CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 306/24

In the *ex parte* application of:

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA Applicant

In re:

CONSTITUTIONALITY OF THE COPYRIGHT AMENDMENT BILL AND THE PERFORMERS' PROTECTION AMENDMENT BILL

together with

SPEAKER OF THE NATIONAL ASSEMBLY First Interested Party

CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES Second Interested Party

DEMOCRATIC ALLIANCE Third Interested Party

FREEDOM FRONT PLUS Fourth Interested Party

BLIND SA Fifth Interested Party

and

NATIONAL ASSOCIATION OF BROADCASTERS First Amicus Curiae

COPYRIGHT COALITION OF SOUTH AFRICA Second Amicus Curiae

RECREATE ACTION Third Amicus Curiae

JONATHAN SHAPIRO Fourth Amicus Curiae

CENTRE FOR CHILD LAW AND ANOTHER Fifth Amicus Curiae

RECORDING INDUSTRY OF SOUTH AFRICA Sixth Amicus Curiae

COMPOSERS, AUTHORS AND PUBLISHERS ASSOCIATION AND OTHERS Seventh Amicus Curiae

SOUTH AFRICAN NATIONAL EDITORS FORUM AND CAMPAIGN FOR FREE EXPRESSION Eighth Amicus Curiae

Neutral citation: *Ex parte President of the Republic of South Africa: In re Constitutionality of the Copyright Amendment Bill and the Performers' Protection Amendment Bill* [2026] ZACC 26

Coram: Madlanga ADCJ, Dambuza J, Goosen AJ, Kollapen J, Majiedt J, Mhlantla J, Opperman AJ, Rogers J and Tshiqi J

Judgments: Mhlantla J (majority): [1] to [209]
Majiedt J (dissenting): [210] to [317]

Heard on: 21 and 22 May 2025

Decided on: 26 June 2026

Summary: Section 79(4)(b) of the Constitution — competence of referral — scope of referral — referral incompetent as to sections 6A, 7A and 8A

Copyright Act 98 of 1978 — Performers' Protection Act 11 of 1967 — constitutionality of sections 6A, 7A, 8A, 12A-12D, 19B and 19C under the Copyright Amendment Bill, 2017 and parallel sections under the Performers' Protection Amendment Bill, 2017 — sections 12A-12C, 12D(6)-(9), 19B and 19C constitutional — section 12D(1)-(5) unconstitutional

Section 25(1) of the Constitution — arbitrary deprivation of property — copyright exceptions — fair use — Berne Convention for the Protection of Literary and Artistic Works

---

ORDER

On referral from the President of the Republic of South Africa in terms of sections 79(4)(b) and 84(2)(c) of the Constitution:

1. The referral by the President in terms of section 79 of the Constitution in respect of sections 6A, 7A and 8A of the Copyright Amendment Bill, 2017 (CAB) as a whole is incompetent.
2. The fair use exception in section 12A of the CAB is not arbitrary and does not infringe the right to property under section 25(1) of the Constitution and is constitutional within the scope of the President's referral.
3. The exceptions in sections 12B and 12C of the CAB are not arbitrary, do not infringe the right to property under section 25(1) of the Constitution and are constitutional within the scope of the President's referral.
4. The exceptions in subsections 12D(1)-(5) of the CAB constitute an arbitrary deprivation of property under section 25(1) of the Constitution and are unconstitutional.
5. The exceptions in subsections 12D(6)-(9) of the CAB are not arbitrary, do not infringe the right to property under section 25(1) of the Constitution and are constitutional within the scope of the President's referral.
6. Section 19B of the CAB is not arbitrary, does not infringe the right to property under section 25(1) of the Constitution and is constitutional within the scope of the President's referral.
7. Section 19C of the CAB is not vague and does not constitute an arbitrary deprivation of property under section 25(1) of the Constitution.
8. The orders in paragraphs 1-7 in relation to the CAB also apply to the relevant sections of the Performers' Protection Amendment Bill, 2017.

JUDGMENT

MHLANTLA J (Madlanga ADCJ, Dambuza J, Goosen AJ, Kollapen J, Opperman AJ, Rogers J and Tshiqi J concurring):

Introduction

[1] On 10 October 2024, the President of the Republic of South Africa launched an application on an ex parte (without notice to other parties) basis in terms of sections 79(4)[1] and 84(2)(c)[2] of the Constitution. The application concerns proposed amendments to the Copyright Act[3] (Act) and the Performers' Protection Act,[4] and in particular, whether certain sections in the Copyright Amendment Bill (CAB) and the Performers' Protection Amendment Bill (PPAB) are constitutional.

Background

[2] The CAB and PPAB were published for public comment on 27 July 2015. The CAB and PPAB create a new copyright legislative framework in South Africa. The purpose of the CAB is, among others, to "allow for further limitations and exceptions regarding the reproduction of copyright works" and to "provide for access to copyright works by persons with disabilities". Similarly, the PPAB seeks to broaden the restrictions on the use of performances. I will refer to the CAB and PPAB collectively as the Bills. The Bills were introduced in the National Assembly on 16 May 2017 and passed by Parliament in March 2019. The Bills were then referred to the President for assent. After considering the Bills, the President had reservations about their

[1] Section 79(4) of the Constitution provides:

> "If, after reconsideration, a Bill fully accommodates the President's reservations, the President must assent to and sign the Bill; if not, the President must either—
>
> (a) assent to and sign the Bill; or
>
> (b) refer it to the Constitutional Court for a decision on its constitutionality."

[2] Section 84(2)(c) of the Constitution reads:

> "The President is responsible for—
>
> (c) referring a Bill to the Constitutional Court for a decision on the Bill's constitutionality".

[3] 98 of 1978.

[4] 11 of 1967.

constitutionality and, in June 2020, he referred the Bills back to Parliament for reconsideration in terms of section 79(1) of the Constitution.

[3] The President had two procedural reservations: the correct tagging of the Bills and the public participation process. The referral letter to Parliament stated that the reservations concerning sections 6A(7), 7A(7) and 8A(5) of the CAB[5] were that they may constitute arbitrary and retrospective deprivation of property in that, in the future, copyright owners would be entitled to a lesser share of the fruits of their property than before. The letter continued to express reservations about the amendments to section 12A on fair use, claiming that such amendments were not put out for public comment. Additionally, the President raised his concerns about the delegation of legislative power to the Minister of Trade and Industry (Minister). The letter asserted that sections 6A(7)(b), 7A(7)(b) and 8A(5)(b) unconstitutionally conferred substantial discretionary legislative powers to the Minister. The letter continued with reservations in respect of sections 12A-D, 19B and 19C, based on concerns that they constitute an arbitrary deprivation of property and risk violating the right to freedom of trade, occupation and profession.

[4] The letter concluded with reservations claiming that the Bill may contravene multiple international treaties to which South Africa is a party. These treaties included the World Intellectual Property Organization's WIPO Copyright Treaty (WCT), the WIPO Performance and Phonograms Treaty (WPPT), the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Disabled (Marrakesh Treaty). Further, the letter raised that the impact of these provisions reaches far beyond the authors they seek to protect.

[5] For convenience, I refer to these as sections of the CAB. In fact, they are provisions which the CAB proposes to insert as new sections of the Copyright Act.

[5] Parliament addressed some of these reservations by amending or deleting the sections in question, in the belief that it was accommodating the objections raised regarding the constitutionality of these provisions.

[6] On 21 September 2022, this Court, in *Blind SA I*,[6] declared sections 6 and 7 (read with section 23) of the Act constitutionally invalid on the basis that these provisions violated the rights of persons with visual and print disabilities under sections 9(3), 10, 16(1)(b), 29(1) and 30 of the Constitution by requiring the consent of copyright owners to convert works into accessible formats. This Court suspended the declaration of invalidity for 24 months to allow Parliament to address the defect and formulated interim provisions to be read into the Act during the suspension period.

[7] On 29 February 2024, Parliament completed its work and resubmitted the CAB for the President's assent and signature. On 2 March 2024, the CAB and the PPAB were presented to the President for his assent. Although the President was satisfied that the procedural complaints were addressed, he took the view that Parliament had failed to accommodate his substantive reservations.

[8] On 10 October 2024, the President filed the ex parte application in this Court in terms of sections 79(4)(b) and 84(2)(c) of the Constitution for a decision on the constitutionality of sections 6A, 7A, 8A, 12A-D, 19B and 19C of the CAB[7] and related provisions in the PPAB. The President's referral acknowledged that Parliament had addressed some of his concerns in the resubmitted Bills. However, he still had reservations about certain provisions.

[9] The President, in his referral, raised the following issues:

---

[6] *Blind SA v Minister of Trade, Industry and Competition* [2022] ZACC 33; 2022 BIP 518 (CC); 2023 (2) BCLR 117 (CC).

[7] Sections 6A, 7A and 8A are quoted in full at [61]. Section 12A is quoted in full at [78]. Sections 12B and C are quoted in full at [142]. Section 12D is quoted in full at [153]. Section 19B is quoted in full at [184]. Section 19C is quoted in full at [188].

(a) Sections 6A, 7A and 8A raise concerns regarding retrospectivity and therefore may constitute arbitrary deprivations of property under section 25(1) of the Constitution, notwithstanding the deletion of subsections 6A(7), 7A(7) and 8A(5) of the CAB.

(b) Sections 6A, 7A, 8A, 12A-D, 19B and 19C of the CAB—

> "in light of section 25(1) of the Constitution read with the international treaties . . . limit the property rights of copyright owners, which limitations are in breach of section 25(1) of the Constitution as they are contrary to the international treaties."

(c) Further, that "[w]ithout evidence that the new exceptions are necessary to align the Bills with international law, there is insufficient reason for them."

The same is contended with regard to the parallel provisions of the PPAB.

