



**SOUTH AFRICA'S CAPABILITY TO REGULATE AND ENFORCE
THE SALE OF DIGITAL GOODS**

by

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DECLARATION

I, 1753779, declare that this Research Report is my own unaided work. It is submitted in partial fulfillment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

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Abstract

There are several challenges to regulating digital goods in South Africa. Firstly, the classification of digital goods can be found in the Films and Publication Amendment Act (FPAA), which seeks to bring the Films and Publications Act in line with new technologies and digital goods. The changes made within the FPAA raise other issues and questions of who is bound to the FPAA regulations, whether it only applies to publishers in South Africa and whether the regulations will be binding on individual publishers. Secondly, copyright enforcement has become more complex as the ability to replicate and reproduce copyright protected works has become easier. The Copyright Amendment Act (CAA) now offers greater protection of copyrighted works in the art, music, film, and video game industries through royalty agreements, allowing a copyright infringer to escape liability by paying an agreed amount for the use of the digital goods. Finally, the sale of a non-physical, digital good is governed by the Consumer Protection Act (CPA); it only provides general protections when entering into end-user licence agreements. Access to the digital good will find protection under the traditional law of contract principles.

South Africa has made great progress in regulating the sale of digital goods however, many gaps remain within South Africa's law. Drawing from the analysis of foreign jurisdictions, such as the United States of America (USA) and the European Union (EU). The USA, unlike South Africa, has created specific laws to govern problems that directly result from the increase in the sale of digital goods. The USA has focused their efforts on regulating password sharing, the legal principle of first sale through the Digital Millennium Copyright Act and the Computer Fraud and Abuse Act. Finally, the USA has also allowed for specific copyright protection within the video game industry, protection that is not available in South Africa.

On the other hand, the EU offers more generalised protection as the EU's Copyright provides broad solutions instead of individual laws addressing individual issues. The EU's solutions include a strike system and the transfer of copyright infringement liability to the providers of the infringing material, allowing for adequate and efficient enforcement of copyright protections across multiple jurisdictions within the EU. South Africa would need to consider creating regulations that address live streaming, increasing video game copyright protection, and implementing the strike action through newly focused regulations rather than existing film and copyrights laws. By extending existing liability regulations to include those who provide access to the infringing material, it would enhance and encourage more well-rounded and sufficient protections in South Africa.

I INTRODUCTION

The global digital goods industry has grown exponentially with the advent of the new digital distribution era, allowing goods to be transferred and purchased instantaneously. Digital goods can be described as a product created in the virtual space, made up of elements known as bitstrings that offer some form of economic benefit,¹ for example video games, whose industry has become one of the most profitable digital media industries since 2017.² The video game consumer market in South Africa (SA) was valued at R 2.2 billion in 2015,³ this industry has continued to grow and expand since then.⁴ Despite the industry's profitability, the market still suffers from a lack of investment due to the negligible regulation resulting in investors' unwillingness to risk their investments in an industry with limited protection. An example of the limited protection offered concerns copyrights, where only partial protection is afforded to this form of intellectual property.⁵ This, however, is a double-edged sword as the over regulation in the earlier years of technological development can limit innovation but allowing the industry to remain unregulated could adversely affect this industry's growth. For any industry to survive the laws governing it, it must remain flexible enough to inspire innovation while offering adequate protection to its clients, developers, and investors.⁶ This analysis of the SA legal framework aims to determine whether it allows for adequate expansion of the digital goods industry while protecting intellectual property interests and consumers from unnecessary exposure to offensive materials while determining what can be learnt from foreign jurisdictions about regulating these goods.

¹ Dentons 'The gaming Industry in SA' (2018) Available at https://www.dentons.com/en/insights/newsletters/2018/january/30/south-africa-newsletter/south-africa-newsletter-january-edition/the-gaming-industry-in-southafrica?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration, accessed on 6 August 2022.

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ News24 'SA gaming industry 'suffering under regulation' (2016) Available at <https://www.news24.com/fin24/sa-gaming-industry-suffering-under-regulation-20160516>, accessed on 8 August 2022.

⁶ M Njotini 'Exposing the ICT Regulatory Dilemma: The Test for Governments' (2020) 41 *Obiter* 328 at 34.

It is imperative to have a comprehensive understanding of the definition of a digital good. The simplest way the author can define a digital good is as a product created in the virtual space comprising of elements known as bitstrings, which offer some form of economic benefit.⁷ This concept of a bitstring can be further broken down into binary code sequences, known as 1's and 0's, that assist in the breaking down and reproducing of computer systems. One of the major differences between a digital good and a traditional physical good is that the material used to create and store a digital goods are all the same. These bitstrings of a digital good allow for the codification of knowledge, resulting in the ability of a digital good to be written, stored, and executed when needed. This results in most digital goods acquiring the same characteristics, namely that of 'non-rivalry', meaning that the existence of one good does not compete against copies/replications of itself.

Conversely, 'infinite expansibility' allows for the good to be replicated without devaluing the original product, which ensures the replication maintains the same value as the original good. These digital goods are highly robust and the likelihood of them existing elsewhere is high. Simultaneously, each bitstring of the code must be replicated perfectly, or the digital good will be incapable of being recombined to form the digital product. The codes that make up digital goods are similar to that of human DNA; easy to be replicated and reproduce, but the entire system will fail should an error occur.⁸

The aims of this research report are twofold the first is to holistically discuss the ability of the SA legislature to regulate the sale and publication of digital goods. There are three types of digital goods industries, namely the streaming industry, which is primarily concerned with digital goods such as movies and music; the video game industry; and the creative industry, which primarily focuses on non-fungible tokens as a form of art. This section will assess how SA's existing regulations govern these digital goods and how the SA legislature creates grounds for the protection and enforcement of the intellectual property rights of these goods. The second aim is to

⁷ D Quah, 'Digital goods and the new economy' (2002) *CEP discussion paper* 563 at 2.

⁸Ibid at 1-12.

provide a comparative analysis of the SA regulatory position considering the standards applied to the regulations of digital goods in the USA and the EU. This comparative analysis aims to highlight SA's shortcomings and, more importantly, identify existing solutions that could inform a roadmap for future regulations of digital goods in SA.

II SA LEGAL FRAMEWORK

SA's current legal position and its ability to address the sale of these new digital goods will be assessed. The assessment will focus on three elements first, SA's ability to classify these new forms of goods and thus regulate the creation of digital goods. Secondly, SA's ability to legally enforce the rights that accrue to these new goods, through the route of copyright infringement and thirdly, the regulation of the sale and transfer of these goods.

a) Classification as a regulation tool for the creation of digital goods.

Classification is required for any media to be legally shown in SA,⁹ it acts as a form of regulation for all digital goods which, through their very nature, must be displayed according to their classification. Classification is the reviewing process in which media is granted an age rating, this rating informs the public of what type of content can be expected when viewing.¹⁰ The legislature has already taken steps to address some of the previous shortcomings¹¹ of the law by enacting the FPAA.¹² The FPAA has brought the Films and Publication Act (FPA)¹³ in line with future technologies which were initially not catered for. Aside from the added clarity of how classifications would apply to these new technologies, some of the other aims of the FPAA were to regulate the sale of online films and, more recently, the sale of online video games. The FPAA requires that an enforcement committee be established to monitor and combat violations, with

⁹ The Films and Publication Act 65 of 1996.

¹⁰ Films and Publication Board 'Classifications guidelines' Available at <https://www.fpb.org.za/classification/>, accessed on 10 October 2022.

¹¹ Namely the lack of classification standards for video games and the uncertainty relating to classification through new real time mediums such as streaming.

¹² The Films and Publication Amendment Act 11 of 2019.

¹³ Loc cite note 9.

specific focus on protecting children from accessing harmful material.¹⁴ The aims mentioned above are discussed in greater detail below starting with the previous regulations and how the FPAA has addressed the shortcomings of the FPA.

i) Film and Publication Act 65 of 1996

The FPA created a definition for publication which listed various types of publication, each with its own separate definition. This list was created as widely as possible to cover almost any medium of creation, the definition of publication failed to include both film and video games. However, under the definition of films, the FPA recognised the various components of a film. These include musical recordings, soundtracks and visual presentations (illustrations/photographs), regardless of whether it was made physically or through electronic means. Further, the definition of publication includes the concept of computer software but made no express mention of video games, and limited, the computer software definition to a programme which can be interacted with and displayed on limited mediums.¹⁵

ii) Films and Publication Amendment Act 11 of 2019

As a result of the above shortcomings, The FPAA made amendments to the above definitions. Section 1(r)(i) of the FPAA extended the definition of publication, which now reads as 'any content made available through the internet'. Yet again, this definition expressly excludes games and films from a publication and treats them as separate entities, much like films were in the original Act.¹⁶ A film is now defined as a sequence of images and audios that can be viewed through any medium, whether stored on an electronic device or streamed through the internet, provided it is a moving picture.¹⁷ The FPAA has expanded the concept of a game to mean any form of interactive computer software in which a person's action or input into the software determines the outcome that will be

¹⁴ Supra note 12 (Preamble).

