of law access to information dimension as promoting accountability and integrity in both the public and private sector, which are the essential prerequisites of a democracy, preventing corruption and bad governance practices.

[1684] Moneyweb case (note 9 above) para 108.
[1685] M Du Bois 'Intellectual property as a constitutional property right: The South African approach' (2012) 24 *South African Mercantile Law Journal* 177-193.

PART THREE

CHAPTER 8

CONCLUSION

8.1 INTRODUCTION

The advent of the Digital Age, as demonstrated in this study, created a conundrum between copyright law and technology and has been distinctly situated between the often discordant interests of both authors and end users. This prompted the need to strike the right balance without prejudicing the legitimate interests of either party. The primary objective of this study is to safeguard the authors' robust creativity, by relaxing the often limited monopoly of their exclusive rights to be accompanied by corresponding economic incentives, which also require in return for end users to have convenient access to the works in return they pay fair compensation. This study is motivated by the ease with which creative content is reproduced, copied and distributed in huge quantities across various forums and digital networks without corresponding compensation, creating both domestic and international angst over the security of copyright. Addressing the disequilibrium through copyright law interventions that construct an alternative statutory remuneration stream through a levy to address the digital copyright law quandary for rightholders' dictated the scope of this research.

Conceivably, it often happens that scholarly research exertions have challenges and limitations. Regardless, intellectual curiosity is normally activated and appears to thrive in such settings. The curiosity - a puzzling feeling when faced with a problem - is imbued by what Lindholm writes, 'In human cultures, it circumscribes the episodic hunger for novel information, which calms when the answer is found.'[1686] The study's blunt setback that emerged is the dearth of African private copying levy scholarly literature. As at December, 2023 no known similar postgraduate research work or comprehensive text addressing the necessity for introducing private copying levies in South Africa or other African jurisdiction had been undertaken. Similar research for other African jurisdictions only makes reference to copyright levy either in passing as a recommendation without making detailed analysis of applicable principles in their African jurisdictions, or just routine thin sublime references of the levy's usefulness as an alternative remuneration stream. Nonetheless, the author is

[1686]M Lindholm 'Promoting Curiosity?'(2018)*Sci & Educ* 27, 987–1002 (2018) available at *https://doi.org/10.1007/s11191-018-0015-7.* accessed 10 July 2023.

grateful to other African scholars who have either dealt on the subject in a journal, or written corresponding work,[1687] and importantly research work conducted thus far by Forere, whose persistent analysis and references towards the copyright introduction in South Africa in her journals provided helpful penetrating insights towards this study.[1688] Texts and journals from many scholars in Europe provided valuable reference points which were invariably referenced to solidify this study. As a result, this study therefore ventilated legal deficiencies within South Africa's copyright law regime before providing a comprehensive body of integrated domestic and international principles to help implement the levy.

It is noted that the Copyright Act lacks conformity with current digital developments, while the Copyright Amendment Bill drafted to address the same has not sufficiently provided adequate safeguards to secure authors' remuneration rights. This will be illustrated later in this chapter through chapter findings. The effect of such legislative deficiencies lies in the perpetuation of the authors' indigence through failures to guarantee their historically elusive statutory remuneration right. A key finding is that the legal deficiencies and unauthorised exploitation of works without compensation can be statutorily remedied by a copyright levy, which is thus recommended together with a complimentary legal framework that immunised private copying from the realm of criminal and or civil infringements together with a transparency model in the collection, management and distribution of the levy to rightsholders. The development of the copyright levy was largely informed by drawing lessons from its operationalisation in the European Union (EU) and Ghana.

In this regard, research questions that emerged for address were what could be an appropriate copyright levy framework for adoption in South Africa; what is the basis for determining fair compensation for authors from the levies collected; how could CMOs be regulated to conform to good corporate governance standards, and lastly, which transparency remuneration model framework can be adopted to ensure that the CMOs discharge their copyright management mandate in a way that brings trust among rightholders without unduly burdening the collecting societies? These research questions were answered, despite in some instances very limited scholarly copyright levy literature focusing on Ghana and South Africa. Notwithstanding, this wasn't a significant barricade towards developing the study, as

[1687] See Olubiyi (note 161 above); Oriakhogba (note 1364 above); Oduor (note 1 above).
[1688] See Forere (note 52 above).

Lindholm writes profound epistemic curiosity is the persistent demand for knowledge where curiosity is not satisfied but fired by new information.[1689]

The objective of this ultimate chapter – conclusion - is to highlight the research findings that the digital exploitation of works is uncontrollable, harmful and cannot be remedied through TPMs, criminal sanctions, or enforcements intrusions into infringers' private sphere. Rather, legalising private copying and levying digital devices that are capable of recording, storage and distribution of copyright works is the durable effective remedy. This chapter also summaries the detailed principles proposed for supporting the levy's introduction. This research foundation was laid in Part 1 of the study which provided a background to the thesis, its nature and scope, and the three main inquiries required by the research question; Chapter 2 detailing the utilitarianism philosophical approach guiding the research; Chapter 3 providing a detailed assessment of the problems to be investigated, namely copying; unregulated CMOs; transparency and access to information challenges and highlighting the social plight of rightholders' dying indigent. Part II of the study formed the crux of the research, thus providing in Chapter 4 a historical development of the copyright levy, and the Internet; providing an analysis of the principles guiding copyright levy implementation in the jurisdictions, the EU and Ghana respectively. Chapter 5 provides a detailed justification for the copyright levy remedy as a solution to the challenges identified Part 1 of the study. Chapter' 6 and 7 provided detailed principles through a comprehensive administrative copyright levy blueprint, a transparency obligation principle and access to information model. This chapter therefore finally offers a brief conclusion through findings to the issues highlighted in the foregoing.

The present research is intended to contribute to the development of intellectual property law alternative remuneration streams evolving in tandem with the growth of the Digital Age. The research should be a useful reference point for other African jurisdictions seeking to develop the same. Already, there is some growing momentum towards implementation of copyright levy on the continent.[1690] The setback, as earlier indicated was very limited copyright levy literature in particular addressing the needs of the African continent. This study shall contribute in filling that gap. Already, observations by African scholars McDave and Hackman-Aidoo are telling in this regard noting that,

[1689] Lindholm (note 1686 above).
[1690] See Michael Wabugo 'Introducing a private copy levy can help Uganda's artistes' *The Observer* 8 December 2021. available at *https://observer.ug/viewpoint/72112-introducing-aprivate-copy-levy-can-help-uganda-s-artiste*s. accessed 29 May 2023..