[10] Upon receipt of the referral from the President, this Court issued directions calling upon the Speaker of the National Assembly (Speaker) to file submissions relevant to the determination of the issues raised in the President's referral.[8] The Speaker was also directed to bring these deadlines to the attention of the interested parties, who are all political parties represented in the National Assembly, so that they could file affidavits pertaining to the referral, should they wish to do so. Ultimately,

[8] The Court issued directions on 22 October 2024, directing the Speaker to file all versions of the CAB and the PPAB, all written comments on the two Bills, the minutes of the Portfolio Committee relating to the Bills and all relevant correspondence between the Presidency and Parliament regarding the two Bills. The directions mandated:

> "The submissions shall address . . . [t]he President's submission that subsection 6A(2) of the [CAB] will result in retrospective and arbitrary deprivations of property which is contrary to section 25(1) of the Constitution"

and

> "[t]he submission by the President that sections 6A, 7A, 8A, 12A-D, 19B and 19C of the [CAB] will lead to non-compliance with the [WCT] and the [WPPT]."

the Democratic Alliance (DA), Freedom Front Plus (FF Plus) and Blind SA all filed submissions as interested parties.

[11] Blind SA opposes the President's application and submits that the referral is unlawful. A number of organisations and individuals applied to be admitted as amici curiae (friends of the court). Eventually, eight were admitted: the National Association of Broadcasters (NAB); the Copyright Coalition of South Africa (CCSA); ReCreate Action (ReCreate); Mr Jonathan Shapiro (a cartoonist who publishes under the name Zapiro); the Centre for Child Law (CCL) and the United Nations Educational, Scientific and Cultural Organisation (UNESCO) (collectively CCL for convenience); Recording Industry of South Africa (RISA); Composers, Authors and Publishers Association and others (collectively CAPA for convenience); and the South African Editors' Forum and Campaign for Freedom of Expression (collectively SANEF for convenience).

Issues

[12] The issues for determination are—

(a) condonation for the late filing of the record;

(b) jurisdiction and the competence and scope of the referral;

(c) whether sections 6A, 7A and 8A of the CAB constitute retrospective and arbitrary deprivation of property; and

(d) whether sections 6A, 7A, 8A, 12A-D, 19B and 19C of the CAB limit property rights of copyright owners and, if so, whether the limitations are unconstitutional.

Analysis

Condonation

[13] The President filed condonation applications for the late submission of Parts A and B of the record.[9] He submits that the delay in the filing of Part A was only two

[9] Part A contains the applications and affidavits filed in this Court. Part B contains the material generated during the consideration of the Bills by Parliament.

days, as it was due on 28 February 2025 but was filed on 5 March 2025. The delay in filing Part B was ten days, as it was due on 5 March 2025, but was filed on 19 March 2025. The President explains that the physical printing of the record was outsourced and the service provider was, due to the unforeseen return of load shedding, unable to comply with the extended deadline. He submits that it is unlikely that the other parties suffered any prejudice, as the dates for the hearing had already been moved from 19 and 20 March 2025 to 21 and 22 May 2025.

[14] The application for condonation is unopposed. The delay in filing the record is minimal, the explanation provided for the delay is satisfactory and no prejudice will be caused to any party. Therefore, condonation is granted.

Jurisdiction

[15] In terms of section 84(2)(c) of the Constitution, the President is responsible for referring a Bill to this Court for a decision on its constitutionality. This Court has, in terms of section 167(4)(b) of the Constitution, exclusive jurisdiction to decide on the constitutionality of any parliamentary Bill, provided that the requirements contemplated in terms of section 79 have been met. While this Court has exclusive jurisdiction over this matter, a close examination of the necessary preconditions for a competent referral is required.

Competence and scope of the referral proceedings

[16] The FF Plus and several amici raise issues about the competence and scope of the referral. The FF Plus submits that this Court should, in the interests of justice, consider all potentially unconstitutional provisions and not only those referred by the President. It advocates for a holistic consideration of the Bills to ensure legal certainty and avoid future litigation. Further, it submits that the wording of sections 79(4)(b) and 84(2)(c) of the Constitution is of such a nature that it does not preclude this Court from ruling on the constitutionality of other provisions of the Bills in addition to those referred by the President.

[17] In *Liquor Bill*,[10] this Court dealt with the scope and extent of the referral when a Bill is referred to it. The referral must be preceded by a series of steps that require active participation by the Legislature. The referral to this Court will be competent when the Legislature has failed to consider the specified reservations adequately during the aforementioned steps. This means that the attitude of the Legislature to the President's constitutional concerns is material, since it is only where the President's reservations regarding the constitutionality of the Bill are not addressed or fully accommodated by the Legislature that a referral to this Court can follow.[11]

[18] To understand the scope of a referral, it is important to understand its rationale and the underlying principles at play. The opportunity for Parliament, as a first step, to consider and address the concerns raised by the President is essential. It is founded on the separation of powers doctrine. The President, through his power to assent to the Bill or refer it back to Parliament for consideration, and at a later stage, this Court, essentially performs a safeguarding function. This Court, while approvingly quoting *Liquor Bill*, held as much in *Mpumalanga Petitions Bill*:[12]

> "What is envisaged is consideration by this Court of a Bill that has gone through a number of steps, which include communication by the Premier of his or her reservations to the legislature and its reconsideration of the Bill in the light of those reservations. The Court's function to adjudicate upon the Bill commences only after this political process has been exhausted and it is limited to a consideration of the Premier's reservations together with the responses of the parties represented in the legislature. The role of the legislature would be undermined if the Premier's reservations could be entertained by this Court without having been referred to the legislature for its consideration."[13]

---

[10] *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* [1999] ZACC 15; 2000 (1) BCLR 1 (CC); 2000 (1) SA 732 (CC).

[11] Id at paras 13 and 18.

[12] *In re Constitutionality of the Mpumalanga Petitions Bill* [2001] ZACC 10; 2001 (11) BCLR 1126 (CC); 2002 (1) SA 447 (CC). While the referral in that case was one undertaken by the Premier under section 121, this Court held that sections 79 and 121 were for relevant purposes identical; see at para 8.

[13] Id at para 9.

[19] In *Mpumalanga Petitions Bill*, this Court answered the question that was left open in *Liquor Bill*, whether this Court must consider "other provisions which are *manifestly* unconstitutional" but not included in the referral.[14] It held that there was no room for such consideration in referral proceedings under sections 79 and 121 of the Constitution.[15] The purpose and scope of a referral is a narrow safeguard mechanism and its nature is described as follows in *Liquor Bill*:

> "Section 79 does not entail a 'mini-certification' process. The specificity required of the President in spelling out his reservations plainly negatives the notion that this Court's function is to determine, once and for all, whether a Bill accords in its entirety with the Constitution. What section 79 entails is that in deciding on the constitutionality of the Bill this Court must in the first instance consider the reservations the President specified when he invoked the section 79 procedure."[16]

[20] In other words, the wording of section 79 of the Constitution and the character of the referral necessitate that the President's reservations must be specified in the referral back to Parliament. Section 79(1) and the reference in section 79(4) require the President to assent and sign if his (specified) reservations are fully accommodated.[17] If the President has no reservations concerning the constitutionality of the Bill, or if the specified reservations are accommodated, the referral is incompetent.[18] This Court said in *Liquor Bill*:

> "Given that the powers accorded by section 172(1) are inapplicable, in effect this Court's decision on the Bill's constitutionality constitutes a finding on the President's reservations. That decision, without being able to be or purporting to be

[14] *Liquor Bill* above n 10 at para 15 (emphasis added).

[15] *Mpumalanga Petitions Bill* above n 12 at para 13.

[16] *Liquor Bill* above n 10 at para 16.

[17] Id at para 13.

[18] Id at para 14.

> comprehensive, must clearly encompass any provisions the Court scrutinises in fulfilment of its remit and finds unconstitutional."[19]

[21] It follows that this Court cannot consider sections that were not mentioned by the President in his referral to the Legislature. Strictly applying this requirement does not cause prejudice. All other constitutional remedies remain intact. A referral does not preclude members of Parliament from considering remedies such as the one provided in section 80 of the Constitution[20] to institute proceedings in this Court for an order declaring all or part of the Act (once the Bill is signed into law) unconstitutional. And of course, an ordinary constitutional challenge could be brought by a member of the public. As this Court in *Liquor Bill* held:

> "[S]upervening constitutional challenges after [a Bill] has been enacted are not excluded, save to the extent that this Court has in deciding the questions the President placed before it in the section 79 proceedings already determined them."[21]

---

[19] Id at para 18.

[20] Section 80 provides:

> "**Application by members of National Assembly to Constitutional Court**
>
> "(1) Members of the National Assembly may apply to the Constitutional Court for an order declaring that all or part of an Act of Parliament is unconstitutional.
>
> (2) An application—
>
> (a) must be supported by at least one third of the members of the National Assembly; and
>
> (b) must be made within 30 days of the date on which the President assented to and signed the Act.
>
> (3) The Constitutional Court may order that all or part of an Act that is the subject of an application in terms of subsection (1) has no force until the Court has decided the application if—
>
> (a) the interests of justice require this; and
>
> (b) the application has a reasonable prospect of success.
>
> (4) If an application is unsuccessful, and did not have a reasonable prospect of success, the Constitutional Court may order the applicants to pay costs."

[21] *Liquor Bill* above n 10 at para 20.

[22] In *Doctors for Life*,[22] this Court reiterated that its competence to exercise its exclusive jurisdiction to decide on the constitutionality of parliamentary and provincial Bills was limited to referrals properly brought in terms of sections 79 and 121 of the Constitution.[23] While elaborating on the relationship between sections 167(4)(b) and (e) of the Constitution, it made important comments about the President's powers in bringing a referral. It clarified that the President was not limited to the substantive contents of the Bill; instead, the word "constitutionality" also encompassed procedural requirements.

[23] While it appears clear that this Court cannot consider issues wholly unrelated to the President's reservations, there are some questions left open by the limited number of previous decisions on this aspect. In *Liquor Bill*, the original referral only raised reservations regarding the "override" provision in terms of section 44(2) of the Constitution of a domain of legislation that was exclusive to the Provinces. However, this Court held that the procedural issue raised by the Western Cape government and the Minister's contentions that the Bill was incidental to national legislative competence, and further that it may be invalid as it had been passed under the inappropriate procedure of section 76, were "relevant to those reservations", even if those issues had not been strictly and explicitly encompassed by them.[24]

[24] This, together with the wording of section 79 of the Constitution, appears to leave open the question whether, regarding a referred section, this Court must consider its constitutionality more holistically, or if it is bound to examine merely the precise material reservations that the President had raised. That is, if a section is referred, as in this case, with potential reservations on the constitutionality due to it infringing the property right under section 25(1), how far does the power to consider other aspects "relevant to those reservations" extend?