¹⁵ Supra note 9 s 1 A game could be defined for purposed of the act as an interactive set of data that can be displayed.

¹⁶ Supra note 12 s 1.

¹⁷ Supra note 12 s 1(h).

generated by the program with the aim of achieving predetermined results or passing through stages.¹⁸

iii) Films and Publication Guidelines

It is important to set out how such defined media classifications are determined, chapter 2 of the FPA provides the legal foundation for the Act's enforcement. The FPB and a Films and Publication Review Board (FPRB) were both created in terms of the FPAA, they ensure that every publication, film, or game made, is suitable for consumption and enjoyment by the public. The FPB and FPRB perform three primary functions. The first is to provide guidelines for producing publications, films, and video games, which assist publishers on what may be shown, where it may be shown and what must be submitted for review before publication. Their second function is to address complaints about unclassified publications. The FPB and FPRB have been tasked with investigating complaints and where necessary, to provide an official classification of the publication. Further, they must determine the possible penalties or criminal liability of the publisher's infringements. Their third function, created through section 31, is to advise publishers on how classification is determined, including section 29's prohibited content. These guidelines ensure that any publication, film, or game must be submitted for classification before publication occurs. Only when the production contains prohibited content such as, propaganda for war, incites violence or advocates hatred based on a protected ground, is it automatically prohibited. Unless the FPB Chief Executive Officer (CEO) has been notified of the infringing media and grants it a suitable classification¹⁹ acting as a pre-classification of the publication which protects the public from unsuitable media. Section 16(2)(a) of the FPAA further expands on the generally prohibited grounds above to include the publication of material that contains sexual conduct, incites harm, degrades a person or attempts to violate or disrespect the right to human dignity.²⁰ Any conduct

¹⁸ Supra note 12 s 1(i).

¹⁹ Supra note 9.

²⁰ Supra note 12.

depicting some form of child pornography will always be prohibited, be it the sale or creation of such products, they must be reported to the police and CEO of FPB without exception.²¹

iv) Impact of the FPAA

The prohibited elements of production that create the duty of pre-classification have negatively impacted the right to freedom of expression. These constraints were challenged in *Print Media SA v Minister of Home Affairs and Another*²²(*Print Media*) based on severe penalties that they imposed. The court in *Print Media* held that the challenges posed by the prohibited grounds have a grave impact on freedom of expression.²³ The dangers of prior constraints on publications and their negative impacts were stated in both Judgments, in which the court held that no entity should be entitled to restrict publication through classification without limitation. The majority judgment held that the limitations created by section 16(2)(a) of the FPAA are unconstitutional, thus calling into question the legality of the FPAA.²⁴

Even though the FPAA has taken major strides in developing SA's laws to adapt to a new technological era, there are still major concerns regarding the impact of the FPAA and how this awkwardly drafted legislation applies.

The primary critique of the FPAA is that it acts as an unnecessary censor to the creation and production of digital goods, especially when focusing on the stringent steps required to classify goods. The Constitutional Court in *Print Media* confirmed this view when it declared the concept of pre-classification unconstitutional.²⁵ Despite the judgment of *Print Media*, the penalties in section 24 of the FPAA remain valid, which allows for imprisonment of up to 5 years and significant fines, should a content distributor show publications which have not been classified.²⁶

²¹ Classification guidelines for the classification of films, interactive computer games and certain publications in GN 539 GG 42380 of 5 April 2019 at 20.

²² *Print Media SA and Another v Minister of Home Affairs and Another* 2012 (6) SA 443 (CC).

²³ *Print Media* Supra note 22 para 23.

²⁴ *Print Media* Supra note 22 para's 69-75.

²⁵ Ibid.

²⁶ Supra note 12.

The effects of section 24 are that publishers of films and video games are forced to classify their goods before publication or risk dire consequences. These consequences include the removal of their digital good/s, and all persons included in the distribution and creation, may be held liable. Further, the power dynamic is skewed in favour of the FPB as there is no minimum time period in which the FPB must act²⁷ Thus, there is no duty for the timely classification of goods, this has negative financial implications for the publisher while waiting for classification.²⁸ The freedoms that the court in *Print Media* tried to protect, may still be violated, while the publisher waits for the FPB classification.

The second issue with implementing the FPAA, is its scope of application and who is bound by these principles. The criminalisation of unclassified goods creates a problem as any video taken constitutes a film making any person who distributes a film or game a content distributor, placing them under the scrutiny of the Act.²⁹ No meaningful distinction between a commercial distributor and a non-commercial distributor is provided for in the FPAA.³⁰ Under the current definition of a film any recording may constitute a film, including home videos or items such as WhatsApp statuses, Facebook posts and any other video posted to social media.³¹ Even though it may not necessarily require classification, such as children's content, any individual may request a post be referred to the FPB for classification, where distributors stand the chance of being fined or imprisoned.³² The FPAA was also drafted to include online streaming and other instantaneous consumption mediums. Streaming companies like Disney+, Netflix and Steam have pre-set games and movies that only need to be classified once before publication. Unlike other industries where live streaming cannot be classified before publication. Subsidiary industries such as Twitch and

²⁷ Supra note 9.

²⁸ Critical Lawsuit with Nick and Kevin 'Why classify' (2018) Available at <https://soundcloud.com/nicholas-hall-707780259/critical-lawsuit-0004> From 20:00-42:00, accessed on 9 August 2022.

²⁹ Michalson's 'Films and Publication bill-internet censorship' (2018) Available at <https://www.michalsons.com/blog/film-and-publications-bill/33423>, accessed on 9 August 2022.

³⁰ Ibid.

³¹ Michalson's 'Mr. President, please don't sign the Film and Publications Amendment Bill' (2019) Available at <https://www.michalsons.com/blog/mr-president-please-dont-sign/37894>, accessed on 9 August 2022.

³² Ibid.

YouTube allow for live streaming of gameplay or content creation, which would constitute distribution of a film or game without prior classification. The FPAA, technically, makes these streaming actions illegal, as it is impossible to classify these streams before publication. Should an unexpected action occur, such as violence or racial slurs outside the publisher's control, the creators of these live streams may be imprisoned for the behaviour of others.³³ The EU and the USA suggest alternate means of regulation, which will be discussed below under international considerations.

v) Publication under the FPAA

The third issue is the severe administrative burden placed on publishers and producers as a direct result of the new regulations. Publishers only have two options; they must submit all their publications for pre-classification, creating a severe administrative burden, or publishers must change their classification system. This administrative burden would be felt both by the FPB and publishers. This sentiment was confirmed in the *Print Media* case, where the court held that:

'The upshot of the overbroad and vague manner in which section 16(2)(a) is cast...is that numerous mainstream publications fall to be submitted for classification before they may become publicly available, even if they are manifestly in the public interest. This will impose severe financial and practical burdens on publishers, especially since it is the entire publication, and not merely the impugned material, that must be submitted'³⁴

Practically, any reasonable publisher would bear the cost of submitting every publication for classification rather than liability, which could result in innovation being stifled in the industry and increasing the possibility of publishers seeking other forms of classification outside of SA.³⁵ This, combined with the creation of the Enforcement Committee (EC) under sections 2-6 of the FPAA,³⁶ shows that the SA Government was unable to keep up with the regulation and

³³ Michalson's op cit note 29.

³⁴ *Print Media* Supra note 22 para 21.

³⁵ Michalson's op cit note 29.

³⁶ Supra note 12.

classifications of these expanding industries. The creation of the EC is a welcomed action to relieve the pressure of the FPA regulatory backlog; however, with the new classification regulations, it is unlikely that the EC will be capable of handling and enforcing the burdensome provisions. The questions then arise, if the SA Government is in charge of classifying these publications, would they be able to keep track of every classification? Secondly, how could individual publishers, large or small, be expected to satisfy all the requirements of the FPA and the FPAA? Section 23 of the FPAA confirms that a film or game publisher must take reasonable steps to ensure that publications are rated, even when the subject matter could be classified as 'X18' or higher, and that distributors insert reasonable safeguards to prevent minors from accessing the material.³⁷ Thus adding additional burdens on the producers, one example of such a safeguard would be to have consumers input a credit card number before accessing 'X18' or higher material.