> 'Legal scholarship in Africa has over the years been concerned about other areas of law which are perceived to be more intellectually engaging, notably Contract Law, Criminal Law, Immovable Property Law, and lately Commercial Law. The obvious justification for the high concentration in these areas is both academic and economic. African scholars find it academically gratifying and economically rewarding to work in the above mentioned areas of law. In Ghana, for example, the issue of intellectual property and for that matter copyright is almost silent if not all together a non-existent area of law. Literature is almost silent on this area of law.'[1691]

As such, this study becomes relevant and important in addressing this scholarly lacuna. Observations have been made by CISAC that levies on private copying are crucial in African jurisdictions with weak copyright environments where also physical sales are dominant.[1692] While physical sales might not be dominant in South Africa, its copyright law as demonstrated in the preceding chapters is weak in addressing digital infringements. There is hardly comprehensive literature on private copying levies for South Africa, despite scholarly and occasional public consultations reference points that it should be introduced without painstakingly providing wide-ranging implementation frameworks. This study developed principles and regulatory mechanisms through the envisaged copyright levy, which should be useful for the authors', academics, the legislature and judiciary. This is important coming against observations that, 'As copyright moves into the digital age, the courts must keep abreast with the times to appropriately deal with the contemporary challenges. This may necessitate a review of the copyright law in certain regards.'[1693]

8.2 REMUNERATION RIGHTS FOR COPYRIGHT HOLDERS IN THE DIGITAL ECONOMY

8.2.1 Copyright law's digital conundrum

As explained in Chapter 1 of this thesis, the advent of the Internet and digital technologies has presented enormous challenges to copyright holders' exclusive rights in the form of among others reproduction or makes available right. In its origin, copyright law emerged as a direct response to the fifteenth century printing technology developments which revolutionised reprographic productions of literary work. The infringements were extensive

[1691] K E. McDave & A Hackman-Aidoo 'Developing Copyright Law in Ghana: The Role of the Courts '(2019) *US-China Law Review*, August 2019, Vol. 16, No. 8 324.
[1692]Carlos Ncube 'Private copying levies a must' *MusikAfrica*, 24 April 2018 available at *https://www.musicinafrica.net/magazine/private-copying-levies-must*. accessed 21 June 2023.
[1693] McDave & Hackman-Aidoo (note 1601 above) 336.

as the incipient technology produced speedy reproductions, as opposed to the painstaking manual methods.[1694]

If the electrical engine was the artery of technological revolution of the Industrial Age, the Digital Age provides the pivotal technology of the period that has relentlessly altered the author's limited exclusive rights. The necessity for copyright law adaptation demonstrated in this study has a context in the Internet's sheer mass reproduction volumes, often without corollary economic incentives for authors. The Internet is an offshoot of the twentieth century political cold war between the United States and the former Soviet Union, which has unleashed copyright wars that resultantly created a cold war between authors, end users and manufacturers of infringing digital devices. This study thus created a durable copyright levy remedy to the copyright tensions. The ubiquitous and unstoppable power of the Internet is best illustrated by its phenomenal growth in statistics from 1990 when it was privatised and unleashed into the world by the United States - State department - where its usage and growth has been phenomenal.[1695]

The Internet's transformative power in our everyday lives is exceptional but almost impossible to assess its full technological ramifications. Castels aptly puts it, 'As in all moments of major technological change, people, companies, and institutions feel the depth of the change, but they are often overwhelmed by it, out of sheer ignorance of its effects.'[1696] The effects of private copying are being felt, but there is demonstrated institutional reluctance to address it and protect the authors' remuneration interest. This is akin to normalisation of deviance copying patterns whose harmful effect to copyright holders' remuneration is insidious. This study made levy findings to arrest the normalised deviant digital copying patterns that are desensitising infringers against the anomaly. Chapter 3 made references to the theory of normalisation of deviant patterns propounded by Vaughan and tailored to suit the current digital copying phenomenon.[1697] As Oudur pointed out the average person thinks there is nothing wrong with copying because they have grown accustomed to doing it.[1698] The

[1694] Adetunji & Okuonghae (note 18 above) 5.
[1695] Ibid.
[1696] M Castells 'The Impact of the Internet on Society: A Global Perspective' (2014) 133. Society, the community and the people. available *at https://aasa.ut.ee/augsburg/literature/CASTELLS_BBVA-OpenMind-book-Change-19-key-essays-on-how-internet-is-changing-our-lives-Technology-Internet-Innovation.pdf.* accessed 8 February 2023.
[1697] D Vaughan *The Challenger launch decision: risky technology, culture, and deviance at NASA* (1996).
[1698] Oduor (note 1 above) 522.

danger with copying is that normalisation of copying deviance conduct is easier to prevent than to correct.[1699]

As demonstrated in this study from 1993 until 2015 - several governments appointed commissions investigating the plight of creative content producers made reference to the dangers of private copying and several recommendations for the implementation of a copyright levy. Nevertheless, no legislative intervention has been initiated by the government to address the same to date. This study provided that critical wakeup call and admonition because the remuneration plight of authors remains a pipe dream even though significant strides have been attempted through the CAB. Thus, the largest porous remuneration leakage in the form of a private copying need to be addressed through a copyright levy, as recommended in this study. This is important because the digital exploitation of work without compensation has noteworthy economic downsides. With the emergence of digital media platforms, it is possible to freely ride on the back of content originators.[1700] Unfortunately, South African copyright law has a private copying exception without complimentary compensatory frameworks for authors. This study provides the normative basis for the levy's implementation.

8.2.2 Utilitarianism

In this study, there was need to locate authors' remuneration rights clarion call within a particular philosophical trajectory. Chapter 2's utilitarianism guided the research through a vector that guarantees authors economic incentives in return for end users' exploitation of their works. Utilitarianism perceive copyright law as an attempt to promote economic efficiency by guaranteeing exclusive rights for a limited period to provide for accumulation of sufficient incentives for authors before end users can exploit the works for commercial purposes. During the period of exclusivity, there is latitude for copyright holders to license their rights to recover their capacity expenditure. While the digital exploitation of the works creates a peculiar argument that its reproduction and distribution across digital platforms give authors rapid popularity of their works,[1701] it ignores the fact that this comes without corresponding compensatory frameworks that should stimulate further innovation and creativity producing some imbalance that this study sought to address. Consequently,

[1699] Vaughan (note 1697 above).
[1700] B Na 'Copyright Law and the Digital Era' (2019) *Chicago-Kent | Journal of Intellectual Property*, available at *https://studentorgs.kentlaw.iit.edu/ckjip/copyright-law-and-the-digital-era/.* accessed 13 February 2023.
[1701] Adetunji & Okuonghae (note 18 above) 12-13.

copyrightholders' have become wary of transfiguring their work into digital format because of the infringements threats presented by uploads, downloads and sharing of copyrighted material.[1702]

Therefore, the utilitarian philosophy provides for such economic incentives to encourage, not dissuade creativity and this chimes with the objectives of the international treaties' three-step test, encouraging states to provide for mechanisms and policies that don't interfere with the author's normal exploitation works, prejudicing their legitimate interests. It is in this context that the study provided a sound theoretical justification for copyright which was important to determine the levels, extent and thrust of authors' copyright protection. In so doing, utilitarianism's global impact was traced from the day it was born within Europe and afterwards traversing America and Africa, influencing legislative changes even within this jurisdiction by providing authorial rights frameworks that helped secure authors' remuneration rights. A memorandum on the objects of the CAB provides that it seeks to have copyright amendments envisaged in the Bill reward and incentivise authors of knowledge and art because various sectors within the copyright regime are dissatisfied.[1703] Unmistakably, utilitarian traits are evident in South Africa policy frameworks and apparently guided and informed the approach to the copyright amendments in the CAB. The irony is that the CAB carries private copying exceptions without compensatory frameworks defeating the utilitarian objectives envisaged. Through the levy, it must respond satisfactorily to the digital effects on authors' remuneration by providing economic incentives in return for the exploitation of works.[1704]