---

[22] *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC).

[23] Id at paras 43, 50-4 and 56.

[24] *Liquor Bill* above n 10 at para 23.

The Socio-Economic Impact Assessment

[25] The FF Plus submits that its focus in this matter is on the necessity for proper assessment reports, also known as the Socio-Economic Impact Assessment Study (SEIAS), preceding consideration of the Bills in question. The FF Plus submits that the SEIAS system was introduced in 2015 to ensure that legislation is backed up by socio-economic analysis. It also submits that the Department of Trade, Industry and Commerce (DTIC) failed to submit proper SEIAS reports before deliberations and approval of the Bills, rendering the legislative process irrational and unconstitutional. The reports presented were unsigned, undated and lacked approval from the Department of Planning, Monitoring and Evaluation. The FF Plus submits that the reports show no signs of comprehensive research and the arguments advanced therein do not carry weight. In particular, the FF Plus submits that the findings in the SEIAS reports on fair use, namely that it would lead to legal certainty, are refuted by Professor S Karjiker.[25]

[26] The FF Plus submits that the absence of proper SEIAS reports means that neither the Cabinet, nor Parliament, nor other provincial legislatures were properly informed about the impact of the Bills when deliberating and adopting them. That absence also prevented Parliament from having all the facts and circumstances pertaining to the Bills before it. The FF Plus further submits that there is a need for rational legislation that will not infringe upon constitutional rights, in particular intellectual property rights, which are protected by section 25 of the Constitution.

[27] The FF Plus and CAPA submit that the failure to submit proper SEIAS reports renders the legislative process leading to the passing of the Bills irrational and unconstitutional. They submit that in order to assess the facts and circumstances regarding the Bills, a proper impact study on the regulatory, socio-economic and financial consequences of the Bills, as provided for in the SEIAS Guidelines,[26] should

[25] Karjiker "Should South Africa Adopt Fair Use? Cutting Through the Rhetoric" (2021) 2 *Journal of South African Law* 240.

[26] Socio-Economic Impact Assessment System Guidelines, May 2015.

have been before Parliament. CAPA also submits that the Government failed to assess the socio-economic impacts of the Bills, with the result that they are substantively irrational and, through inadequate engagement and consultation with stakeholders, fail to meet the standard of procedural rationality.

[28] CCSA also avers that the Bills are procedurally flawed since no proper SEIAS was undertaken in this matter. The draft legislation was not published for public comment with the final assessment attached and no proper consultative process with relevant stakeholders took place, therefore failing to provide for meaningful public participation. It submits that the National Assembly did not have sufficient information on the economic impact of the Bills on creative industries such as theirs. This renders the Bills open to a challenge on the grounds of irrationality, and they should thus be referred back to Parliament for proper consideration.

[29] The President does not appear to dispute that the reports were not compliant with the SEIAS Guidelines, but rather dismisses the argument on the ground that it is not an issue before this Court. This raises the question whether this Court can consider the lack of a proper SEIAS, an issue that was not part of the referral.

[30] As previously stated, this issue has been decided by this Court in *Mpumalanga Petitions Bill*, where it held that no room exists in referral proceedings under section 79 of the Constitution for this Court to consider issues not raised in compliance with the Constitution by the President.[27] Therefore, the FF Plus's contention that this Court can regulate its own proceedings and simply consider this issue has no merit and must be rejected.

[31] However, CAPA's argument must be closely examined. Upon questioning, counsel clarified that the lack of consideration of the SEIAS was closely tied to the reservations raised by the President, namely that the sections constituted an arbitrary

[27] *Mpumalanga Petitions Bill* above n 12 at para 7.

deprivation of property. Counsel contended that the lack of consideration of a proper SEIAS may have been a material factor in Parliament's drafting of the CAB in this particular manner. Had Parliament been given a proper SEIAS report, it would have been able to pay proper regard to, and be wary of, the potential violation of the section 25(1) rights of copyright owners and the real-life impact on industries tied to them.

[32] While this contention does not allow this Court to examine the procedural inadequacy of the Bill as a whole, it may be necessary to consider the lack of consideration of the SEIAS as an aspect "relevant to those reservations" raised by the President in respect of the referred sections as potentially arbitrary deprivations of property.

Is the President's referral irrational?

[33] Another question to be considered regarding the competence of the presidential referral in the present case is one that was raised by several parties and amici in their written submissions and during the hearing. That is: is the referral wholly incompetent as it relies on a fundamentally wrong test in law to be applied to a Bill? Blind SA and UNESCO contend that the President focused on international copyright law only, completely disregarding South Africa's numerous other international law obligations, specifically those pertaining to socio-economic rights and educational rights.

[34] During the hearing, counsel for the President submitted that the President took into account other international law obligations, albeit these were not expressly articulated. I do not agree. This is not reflected in the referral. The reasoning apparent in the referral letter and submissions shows, at the very least, a one-sided approach reflecting a lack of engagement with the right to education and other constitutional and international law obligations. In the evaluation, I will have to consider and balance all these constitutional and international law rights, which exist outside of copyright law.

[35] The President, while also relying heavily on international copyright law on this aspect, also raises concerns about arbitrary deprivation of property in violation of section 25(1) of the Constitution. Therefore, this does not render the President's referral on its face irrational.

The relevant standard and test to be applied in a referral

[36] Now that the scope of this case has been defined, the approach to and standard of the analysis in a referral matter warrant further consideration. It is clear that a Bill must be measured against the Constitution. However, this particular referral raises a novel problem, one that this Court has never before been required to confront in the context of a referral. All previous referral cases have been concerned with the powers of the national or provincial legislature, or with procedural issues. In contrast, this is the first referral matter in which the reservations raised by the President concern the substantive content of the provisions of a Bill and its conformity with the Constitution, specifically the Bill of Rights.

[37] This then poses the question of the relevant standard and test of constitutionality in a referral matter raised on substantive grounds. Given that an inquiry into the constitutionality of impugned provisions stemming from a referral is an exercise done in the abstract, it is not easy to assess substantive reservations about a Bill's impact on constitutional rights of individuals. For example, whether a Bill falls under the exclusive provincial legislative domain over certain areas as prescribed by section 44(2) of the Constitution can be assessed with reference to the text of the Bill, the Constitution and its mandate and precedent. However, predicting the substantive impact a Bill will have once it is put into effect is not straightforward. Without concrete examples of present rights violations, this exercise of abstract judicial review concerns whether the impugned provisions generally limit fundamental rights and whether such a limitation is justified.

[38] Therefore, the examination of a Bill with regard to such reservations must be guided by a careful consideration of what this Court can and cannot assess before a Bill

is enacted into law. The limited purpose of a referral procedure, as outlined above, must be kept in mind as the background to the standard and test this Court applies in this regard. Even though this Court has held that a referral does not constitute a "mini certification", the situation, within the narrow scope of the referral that this Court is presented with, is in some respects similar to the one encountered in the *Certification Case*.[28] This Court has, in other cases, correctly characterised referrals in terms of section 79(4) of the Constitution as "abstract judicial review", as was the *Certification Case*, which is "quite distinct from the power, having found an enactment inconsistent with the Constitution, to strike it down and to grant appropriate consequential relief relating to its effect".[29]

[39] Section 167(4)(c) of the Constitution grants this Court exclusive power to undertake another form of abstract judicial review of national and provincial Acts. This is when an application is brought by members of the National Assembly in terms of sections 80 or 122 of the Constitution.[30] There are differences in the procedure and scope of such an application. Under section 79, the President, in referring a Bill, interferes from the outside of the legislative drafting process. Because of this external interference, section 79 requires a more stringent "internal dispute resolution process" prior to the referral to this Court.[31] Alternatively, members of Parliament may apply to this Court under section 167(4)(c) immediately after the Bill has been signed into law, without further consideration of the matter by Parliament such as is mandated for referrals under section 79.[32] Regardless, the standard for such reviews can be considered akin to a referral. As the 30-day deadline imposed by sections 80(2)(b) or 122(2)(b), as the case may be, is triggered by the President signing the Bill, it may run

---

[28] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC).

[29] *President of the Republic of South Africa v United Democratic Movement* [2002] ZACC 34; 2002 (11) BCLR 1164 (CC); 2003 (1) SA 472 (CC) at para 26.

[30] Section 167(4)(c) of the Constitution.

[31] Seedorf "Jurisdiction" in Woolman et al (eds) *Constitutional Law of South Africa* Service 5 (2013) at 4-41.

[32] Id.

out long before the Act comes into effect.[33] Therefore, little to no practical knowledge of how the Act will operate is available. However, no application in terms of sections 80 or 122 has ever been brought since this Court and the Constitution have been in existence.

[40] While the *Certification Case* may be considered a form of abstract review, it does not provide sufficient practical guidance on how to conduct an abstract judicial review in terms of constitutional compliance. Therefore, it is useful to consider foreign jurisdictions, to provide some insight into how the presidential referral power, and abstract judicial review more broadly, are understood.

Comparative pre-enactment judicial review in foreign jurisdictions

[41] A number of jurisdictions were identified in *Liquor Bill* as having similar referral procedures to the one in terms of section 79(4) of the Constitution.[34] While it is true that several countries have pre-enactment referral provisions, it is important to pay close attention to the construction of those provisions when engaging in comparative constitutional analysis.

[42] According to Article 26 of the Irish Constitution, the President may refer a Bill to the Supreme Court for a decision on its constitutionality. This power of review, however, has one significant distinguishing feature which renders it substantially different from our presidential referral. Article 34(3)(3) of the Irish Constitution[35] grants the referred Bill the "seal of constitutionality" and immunises it from any further legal challenge once its constitutionality has been pronounced upon by the

[33] Id.

[34] *Liquor Bill* above n 10 at paras 7-10.

[35] Article 34(3)(3) reads:

> "No Court whatever shall have jurisdiction to question the validity of a law, or any provision of a law, the Bill for which shall have been referred to the Supreme Court by the President under Article 26 of this Constitution, or to question the validity of a provision of a law where the corresponding provision in the Bill for such law shall have been referred to the Supreme Court by the President under the said Article 26."