The creation of online platforms such as Steam and Netflix make it difficult to imagine how any reasonable distributor could verify a person's age before allowing them to access any material on their site. Section 23 of the FPAA states publishers must set age locks on all adult material to ensure they do not allow unsupervised access, such as the creation of kids' modes on apps. One potential answer would be to regulate individual accounts and subscriptions. With accounts similar to Netflix, a family could share an account, but there would be almost no way to enforce an age restriction. Ideally, it should be up to the individual who owns the account to police what content they allow minors to access, this would be simple, as most streaming services provide safety modes, which a legal guardian could use.³⁸ The other form of classification available to publishers would be to enter into an agreement with the FBP to self-classify all of the publisher's own content, with monthly reports given to the FPB once a permit is received.³⁹ After consultations with the Minister of Communications and Digital Technologies, these publishers must provide

³⁷ Ibid.

³⁸ Netflix 'Sharing your Netflix account' Available at <https://help.netflix.com/en/node/123277>, accessed on 3 October 2022.

³⁹ Supra note 12 s 19.

completed lists of all materials to classify their goods.⁴⁰ The publisher must provide the FPB with easy access and full control of the source material and code for the board to either accept the classifications or reject it.⁴¹ This would shorten the time period of the classification of goods. In line with the previous self-regulation requirements, all 'XX' and 'X18' rated items must be published in a Government Gazette before being released to the public. The other, more feasible method would be to have the publishers' goods classified by a foreign accredited classification system approved by the FPB.⁴²

The final concern with how the FPAA has regulated classifications is that it fails to regulate international digital media producers, who rely on different forms of classification, these classifications fall under foreign jurisdictions, avoiding classification under the FPAA. The costly and perhaps overzealous regulations within the FPAA have led many local game producers, content creators, movie makers, and musicians publishing their creations internationally or in countries with less strenuous laws and punishments.⁴³ This allows publishers to save on unnecessary costs and time while awaiting classification.⁴⁴ After setting out the main legislation addressing the creation and publication of digital goods, it is important to look at how these Intellectual Property (IP) rights are protected within the SA context.

b) Copyright protection and enforcement mechanisms

The primary legislation governing the enforcement of digital goods is the Copyright Act 98 of 1978 (CA), most digital goods have their basis in IP instead of corporeal property rights. This section will discuss some of the current challenges in using copyright as the primary form of protection for digital goods in SA, followed by a brief overview of how the CA protects each

⁴⁰ Film and Publication board 'FPB' Available at <https://nationalgovernment.co.za/units/view/97/film-and-publication-board-fpb>, accessed on 3 September 2022.

⁴¹ Baker McKenzie 'SA: significant implications for online gaming companies in the draft Films and Publications Amendment Regulations' (2020) Available at <https://www.lexology.com/library/detail.aspx?g=d276a252-1fe9-458e-a8eb-6ecbf77f26c>, accessed on 28 September 2022.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ News24 op cit note 5.

digital good's IP rights. The first of several copyright challenges in SA, that needs addressing is the increase in consumers' ability to circumvent the publishers' safeguards when releasing their games and other digital goods. Digital goods such as film, music and art are easy to pirate, as they offer very limited protection when released allowing for these goods to be replicated easily, making the copyright simple to violate through unlicensed replication. These two issues have resulted in economic losses within the film and music industry, reaching 35 million dollars in 2004.⁴⁵ In the SA context, youths have shown a marked increase in piracy, with individuals "cracking" the protections and sharing the goods multiple times. This is due to the belief held by the youth of SA, that piracy is not unethical.⁴⁶

It would be useful to provide an overview of how the current regulations address the concept of copyright infringement. Copyright infringement is the unauthorised reproduction of another's work.⁴⁷ Under the CA each type of work provides its own definition of what constitutes copyright protection, section 2 makes provisions for protecting the rights attached to the following works: musical, artistic, and cinematographic.⁴⁸ These works are protected from partial or whole replication as well as the unauthorised sharing and publication through physical means.⁴⁹ There is no direct protection for a video game presently in the CA. The second issue relevant to how the CA was drafted is that it does not refer to copyright infringements through digital media. However, various sections of the Electronic Communications and Transactions Act (ECTA)⁵⁰ address these issues by incorporating copyright protection in new digital technologies.⁵¹ Section 1 of the ECTA expands the definition of data to include information in any form of electronic representation and

⁴⁵ J.P Van Belle, B Macdonald, and D Wilson 'Determinants of Digital Piracy among Youth in SA, ' (2007) 7 *Communications of the IIMA* 3 at 47-9.

⁴⁶ *Ibid* at 50-8.

⁴⁷ The Copyright Act 98 of 1978 Preamble.

⁴⁸ *Ibid*.

⁴⁹ *Ibid* ss 6-10.

⁵⁰ Electronic Communications and Transactions Act 25 of 2002.

⁵¹ R Moosa Copyright and property in the Digital Era: Achieving Functional Equivalence between Digital property and Physical Property (unpublished LLM thesis, University of Pretoria, 2015) at 14-5.

section 86 of the ECTA, known as the anticircumvention provision,⁵² which prevents the tampering and avoidance of security measures which intercept, reproduce and distribute data without authorisation.⁵³ The anticircumvention provision was recently removed from the ECTA and replaced by section 58 of the Cybercrimes Act,⁵⁴ which deals with unlawful and unauthorised access and possession of data.⁵⁵ Despite this, the ECTA succeeded in having the CA applied to the digital space.⁵⁶ The new proposed Copyright Amendment Bill (CAB) seeks to eliminate any confusion regarding the protection of copyrights through the online medium by focusing on and correcting the technological shortcomings in previous legislation. The CAB will be discussed in relation to each of the digital goods protected by the amendments, namely art, music, film, video games.⁵⁷

i) Art

The concept of art is classified under section 1(iii) of the CA as any artistic picture, drawing, painting, or any work of artistic craftsmanship, regardless of the quality. Artistic works currently find protection under section 7 of the CA, which prevents unauthorised reproduction, either in part or full, for example, the creation of derivative work or unlicensed distribution of the artwork.⁵⁸ Digital crafting could be protected under the concept of 'any artistic craftsmanship' however, more express protection is provided under section 1(B)(e) of the CAB including any audio-visual work or moving imagery under the definition. Section 8 of the CAB prevents the dissemination, distribution and reproduction of any film and audio-visual artwork through any physical, wired, or

⁵² 'a person who intentionally accesses or intercepts any data without authority or permission to do so. is guilty of an offence'. Supra note 50 s 86.

⁵³ Supra note 50.

⁵⁴ The Cybercrimes Act 19 of 2020.

⁵⁵ Ibid.

⁵⁶ Pistorius, t and Mwim, o.s. 'the Impact of Digital copyright law and Policy on access to knowledge and learning' (2019) 10 *Reading & Writing-Journal of the Reading Association of South Africa*, 1 at 1-7.

⁵⁷ This Bill has not yet become law and at the time of this research report was still under consideration by the national assembly. Copyright Amendment Bill 2017 B13B ISBN 978-1-4850-0545-2.

⁵⁸ Supra note 47.

wireless technologies.⁵⁹ One such practical example of audio-visual work would be through a non-fungible token (NFT), which is a visual expression of a non-transferable token called a blockchain. Attaching an audio or visual component to this blockchain, creates a digital good, which cannot be amended, replaced, remade, or separated from the blockchain.⁶⁰ Thus, an NFT is an artwork with equivalent or greater protection to those in the physical world, problems may arise when this work is already a derivative or copy of an existing art source. The art attached to the blockchain could already violate the provisions of the CA. However, should the NFT constitute original work, the sale of an NFT does not automatically ensure the sale of the underlying copyright, which shall be kept by the creator unless transferred. NFT's do not create any new forms of copyright; thus, the protection afforded under the existing laws can be used where an infringement of this right has occurred.⁶¹ However, due to the uncertainty regarding how block chains should be regulated it is pertinent to ask whether NFT's should be governed by copyright laws at all. Under the 12th edition of the Nice classifications which are binding on both the EU and the USA NFT's are protected under trademark law and not copyright, it is still unclear how this will affect South African legislation.⁶²

ii) Music

In terms of the CA, music is defined 'as any original work which has been transcribed and will be independently identifiable',⁶³ which includes a sound recording. Section 6 of the CA protects this work from reproduction, performance, broadcasting, adaption or diffusion in instances without the

⁵⁹ Supra note 57 s 1(B)(e).

⁶⁰ Y Nagpal 'Non-Fungible Tokens (NFT'S): The Future of Digital collectables' (2021) 4 *International Journal of law Management & Humanities* 5 at 759-61.