8.2.3 Private copying and salient remuneration rights

Chapter 3 raised challenges within copyright law relating to copying, unregulated CMOs and lack of transparency obligations in the management of royalties. The crux of the copyright remuneration concern in the study is that copying occurs in private homes without accompanying compensation. The current South African copyright law is antiquated to deal with the current digital copying challenges, hence the CAB's introduction to address challenges. It's been noted that in the digital era copying is unavoidable, and could be legalised under a statutory framework that provides scope for its authorisation in return for compensation. Lack of incentives diminishes the appetite for innovation because there is no

[1702] Ibid.
[1703]Memorandum on the objects of the Copyright Amendment Bill (note 13 above) 60.
[1704] Adetunji & Okuonghae (note 18 above) 7.

guaranteed return for the authors' cultural investments.[1705] Digital copying has that effect because authors' become unwilling to create more works because of free-riding activities.[1706]

This part of the research raised the challenge of the social disequilibrium created by the private copying exception and its effect on the three-step test in which the normal exploitation of the works are interfered with and without compensation to encourage innovation.[1707] Another problem identified with copying is that if authors are not given legal protection in respect of their copyright works there is a problem of market failure in which there will be limited copyright works or underproduction in an economy.

An exception to the exclusive right, provided that rightsholders are fairly compensated, has generally been considered as the only efficient mechanism to remunerate creators for the widespread copying of their works, under a private copying exception, for private or domestic use.[1708] The scope of the exception applies only to copying works from legal sources such as permitted sites used with the consent of rightsholders. Copyright works economic impact lies in their over 4 per cent GDP contribution employing 4 per cent of the population.[1709] The context of TPMs was considered. While their relevance and regulation in a digital economy are important, they continued to be circumvented - thereby creating the need for a durable solution that at least guarantees remuneration despite such unavoidable technical circumventions.

8.3 FRAMEWORK FOR SOLUTIONS TO PART ONE OF THE STUDY

Chapters' 4, 5, 6 and 7 provided the crux of the research which now sought to address the challenges that emerged from Part 1 relating to copying, AI text and data mining, unregulated CMOs and lack of transparency obligations that have facilitated misappropriation of royalties.

Chapter 4 discussed the historical context that gave birth to the copyright levy, and its implementation in both the EU and Ghana: covering a union of developed western countries and an emerging economy in an African continent respectively. Encouraging reference points

[1705] Karjiker (note 118 above) 29.
[1706] Ibid.
[1707] Berne Convention: Article 9(2).
[1708] Ibid.
[1709] Aaron O'Neill 'Unemployment rate in South Africa 2021' *Statista*, 30 January 2023, available at *https://www.statista.com/statistics/370516/unemployment-rate-in-south-africa/#:~:text=The%20unemployment%20rate%20in%20South,in%202021%20with%2033.56%20percent.* accessed 9 February 2023.

from which to draw lessons in drafting a relevant copyright levy framework for this jurisdiction were made. In particular, the EU's Copyright Directives were considered in this study which covered its body of private copying exceptions; salient remuneration rights under Article 5 on fair compensation;[1710] Article 18(1) which entitles authors and performers to receive appropriate and proportionate remuneration and Article 19 which a contains a transparency provision for rightsholders' to regularly receive information on the exploitation and disbursements of their royalties.[1711] Their rich jurisprudence provided a foundation from which to develop applicable principles that informed a bespoke statutory and regulatory framework speaking to South Africa's own circumstances in relation to how the current CAB could adapt and incorporate the salient remuneration rights which are not explicitly expressed.

Chapter 5 then introduced a profound digital remedy through a copyright levy. A detailed justification for the levy followed, and its rationale is established from the finding that private copying is difficult to monitor, control and provide effective enforcement mechanisms against without violating constitutional rights to privacy. This provided need for some statutory intervention that secures their remuneration right without resorting to some intrusive remedy. However to understand why it should be established, the reasons that motivated its failure to get introduced needed to be explored, hence its abortive attempts were assessed from the 1990s until the introduction of the CAB. Some of reasons advanced to deny the levy's implementation, for example, that it will not address piracy are not compatible with the spirit behind the introduction of private copying exceptions and its relation with the copyright levy. The private copying levy only emerges to address the implications of private copying exception, not piracy, because its remuneration is derived from lawful sources. Yet, the South African rightsholders have been exposed to peculiar challenges that involved downloads, uploads, reproductions and dissemination of works with a private copying exception not accompanied by any form of remuneration. There are practical administrative complications of licensing millions of private end users. This therefore warranted a convenient, administratively less cumbersome formula that authorised such copying in return for levying the devices facilitating such digital exploitation of works. The main targets liable for levy payments are the manufacturers, importers, and distributors of the devices. This is the approach in both Ghana, and the EU, though the devices, tariffs, and percentages vary

[1710] EU Copyright Directive, Art. 5(2) (b).
[1711] EU Copyright Directive, Art. 19.

according to cultural, accessibility and national policy considerations. In this regard, South Africa should draft its own levy and regulatory frameworks adjusted to suit its socio-economic milieu, as proposed in a proposed Model Law: Appendix 1, Copyright Amendment Bill (private copying levy amendment) and Appendix 2, Private Copying Levy Regulations. Furthermore the Chapter provided a justification for the introduction of AI presumptive ley, and dangers of leaving the developing technology unregulated.

Chapter 6 provided the administrative blueprint setting out the principles that guided that enactment of the levy. The body of principles set out should inform the normative value system from which levy statutory framework should be drafted. Importantly, it was realised that any exception or law, should to some extent be guided by the harmonised international treaties that are of persuasive value to domestic interpretations in which South Africa is signatory, such as the Berne Convention's Article 9(2) three-step test, articulating that the normal exploitation of work should not be interfered with, and the interests and legitimate expectation of the author should not be compromised. Its own copyright policy framework provides that the provisions in the CAB are strategically aligned with the international treaties that South Africa reviewed, amongst others, the digital treaties and such an alignment is for purposes of ensuring effective governance, social protection, employment creation and reduction of inequalities.[1712]

This study realised that the wholesale adoption of EU principles wasn't an effective practical approach. Several local precedents and scholarly opinions have cautioned against indiscriminate adoption of foreign law because such laws are not binding legal sources and domestic courts can only to consider them, not to follow them.[1713] Besides, there are similar principles ingrained in domestic jurisprudence around the Constitution, relevant legislation such as PAIA, POPIA, and the law of delict and common law that could be used to develop copyright levy principles, complementing existing approaches by the EU. The EU has several principles set out for consideration in its Copyright Directives framework which include: fair compensation; harm caused for loss of sale; appropriate and proportionate remuneration; tariffs; leviable devices; levying of refurbishments; levying of cloud storage facilities, providing the framework for the collection and distribution of the fund, and the role of the CMOs. It should be noted that journalists are not covered in many jurisdictions and this study

[1712] Memorandum on the objects of the Copyright Amendment Bill (note 811 above) 59.
[1713] C Rautenbach 'Case Law as an Authoritative Source of Customary Law: Piecemeal Recording of (Living) Customary Law?'(2019) *PER / PELJ* 2019(22) available at *https://www.saflii.org/za/journals/PER/2019/67.html a*ccessed 21 June 2023.

proposed a levy framework through which they could benefit. It is proposed that they register as creative writers through the CMO registration as individual entities. Their work should to be covered as works of creative writing in the copyright law to be eligible for the levy.