Supreme Court. This provision has been criticised for being inconsistent with standard Irish constitutional principles and the principle of a "living constitution".[36] This too, it is said, heightens the problems encountered in abstract judicial review: there is no litigant impacted by a law, which may skew the picture and lead this Court not to have a full understanding of the effects of a provision.[37] When coupled with such immunity, the already difficult balancing act that a court engages in is rendered even more fraught, and, in the Irish case, may be a reason for the power to refer under Article 26 being used only rarely.[38]

[43] The German President is generally considered to have clear review competence with regard to formal and procedural constitutionality, based on Article 82(1) of the German Basic Law. The question of the material constitutionality of a Bill to be signed by the President remains a live debate, though it is generally conceded that the President has a right to refuse to sign a Bill in the case of grave and obvious material unconstitutionality.[39] However, the German President has no referral powers; the only potential manner to review the validity of the President's refusal is a proceeding for failure to fulfil his or her constitutional obligation to sign.

[44] Meanwhile, regarding mechanisms of abstract judicial review, the German Basic Law provides in Article 94(1)(2) that the Bundesverfassungsgericht (Federal Constitutional Court) has exclusive jurisdiction over "abstract norms review", which is somewhat parallel to an application in terms of sections 80 and 122 of our Constitution. The function of an abstract norms review is to provide clarity on and ensure the

---

[36] Daly "Reforming Abstract Constitutional Review in Ireland: From Executive Dominance to Constitutional Contestation" (2024) *Social Science Research Network* at 2; Hogan "The Decline of Article 26: Reforming Abstract Constitutional Review in Ireland" (2022) 67 *The Irish Jurist* 123 at 123-4; and Cahillane "Ireland's Abstract Review and the Judicial Appointments Commission Bill Case" (2024) 44 *Legal Studies* 742 at 742.

[37] Daly id at 4 and Hogan id at 127-8.

[38] Cahillane above n 36 at 742-3. The author, writing in 2024, states that only 16 such referrals have ever been made since 1937, with a President sometimes choosing not to refer a Bill for fear of closing off the Bill to potential future challenges.

[39] Mann "Art. 82 Ausfertigung, Verkündung und Inkrafttreten von Bundesrecht (Art. 82 Enactment, Promulgation, and Entry into Force of Federal Law)" in von Coelln and Mann (eds) *Grundgesetz Kommentar* 10 ed (CH Beck, 2024) at paras 7-11.

constitutionality of law, in accordance with the Federal Constitutional Court's function as the "guardian of the constitution".[40] No pre-enactment power to review Bills exists.[41] The main distinction between concrete and abstract judicial review does not lie in a different substantive analysis; rather, it lies in the fact that certain organs of state, due to their responsibility to safeguard the constitutional state of law, are given the power to make an application that cannot be constrained by further standing requirements.[42] Except in relation to standing, it appears that the characterisation of abstract versus concrete judicial review does not entail a difference in the standard and tests applied to the constitutionality of an enacted law in the German context.

[45] As noted by Cameron AJ in *Liquor Bill*,[43] by contrast, the Indian Constitution[44] and the Canadian Supreme Court Act[45] establish a reference procedure that can encompass both pre- and post-enactment legislation, as well as more abstract questions that do not need to be tied to specific legislation. The form of the decision handed

---

[40] Bundesverfassungsgericht 1, 184, 195f; Rozek in Schmidt-Bleibtreu et al (eds), *Bundesverfassungsgerichtsgesetz Kommentar* 64 ed (CH Beck, 2024) at section 76, paras 4-5.

[41] Bundesverfassungsgericht 1, 396, 408.

[42] Rozek above n 40 at section 76, paras 4-5.

[43] *Liquor Bill* above n 10 at paras 8-9.

[44] Section 143(1) of the Indian Constitution, 1950 reads:

> "(1) If at any time it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to that Court for consideration and the Court may, after such hearing as it thinks fit, report to the President its opinion thereon."

[45] Section 53(1) of the Canadian Supreme Court Act RSC 1985, c. S-26 reads:

> "**Referring certain questions for opinion**
>
> 53(1) The Governor in Council may refer to the Court for hearing and consideration important questions of law or fact concerning
>
> (a) the interpretation of the Constitution Acts;
>
> (b) the constitutionality or interpretation of any federal or provincial legislation;
>
> (c) the appellate jurisdiction respecting educational matters, by the Constitution Act, 1867, or by any other Act or law vested in the Governor in Council; or
>
> (d) the powers of the Parliament of Canada, or of the legislatures of the provinces, or of the respective governments thereof, whether or not the particular power in question has been or is proposed to be exercised."

down, as a result, differs at least formally, because it is strictly an advisory opinion.[46] While in the Canadian system questions can theoretically be referred regarding any legal topic, it is vital to note the importance and impact of references. Firstly, the majority of questions are constitutional and many of the major constitutional decisions are handed down on reference. Secondly, while they are not technically binding,[47] they are "highly persuasive" and there are no recorded instances of courts or parties disregarding reference opinions.[48]

[46] Both Supreme Courts have some discretion in answering a referred question. This is more explicit in the formulation of section 143(1) of the Indian Constitution, which states that the Court "may . . . report" its opinion.[49] The Supreme Court of Canada too, in several instances, has refused to answer a referred question on the basis of "non-justiciability", as the questions are either not proper questions of law but instead political questions; are merely speculative and theoretical; or are not yet ripe for judicial consideration and thus are outside the proper role of courts.[50] The referred question must also be a question of national or constitutional law.[51] Within the ambit of the question referred, the Supreme Court of Canada performs a comprehensive constitutional analysis of both the powers of national and provincial governments and substantive Bill of Rights concerns.[52]

---

[46] This has been emphasised by the Supreme Court of Canada, not least of all to justify the constitutionality of such a broad abstract review, in a number of cases. See, for example, *Reference re References by the Governor-General in Council* [1910] 43 SCR 536 at paras 8-9 and *Reference re Secession of Quebec* [1998] 2 SCR 217 (*Secession of Quebec*) at paras 15 and 25.

[47] In *Reference re Fisheries* (1896) 26 SCR 444 at 539, Taschereau J wrote: "We determine nothing. We are mere advisers, and the answers we give bind no one, not even ourselves." (This was said in relation to a similar referral power under an earlier statute.)

[48] Hogg and Wright *Constitutional Law of Canada* 5 ed (Thomson Reuters, Toronto 2009) at 8.6(d).

[49] See also *In re The Kerala Education Bill, 1957* (1959) SCR 995 at 1018.

[50] *Secession of Quebec* above n 46 at paras 26-7.

[51] Id at para 20.

[52] As can be seen in the central decision regarding a proposed Bill on same-sex marriage, *Reference re Same-Sex Marriage* [2004] 3 SCR 698.

Property under section 25(1) of the Constitution

[47] Copyright is a species of intellectual property law that creates rights of a proprietary nature in respect of the incorporeal products of the intellect. It grants its owners the exclusive right over copyrighted works, allowing them to control how those works are reproduced, distributed, performed, or adapted. In broad terms, copyright may be described as—

> "the exclusive right in relation to work embodying intellectual content (i.e. the product of the intellect) to do or to authorise others to do certain acts in relation to that work, which acts represent in the case of each type of work the manners in which that work can be exploited for personal gain or profit."[53]

[48] Section 25 of the Constitution does not define property, other than stating that it is not limited to land.[54] In *FNB*,[55] this Court said that it is not wise nor possible to assign a comprehensive definition to the term "property".[56] However, this Court has recognised the following, albeit not exhaustive, as constitutional property: corporeal and incorporeal property generally,[57] trade marks,[58] the right to an enrichment claim[59] and the right to exploit minerals.[60]

[49] If we adopt a generous formulation of private property law that is not limited to the law of things, which is traditionally restricted to tangible things or corporeal

---

[53] Dean *Handbook of South African Copyright Law* 1 ed (Juta & Co Ltd, Stellenbosch 2015) at 1.

[54] Section 25(4)(b) of the Constitution.

[55] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Limited t/a Wesbank v Minister of Finance* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC).

[56] Id at para 51.

[57] *Law Society of South Africa v Minister for Transport* [2010] ZACC 25; 2011 (1) SA 400 (CC); 2011 (2) BCLR 150 (CC) at para 83.

[58] *National Credit Regulator v Opperman* [2012] ZACC 29; 2013 (2) SA 1 (CC); 2013 (2) BCLR 170 (CC) (*Opperman*) at para 61.

[59] Id.

[60] *Agri SA v Minister for Minerals and Energy* [2013] ZACC 9; 2013 (4) SA 1 (CC); 2013 (7) BCLR 727 (CC) at paras 38-46.

property,[61] then it is uncontroversial that copyright falls within these parameters, as copyright is generally accepted as a *sui generis* (unique) form of property in private law.[62] This may be the reason for courts accepting trade marks as constitutional property, certain lower courts assuming that copyright forms part of constitutional property and academic authorities concluding that intellectual property, including copyright, is "widely regarded" as property for purposes of the constitutional property clause.[63] Therefore, copyright is entitled to constitutional protection against arbitrary deprivation under section 25(1) of the Constitution. Like other forms of property, copyright is transferable, licensable and enforceable against third parties and confers exclusive control over the exploitation of creative works. Moreover, it enables its owners to derive income and profit, akin to tangible property.

Deprivation of property

[50] In *Mkontwana*,[64] this Court held that for a deprivation to have occurred, there must be "at the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society".[65] The deprivation, in other words, must have a "legally relevant" impact on the rights of the affected parties.[66] A deprivation is, however, not limited to "direct or

---

[61] See Van der Walt *Constitutional Property Law* 3 ed (Juta & Co Ltd, Cape Town 2011) at 87.

[62] Kellerman *The Constitutional Property Clause and Immaterial Property Interests* (LLD dissertation, University of Stellenbosch, 2011) at 35.