⁶¹ G Chinlund & K Gordon 'What are the copyright implications of NFTs?' (2021) Available at <https://www.reuters.com/legal/transactional/what-are-copyright-implications-nfts-2021-10-29/>, accessed on 12 August 2022.

⁶² G Bene 'New nice classification: Trademarks related to virtual goods in the metaverse and NFT finally protected.' (2023) Available at https://www.lexology.com/library/detail.aspx?g=2db7797f-df39-4a24-bc00-ce3f447954c1&utm_source=Lexology+Daily+Newsfeed&utm_medium=HTML+email&utm_campaign=Lexology+subscriber+daily+feed&utm_content=Lexology+Daily+Newsfeed+2023-01-16&utm_term=, accessed on 22 January 2023.

⁶³ Supra note 47 s 1(b).

prior consent of the copyright holder.⁶⁴ Additionally, section 9 of the CAB provides that no sound recording is allowed to be transferred or made available to the public through wireless, physical, or wired means.⁶⁵ What separates this digital good from others is that a musical work receives three different forms of copyright protection. Firstly, the sound recording belongs to whoever paid for the recording. Secondly, the composition right belongs to the author of the music if it was written in music notation. Finally, the master recording right belongs to the company that owns the equipment and undertook the activity of mixing, recording, and editing the music to its final form, unless a prior agreement with a studio exists.⁶⁶ When music is distributed, it is generally through a licensing scheme, the Southern African Music Rights Organization (SAMRO) administers the proper distribution of royalties to the artist and ensures compliance by consumers of music, preventing copyright infringement. This method is generally used in SA to enforce copyrights allowing digital publishers such as Spotify, Apple Music, YouTube, and broadcasters to legally use music without infringing copyrights.⁶⁷

The above digital publishers make use of streaming. The act of streaming does not constitute possession of a digital good, as streaming allows for the data package to be received, processed, and deleted as soon as the viewing has occurred with no storage by the end user. Streaming differs from downloading a digital good, where the data package is transferred, stored and decoded for repeated access on the same download. The difference highlights that every time a song is played through a streaming service, it constitutes a reproduction of the digital good.⁶⁸ This would mean that when someone downloads a digital good, the copyright is only violated once; however, every time the good is streamed, it constitutes a new copyright violation. To deal

⁶⁴ Supra note 47.

⁶⁵ Supra note 57.

⁶⁶ F Mackinnon 'An overview of music copyrights in SA' (2022) Available at <https://www.musicinafrica.net/magazine/overview-music-copyrights-south-africa>, accessed on 12 August 2022.

⁶⁷ SAMRO 'Understanding Music Publishing' (2015) Available at <https://www.samro.org.za/newsletter/content/understanding-music-publishing-jonathan-shaw>, accessed on 12 August 2022.

⁶⁸ G Jansen 'Copyright owners, performers and streaming: A SA perspective on addressing the value gap' (2022) 2022 *The Journal of SA law* 3 paras 1-2.3.

with the multiple violations, section 14(1)(d) of the CA has made special provisions for the payment of royalties to be paid each time the music is consumed to prevent copyright infringement.⁶⁹ This concept is expanded on and regulated to a greater extent in the CAB, where there is a greater focus on streaming digital goods.⁷⁰

The legal framework discussed suggests that the SA legislature is capable of regulating the streaming industry with current legislation. However, there are calls for greater transparency in the method and manner in which royalties are distributed to local artists, this however falls outside of the scope of this research.⁷¹

iii) Film

A film is defined as a collection of images that, when combined with any technological means, produce a moving picture.⁷² A film may consist of music and other artistic copyrights, i.e., the script or soundtrack, as such, a film is protected from reproductions, public viewing, broadcasting, adaption and replication of acts contained within the film.⁷³ Under the CAB, all of the protections mentioned above have been extended to the physical, wireless and wired spheres of technology. Thus, the CAB has extended the original CA protection to the online space.⁷⁴ The CAB makes provision for the allocation of royalties to allow for continued authorised infringements, such as a licensing agreement, in which the violations of the CAB may be permitted when there is financial compensation.⁷⁵ This will only be allowed if there is a prior agreement in effect whereby the author will retain their copyright regarding the film.⁷⁶ In the case of Netflix and Disney+, it is suggested that there has never been a case of copyright infringement by either of these services. Thus, the

⁶⁹ Supra note 47.

⁷⁰ Supra note 57 s 11.

⁷¹ A Shumba 'SAMPRA to take legal action against SABC over unpaid royalties' (2021) Available at <https://www.musicinafrica.net/magazine/sampra-take-legal-action-against-sabc-over-unpaid-royalties>, accessed on 10 October 2022.

⁷² Supra note 47 s 1(VIII).

⁷³ Ibid.

⁷⁴ Supra note 57.

⁷⁵ Ibid at ss 8-9.

⁷⁶ Ibid.

action of streaming allows these companies to offer a variety of digital goods without copyright infringement. The lack of copyright infringements by these streaming services is due either to the fact that the company owns the rights or has secured licensing agreements with the original copyright holder as such, there can be no copyright infringement. These companies employ a principle of pre-classification and pre-agreement before allowing any digital good to be accessed on their streaming services.⁷⁷

iv) Video games

Video games are the most challenging digital good to regulate due to the lack of clarity on the definition and make-up of a video game. The primary concern is the *Golden China v Nintendo*⁷⁸ (*Nintendo case*) judgment, where the Supreme Court of Appeal held that a video game constitutes a cinematic film. It can be repeated and generated, resulting in the same outcome, thus, making it different to a computer programme which could result in new outputs.⁷⁹ The issue with this judgment is that it was decided over 20 years ago when the video game industry was very different from what it is today. The increase in technological advances and the mediums through which these games are enjoyed would render this judgment outdated. The advent of open-world games, such as 'No Man's Sky', where programmers have developed a program that simulates an ever-expanding universe, and the space you can traverse is similar to our universe in terms of scale.⁸⁰ Thus, it can be submitted that no matter how much you try, it would be nearly impossible to have the same outcome generated by this game. This *Nintendo case* of 1996 judgment finds further scrutiny under the Copyright Amendment Act of 1992 (CAA) which specifically states that a computer programme is excluded from the cinematic protection of the CA, thus directly contradicting the judgments definition. The court in *the Nintendo case* states that a video game

⁷⁷ M Liang 'Copyright issues related to reproduction rights arising from streaming' (2020) 23 *The Journal of world intellectual property* at 5-6.

⁷⁸ *Golden China TV Game Centre and Others v Nintendo Co Ltd.* 1997 (1) SA 405 (SCA).

⁷⁹ *Golden China* Supra note 78 paras 17-24.

⁸⁰ R Morin 'Inside the Artificial Universe That Creates Itself' (2016) Available at <https://www.theatlantic.com/technology/archive/2016/02/artificial-universe-no-mans-sky/463308/>, accessed on 10 October 2022.

could not constitute a computer programme.⁸¹ However, as it currently stands video games still fall under the copyright protection of films primarily with the games separate components falling under other protections mentioned above i.e., art and music.⁸²

Under section 1(g) of the CAA, a computer programme is any set of instructions created, stored and, when enacted upon, creates an output in line with the instructions programmed.⁸³ Considering the definition of a computer programme, one can argue that a video game could constitute a computer programme. Much like a computer programme, a game responds to the input and the software will react to that input providing an output. Ebersohn argues that a game cannot constitute a film for two main reasons, first, the express exclusion of a computer programme from the protection provided by the CAA.⁸⁴ Secondly, a game could not be considered a film due to the inordinate number of possibilities.⁸⁵ For a person to replicate the same outcome every time is impossible, whereas a film is something that must be reproducible in the same form multiple times with ease.⁸⁶ Thus, a video game would require additional protection to the various protections provided by copyrightable artistic, musical and film works. One such example would be the Netflix interactive films in which the elements of both films and games are included allowing for a single good to receive multiple layers of copyright protections.⁸⁷

The following acts which are specifically geared towards the coding aspects of game design would also be prohibited in relation to the CAA; the translation of one person's code to another outcome without the previous person's consent (copying a large part of another code to be used in

⁸¹ O Dean 'Case comment SA: video- video games constitute cinematographic films'(1997) Available at <https://blogs.sun.ac.za/iplaw/files/2012/08/Case-Comment-South-Africa-Video-Video-games-constitute-cinematographic-films-Golden-china-TV-Game-Centre-v-Nintendo-Co.pdf>, accessed on 10 October 2022.

⁸² Dentons op cit note 1.

⁸³ The Copyright Amendment Act 125 of 1992.

⁸⁴ Ibid.

⁸⁵ G Ebersohn 'Protecting copyright in Computer games and Computer software' (2005) 5 *Journal of SA law* 106 at 112-5.