The salient legal principles for consideration, setting the copyright levy up for operationalisation that were found applicable are that: there shall be a levy on any device capable of copying or storing copyrightable work, by a natural person, and or other entities such as the tertiary institutions, and reprographic business shops. The privacy copy must only be copied for private use, not for indirect or direct commercial purposes. The reproduction exception, should be limited to a few or negligible copies, proportional to the purpose. (See Appendix 1 12A). The proposed levy and its accompanying regulations should delineate the role and function of the CMO encompassing appointment of a private entity to conduct a national online consumer statistical and digital survey, with a view to providing accurate details for beneficiaries' remuneration and leviable devices. The entity will also digitally work out consumption levels of the creative content that should help determine the amount of remuneration for beneficiaries. Most EU jurisdictions have commissioned private entities to conduct national surveys that guided the CMOs in their formulation of tariffs, targeted devises and remuneration levels for members.[1714] The CMOs should also from the levy provide for cultural purposes,[1715] and specific private investments relating to medical health insurance covers and pension benefits for retired rightholders. This is so because rightholders' have no other relevant institutional framework collectively managing their royalties with a capacity to engage other health and pension benefit institutions to create viable policies that should benefit them.[1716] The chapter also set out the principles behind the introduction of an AI presumptive levy, and provided a relevant definition to assist in drafting a certain and coherent legislative and regulatory framework.

Chapter 7 interrogated the nature, form and role of CMOs in the administration of the levy with a key component of the study being the recommendation of transparency obligations principles that are alive to South Africa's constitutional right to access to information, facilitated through the enabling PAIA, but subject to POPIA limitations. The

[1714]See also The Stichting Onderhandelingen Thuiskopievergoeding (SONT; Foundation for Private Copying Levy Negotiations) 'SONT Decree on Private Copying Levies 2023 – 2024' available at *https://www.onderhandelingthuiskopie.nl/About-the-SONT*. accessed 24 May 2023.
[1715] See *Amazon v Austro-Mechana* Case C-521/11.
[1716]See GhanaWeb.com 'GHAMRO to institute insurance policy for musicians' *Ghana. Web*, 25 August 2017. available at *https://www.ghanaweb.com/GhanaHomePage/entertainment/GHAMRO-to-institute-insurance-policy-for-musicians-573445*. accessed 24 May 2023.

transparency obligation is itself a salient feature of remuneration right, and is predicated on similar access to information rights frameworks within the EU and domestic law.[1717] The transparency model makes the production, accessibility and delivery of records relating to all revenues generated and disbursed to rightholders mandatory. Coming against a background of public ructions of CMOs management of royalties,[1718] it is hoped that this provision will build accountability mechanisms and provide scope for rightsholders' to assert their rights. However, a request for information may not be entertained when the contribution of the author or performer is not significant to the overall work or performance.

Any attempt to circumvent or defy the transparency obligation provision is statutorily neutralised by an emphatic principle providing that any contractual provision seeking to avoid compliance with the application of the copyright levy's Article 19 equivalent will be unenforceable. The transparency obligation will complement the enjoyment of the right to remuneration as facilitated by the CMO under the Copyright Act.[1719] The levy transparency obligation framework is expected to readjust economic relations between the authors, performers and the CMOs.

While the principal objective of the transparency model is to safeguard the remuneration right framework, it should be also viewed in the context of promoting good corporate governance which automatically captures accountability and transparency mechanisms in the corporate sector.[1720] Constitutional principles underpinning the rule of law and the right of access to information are also frequently encapsulated to promote good governance and build trust in the policy-making process increasing scope for the credibility of public institutions,[1721] while being elevated as safeguards against corruption and bad governance practices. The South African Constitution also provides for right of access to

[1717]E Rosati 'Article 19—Transparency Obligation - Copyright in the Digital Single Market: Article-by-Article Commentary to the Provisions of Directive 2019/790' (2021) 368 – 380. online edn, Oxford Academic, 23 Sept. 2021, available at, *https://doi.org/10.1093/oso/9780198858591.003.0020*. accessed 9 February 2023.
[1718] Moyagabo Maake 'Samro boss faces the music head on' *Sunday Times*, 23 June 2013, available at *https://www.timeslive.co.za/sunday-times/lifestyle/2013-06-23-samro-boss-faces-the-music-head-on/.* accessed 9 February 2023.
[1719] See S.1 (ix) Copyright Act 1978 which defines collecting society. This section was inserted by S.1 (a) of Act 9/2002. This definition is also contained in the Performers' Protection Act 11 of 1967 and the Collecting Society Regulations 2006.
[1720]M E Warren 'Accountability and democracy' in Mark Bovens, Robert E. Goodin & Thomas Schillemans (eds) *The Oxford handbook of public accountability* (2014) 39–54.
[1721]Robert Panizza 'European Parliament: Briefing for the PETI committee: Transparency, integrity and accountability in the EU institutions' (2019) EU Policy Department for Citizens' Rights and Constitutional Affairs, 2. available at *https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/608873/IPOL_BRI(2019)608873_EN.pdf.* accessed 20 January 2020.

information under section 32(1) (a) (b), which may under a generous interpretation operate to include CMOs given their prominent national role in managing royalties.

8.4 SADC: REGIONAL ORGAN RECOMMENDED APPROACH

Some observations have been made that there is an absence of a regional normative framework or code of conduct regime to support the practice of RROs in Africa.[1722] Orikhoba and Kawooya research findings have indicated that, 'there is currently no legal instrument setting norms or codes of good practice for collective management of copyright and related rights at the regional level in Africa.'[1723] Should South Africa implement the levy, the number of countries within SADC with a private copying exception and a remuneration and distribution of the copyright levy framework will grow to four, from the original sixteen list. Given that RROs are an important collection society in the collection and distribution of the levy, it is therefore imperative that a regional code of conduct regime or legal instrument setting norms or codes of good practice for CMOs collective management of copyright and related rights at the regional level be adopted.[1724] This will also contribute towards narrowing the knowledge gap that exists in understanding the activities and operation of RROs in Africa, and at SADC regional level in particular.[1725]

In future, SADC should also consider applying harmonised copyright levy at regional level, carrying similar objectives applied under the EU institutional Copyright Directives. This recommendation is proposed after a finding and an overall assessment of the EU regional experience in the implementation of the copyright levy, and emerging trends in West Africa around attempts to set up harmonised regional law frameworks. Already the number of SADC countries implementing the copyright levy is growing, and so far Botswana and Malawi have operationalised the levy, while Tanzania has proposed a law for its introduction. In East Africa, both Kenya and Uganda are due to either introduce or operationalise it. This is important because SADC is making great strides towards integration of its regional economies with emphasis on trade in goods and services.[1726] Concerns remain that the SADC

[1722] D Oriakhogba & D Kawooya (note 8252 above) 10-11.
[1723] Ibid.
[1724] Ibid.
[1725] Ibid.
[1726] M Nkomo 'Regional intergration in the area of intellectual property: The case for Southern African Development Community involvement' (2014) *Law democr.Dev.* Vol.18 317.