[63] See, for example, *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International* [2005] ZACC 7; 2005 (8) BCLR 743 (CC); 2006 (1) SA 144 (CC) (*Laugh It Off*) at para 17; *National Soccer League t/a Premier Soccer League v Gidani (Pty) Ltd* [2014] 2 All SA 461 (GJ); 2014 BIP 426 (GJ); Van der Walt above n 61 at pages 143-4 and fn 219; Van der Walt and Shay "Constitutional Analysis of Intellectual Property" (2014) 17 *Potchefstroom Electronic Law Journal* 52 at 52 and fn 11; and Chidede "The Role of Intellectual Property Rights' Protection in Advancing Development in South Africa" (2022) 26 *Law, Democracy and Development* 168 at 168.

[64] *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng* [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC).

[65] Id at para 32. This was followed in *Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd* [2010] ZACC 20; 2011 (1) SA 293 (CC); 2011 (2) BCLR 189 (CC) (*Offit Enterprises*) at para 39; *Tshwane City v Link Africa* [2015] ZACC 29; 2015 (6) SA 440 (CC); 2015 (11) BCLR 1265 (CC) at para 58; and *South African Diamond Producers Organisation v Minister of Minerals and Energy N.O.* [2017] ZACC 26; 2017 (6) SA 331 (CC); 2017 (10) BCLR 1303 (CC) (*SADPO*) at para 42.

[66] *SADPO* id at para 48.

physical interference": "it suffices for one or more of the entitlements of ownership to be impacted upon".[67]

[51] There is no precise formula for determining what a substantial interference is. This Court has stated that this will depend on the context of a particular case.[68] However, the extent of the interference in the use or enjoyment of the property in question (in terms of both degree and duration) will be a relevant consideration.[69]

Arbitrariness

[52] Arbitrariness as a standard in terms of section 25 is "a wider concept and a broader controlling principle" than rationality, but is not as exacting as the proportionality standard in section 36 of the Constitution.[70] A deprivation may be arbitrary if it is procedurally unfair (procedural arbitrariness) or if there is not a sufficient reason for the deprivation (substantive arbitrariness).[71]

[53] According to *Mkontwana*, when determining whether a deprivation is substantively arbitrary, one needs to consider the relationships involved, that is, between the purpose of the law and the deprivation effected by it, along with the purpose of the law and the owner of the property and the property itself. One would then look at the reason for the deprivation in relation to the extent of the deprivation and the nature of the property.[72] If there is a rational relationship between the purpose of the law, the owner of the property and the property itself,[73] then there are three interrelated considerations in determining whether a deprivation is substantively arbitrary. These are—

---

[67] *Offit Enterprises* above n 65 at para 41.

[68] Id at para 40.

[69] Id at para 41.

[70] *FNB* above n 55 at para 65.

[71] Id at para 100.

[72] *Mkontwana* above n 64 at para 35.

[73] The property deprivation in *FNB*, for example, did not satisfy this test.

> "(a) the nature of the property concerned and the extent of the deprivation;
>
> (b) the nature of the means-ends relationship that is required in the light of the nature and extent of the deprivation; and
>
> (c) whether the relationship between means and ends accords with what is appropriate in the circumstances and whether it constitutes sufficient reason for the section 25(1) deprivation."[74]

[54] The standard applied to determine whether a deprivation is arbitrary shifts depending on the extent of the deprivation. For example, a minor deprivation may only call for a rationality inquiry, while more significant deprivations may call for proportionality-type inquiries.[75] Additionally, more compelling purposes may need to be advanced for the deprivation if the property concerned is corporeal property and the deprivation affects all incidents of ownership rather than certain limited incidents of ownership.[76] Finally, one must have regard to the particular legislative context of the property-depriving provision.[77]

[55] In the present case, one of the central issues revolves around the practical impact of the new regime on property rights. This requires careful consideration of what this Court can reasonably ascertain at this time. Of course, it goes without saying that a provision can, in certain instances, on its face constitute an infringement of constitutional rights and thus be unconstitutional.

[56] However, when this is not the case, this Court must be cautious when reaching a conclusion of unconstitutionality based principally on what amounts to "educated guesses", to put it crudely, or an apprehension about practicality. This approach is based on the character of a referral as a "safeguarding mechanism" of the legislative process

---

[74] *Mkontwana* above n 64 at para 44.

[75] Id at paras 34-5.

[76] *FNB* above n 55 at para 100.

[77] Id at para 66.

and the fact that an abstract constitutional review implies a lack of evidence on the practical effects of the application of the impugned laws. Judicial caution must, therefore, be employed to prevent usurping the deliberative function of the Legislature to formulate laws; only reasonably foreseeable unconstitutional Bills must be struck down.

[57] Further, particularly with regard to the practical impacts of a Bill when it eventually comes into force, there are robust judicial routes available to persons affected, in addition to the other forms of abstract review open to Members of Parliament under section 80 of the Constitution. It is vital for this Court to carefully ensure that we do not inadvertently encroach on political functions or questions that are not yet "ripe" and that we limit ourselves to matters that can be ascertained in abstract judicial review. In turn, while this Court's verdict does not confer the cloak of immunity on a provision, as is the case in Ireland, and subsequent challenges are open, a referral decision confirming constitutionality constitutes binding precedent in respect of its content.[78]

[58] This should not be understood to mean that this Court only gives the impugned provisions a "cursory glance". It is not merely tasked to ascertain whether provisions are "obviously" or "on their face" unconstitutional. It is not enough to rely on the possibility of subsequent challenges. In respect of the sections referred to and the reservations raised by the President, this Court will have to make a determination on the *constitutionality* of such sections. Therefore, a careful and thorough constitutional review of such norms must be undertaken. All that is ascertainable at this stage must be considered. In the event that we conclude that this Court *cannot* ascertain at this point that the reasonably foreseeable consequences of a law would render it unconstitutional, due deference must be given to the expertise of the Legislature. The same stance applies to the corresponding provisions of the PPAB.

[78] *Liquor Bill* above n 10 at para 20 and *Mpumalanga Petitions Bill* above n 12 at para 11.

Constitutionality of the referred sections of the CAB read with the corresponding provisions of the PPAB

[59] Now that I have dealt with the preliminary issues and set out the proper standard to be applied to determine the constitutionality of the impugned provisions, I proceed to determine the reservations raised in respect of the impugned provisions.

Sections 6A, 7A and 8A of the CAB

[60] The concerns regarding sections 12A-D, 19B and 19C of the CAB mirror the reservations set out in detail to Parliament in the President's referral letter on 16 June 2020. However, that is not the case in respect of sections 6A, 7A and 8A of the CAB. In light of the strict requirements laid out above, some consideration must be given to the referral of sections 6A, 7A and 8A of the CAB.

[61] For a better understanding of the matter, it is necessary to quote the impugned sections 6A, 7A and 8A in full. The subsections in strike-out text are those that Parliament deleted pursuant to the President's reservations about their retrospectivity and impermissible delegation of power to the Minister. These sections provide:

> "**Equitable remuneration or share in royalties regarding literary or musical works**
>
> 6A (1) For the purposes of this section, 'royalty' means the gross profit made on the exploitation of a literary work or musical work by a copyright owner or a person who has been authorised by the author to do any of the acts contemplated in section 6.
>
> (2) Notwithstanding—
>
> (a) the assignment of copyright in a literary or musical work; or
>
> (b) the authorisation by the author of a literary or musical work of the right to do any of the acts contemplated in section 6, the author shall, subject to any agreement to the contrary, be entitled to receive equitable remuneration, or a fair share of the royalty received, for the execution of any of the acts contemplated in section 6.

(3) (a) The author's equitable remuneration or share of the royalty contemplated in subsection (2) shall be determined by a written agreement in the prescribed manner and form, between the author and the copyright owner, or between the author and the person contemplated in subsection (2)(b), or between their respective collecting societies.

(b) Any assignment of the copyright in that work, by the copyright owner, or subsequent copyright owners, is subject to the agreement between the author and the copyright owner, contemplated in paragraph (a), or the order contemplated in subsection (4).

(4) Where the author and copyright owner, or the person contemplated in subsection (2)(b), cannot agree on the author's equitable remuneration or share of the royalty, either party may refer the matter to the Tribunal for an order determining the author's equitable remuneration or share of the royalty.

(5) The agreement contemplated in subsection (3)(a) must include the following:

(a) The rights and obligations of the author and the copyright owner or the person authorised by the author to use the work as contemplated in subsection (2)(b);

(b) the author's equitable remuneration or share of the royalty agreed on, or ordered by the Tribunal, as the case may be;

(c) the method and period within which the amount must be paid to the author by the copyright owner, or the person authorised to use the work as contemplated in subsection (2)(b), to the author; and

(d) a dispute resolution mechanism.

(6) This section does not apply to—

(a) a copyright owner who is the author of the literary or musical work in question;

(b) a work created in the course of employment contemplated in section 21(1)(b) or (d); or

(c) a work where copyright is conferred by section 5 in the state, or a prescribed local or international organisation.

~~(7) (a) This section applies to a literary or musical work where copyright in that work was assigned before the commencement date of the Copyright Amendment Act, 2019, if that literary or musical work—~~

~~(i) falls within the application of this Act; and~~

~~(ii) is still exploited for profit.~~

~~(b) The Minister must—~~

~~(i) develop draft regulations setting out the process to give effect to the application of this section to a work contemplated in paragraph (a);~~

~~(ii) conduct an impact assessment of the process proposed in the regulations contemplated in subparagraph (i); and~~

~~(iii) table the draft regulations and impact assessment contemplated in subparagraphs (i) and (ii) respectively, in the National Assembly for approval, before the Minister may make the regulations contemplated in subparagraph (i) in accordance with the process envisaged in section 39.~~

~~(c) The share in the royalty only applies to royalties received, in respect of a work contemplated in paragraph (a), after the commencement date contemplated in section 38(2) of the Copyright Amendment Act, 2019.~~

. . .

Equitable remuneration or share in royalties regarding visual artistic works

7A (1) For the purposes of this section, 'royalty' means the gross profit made on the exploitation of a visual artistic work by a copyright owner or a person who has been authorised by the author to do any of the acts contemplated in section 7, but does not include profit made on the commercial resale of a visual artistic work contemplated in section 7B.

(2) Notwithstanding—

(a) the assignment of the copyright in a visual artistic work; or

(b) the authorisation by the author of a visual artistic work of the right to do any of the acts contemplated in section 7, the author shall be entitled to receive equitable remuneration, or to share in the royalty received, for the execution of any of the acts contemplated in section 7.