⁸⁶ Ibid.

⁸⁷ P Radulovic 'Netflix's interactive specials ranked by how much your choices matter' (2022) Available at <https://www.polygon.com/22286070/netflix-interactive-shows-movies-ranked>, accessed on 23 October 2022.

a separate game), prevention of making copies of the digital programme (no multiple versions may be owned from one purchase) except for one backup and prevention of unauthorised shifting of mediums (preventing a person from breaking into the code of a game to allow it to be played on a different technology).⁸⁸ One such example is dealt with in the next paragraph concerning Nintendo. The other potential protection that could be achieved for a video game would be a patent, but this would require the invention of a whole new form of technology in which your game is played, such as Virtual Reality or Haptic Feedback that was made for the PlayStation.⁸⁹ Conversely, this could be an extreme form of protection that would not be economically viable, creating new technology with every game produced would be impractical and expensive.⁹⁰

Since the shift away from disks and other physical means to produce games to providing licensing keys for digital downloads, the opportunities for copyright infringement have increased dramatically. Individuals with less knowledge about computer systems are no longer prevented from accessing source code,⁹¹ for instance, a Nintendo game card is difficult to read (processed into an intelligible form) on any machine except a Nintendo console. This means that a person must bypass the security and 'crack' the game on its intended medium. It must then be copied to a computer and translated into a new intelligible form, which can be played on another medium. This may seem complicated, but this is one of the most common activities present in the gaming world.

The gaming distributor known as Steam has provided a copy of a game already in an intelligible form. With some minor security circumvention techniques, these could be cracked and shared, allowing for much easier infringement of copyright. The unethical culture and attitudes of video game consumers exasperate this problem. The unethical behaviour was confirmed in a study

⁸⁸ Eberson op cit note 85 at 110-5.

⁸⁹ T Montong “‘God-mode’ Your IP Exploring intellectual property protection options for the gaming industry’ (2019) Available at <https://www.mondaq.com/southafrica/patent/865340/god-mode-your-ip-exploring-intellectual-property-protection-options-for-the-gaming-industry>, accessed on 13 August 2022.

⁹⁰ Montong op cit note 89.

⁹¹ Dentons op cit note 1.

conducted by the University of Cape Town, which found that 70% of gamers involved in their study had knowingly shared illegal content.⁹² The additional problem is that the illegal file sharing does not necessarily financially impact producers sufficiently enough to warrant the initiation of civil proceedings as such, copyright infringements continue without consequences for these individuals.⁹³

The supplier of digital goods seems to bear no liabilities for their failure to implement safeguards protecting against copyright infringements. As a result, the liability falls solely on the individual who accessed the work, with additional penalties for sharing the said work.⁹⁴ The lack of accountability placed on the sellers of digital goods leaves room for the SA legislature to develop further copyright protection. Which would finally address the lack of regulation in the video game industry and provide much needed guidance to those operating commercially in this industry.

c) Enforcement of copyrights

Once it has been proven that there is a copyright infringement, specifically concerning the digital space, there are three methods through which one could vindicate their copyrights, namely a take-down notice, Anton Pillar Order and an interdict.⁹⁵ A take down notice is brought to the attention of an Internet Service Provider (ISP) by a party who has identified the infringing content and then the ISP in terms of section 77 of the ECTA must either take down the content or provide reasons why they will not.⁹⁶ An Anton Pillar Order essentially allows for authorities, either SAPS or sheriffs, to go into a location and collect all the infringing material and destroy or preserve it as

⁹² N Hall 'Beware: personal copies of games can get you sued' (2012) Available at <https://mygaming.co.za/news/features/41208-beware-personal-copies-of-games-can-get-you-sued>, accessed on 13 August 2022.

⁹³ Primarily due to the fact that one individual share a game with two others and those two shares with another two each thus each individual's infringement only constitutes minor economic damage while the group as a whole creates a major impact. A Malczyk 'Games, Copyright, piracy: SA gamers' perspectives.' (2010) Available at <https://open.uct.ac.za/handle/11427/14315?show=full>, accessed on 13 August 2022.

⁹⁴ Hall op cit note 92.

⁹⁵ Papadopoulos & Siswe Snail (eds) *Cyber Law @ SA: The Law of the Internet in SA* (2020) at 181-203.

⁹⁶ Supra note 50.

evidence before the infringer can amend it.⁹⁷ Finally, an interdict forces the offending party to stop the current showing of the good and/or prevent them from showing the digital good in future under the threat of criminal sanctions. Additionally, multiple copyright infringements, especially prior ones, may open separate criminal liability.⁹⁸

d) Regulation on the sale of digital goods

Now that the basic framework for the protection applied to digital goods has been discussed, it is useful to analyse the regulations relating to the 'sale' of digital goods. The primary difference between the sale of physical goods and digital goods is that the sale does not constitute a transfer of ownership but rather a licensing agreement to use the good. Thus, allowing for Steam, Netflix, Disney+ and Spotify (film, games and music) to all fall under the same regulations, as licensing agreements. While film and streaming services are generally homogeneous as they relate to one's subscriptions, granting access to all of the media on their platform. The games industry differs slightly; for example, publishers like Steam allow a game to be downloaded through a license code provided to activate a specific product. The difference between the subscription and license agreement is that once one stops paying for the subscription, access to the content ends.

In contrast, a direct license agreement, such as Steam, allows one access to that good for as long as you have access to the account which holds the license. However, if you should violate Steam's license agreement, where it is found that the user attempted to circumvent security measures, this user may have all access removed. These actions reaffirm the licensing concept as opposed to true ownership.⁹⁹ When considering what protection should be applied within the SA context, we first need to know what constitutes a good in terms of the Consumer Protection Act (CPA). Under section 1(C) of the CPA, a good is 'any literature, music, photograph, motion picture, game, information, data, software, code or other intangible product written or encoded on any

⁹⁷ Papadopoulos & Siswe Snail op cit note 95 at 225.

⁹⁸ Ibid at 223.

⁹⁹ Malczyk op cit note 93 at 99-105.

medium or a license to use any such intangible product.¹⁰⁰ This definition suggests that all goods mentioned within this research fall directly under the CPA and shall be afforded the same protections thus, the CPA would govern the sale of digital goods and licensing agreements.

The concept of an End User License Agreement (EULA) is a contract similar to that of a clickwrap agreement¹⁰¹ in which a supplier provides a limited license for the use and enjoyment of digital goods. These licenses generally impose a limitation on the consumer regarding the reproduction and sharing of the digital good, providing a similar form of protection to the supplier as under the concept of copyright.¹⁰² This means that when entering into a licensing agreement, the provisions of the CPA must apply with a specific focus on the principles of plain language and fair terms. In addition to the CPA's provisions being bound to the original seller, they will also be binding on third party sellers and intermediaries that facilitate the allocations of these licenses.¹⁰³ This shows that intermediaries such as Steam, which provide facilities for the transferal of activations codes for licenses, and Netflix, which allows access to materials they, themselves, have licensed, will fall under the protection of the CPA. Further, when conducting a licensing agreement with these suppliers, as a supplier, listing their game on Steam or providing access to Netflix, the only form of protection afforded to the creator or supplier of the good is the EULA.

The enforceability of these contracts then comes into dispute, as section 5 of the CPA has been drafted in such a manner that the Act in question would apply to each transaction that occurs within SA.¹⁰⁴ Furthermore, this protection cannot be waived if it relates to any direct supply or promotion of any digital goods happening within SA.¹⁰⁵ Finally, the law that applies to the rest of

¹⁰⁰ The Consumer Protection Act 68 of 2008.

¹⁰¹ In its most basic terms, a Click wrap agreement is an agreement in which the terms and conditions are placed away from the product on a different page, this agreement will pop up when the transaction is about to be completed and will inform the customer of what terms and conditions are applicable as well as where to find the contract. T Pistorius 'Click-Wrap and Web-Wrap Agreements' (2004) 16 *SA Mercantile Law* 4 at 569-70.

¹⁰² Moosa op cit note 51 at 15-7.

¹⁰³ G Klopper *An analysis of licensing Agreements in retail computer programs and the effect of the Consumer Protection act* (Unpublished LLM thesis, university of Pretoria, 2015) at 15-7.

¹⁰⁴ Supra note 100 s 51.

¹⁰⁵ Supra note 100 s 51.

the contract must be determined by the regular rules of international law and the respective countries' contract law. This must include the relevant protections from the CPA, unless other legislation would provide greater protection for the consumer.¹⁰⁶ Thus, there is a clear form of protection for the SA consumer when contracting online.