Protocol on Trade despite making calls for its Members to comply with the TRIPS Agreement,

> '[there haven't been any] substantive or operational provisions outlining the proposed contribution of the SADC to this end. As cross-border trade and economic integration within the region increase, the existing territorial approach to intellectual property is becoming more and more inadequate.'[1727]

While ARIPO incorporates a handful of SADC jurisdictions, it operates in a fragmented manner that Nkomo opines, 'frustrate the business simplification objective of regional integration. Certain institutional limitations also call into question the suitability of the body as an appropriate platform for the advancement of regional integration in the context of intellectual property.'[1728] Nkomo then makes a case for SADC and South Africa to play a more leading IP integration role. Factors for considerations in this approach are based on statistical facts that SADC is the regions' largest economy, which could also capitalise on South Africa's attractiveness as the region's commercial hub with vast IP experience and resources.[1729] This is important because already since the introduction of the Berne Convention, the need for application of uniform global copyright standards and protection has grown. Should South Africa adopt the copyright levy, a SADC harmonised copyright levy should facilitate and expedite regional trade, creating uniformity of tariffs, rules, customs standards, thus paving way for mainstreaming regional economic integration. SADC would as a regional block engage the EU to operate as equal partners in facilitating and formalising trade around the implementation copyright levy, setting workable harmonised tariffs on devices removing existing barriers.

8.5 CONCLUSION

This study used the EU and Ghana to draw lesson in the implementation of the levy. Ghanaian scholars' McDave & Hackman-Aidoo provided a copyright law development perspective that should sum up this study:

> 'In a world where everyone, every group and every society continually claims certain rights to be their god-given right or that such a right is guaranteed by the constitution of its country, we appreciate the enormous challenges which must be overcome to effect some of the

[1727] Ibid.
[1728] Ibid.
[1729] Ibid.

> changes that may appear necessary to our copyright laws. In going forward, we advocate broad consultation and engagement of all, taking into consideration the influence and demands of best practices across the globe.'[1730]

A priori, broad consultation and engagement would provide a good grounding from which to develop a relevant, effective and enduring copyright levy. Notwithstanding, this study has provided the statutory and regulatory scope for the enactment and operationalisation of a private copying levy, it being a response to the existing problem where the current copyright law regime, despite having private copying exceptions does not provide for copyright holders corollary compensation for private copying of their work. The elementary utilitarian view on copyrights is that they help to support authors with economic incentives to bolster their creative content innovations and productions. End users should enjoy exploitation of creative content in return for payment. Free-riding activities often diminish authors' interest in creativity further weakening their capacity to support their livelihoods. Copyright protection in the Digital Age is a complex issue and it behoves upon the South African government to be proactive. While TPMs can be useful and relevant, they should operate in tandem with a robust legal framework created through a resilient private copying levy, if the copyrightholders remuneration is to be guaranteed. Rightsholders' should also where necessary utilise effective modern TPMs in tolerable circumstances to protect their licensed online material which can be subject to unlawful circumventions by end users. Therefore, it is this study's considered submission that a copyright levy would encourage creativity to ensure the realisation of due remunerations and contribute to South Africa's economic development. Consistent intellectual creations inspire a nation's cultural development and the existing copyright law or its amendments through the CAB must be urgently reviewed to cater for the Digital Age.

A holistic approach in providing an effective levy framework is prerequisite. Given the levy's remuneration objective, its fundamental relevance lies in the fact that the economic justification for copyright seeks to guard against authors becoming inactive if don't realise a return on their investment. Copyright protection and promotion of incentives appears to be the principal justification for copyright law. The need for a levy has become particularly poignant given the authors dire economic circumstances. It is therefore submitted that the enactment, and operationalisation of a private copying levy, or blank tape levy, will provide that effective remedy to questions raised by new economic, social, cultural and technological developments. To make this copyright levy a success, the words of McDave & Hackman-

[1730] McDave & Hackman-Aidoo (note 1691 above) 337.

Aidoo are poignant: calling for everyone, every group and every society overriding our enormous challenges to effect some of the changes that appear necessary to our copyright laws through broad consultation and engagement of all.

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APPENDIX ONE

REPUBLIC OF SOUTH AFRICA

MODEL PRIVATE COPYING LEVY LEGISLATION PROVISIONS UNDER THE COPYRIGHT AMENDMENT BILL

.....

(MINISTER OF TRADE AND INDUSTRY)

BILL

…..

BE IT ENACTED by the parliament of the Republic of South Africa, as follows:-

The following sections are hereby inserted in the principal Act.

Section 1 of the Copyright Act, 1978 (hereinafter referred to as ‘‘the principal Act’’), is hereby amended—

(a) …..

by insertion, before the definition of ‘computer programme”, the following definition:

“Artificial Intelligence”- a human computer, with the technical capacity to engage in or perform responsibilities requiring or associated with human intelligence, through texts data mining – or otherwise using AI systems incorporating algorithms, data, and computational power to simulate human intelligence.

„„„„

“commercial use” – means any reproduction by the end user/s, under the private copying exception, for the sole purpose of unlawfully marketing, promoting, or selling the work in an unauthorised and or unlicensed financial transaction.

……..

By insertion, before the definition of “country”, the following definition:

“collection society”- means the collection society organisation established by section 12A(8),

…

By insertion, before the definition of "copyright management information" the following definition:
"copy" – means any copy made a natural person either directly or indirectly for non-commercial purposes, for personal use, emanating from a lawful source.

By insertion, before the definition of "derived signal", the following definition
"derivative works" – means work, derived from existing work, either audio, audio-visual, literal, films, or musical works, in the form of digital reproductions, translations, drama, motion pictures, musical arrangements, abridged work or condensations of already existing work**.**

……

By insertion, before the definition of "diffusion service" the following definition

"devices" – means either locally manufactured, or imported digital storage device/s, blank sound and audio-visual carriers, compact discs, and or any equipment capable of reproducing, storage of protected copyright work.

…..

By insertion, before the definition of "infringing copy", the following definition

"fund"- means an established fund, for the purposes of a private copying levy, established under section 12A(7) of the Act,

…..

by the insertion before the definition of ''private use'' under literal works (g) of the following definition

"Private copying levy" – means the levy imposed on devices pursuant to section 12A

of the Act,

….

By the insertion before the definition of ''programme'' under literal works (g) of the following definition

"private use" – means the reproduction is for home use, and non-commercial purposes.

……

By insertion before the definition of "technologically protected work" of the following definition:

"refurbished works" – means a second hand product, altered for the purposes of being resold to end users, carrying the same functionalities, as before.

……..

The following sections are hereby inserted in the principal Act after section

9A.