(3) (a) The author's equitable remuneration or share of the royalty contemplated in subsection (2) shall be determined by a written agreement in the prescribed manner and form, between the author and the copyright owner, or the person contemplated in subsection (2)(b), or between their respective collecting societies.

(b) Any assignment of the copyright in that work, by the copyright owner, or subsequent copyright owners, is subject to the agreement between the author and the copyright owner, contemplated in paragraph (a), or the order contemplated in subsection (4), as the case may be.

(4) Where the author and copyright owner, or the person contemplated in subsection (2)(b), cannot agree on the author's equitable remuneration or share of the royalty, any party may refer the matter to the Tribunal for an order determining the author's equitable remuneration or share of the royalty.

(5) The agreement contemplated in subsection (3)(a) must include the following:

(a) The rights and obligations of the author and the copyright owner or the person contemplated in subsection (2)(b);

(b) the author's equitable remuneration or share of the royalty agreed on, or ordered by the Tribunal, as the case may be;

(c) the method and period within which the amount must be paid by the copyright owner, or the person contemplated in subsection (2)(b), to the author; and

(d) a dispute resolution mechanism.

(6) This section does not apply to—

(a) a copyright owner who commissioned, or who is the author of, the visual artistic work in question;

(b) a work created in the course of employment contemplated in section 21(1)(b) or (d); or

(c) a work where copyright is conferred by section 5 in the state, or a prescribed local or international organization.

~~(7) (a) This section applies to a visual artistic work where copyright in that work was assigned before the commencement date of the Copyright Amendment Act, 2017, if that visual artistic work –~~

~~(i) falls within the application of this Act; and~~

~~(ii) is still exploited for profit.~~

~~(b) The Minister must –~~

~~(i) develop draft regulations setting out the process to give effect to the application of this section to a work contemplated in paragraph (a);~~

~~(ii) conduct an impact assessment of the process proposed in the regulations contemplated in subparagraph (i); and~~

~~(iii) table the draft regulations and impact assessment contemplated in subparagraphs (i) and (ii) respectively, in the National Assembly for approval, before the Minister may make the regulations contemplated in subparagraph (i) in accordance with the process envisaged in section 39.~~

~~(c) The share in the royalty only applies to royalties received, in respect of a work contemplated in paragraph (a), after the commencement date contemplated in section 38(2) of the Copyright Amendment Act, 2019.~~

. . .

Equitable remuneration or share in royalties regarding audio visual works

8A (1) A performer shall, subject to the Performers' Protection Act, 1967 (Act No.11 of 1967), be entitled to receive equitable remuneration to

share in the royalty received by the copyright owner, for any of the acts contemplated in section 8.

(2) (a) The performer's equitable remuneration or share of the royalty contemplated in subsection (1) shall be determined by a written agreement in the prescribed manner and form, between the performer and the copyright owner or between their respective collecting societies.

(b) Any assignment of the copyright in that work by the copyright owner, or subsequent copyright owners, is subject to the agreement between the performer and the copyright owner, contemplated in paragraph (a), or the order contemplated in subsection (3), as the case may be.

(3) Where the performer and copyright owner contemplated in subsection (2)(a) cannot agree on the performer's equitable remuneration or share of the royalty, the performer or copyright owner may refer the matter to the Tribunal for an order determining the performer's equitable remuneration or share of the royalty.

(4) The agreement contemplated in subsection (2)(a) must include the following:

(a) The rights and obligations of the performer and the copyright owner;

(b) the performer's equitable remuneration or share of the royalty agreed on, or ordered by the Tribunal, as the case may be;

(c) the method and period within which the amount must be paid by the copyright owner to the performer; and

(d) a dispute resolution mechanism.

~~(5) (a) This section applies to an audiovisual work where copyright in that work was assigned before the commencement date of the Copyright Amendment Act, 2019, if that audiovisual work—~~

~~(i) falls within the application of this Act; and~~

~~(ii) is still exploited for profit.~~

~~(b) The Minister must—~~

~~(i) develop draft regulations setting out the process to give effect to the application of this section to a work contemplated in paragraph (a);~~

~~(ii) conduct an impact assessment of the process proposed in the regulations contemplated in subparagraph (i); and~~

~~(iii) table the draft regulations and impact assessment contemplated in subparagraphs (i) and (ii) respectively, in the National Assembly for approval, before the Minister may make the regulations contemplated in subparagraph (i) in accordance with the process envisaged in section 39.~~

~~(c) The share in the royalty only applies to royalties received, in respect of a work contemplated in paragraph (a), after the commencement date contemplated in section 38(2) of the Copyright Amendment Act, 2019.~~

~~(6)~~[5] Any person who executes an act contemplated in section 8 for commercial purposes must—

(a) register that act in the prescribed manner and form; and

(b) submit a complete, true and accurate report to the performer, copyright owner, the indigenous community or collecting society, as the case may be, in the prescribed manner for purposes that include the calculation of equitable remuneration or royalties due and payable by that person.

~~(7)~~[6] (a) Any person who intentionally fails to register an act as contemplated in subsection (5)(a), or who intentionally fails to submit a report as contemplated in subsection (5)(b), shall be guilty of an offence.

(b) A person convicted of an offence under paragraph (a) shall be liable to a fine or to 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) For the purpose of paragraph (b), the annual turnover of a convicted person that is not a natural person at the time the fine is assessed, is the

> total income of that person during the financial year during which the offence or the majority of offences were committed, and if that financial year has not yet been completed, the financial year immediately preceding the offence or the majority of offences, under all transactions to which this Act applies.
>
> (d) If the court is satisfied that substantial and compelling circumstances exist, which justify the imposition of a lesser sentence than the minimum sentence prescribed in paragraph (b), it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence."

Submissions by the parties regarding sections 6A, 7A and 8A

[62] The President, in a letter to the Speaker, submitted that the legislative frameworks of the CAB and PPAB create limitations and exceptions to provide access to copyright works for visually- and print-impaired persons, by creating an exception that excludes the rights of authors and their assignees to prevent the reproduction of copyright works. In addition, the President highlighted the Bill's aim to reframe the balance between the authors of copyright work and the purchasers or owners of copyright.

[63] Before this Court, the President submits that the impugned provisions constitute a retrospective and arbitrary deprivation of property. He submits that property protected in terms of section 25 of the Constitution includes copyright. Sections 6A, 7A and 8A aim to protect the authors of copyright who may not have sufficient bargaining power and consequently relinquish their copyright at a lesser value. Therefore, these provisions affect property rights. By providing protection to authors, these provisions detract from the benefits of copyright which a subsequent owner of the copyright might have acquired from the author.

[64] In relation to sections 6A, 7A and 8A, in the referral letter to Parliament the reservations were that sections 6A(7), 7A(7) and 8A(5) of the CAB may constitute arbitrary and retrospective deprivation of property, in that, going forward, copyright

owners would be entitled to a lesser share of the fruits of their property than before. Further, the impact of these provisions extends far beyond the authors they seek to protect.

[65] The President accepts that Parliament sought to address these reservations by deleting these subsections in the belief that it was accommodating the objections raised in relation to the constitutionality of these provisions. However, he contends that, notwithstanding the deletion, sections 6A, 7A and 8A still apply to copyright works assigned prior to the new sections coming into force, and therefore still have a retrospective effect.

[66] The President further argues that his objection to the provisions includes the fact that they bestow a windfall on authors who received fair value for their copyright and even on those who were overpaid. It also penalises owners who acquired their copyright not from the author, but from a "hard-nosed" intermediate owner. This indiscriminate operation of the new rule renders it arbitrary.

[67] The Speaker and the Chairperson of the NCOP do not oppose the referral of the Bills and state that their submissions are strictly confined to the issues raised in the President's reservations.

[68] On procedural reservations, they submit that the President raised concerns about the incorrect tagging of the Bills as section 75 Bills rather than section 76 Bills, and about the public participation process during parliamentary proceedings. They submit that these concerns were addressed since the Bills were reclassified as section 76 Bills, extensive public participation and hearings were conducted and oral and written inputs from provincial legislatures, experts and the public on the "fair use" provisions were received and considered.

[69] On substantive reservations, they submit that the President questioned whether subsections 6A(7), 7A(7) and 8A(5) of the CAB amounted to retrospective deprivation

of property in breach of section 25 of the Constitution. In response, they submit that Parliament deleted the impugned subsections, thus eliminating the retrospectivity provisions and the related delegations to the Minister. They further submit that these amendments were intended to cure the constitutional defects identified and that, notwithstanding the amendments, the President still pursues the referral on the basis that the impugned sections have retrospective application.

[70] The DA only agrees with the President's first reservation, namely, that despite the deletion of subsections 6A(7), 7A(7) and 8A(5), the new sections 6A, 7A and 8A still entail the retrospective and arbitrary deprivation of property, in violation of section 25(1) of the Constitution. In summary, the DA submits that: (a) section 6A constitutes a retrospective and arbitrary deprivation of property; (b) sections 7A and 8A constitute either a retrospective and arbitrary deprivation of property, or an irrational differentiation from section 6A; and (c) a finding of unconstitutionality of any of the three provisions is sufficient for this Court to declare the CAB to be unconstitutional and for the President to be precluded from signing it. The DA explains that its focus is on the meaning and constitutionality of section 6A.

[71] The referral in respect of the reservations about sections 6A, 7A and 8A of the CAB must be properly before this Court for it to be considered. The problem that arises here is the following. In his referral letter to Parliament, the President's reservations with regard to subsections 6A(7), 7A(7) and 8A(5) of the CAB were narrow, as his concern was that they "may constitute retrospective and arbitrary deprivation of property". Parliament, in turn, considered this reservation and deleted the subsections referred to it, in the view that this would remedy the potential retrospectivity and lead to a prospective application of the sections. Only in his referral to this Court did the President for the first time allege that the sections as a whole might still be construed to operate retrospectively, despite the deletion of the three impugned subsections. Citing subsection 6A(2), the President submits that—

> "the above provision entitles an author to share in the royalty notwithstanding the assignment of the copyright in the work. It applies to any work of which copyright has been assigned, whenever it might have occurred. It is not confined to works of which the copyright is only assigned after the introduction of section 6A."