How the CPA relates to the concept of an NFT remains unclear, as the SA legislature is still unable to regulate the idea of a Bitcoin. As a result, there can be no clear protection provided to an NFT creation from the same bit string technology, the only possible protection that could apply would align with the regulation of a normal contract of sale.¹⁰⁷ The following is an investigation into international law applied against the backdrop of digital goods.

III FOREIGN LAW

SA has only taken the steps to translate pre-existing laws to the online sphere with no regard to some of the specific legal challenges that arise with these technologies. The following will investigate the laws within the USA and the EU to determine how they deal with the regulation of digital goods and their industries.

A) *United States of America*

One specific legislative problem already identified in the American legislature is Netflix's creation and publications of stories collected from criminals. 'The Son of Sam laws' aim to prevent and protect victims from continuously reliving their experiences and having the perpetrators financially rewarded for sharing the story to film makers and documentarians as well as to prevent wrongdoers from benefitting from their wrongdoings, for example "Inventing Anna". These laws were applied in most States until the case of *Simon & Schuster v Crimes Victims Board*¹⁰⁸ which overruled this law in preference to the first amendment right to freedom of speech.¹⁰⁹ This does not, however,

¹⁰⁶ Klopper op cit note 103 at 55-8.

¹⁰⁷ Papadopoulos & Siswe Snail op cit note 95 at 67-9.

¹⁰⁸ *Simon and Schuster v. Members of the New York State Crime Victims Board* (1991) 502 U.S. 105.

¹⁰⁹ J Burnsworth 'Making a constitutional "Son of Sam" law: Netflix's Booming True Crime Business' (2022) 49 *Hastings Constitutional Law Quarterly* 1.

mean that this is not an important legal consideration when it comes to moral and ethical streaming and content production. America places great value on freedom of speech however, this does not mean that a country like SA, which favours dignity, would not be able to pass such laws.

The most severe issue in the US is that of password sharing. One of the main shortfalls of the CA in SA is the lack of protection against sharing for non-commercial purposes, like lending a copy or granting access to your Netflix account. The American courts have been unwilling to declare that password sharing constitutes circumvention of the Digital Millennium Copyrights Act (DMCA) security measures (unlike the UK which is discussed below).¹¹⁰ However, under the Computer Fraud and Abuse Act (CFAA),¹¹¹ the intentional access of a computer without authorisation is a criminal act. Refined in *US v Nosal*,¹¹² where it was held that giving your password to someone who does not have access to the system constitutes a criminal infringement.¹¹³ Thus, providing access becomes a crime; however, transfer of goods by sharing access to an account must still be tested. The principle of 'First sale' where there was a lawful purchase of goods, the purchaser is entitled to sell the good onwards without violating the DMCA, provided that the seller does not retain their access to the material. If access is retained, it would amount to the selling of a reproduction, violating copyright protection.¹¹⁴

Conversely in *Vemor v Autodesk*¹¹⁵ it was held that the sale of software is not protected under the principle of first sale, as the purchasing of a license does not allow for the transfer of ownership but only access to a license.¹¹⁶ I agree with the dissenting judgment handed down by Judge Reinhardt's in the *Nosal II case*¹¹⁷ in which the court stated that even though licensing should

¹¹⁰ The Digital Millennium Copyright Act of 1998.

¹¹¹ The Computer Fraud and Abuse Act of 1986.

¹¹² *United States v. Nosal*, 676 F.3d 854 (9th Cir. 2012).

¹¹³ J Mixon 'Netflix and Not-so-chill: The legality of sharing passwords for Netflix & Other Streaming Services' (2021) 101 *Journal of Patent and Trademark Office Society* 3 at 339-49.

¹¹⁴ R Moosa op cit note 51 at 24-33.

¹¹⁵ *Vemor v. Autodesk, Inc.*, 621 E3d 1102, 1116 (9th Cir. 2010).

¹¹⁶ *Ibid.*

¹¹⁷ *Nosal* Supra note 112.

not constitute a transfer of ownership, the accounts used to control access should be considered, at the minimum, a limited property right.¹¹⁸ While the dissenting judgment in *Nosal II* does not apply to the concept of streaming services, it is already in effect on a platform like Steam. Where one person has an account with various activated licenses that can only be used by them. Should the licence holders choose to sell their account with the licenses inside, they would be prevented from accessing the licenses under the control of the new account holder. This suggests that the doctrine of first sale finds some application where digital goods are concerned. The sharing of passwords on Netflix or Spotify accounts could be illegal under EULA however it has not been legally tested, and the Cyber Fraud and Abuses Act. SA, in comparison, has no such provisions, allowing for the sharing of these goods to remain unregulated.

Moving to more specialised regulations. The case of *Ster Electronics v Kaufman*,¹¹⁹ where the court classified a video game as a computer programme when displayed on a television, controlled by the player. This approach is preferred as it allows for variations of the game to be protected as the outcomes change with each play.¹²⁰ The American courts have also provided greater clarity on the elements of a copyrightable game, these include physical features like shapes and sounds but also apply to the game's abstract concepts, such as their purpose. This approach is similar to how the rules of board games work. If these two elements were proven to be copied without anything new added to the game, it would constitute a copyright violation. However, this is not to say that once Pac-man was made, no other maze game could ever be created.¹²¹ This has allowed for the development of game classifications like "a maze game" or various other categories of games with non-copyrightable elements, such as fighting games and battle royals. In addition to this, using characters or creating different versions of games are also not protected by a copyright and are more akin to sequels of movies, with each one receiving its own protection.¹²²

¹¹⁸J Mixon op cit note 113 at 348.

¹¹⁹ *Stern Electronics, Inc. v. Kaufman*, 669 F.2d 852 (2d Cir. 1982) (U.S.).

¹²⁰ *Ibid.*

¹²¹ *Atari, Inc. v. North American Philips Consumer Electronics Corp.*, 672 F.2d607 (7th Cir. 1982) (U.S.).

¹²² I C Caguio 'Recent Copyright Issues in Video games, E-sports and Streaming' (2019) 63 *Ateneo Journal of law* 3 at 899-902.

For example, this would be analogous to *Fantastic Beasts*, which exists in the Harry Potter universe but receiving separate protection from Harry Potter copyrights. We now move to the actual enforcement of copyright in the American context, the most important aspect is the EULA. The American system recognises two types of EULAs, one that prohibits streaming their content and those that allow it within specific terms. The allowance of digital content streaming is governed by the DMCA, and any content produced in violation of the EULA's will be taken down.¹²³

It is important to note that while the USA might have taken significant steps to regulate the digital goods industry, it is still not sufficient to prevent the oncoming monopolies of digital streaming. The Justice Department of America has allowed this monopoly to be built faster through the repeal of the Paramount decrees,¹²⁴ which were agreements limiting movie producers' abilities to select which theatres could showcase their movies through Block booking. These decrees were created in the 1950s to allow independent movie houses and movie producers to survive the expanding movie market. In 2017, the repeal of these decrees allowed Disney and Netflix to set their own rules on what, where and how long something must be shown, they could do this due to their monopoly of digital licenses in the market. Disney Corporation has allowed its content to be shown in theatres. Their content must be shown for five weeks or more in their largest auditorium and Disney receives 65% of the revenue generated in every theatre,¹²⁵ this was significantly higher than the normal amount.¹²⁶ This demonstrates that companies like Disney have grown their share and control.¹²⁷

¹²³ Ibid.

¹²⁴ *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

¹²⁵ D Oler 'Netflix, Disney+, & a Decision of paramount importance' (2020) 20 *University of Illinois Journal of Law, Technology & Policy* 2 at 496-503.

¹²⁶ Ibid.

¹²⁷ Ibid.

B) European Union

The primary legislation that protects copyright throughout the EU is the EU Copyright Directive (the Directive),¹²⁸ whose primary objective is to protect the sanctity of copyright against new and emerging forms of infringement. Subsequently, it lays substantial groundwork for the regulation of lawful uses of copyrights. While the Directive manages to amend and adapt copyright law into the online sphere, one clause stands out and separates this law from many others. Article 17 of the Directive states that a content sharing platform will be held liable for copyright infringements that occur through their website or application and may need to ensure no future upload ever occurs.¹²⁹ This would provide adequate protection and enforcement of copyright protections for sites like Spotify, Netflix and Steam.

Further, Steam and Spotify, which license their goods from small to large publishers, would need to take additional steps to ensure that no licenced digital goods within their collection contain infringing material, even though the Directive states that there is no general monitoring obligation. Consistent monitoring of uploads will have to be done to ensure, these content-based sharing services, follow the regulations of the Directive. Should a company fail to comply it would result in major fines against the company.¹³⁰ This is problematic and has a chilling effect on the content available to users and could potentially constitute a form of censorship in favour of copyright.¹³¹ The EU legislative framework makes third party sites, who were not directly involved with the uploading of the infringing content liable. In the *Delfi* case,¹³² it was confirmed by the European Court on Human Rights that publishers are liable for any comments or other information posted

¹²⁸ Directive (EU) 2019/790 Of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

¹²⁹ I C Caguio op cit note 122 at 912-5.