"Private copying levy on storage digital devices

9A. (1). There shall be a levy imposed on all devices, locally manufactured or imported, capable of recording, storage, reproduction and or carriage of copyright protected work.

(2) Liability for payment shall include all persons, or entities engaged in the manufacture, assembly, importation, and or distribution of the devices set out in section 9B (1).

(3) There shall be no infringement as a result of private copying of any work for private use and such, reproduction, adaptation, dissemination should neither be directly nor indirectly for commercial purposes.

(4) Private use can include, but not limited to the following: photocopying, scanning, sharing music, time shifting, and or recording. The reproduction must be with respect to audio, visual and audio-visual materials for private use by either a natural person, or corporate entity.

(5) The reproduction copying exception should be in certain special cases, be limited to negligible copies, and proportional to the purpose, without interfering with the normal exploitation of the work, or causing prejudice to the interest of the copyright holder/s.

(5.) Private copying is to include, but not limited to the following,

(i) Making back-up copies / archiving / time shifting / format shifting

(ii) Passing copies to family / friends

(iii) Downloading for personal use

(iv) Uploading to digital storage facilities

(v) File sharing in digital networks

(vi) Online publication, performance, and distribution within networks of friends

(vii) User generated content / mixing / mash-up.

(viii) Reprographic activities.

(6.) The private copying levy shall apply to copies of works stored by the provider of a cloud computing service.

(7.) Refurbished devices, or second hand devices shall be liable for levy

payment if it meets the conditionality set out under section 9B (1).

(8.) The levy shall be specified by the relevant minister, mandated by to administer the Copyright Act, after consultation with a relevant collective management organisation by order published in the gazetted regulations.

Levy on reprographic reproductions

(9). The levy on reprographic reproductions shall be payable by;

(a.) By any copyshop or commercial entity, which carries reprographic reproductions through providing access to photocopiers or electronic copiers in commercial terms. Reproductions carried on paper or any comparable medium by the use of any kind technical operation for commercial purposes is covered by the scope of this Act.

(b.) The entity – copyshop- must be registered by collective management organisations before operating such business. Non-compliance is a criminal offence and any person found guilty shall be liable to a fine or imprisonment for a period not exceeding five years or to both such fine and such imprisonment, or if the convicted person is not a natural person, to a fine of a minimum of ten per cent of its annual turnover.

(c.) The registration certificate from the collection society must be displayed at all material times prominently within the commercial premises main entrance.

Artificial Intelligence presumptive levy

9(1) There shall be a presumptive Artificial Intelligence levy, on every human computer, with the technical capacity to engage in or perform responsibilities requiring or associated with human intelligence, through texts data mining – or otherwise using AI systems incorporating algorithms, data, and computational power to simulate human intelligence.

(a,) The minister shall fix the presumptive levy to paid every six months by users, trainers or producers of the Artificial intellence – human computer.

(b.) Every holder, user, purchaser, trainer or producer must declare possession of the AI with the CMOs and ensure that levy liabilities are met within the prescribed period.

Double payments

(10) Double payments arising from cross-border transactions for the same product shall be reimbursed by the mandated collection society.

Levy collections for non-members

(11) Where the collecting society, for whatever reason, is unable to distribute the copyright levy within seven years from the date on which it was collected, it shall—

(a) invest the royalties in an interest-bearing account with a financial institution, the rate of which may not be less than the rate applicable to a savings account with that financial institution; and

(b) upon demand by the performer or copyright owner, or their authorised representatives, pay over the levy together with the interest earned on the investment contemplated in paragraph (a).

(c.) after the expiry of seven years period, the levy shall be distributed towards cultural activities.

Offenses and penalties

(12) Any person who wilfully falsifies records, or accounts to avoid levy obligations, and or defaults from making such payments due, commits an offence and shall upon conviction, be liable to a fine or imprisonment term of not more than five years, or both such fine and imprisonment term.

(a.) Such proceeds from the fine/s, shall be deposited with the mandated collection society.

Auditing purposes

(13.) For auditing purposes, the collection society shall keep such records, books and make periodic returns as may be required by the Commission. The records are to be made regularly available for inspection by the Commission, or any other persons authorised by the Commission at any time reasonably convenient as requested.

(a.) The Commission shall on request in writing have access to the accounts of manufacturers or importers of devices, retail business in reprographic activities, to determine compliance with the provisions of the

Act, and regulations.

(b.) Strict confidentiality except as is necessary must be maintained on all the information accessed during the course of the routine inspections, and or investigations envisaged under section 10(a.).

(c.) The Commission may recommend an audit, and or an investigation into the management and distribution of the levy, by the collection society organisation/s upon receiving credible information, or developing reasonable suspicion of misconduct, mismanagement, or misappropriation of the levy;

Forfeiture

(14.) Upon the conviction of any person/s of an offence under this Act, and or the regulations, the court may, in addition to any other penalty imposed, order any device/s, articles, equipment, substance, or work or any instrument used as an accessory in connection with the commission of the offence to be forfeited to the Government.

(a.) In applicable circumstances, the court may order that such a thing, contemplated in section 9B (11) be disposed of with proceeds donated towards the levy furtherance of cultural activities.

Collective Management Organisation/s

(15.) The Collective Management Organisation shall be responsible for,

(a.) the collection, management and distribution of the copyright levy to rightsholders;

(b.) identifying leviable digital devices to facilitate the relevant minister gazetting under Second schedule to the regulations;

(d.) Setting tariffs for identified devices to facilitate the relevant minister gazetting under Second schedule to the regulations for levying the purposes;

(e.) Licensing a private entity/ies to carry out national digital data survey for the purposes of determining tariffs for devices, and compensation ratio for rightholders;

(f.) To receive and handle any complaints from rightsholders, manufacturers, importers, exporters, on either tariffs, or device liability for levying purposes, and provide a resolution to the dispute, and or make

such appropriate recommendations in the best interest of the party/ies concerned.

Dispute settlements

(16.) Pursuant to section 9A (12) (f.), should the collection society fail to resolve the dispute, the parties shall refer it to and determined by either the Copyright tribunal or alternatively, through an alternative dispute resolution framework before referral to the court's jurisdiction.

Cultural Fund

(17.) The collection society, shall hereby establish a fund, known as the Cultural Fund from the levy collections, which it shall administer in the interest of

(a.) promotion and improvement of artistic skills and South Africa's cultural industries;

(b.) scholarships designed to promote artistic skills;

(c.) enforcement of rightholders' rights;

(d.) proceeds from such fines, for offenses contemplated under section 9A (12) (a); 9A (14) (a).

(e.) determine, and distribute a sum of the levy towards a pension fund, to an institution, to cater for creative content producers retirement benefits of rightsholders' registered by collection society organisations.

(f.) to determine and distribute a sum of the levy towards a medical aid society, for the benefit of rightsholders' registered with collection society organisations medical insurance.

(g.) The collection society may, upon representations by rightsholders' association, or organisation with a clear and substantial interest in the creative industry, consider providing remuneration, pension, and or medical aid, on good cause shown to an author of creative works not registered by the collection society organisation/s.