[72] As I see it, the scope of the referral process must be construed narrowly. It is essential that Parliament, envisioned as an active participant, must be afforded an opportunity to address the President's concerns. As Seedorf states, "[a]ny judicial challenge to a statute in bill form is thus an intrusion into the domain of the people's democratically elected representatives and should, in the words of the Constitutional Court, be treated with caution".[79]

[73] The President's wording in the referral letter to Parliament was very narrow. He did not refer to an implied retrospective operation due to the construction of the section. Subsection 6A(2) had remained essentially unchanged, aside from the insertion of "subject to any agreement to the contrary" in subsection 2(b). Under these circumstances, Parliament had no indication that the President would subsequently find the wording of subsection 6A(2) in itself offensive. Thus, Parliament was not given the opportunity to consider the reservations raised in the referral to this Court. This remains true despite the assertion by counsel during the hearing that the reservation was concerned more broadly with the concept of retrospectivity as a whole. Parliament could not have surmised this concern from the President's referral to it. The same can be said regarding the subsequent contention by the President that sections 6A, 7A and 8A of the CAB may be in conflict with international law.

[74] In the result, as the requirements of section 79 were not met with regard to sections 6A, 7A and 8A of the CAB as a whole, the referral is, to this extent, incompetent. The specific reservations raised by the President in his referral back to Parliament regarding the previous subsections 6A(7), 7A(7) and 8A(5) of the CAB were sufficiently addressed by the deletion of these subsections.

---

[79] Seedorf above n 31 at 4-33.

Sections 12A-D, 19B and 19C of the CAB

[75] As mentioned above, the concerns regarding sections 12A-D, 19B and 19C of the CAB mirror the reservations set out in detail to Parliament in the President's referral letter on 16 June 2020. Therefore, the referral of these sections is competent.

[76] I now proceed with the analysis of these referred sections to determine their constitutionality. The President, in the main, raised two reservations. Firstly, that the provisions are incompatible with South Africa's international law obligations, and secondly, that a number of the exceptions constitute arbitrary deprivations of property under section 25(1) of the Constitution. While these concerns are not identical, they cannot be said to be completely distinct. Therefore, there may be some overlap in their portrayal.

[77] However, what must be emphasised at the outset is that the correct test in law that this Court applies, both in referral and in all other types of constitutional review, is ultimately a test of constitutional compliance. The question, therefore, is not whether the new provisions of the Bills are in line with international law or differ from the previous provisions of the Act, but rather whether Parliament violated its obligations by drafting and passing a law that is unconstitutional. This, in turn, may be the case if it violates South Africa's international obligations under section 231(2) of the Constitution or constitutes an arbitrary deprivation of property under section 25(1) of the Constitution.

The copyright exceptions in section 12A

[78] Section 12A provides:

> "**General exception from copyright protection**
>
> 12A (a) In addition to uses specifically authorised, fair use in respect of a work or the performance of that work, for purposes such as the following, does not infringe copyright in that work:

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

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

(iii) reporting current events;

(iv) scholarship, teaching and education;

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

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

(vii) ensuring proper performance of public administration.

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

(i) the nature of the work in question;

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

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

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

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

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

(c) For the purposes of paragraphs (a) and (b) the source, as well as the name of the author shall be mentioned, if it appears on the work."

Submissions by the parties regarding the copyright exceptions in section 12A

[79] The President submits that section 12A, which deals with exceptions and limitations, is unconstitutional, specifically with regard to the fair use provision, which

was not put to the public for comment following substantial amendments and before the final versions of the Bills were published. Further, so he contends, certain exceptions violate the Berne Convention's three-step test,[80] are in breach of the Constitution and risk South Africa being in contravention of its international treaty obligations.

[80] The President submits that the impugned provisions are in conflict with the Berne Convention and the TRIPS Agreement, which have both been ratified by South Africa; the WCT and WPPT, which South Africa signed on 12 December 1997 but has not ratified; and the Marrakesh Treaty, which South Africa has neither signed nor ratified.

[81] The Speaker submits that Parliament considered the international treaties and sought advice from international law experts and various presentations from the DTIC to ensure alignment with these treaties while also considering the constitutional framework.

[82] Regarding the question whether the exceptions and limitations, particularly section 12A (fair use), meet the three-step test required by the Berne Convention, the Speaker submits that expert submissions indicated that (a) the fair use doctrine under section 12A is compatible with international obligations; (b) comparative jurisprudence from the US supports its validity; and (c) other exceptions were crafted narrowly enough to comply with the three-step test.

[83] The FF Plus submits that the fair use provision in section 12A is foreign to South African law and introduces significant legal uncertainty, as it allows the use of copyright works without permission from the copyright owner for purposes such as research,

---

[80] The Berne Convention's three-step test is outlined in Article 9(2) and provides that permissible limitations and exceptions to the exclusive reproduction right—

(1) must only be applied in certain special cases, meaning these cases must have a narrowly defined scope and reach;

(2) must not conflict with a normal exploitation of the work; and

(3) must not unreasonably prejudice the legitimate interests of the right holder.

private study or personal use. Moreover, the provision is not underpinned by any jurisprudence in South Africa; it risks encouraging unauthorised use of copyright materials; and it may violate international treaties, such as the Berne Convention and TRIPS Agreement, which only permit narrowly defined exceptions. Further, they argue that it is highly probable that the uncontrolled and unauthorised use of copyright works would lead to the decimation of various industries in South Africa, such as media-based industries.

[84] The FF Plus argues that the wording of section 12A is open-ended and provides for a more liberal allowance for users of copyright works than the system of "fair dealing" currently contained in section 12 of the Act, thereby diminishing the property rights of copyright owners. Under the current section 12 of the Act, "fair dealing" permits use only to the extent reasonably necessary for research, private study or personal use, for purposes of criticism or review or for the purposes of reporting current events. It also argues that this undermines the rights of copyright owners and will primarily serve the interests of big corporations. It submits that most copyright owners would prefer legal certainty on the exceptions for "fair use", as is currently the case for "fair dealing" in section 12.

[85] CCSA submits that the fair use exception unduly and arbitrarily reduces the protection afforded to copyright owners and their right to the fruits of their property by containing an expanded list of purposes and being open-ended in including purposes "akin to" those set out in the section. This, CCSA contends, is not justified by the purpose of enhancing access to copyrighted works and is disproportionate.

[86] CCSA submits that sections 12A, 12B(3) and 12D do not appropriately balance the interests of the copyright owners and other concerns, and fail the first step of the Berne Convention three-step test. Further, the definition of the word "broadcasting" is not in line with the WPPT, as it includes not only wireless but also wired means of

transmission, and is inconsistent with the Electronic Communications Act[81] and the Broadcasting Act.[82] Furthermore, "commercial" and "producer" are not defined, which leads to uncertainty.

[87] RISA submits that the recorded music industry relies on private use for income, and that section 12A of the CAB will bring about the collapse of independent, artist-led labels. It argues that the section constitutes an arbitrary deprivation of property for recording companies, as does section 8(2)(f) of the PPAB for performers, by making their rights subject to the CAB exceptions.

[88] RISA contrasts the CAB "fair use" exception, which is open-ended, with the current "fair dealing" exception in section 12A of the Act. It claims that the "fair use" exception reduces the protection accorded to copyright owners by widening use that does not constitute copyright infringement and taking away the right of copyright owners to remuneration where their work is used for educational or governmental purposes.

[89] RISA submits that the deprivation is arbitrary because there is no sufficient reason provided, no evidence tendered, nor any assessment conducted to demonstrate why the broad "fair use" exception should be introduced in South Africa. Even if it can be assumed that there will be an increase in access, this has not been measured against the impact on the production of creative work and the resulting revenue loss. RISA also argues that the introduction of "fair use", as currently formulated in section 12A, would cause legal uncertainty, as the circumstances where work can be used are "unknown and unknowable" and judicial interpretation will be required.

[90] At any rate, says RISA, subsection 12A(a)(i) is unconstitutional, insofar as it applies to sound recordings and cinematic films, by allowing for personal use. This, in

[81] 36 of 2005.

[82] 4 of 1999.

RISA's submission, constitutes an arbitrary deprivation of the copyright owner's exclusive right to use and reproduction. Personal use is the predominant source of revenue for these materials. RISA argues that the subsection is disproportionate and, in the long term, will actually reduce access to sound recordings due to the significant decline in the profitability of the music production industry caused by the disproportionate effect of subsection 12A(a)(i).

[91] CAPA submits that the fair use exception of section 12A is novel to South African law and would substantially reduce the protection of copyright owners' exclusive rights to their intellectual property. It is, CAPA contends, significantly broader than the US' fair use exception, which it claims to be modelled on. Further, CAPA argues that section 12A is inappropriate in the South African context because it casts the scope of fair use in an unprecedentedly wide and open-ended manner. Section 12A provides for a wider list than the US model; thus, South African courts, in addition to not having their own precedent, could not rely on US case law. CAPA also submits that the fair use list is impermissibly open-ended. With the diverse purposes already listed, it will lead to the defence of fair use being able to "apply to just about anything". There is no rule of burden of proof, leading to confusion.

[92] On the other hand, Blind SA and several amici do not agree with the President. Blind SA contends that the impugned provisions do not amount to arbitrary deprivation, as they are necessary to ensure that the Act is compatible with the Bill of Rights by promoting access to information and the right to education. If it is found that the exceptions and limitations do amount to deprivation, Blind SA argues that the deprivation does not encompass all incidents of ownership, thus requiring less justification. The sections, Blind SA says, arguably only have implications for copyright owners when works under copyright are used for educational and academic activities.

[93] In respect of section 12A, Blind SA contends that the provisions consist of a purpose-based inquiry and a fairness inquiry. This means that subsection 12A(a)

contemplates the purpose for which the copyright work is sought to be used, including, among others, research, private study, criticism, review and scholarship; and contemplates whether the nature, extent, scope and type of use is fair, considering the circumstances of the copyright owner and the user. Blind SA contends that the introduction of the open list permits additional purposes which may be justifiable in terms of subsection 12A(a). This is in addition to subsection 12A(b), which requires that the purpose be fair. Moreover, where either inquiry is not satisfied, the contemplated use would constitute an infringement in terms of section 23 of the Act. Therefore, reliance on any ground in terms of subsection 12A(a) is insufficient to justify the use of a work under copyright, since the fairness requirement in subsection 12A(b) must also be satisfied. The test, which is common to fair use and fair dealing, requires compliance with the aforementioned inquiries.