¹³⁰ R Bateman 'Complying with Article 17 of the EU copyright Directive' (2022) Available at <https://www.termsfeed.com/blog/eu-copyright-directive-article-17/>, accessed on 16 August 2022.

¹³¹ M Reynolds 'What is article 13? The EU's Divisive new copyright plan explained'(2019) Available at <https://www.wired.co.uk/article/what-is-article-13-article-11-european-directive-on-copyright-explained-meme-ban#:~:text=The%20Directive%20on%20Copyright%20and,but%20more%20on%20that%20later>, accessed on 16 August 2022.

¹³² *Delfi AS v. Estonia*, app. no. 64569/09, CE: ECHR:2015:0616J1UD006456909.

on their site, creating liability for the site owner.¹³³ This also compels all companies to monitor what is uploaded on their site, or risk being held liable for the infringements.¹³⁴ These two provisions read together shift the onus of surveillance and enforcement of copyrights to the websites, which facilitate access. Arguably, this could have potentially hazardous effects on user generated content. However, the increase on protection that might occur as a direct result of this change could be worthwhile. Balancing each of the parties' rights is of utmost importance, to ensure a fair outcome for all involved. This is the most effective method of holding the digital goods industry accountable for infringements and may have a significant preventative effect on the violations of copyrights in the future. A separate directive, the Digital Content Directive (DCD),¹³⁵ was created to deal directly with EULA's and other digital content sharing mechanisms. One such form of protection offered by the DCD is that EULA's will not be binding on the consumer when the agreement involves terms which are not reasonable or generally expected in relation to that specific good, this falls in line with the conformity test under Article 7.¹³⁶ Another more specialised protection is the allowance for the amendment of open-sourced material to be adapted and enhanced without inspiring copyright infringement, provided the amender releases it for free.¹³⁷ Allowing for the action of 'modding' games (amending source code to create something new or to amend pre-existing attributes), which has become a significant aspect of the gaming industry worldwide. Further, Article 7 of the DCD is similar to the concept of fair dealing under the South African CPA and provides much greater consumer protection.

A further consideration comes from the English perspective which does not fall under the EU legislation but is similar in certain regards. In terms of password sharing the IP office has

¹³³ Ibid.

¹³⁴ M Griffith 'Downgraded to Netflix and chill: Freedom of expression and the chilling effect on User-generated content in Europe' (2016) 22 *Columbia Journal of European law* 2 at 355-368.

¹³⁵ Directive (EU) 2019/770 Of the European Parliament and Of the Council Of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services.

¹³⁶ Ibid.

¹³⁷ G Spindler 'Digital content directive and copyright -related aspects' (2021) 21 *Journal of Copyright related aspects* 2 at 110-20.

declared that the act of password sharing does in fact constitute a violation of copyright law.¹³⁸ Should a company choose to prosecute they would be able to under both criminal sanction and in terms of breaching of contracts namely the EULA's. However, it is still not clear what the outcome of such a case would be.¹³⁹

Within the EU, certain steps have been taken to try and help regulate the digital goods industries by shifting the onus onto intermediaries making the copyright licenses available. However, it could be argued that despite the EU's specialised legislation, there is insufficient protection provided in these industries, neither for the consumer nor the producers who contract through these companies. The lessons which SA can learn from these foreign jurisdictions will be discussed below.

IV DISCUSSION AND CONCLUSION

Three forms of possible regulation emerge for how to deal with this translation of law. The SA cyber legislation merely translates existing laws from the physical into the virtual space. Conversely, the USA legal system takes the route of drafting new legislation for each type of digital good and the legal issues which arise from it. The EU, however, drafted new legislation with a wide scope in which they sought to address all issues that could arise from new technologies. The SA approach is outdated, and some new legislation is necessary to address these new digital goods and individual issues as they arise. Alternatively, they could draft new legislation to protect an array of possible future digital goods. I would suggest, however, that SA use a combination of the two approaches to provide the most comprehensive and well-rounded protection possible.

The next legislative problem that arises is that of regulatory problems within the FPAA. While there appears to be no direct answer to the strictness of the classifications, it may be useful to look at the EU for guidance on how access to age restricted material is regulated. The strike

¹³⁸ T Gerken 'Netflix password sharing may be illegal, says UK government' (2022) Available at [Netflix password sharing may be illegal, says UK government - BBC News](#), accessed 9 January 2023.

¹³⁹ Ibid.

system, which is implemented by YouTube and other websites, is a direct response to Article 17 in which publishers must ensure infringing material is not shown on their site. In the SA context, making website publishers responsible for the material on their sites could reduce the administrative burden on the FPB and other copyright holders,¹⁴⁰ by having the websites enforce both copyrights and classification. This reduces the burden on enforcement mechanisms, allowing the FPB to spend more time on classification. Creating the space for easier methods of publication in SA, which is likely to result in more SA publishers working through the FPAA instead of foreign forms of publication.

The final issue is unanswered by all jurisdictions: what prevents companies from purchasing an IP right and deciding it shall never be accessed by the public again? In SA, DSTV has full control of all sporting channels; they charge exorbitant prices to watch sport while preventing other services from providing access.¹⁴¹ This is even the case in the USA where through the Paramount decrees, Disney and other media streaming houses may exploit their IP and set unfair pricing on the distribution of their IP. These companies are already acting with impunity in terms of censorship. The children's program 'Bluey' has already had some episodes removed with no justification from the streaming services.¹⁴²

I believe that SA can regulate the digital goods market by introducing new laws and refining current regulations. Namely by incorporating the American laws relating to the criminalisation of granting of access to systems under the CFAA, incorporating the doctrine of first sale and applying it to virtual goods and finally to address the shortcoming of regulation of video games. Through refining the video game industry, copyright protection can be brought in line with the American protection, which provides significant guidance and protection to game makers. The

¹⁴⁰ As discussed under the European Union section above.

¹⁴¹ DNA Economics 'The impact of Netflix on Multichoice and the SA TV market' (2016) Available at http://www.dnaeconomics.com/pages/competition_blog/?zDispID=NewsArtThe_impact_of_Netflix_on_MultiChoice_and_the_South_African_TV_market, accessed on 24 August 2022.

¹⁴² S Olsen 'Disney Plus to 're-evaluate' censoring of Bluey episode focused on farting' (2022) Available at <https://www.avclub.com/disney-plus-reevaluate-banned-bluey-episode-farting-1849451603>, accessed on 3 November 2022.

lessons that I believe should be incorporated in SA from the EU relate to DCD's principle on third party liability and holding the organisations granting access to copyright infringement materials accountable and regulating streamers through the strike system as opposed to the overzealous FPAA. However, there is still a great looming threat regarding the access of digital media in all jurisdictions. The legislature must take notice of the possibility that companies such as Steam, Netflix and Disney may, at some point, decide to restrict all content relating to specific ideas, as there is no legislation to restrict such removal of content. These companies can ultimately shift the perspectives of society by only allowing content which agrees with the companies' objectives to be published and consumed by the populations of SA.

REFERENCE LIST:

Books

- Papadopoulos & Siswe Snail (eds) *Cyber Law @ SA: The Law of the Internet in SA* (2020).

Case law

- *Golden China TV Game Centre and Others v Nintendo Co Ltd.* 1997 (1) SA 405 (SCA).
- *Print Media SA and Another v Minister of Home Affairs and Another* 2012 (6) SA 443 (CC).

Domestic Legislation

- Copyright Amendment bill 2017 B13B ISBN 978-1-4850-0545-2.
- Electronic Communications and Transactions Act 25 of 2002.
- The Consumer Protection Act, 68 of 2008.
- The Copyright Act 98 of 1978 Preamble.
- The Copyright Amendment act, 125 of 1992.
- The Cybercrimes Act 19 of 2020.
- The Films and Publication Act 65 of 1996.
- The Films and Publication Amendment Act 11 of 2019.

Foreign case law

- *Atari, Inc. v. North American Philips Consumer Electronics Corp.*, 672 F.2d 607 (7th Cir. 1982) (US).
- *Delfi AS v. Estonia*, app. no. 64569/09, CE: ECHR:2015:0616J1UD006456909.
- *Simon and Schuster v. Members of the New York State Crime Victims Board*, (1991), 502USA105
- *Stern Electronics, Inc. v. Kaufman*, 669 F.2d 852 (2d Cir. 1982) (US).
- *United States v. Nosal*, 676 F.3d 854 (9th Cir. 2012)
- *United States v. Paramount Pictures, Inc.*, 334USA131 (1948).
- *Vemor v. Autodesk, Inc.*, 621 E3d 1102, 1116 (9th Cir. 2010).