(h.) The Commission shall cause to be kept proper books and other records of account in respect of receipts and expenditures of the Fund in accordance with the Public Finance Management Act, 2022, to;

(i.) ensure that the Fund's is managed efficiently and effectively and; to

(j.) provide for the responsibilities of persons entrusted with fund's financial management and to provide for matters connected therewith.

Auditing of the Fund accounts

(18) The accounts of the Fund shall be audited by the Auditor General in accordance with the Public Audit Act No. 25 of 2004.

(a.) The Minister shall cause to be prepared, within reasonable time, but not later than three months after the end of the financial year, an annual report on all the financial transactions of the Fund.

(b.) Access to the Fund's accounts books and other records of accounts shall include a balance sheet, an income and expenditure account and the annual report of the Auditor General and shall be laid by the Minister before the National Assembly.

(c.) The financial year of the Fund shall be the same as the financial year of the Government.

Levy royalties transparency provision

(19) The collection society administering and distributing the levy, must submit a complete, true and accurate report to the rightholders, as the case may be, in the prescribed manner, for purposes of ensuring transparency in their management of the levy,

(20) The respective collection society/ies, shall, ensure that, rightsholders, whose works have been exploited through private copying, receive annually, before the end of the last Friday of second week

(a.) of November of each year, taking into account the specificities of each sector, up to date, relevant and comprehensive information on the collection, management, and distribution of the levy;

(b.) The information required, must relate to the exploitation of the works, administration and distribution of levy.

(c.) The record/report must be available online, through an official and acknowledged website of the respective collection society.

(d.) In the event of the collection society having failed, or unable to meet the deadline herein set out under paragraph (a.) some communication must be made available to all stakeholders, through the available online database, and a press statement to appear in at least one national newspaper publication, and one weekly Sunday publication, providing details of the constraints.

(e.) The obligation set out in paragraph (a.) and (b.) shall be effective

in ensuring a high level of transparency, to the satisfaction of all rightsholders.

(f.) The collection society, in duly justified circumstances, where the administrative burden resulting from the obligation set out in paragraphs (a.) and (b.) is disproportionate to the revenues generated, the obligation is limited to the types and level of information that can reasonably be expected in such cases.

(g.) The collection society, may decide, and in writing, that the obligation set out in paragraphs (a.) and (b.) does not apply when the contribution of the author or performer is not significant having regard to the overall work or performance, unless the author or performer demonstrates that he or she requires the information for the exercise of his or her rights relating to the exploitation of his or her works, clearly set out in the correspondence. The collection society is duly expected to comply to such request/s.'

Ministerial powers

(21) On justifiable circumstances, the minister may, in the exercise of his duties, order an investigation, or inquiry into the management of the levy. Upon good cause shown, the minister, after consultation with the Commission, may dissolve the collecting society board, suspend the management and appoint an interim committee to administer the funds for a duration period of not more than six months. Upon the expiry of six months, the rightholders may meet to appoint new members of the board and management to run the collection society.

(22) The minister may make regulations for implementation of the provisions of this Act generally, which may relate to; among other duties;

(a.) gazetting leviable devices, on the recommendation of the commission;

(b.) Setting tariffs for the devices, on the recommendation of the collection society.

…..

APPENDIX TWO

GOVERNMENT NOTICE

DEPARTMENT OF TRADE AND INDUSTRY
No….
Date:

NOTICE IN TERMS OF THE COPYRIGHT ACT,
(ACT NO. 98 OF 1978)

I, _____ , Minister of Trade and Industry, hereby, in terms of section 39 of the Copyright Act, 1978 (ACT No 98 of 1978), publish Regulations on the Establishment of a private copying levy for copyright rightsholders' in the cultural creative industry,

These Regulations will come into effect on the date of publication of this Notice.

_____

MINISTER OF TRADE AND INDUSTRY

In the main the Regulations provide for the following:

1. Citation
2. Interpretation
3. Scope
4. Levy on devices and Artificial Intelligence human computers
5. Minister's powers to vary, add, and remove leviable devices
6. Liability for levy payments
7. Customs and Excise role in levy collection
8. Role of the copyright levy commission
9. Application for Registration and Register of importers
10. Authors right to remuneration
11. Procedures for distribution of royalties
12. Exemptions from royalties
13. Devices for commercial purposes exempted
14. Records for accounting or audit purposes
15. Investigations for misappropriation of the Fund
16. Entry into force.

The scope of the Regulations is the one described in terms of section 9B of the Copyright Act, 98 of 1978. During stakeholder consultations, there was a common understanding that due to digital technological developments, there should be an established private copying levy on digital storage devices to compensate copyright holders for the lost sale arising from private copying, and that the rights in the copyright regime should be managed through collecting societies in future.

DEPARTMENT OF TRADE AND INDUSTRY

MODEL COPYRIGHT (LEVY ON DIGITAL STORAGE DEVICES) REGULATIONS, 2024

PRIVATE COPYING LEVY REGULATIONS

Interpretation

1. These Regulations may be cited as the Copyright (Levy on Digital Storage Devices) Regulations, 2024.

2. In these regulations, unless the context otherwise indicates -
   (i) terms and expressions defined in the Acts of Parliament or in the regulations or in the General Notice listed below shall carry the same meaning as defined therein:

   - The Copyright Act, 1978 (Act 98 of 1978), as amended;
   - The Performers' Protection Act 1967, (Act 11 of 1967), as amended;
   - The Copyright Regulations, 1978, published as GN no R 2530 GG no 6252 of 22 December 1978, as amended by GN R1211 GG no 9775 of 7 June 1985, and by GN no 1375 GG no 9807 of 28 June 2985;
   - General Notice no 136 of 1989 published in GG no 11718 of 3 March 1989

   (a) "**Copyright levy commission**" – means a body constituted in terms of section 12A(8) of the principal Act;
   (b) "**devices**"- means either locally manufactured, or imported electronic recording equipment, blank sound and audio-visual carriers, compact discs, and or any equipment capable of reproducing, storage of protected creative content work.
   (c) **"levy"-** it means the levy imposed on devices pursuant to section 12A(1) of the Act and regulations, 20…
   (d) **Artificial Intelligence –** it means a human machine as described in the main Act.
   (e) "**Minister**" means Minister responsible for Trade and Industry, or any other minister assigned to administer the Act by the President of the Republic of South Africa;
   (f) **"Society"** means the Collection society organisation, licensed and operational as established under section 22B of the Copyright Act, 1978 (Act 98 of 1978), as provided for in section 39(cA) read together with section 9A of the Copyright Act, 1978, and with section 5(3) of the Performers' Protection Act, 1967 (Act I1 of 1967).
   (g) "**rightholders**" means the owners or licensees of public playing rights.

First Schedule

Second Schedule

Third Schedule

Scope

3. The Copyright (Levy on Digital Storage Devices) Regulations, set out the conditions under which a levy shall be collected, managed, and distributed by collective management organisation/s for onward distribution to rightholders under the Copyright Act, 1978 (Act 98 of 1978), as provided for in section 9A.

CHAPTER 1

4. Pursuant to section 9A(2), the minister shall impose a levy on devices listed in the First Schedule hereto provided, to be paid as a percentage of the cost of sale, from the reporting and payment of the levy at customs, and or at point of manufacture or assembly of the device within the jurisdiction.

5. The minister may, on the recommendation of the collection society vary, add, or remove from the list of copying devices in the First Schedule or the levy payable on such devices.

6. The levy payable under these regulations shall be paid by-
   (a) a manufacturer of the device/s and or
   (b) an importer or distributor of the devices at the customs point of entry into the jurisdiction.

6(1) Artificial Intelligency presumptive levy
   (a) The minister shall set every year a presumptive levy for any Artificial Intelligence human machine within the jurisdiction that meet the definition prescribed in the main Act. The levy must be paid twice a year in accordance with parameters set by the relevant collection management organisation.

7. The revenue authority, upon making lawful appropriate deductions, shall within reasonable time deposit the levy collected into specified account of a mandated collection society.

8. In pursuant to the levy's administration, the collection society shall exercise and execute its mandate as provided under sections 9A (15) (17) of the Act.

9. The collection society shall, with the collaboration of the customs and excise, create a register of manufacturers and or importers of the devices within the jurisdiction.

   (a.) The Register form is as prescribed in the Second Schedule, hereto attached.
   (b.) The application form for registration is as prescribed in the Third Schedule, hereto attached.

10. The Commission shall ensure and oblige the collection society to distribute fair, appropriate and proportionate remuneration due to the rightholder(s), in accordance with the criteria set out by the Act and these regulations based on the commissioned survey report.

11. The levy shall be distributed in accordance with procedures for distribution of royalties or other remuneration set by the responsible minister as follows -

(i.) 25 % for administration costs,
(ii.) 10% for the Cultural fund,
(iii.) 30% for musical works
(v.) 20%.for audio-visual works; and
(vi.) 15% for literary works.

Exemptions from the levy

(ii.) For the purposes of the levy's administration, the following devices shall not be subject to the levy;

(a.) devices manufactured for export;
(b.) devices manufactured for use by persons with disability;
(c.) devices sold for non-commercial use;

(iii.) There shall be no liability for levy payment, if sufficient evidence can be adduced indicating the devices manufactured or imported are for commercial purposes, and not for consumers.

(a.) a refund shall be made if payment had been made.
(b.) double payments shall be reimbursed as provided for in the Act.

CHAPTER 2

Keeping of records for auditing and investigations purposes

(iv.) Pursuant to section 9A of the Act, entities specified under section 9A(2), must maintain, and upon request, provide relevant accounting records for a period as specified under Companies Act 71 of 2008, section 24, as required by law. The entities shall grant unlimited access to the law enforcement authorities, the commission, or such individuals or entities mandated by it, to carry out specified inspections of their premises.

(v.) In the enforcement of specified lawful activities, law enforcement agencies, may, upon reasonable suspicion of unlawful activities set out therein, confiscate any consignment of material for which levy is prescribed, but has not been paid by the manufacturer or importer, and where it deems necessary, seal up any premises used for the purpose of manufacturing or assembling such materials, or any premises used for the storage of such materials imported into the country pending payment of the prescribed levy.

(a.) Liabilities for contravention shall attract such penalties as prescribed under section 9A (12) of the Act..

(b.) Any improper accounting methods, for the purposes of circumventing payments of the levy, shall attract a penalty/ies including, but not limited to a fine, imprisonment term as prescribed under section 9A(12) of the Act.

CHAPTER 3

Miscellaneous

Entry into force,

(vi.) These Regulations shall enter into force on the date of publication in the Government Gazette.

FIRST SCHEDULE

Device	% **of the levy on cost price**
1. Vinyl	
2. Mini Disc	
3. I-Pod	
4. Modulator	
5. MP3 Player	
6. Digital Jukebox	
7. USB Flash Disc	
8. SIM Card	
9. SD Memory Card	
10. CD/DVD Copier	
11. Cellphone	
12. Personal Computer	
13. CD Writer LEESS	
14. Photocopier	
15. Printer	
16. Scanner	
17. Digital Camera	
18. Computer external hard drive	
19. Radio/TV Sets enabling recording	
20. Decoders/signal receivers	
21. Printingplates	
22. Analogue audio recorders	
23. Analogue video recorders	
24. Artificial Intelligence- ‘human computers’	

The percentage in the Schedule above shall apply in the case of:

(a) imported, manufactured, to the totality of cost, insurance and freight;

(b) materials manufactured, produced or assembled in the country

APPENDIX THREE

SECOND SCHEDULE

MODEL REGISTER FOR MANUFACTURERS AND IMPORTERS



DEPARTMENT OF TRADE AND INDUSTRY

COPYRIGHT ACT, 98 of 1978

COPYRIGHT (LEVY ON RECORDABLE MEDIA DEVICES) REGULATIONS, 2023

OWN/REF No.

APPLICATION FOR REGISTRATION AS AN IMPORTER

Third Schedule to the Regulations

Name of Importer …… Company Registration No. ……

Telephone Number:…… Official Email ……

Export/Import Code. ……

Business Address: ……

Physical Address..……..

Type and Function of device/ as per First Schedule: …….

Quantity of Devices …….

Origin of device……..

I …… having been accredited as an importer do hereby certify that the information provided and contained herein, is true and correct to my knowledge and belief. Therefore, I accept and understand that any falsification of the details above will render this application and registration voidable.

Declared at ……..... on this day…… of ……20…..

_____

Applicant s signature

APPENDIX FOUR

THIRD SCHEDULE

MODEL APPLICATION FORM FOR REGISTRATION



DEPARTMENT OF TRADE AND INDUSTRY

COPYRIGHT ACT, 98 of 1978

COPYRIGHT (LEVY ON RECORDABLE MEDIA DEVICES) REGULATIONS, 2023

OWN REF/No.

REGISTER FOR MANUFACTURERS AND IMPORTERS

Second Schedule to the Regulations

Name of Entity:…… Company Registration No……

Certificate of Incorporation: ……

Company Director/Representee: ……

Designation:……. Email Address…….

Postal/Business Address:……..

Physical Address:……..

Nature of devices for importation……..

Projected annual import quantities ……

Declared at ……. this day …… of …… 20 ……

_____

Applicant s signature

APPENDIX FIVE

MODEL ONLINE QUESTIONNAIRE FOR PRIVATE COPYING LEVY

NATIONAL STATISTICAL CONSUMER SURVEY COLLECTIVE MANAGEMENT ORGANISATIONS (CMO) SURVEY FOR THE COLLECTION AND DISBURSEMENT OF A PRIVATE COPYING LEVY				
RIGHTHOLDERS' CATEGORY:				
MUSICALS	**FILMS**	**ARTISTS / PERFORMERS**	**LITERAL ART AUTHORS**	**JOURNALISTS**
Jazz	**Documentaries**	**Musicals**	**Authors' Books**	**Radio**
Rock	**Movies**	**Theatre Arts**	**Publishers**	**Television**
Amapiano	**Soaps**	**Audio Visuals**	**Script Writers**	**Podcast**
Gospel	**Short Films**	**Other**	**Song Writers**	**Creative Literary Writers**
R n B	**Series**		**Other**	**Other**
Kwaito	**Other**			
Amaskandi				
Other				