Foreign legislation

- Directive (EU) 2019/770 Of the European Parliament and Of the Council Of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services.
- Directive (EU) 2019/790 Of the European Parliament and Of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.
- The Computer Fraud and Abuse Act of 1986.
- The Digital Millennium Copyright Act of 1998.

Government gazette

- Classification guidelines for the classification of films, interactive computer games and certain publications in GN 539 GG 42380 of 5 April 2019.

Internet sources

- A Malczyk 'Games, Copyright, piracy: SA gamers' perspectives.' (2010) Available at <https://open.uct.ac.za/handle/11427/14315?show=full>.
- A Shumba 'SAMPRA to take legal action against SABC over unpaid Royalties' (2021) Available at <https://www.musicinafrica.net/magazine/sampra-take-legal-action-against-sabc-over-unpaid-royalties>.
- Baker McKenzie 'SA: significant implications for online gaming companies in the draft Films and Publications Amendment Regulations' (2020) Available at <https://www.lexology.com/library/detail.aspx?g=d276a252-1fe9-458e-a8eb-6ecfb77f26c>.
- Critical Lawsuit with Nick and Kevin 'Why classify' (2018) Available at <https://soundcloud.com/nicholas-hall-707780259/critical-lawsuit-0004> From 20:00-42:00.
- Dentons 'The gaming Industry in SA.' (2018) Available at https://www.dentons.com/en/insights/newsletters/2018/january/30/south-africa-newsletter/south-africa-newsletter-january-edition/the-gaming-industry-in-southafrica?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration.
- DNA Economics 'The impact of Netflix on Multichoice and the SA TV market' (2016) Available at http://www.dnaeconomics.com/pages/competition_blog/?zDispID=NewsArtThe_impact_of_Netflix_on_MultiChoice_and_the_South_African_TV_market.
- F Mackinnon 'An overview of music copyrights in SA.' (2022) Available at <https://www.musicinafrica.net/magazine/overview-music-copyrights-south-africa>.
- Film and Publication board 'FPB' Available at <https://nationalgovernment.co.za/units/view/97/film-and-publication-board-fpb>.
- Films and Publication Board' Classifications guidelines' Available at <https://www.fpb.org.za/classification/>.
- G Bene 'New nice classification: Trademarks related to virtual goods in the metaverse and NFT finally protected.' (2023) Available at https://www.lexology.com/library/detail.aspx?g=2db7797f-df39-4a24-bc00-ce3f447954c1&utm_source=Lexology+Daily+Newsfeed&utm_medium=HTML+email&utm_campaign=Lexology+subscriber+daily+feed&utm_content=Lexology+Daily+Newsfeed+2023-01-16&utm_term=.
- G Chinlund & K Gordon 'What are the copyright implications of NFTs?' (2021) Available at <https://www.reuters.com/legal/transactional/what-are-copyright-implications-nfts-2021-10-29/>.

- M Reynolds 'What is article 13? The EU.'s Divisive new copyright plan explained' (2019) Available at <https://www.wired.co.uk/article/what-is-article-13-article-11-european-directive-on-copyright-explained-meme-ban#:~:text=The%20Directive%20on%20Copyright%20and,but%20more%20on%20that%20later.>
- Michalson's 'Films and Publication bill-internet censorship' (2018) Available at <https://www.michalsons.com/blog/film-and-publications-bill/33423.>
- Michalson's 'Mr. President, please font sign the Film and Publications Amendment Bill' (2019) Available at <https://www.michalsons.com/blog/mr-president-please-dont-sign/37894.>
- N Hall 'Beware: personal copies of games can get you sued' (2012) Available at <https://mygaming.co.za/news/features/41208-beware-personal-copies-of-games-can-get-you-sued.>
- Netflix 'Sharing your Netflix account' Available at <https://help.netflix.com/en/node/123277.>
- News24 'SA. gaming industry' suffering under regulation' (2016) Available at <https://www.news24.com/fin24/sa-gaming-industry-suffering-under-regulation-20160516.>
- O Dean 'Case comment SA: video- video games constitute cinematographic films' (1997) Available at <https://blogs.sun.ac.za/iplaw/files/2012/08/Case-Comment-South-Africa-Video-Video-games-constitute-cinematographic-films-Golden-china-TV-Game-Centre-v-Nintendo-Co.pdf.>
- P Radulovic 'Netflix's interactive specials ranked by how much your choices matter' (2022) Available at <https://www.polygon.com/22286070/netflix-interactive-shows-movies-ranked.>
- R Bateman 'Complying with Article 17 of the EU copyright Directive' (2022) Available at <https://www.termsfeed.com/blog/eu-copyright-directive-article-17/.>
- R Morin 'Inside the Artificial Universe That Creates Itself' (2016) Available at <https://www.theatlantic.com/technology/archive/2016/02/artificial-universe-no-mans-sky/463308/.>
- S Olsen 'Disney Plus to 're-evaluate' censoring of Bluey episode focused on farting' (2022) Available at <https://www.avclub.com/disney-plus-reevaluate-banned-bluey-episode-farting-1849451603.>
- SAMRO 'Understanding music Publishing' (2015) Available at <https://www.samro.org.za/newsletter/content/understanding-music-publishing-jonathan-shaw.>
- T Gerken 'Netflix password sharing may be illegal, says UK government' (2022) Available at [Netflix password sharing may be illegal, says UK government - BBC News.](https://www.bbc.com/news/technology-61484441)
- T Montong "God-mode" Your IP Exploring intellectual property protection options for the gaming industry' (2019) Available at <https://www.mondaq.com/southafrica/patent/865340/god-mode-your-ip-exploring-intellectual-property-protection-options-for-the-gaming-industry.>

Journal articles

- D Oler 'Netflix, Disney+, & a Decision of paramount importance' (2020) 2020 *University of Illinois Journal of Law, Technology & Policy* 2.
- D Quah 'Digital goods and the new economy' (2002) *CEP discussion paper* 563.
- G Eberson 'Protecting copyright in Computer games and Computer software' (2005) 2005 *Journal of SA law* 106.
- G Jansen 'Copyright owners, performers and streaming: A SA perspective on addressing the value gap' (2022) 2022 *The Journal of SA law* 3.
- G Spindler 'Digital content directive and copyright -related aspects' (2021) 2021 *Journal of Copyright related aspects* 2.
- I C Caguio 'Recent Copyright Issues in Video games, E-sports and Streaming' (2019) 63 *Ateneo Journal of law* 3.
- J Burnsworth 'Making a constitutional' Son of Sam' law: Netflix's Booming True Crime Business' (2022) 49 *Hastings Constitutional Law Quarterly* 1.
- J Mixon 'Netflix and Not-so-chill: The legality of sharing passwords for Netflix & Other Streaming Services' (2021) 101 *Journal of Patent and Trademark Office Society* 3.
- J.P Belle, B Macdonald, and D Wilson 'Determinants of Digital Piracy among Youth in SA' (2007) 7 *Communications of the IIMA* 3 Available at: <https://scholarworks.lib.csusb.edu/ciima/vol7/iss3/5>
- M Griffith 'Downgraded to Netflix and chill: Freedom of expression and the chilling effect on User-generated content in Europe' (2016) 22 *Columbia Journal of European law* 2.
- M Liang 'Copyright issues related to reproduction rights arising from streaming' (2020) 23 *The Journal of world intellectual property*.
- M Njotini 'Exposing the ICT Regulatory Dilemma: The Test for Governments' (2020) 41 *Obiter* 328.
- T Pistorius 'Click-Wrap and Web-Wrap Agreements,' (2004) 16 *SA Mercantile Law* 4.
- T Pistorius, and O.S Mwim 'The Impact of Digital copyright law and Policy on access to knowledge and learning' (2019) 10 *Reading & Writing-Journal of the Reading Association of South Africa*, 1
- Y Nagpal 'Non-Fungible Tokens (NFT'S): The Future of Digital collectables' (2021) 4 *International Journal of law Management & Humanities* 5.

Thesis

- G Klopper *An analysis of licensing Agreements in retail computer programs and the effect of the Consumer Protection act* (Unpublished LLM thesis, university of Pretoria, 2015).
- R Moosa *Copyright and property in the Digital Era: Achieving Functional Equivalence between Digital property and Physical Property* (unpublished LLM thesis, University of Pretoria, 2015).