[94] ReCreate submits that the exceptions, far from rendering sections 12A-D unconstitutional, serve to respect, protect, promote and fulfil a range of rights by providing adequate limitations and exceptions on copyright, as found by this Court in *Blind SA I*.[83] ReCreate parallels these sections to the broad fair use exceptions in US law, highlighting the economic benefits of such schemes. The current scheme, with its very limited exceptions, is described by expert submissions as "extremely restrictive and prohibitive" and "non-functional".

[95] ReCreate submits that the true question is whether the exceptions constitute deprivation and whether they are arbitrary. It submits that the exceptions aim to ensure that copyright is not a barrier to education, satire, comment, illustration and similar uses outlined in section 12A. Thereby, sections 12A-D advance freedom of expression and the right to education as provided for in sections 16 and 29 of the Constitution.

[96] ReCreate argues that, due to the fact that copyright is incorporeal property and given the legitimate constitutional purposes advanced by the CAB, the threshold for

[83] *Blind SA I* above n 6.

sufficient reason to justify a deprivation is lower. The CAB, it submits, strikes an appropriate balance between the protection of copyright owners and the exceptions to and limitations of those protections. Research demonstrates that fair use provisions "benefit innovation and economies without harming copyright-intensive industries traditionally". It argues that the open limitation "such as" in section 12A is given meaning by the listed purposes and the four-factor test in subsection 12A(b). Avoiding commercial prejudice is built into these exceptions, such as in subsection 12B(e).

[97] Relying on *Affordable Medicines Trust*,[84] *Qwelane*[85] and *Savoi*,[86] ReCreate submits that the four-factor test in section 12A[87] is a species of proportionality analysis, providing for balancing and judgment and thereby the future operability of the section in the developing digital era. It is consistent with section 36 of the Constitution and does not violate the vagueness doctrine, so ReCreate argues.

[98] ReCreate submits that sections 12A-D also accord with international law. ReCreate submits that the sections do not violate the open-ended and flexible requirements of the Berne Convention's three-step test. In fact, the four-factor test laid

---

[84] *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2005 (6) BCLR 529 (CC); 2006 (3) SA 247 (CC).

[85] *Qwelane v South African Human Rights Commission* [2021] ZACC 22; 2021 (6) SA 579 (CC); 2022 (2) BCLR 129 (CC).

[86] *Savoi v National Director of Public Prosecutions* [2014] ZACC 5; 2014 (5) SA 317 (CC); 2014 (5) BCLR 606 (CC).

[87] Subsection 12A(b) provides:

> "In determining whether an act done in relation to a work constitutes fair use, all relevant factors shall be taken into account, including but not limited to—
>
> (i) the nature of the work in question;
>
> (ii) the amount and substantiality of the part of the work affected by the act in relation to the whole of the work;
>
> (iii) the purpose and character of the use, including whether—
>
> (aa) such use serves a purpose different from that of the work affected; and
>
> (bb) it is of a commercial nature or for non-profit research, library or educational purposes; and
>
> (iv) the substitution effect of the act upon the potential market for the work in question."

out in section 12A encapsulates some of the same factors regarding the substantiality of the work as well as the purposes and character of use.

[99] Zapiro outlines the importance of parody and satire, emphasising that the fact that expression has a commercial use does not render it unprotected by section 16 of the Constitution. Rather, the question in relation to commercial use is whether the use infringes on the market of the original work and could substitute it. This approach, he says, is reflected in the Copyright Act of the United States,[88] wherein both commercial and non-commercial uses may constitute fair use. He relies on *Laugh It Off* and refers to the European Court of Human Rights' decision in *Vereinigung Bildender Künstler v Austria*.[89]

[100] The freedom of expression of the creator of the later work and of the public must be appropriately balanced against the copyright owner's rights, as intellectual property was found to be property protected under section 25(1) by this Court in *Laugh It Off* and *Opperman*, and can be considered the "just reward for creative work" in section 12A, thus argues Zapiro.

[101] He asserts that a rigid distinction between parody and satire, which would exclude the latter, would constitute an undue limit on important political speech and artistic freedom, and that there are important differences between South Africa and the US. Further, satire does not infringe the market of the original work. Zapiro also relies on Sachs J's separate judgment in *Laugh It Off* to point out the crucial difference between plagiarism and parody/satire: parody was said not to infringe the trade mark in question, as there was no likelihood of economic prejudice.

[102] With reference to the Australian Copyright Act,[90] Zapiro submits that "[i]ncluding satire and parody subject to an analysis of the fairness of the particular use

[88] 17 USC 1978.

[89] Application no. 68354/01.

[90] Australian Copyright Act 63 of 1968.

in each case "is a less restrictive means available" to achieve the adequate protection of copyrighted works and avoid unduly limiting political and artistic speech. Zapiro also submits that where a right is limited, the least restrictive means must be utilised. Zapiro analogises completely excluding satire and parody to "a sledgehammer being used to crack a nut".

[103] Regarding the shift from "fair dealing" to "fair use", Zapiro submits that it is not arbitrary and instead benefits all. The fair dealing concept has previously been criticised for being too vague and indefinite and has also proceeded on a case-by-case assessment basis. The new fair use criterion mirrors US copyright law and creates greater certainty by providing an abundance of comparative case law, which can serve as guidance. Since US copyright law closely parallels the new South African provisions, Zapiro submits that the suggestion that the factors in section 12A breach international law does not hold up. The examples provided in section 12A show that the open-ended list is unproblematic and can be substantiated by the longstanding existence of parallel provisions in US law. Zapiro adds that the President's concerns about the costs of litigation for authors and creatives, who may not be able to afford it, do not bear scrutiny. It is not the fair use exception that makes copyright owners go to court – they must go to court to enforce their rights under all types of statutes.

[104] The submissions of CCL focus on the educational exceptions contained in sections 12A-D and 19C of the CAB, particularly the President's concerns regarding the lack of definition of "commercial"; that the sections may not satisfy the three-step test under international copyright law; and that the sections may result in arbitrary deprivations of property in terms of section 25(1).

[105] CCL submits that these concerns are incomplete and flawed because they focus solely on property law and fail to take into account other domestic rights and rights under international human rights law (IHRL). CCL asserts that, through this narrow focus, the President "effectively elevates international copyright treaties to the constitutional standard, supplanting constitutional analysis with a (copyright-only)

international law frame", while neglecting other international obligations under IHRL that are also constitutional obligations.

[106] According to CCL, the exceptions provide access to all people with visual disabilities and the poorest learners and students, and are thus necessary to fulfil constitutional and IHRL obligations. Studies show that equitable access to learning materials has a positive impact on educational outcomes, and educational exceptions are particularly relevant in mitigating the immense effects of poverty on access to educational materials. On this factual basis, CCL submits that copyright presents a barrier to access to learning materials, as this Court found in *Blind SA I* regarding this very Act. These premises informed the inclusion of the educational exceptions in the CAB. Further, CCL outlines the international law obligations regarding the children's rights and education.

[107] CCL submits that the President's reliance on the generic three-step test in Article 9(2) of the Berne Convention is incorrect, as Article 10(2) of that convention contains a specific educational exception, and is thus the *lex specialis* (a special provision taking precedence over the more general provision). Article 10(2) provides for wide latitude as to what countries consider fair practice in their domestic legal systems and socio-economic conditions. Referring to Blind SA's submissions, CCL avers that Article 10(2) of the Berne Convention is incorporated verbatim in several parts of sections 12A-D.

[108] CCL submits that sections 12A-D are tailored towards specific uses fundamental to education. The sections only allow for non-commercial use, and subject the use to a threshold test and express limitations (such as fair use, naming of the author, reasonable extent, to be integral or essential for a technical process, prohibition on copying whole books except in narrow circumstances and only for limited categories of actors). CCL argues that the aforementioned sections fulfil the state's constitutional obligations outlined above.

Analysis – section 12A

[109] Section 12A of the CAB and the current section 12 of the Act provide for a general exception. As set out above, several parties argue that fair use is unclear, overly broad and lacks guidelines, particularly when compared to the concept of fair dealing under the current regime. They submit that this would lead to legal uncertainty and, at worst, unconstitutionality of the section, due to vagueness, conflict with international law and constituting an arbitrary deprivation of property under section 25 of the Constitution.

[110] Section 12A of the CAB provides that *fair use* in respect of a work or the performance of that work, for purposes such as those listed in the section, does not infringe copyright in that work. It represents a more flexible approach to copyright exceptions and limitations than the closed list in section 12 of the Act. Instead of creating closed categories for exceptions, the construction of fair use in section 12A aims to provide a somewhat flexible approach to exceptions, while providing exemplary purposes of use as guidance (subsection (a) read with subsection (b) provides that, in determining whether an act done in relation to a work constitutes fair use, all relevant factors shall be taken into account, including but not limited to those listed (extent of the use, nature of the work, and purpose)).

Fair use as contrasted with fair dealing

[111] While the relevant test in this inquiry is not the difference between the old and new exceptions schemes, it briefly outlines the fair dealing test as a construct. Fair dealing originates from the Copyright Act 1911, which included provisions for newspaper summaries.[91] This concept later developed into what is now section 12 of

[91] Section 2(1)(i) of the Copyright Act 1911 provided:

> **"2. Infringement of copyright**
>
> (1) Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright: Provided that the following acts shall not constitute an infringement of copyright:

the Act. Initially modelled on section 6 of the English Copyright Act of 1956, section 12 was subsequently amended in 1992 to its current form.[92]

[112] The fair use standard originated in the US. It was established as judicial doctrine in *Folsom v Marsh*[93] and subsequently legislated in statute, currently recognised in section 107 of the US Copyright Act.[94] Over time, several other countries have incorporated fair use into their laws.[95] The current formulation of section 107 is the product of gradual development, shaped by protracted debates concerning the appropriate scope of fair use, particularly in relation to the reproduction of copyrighted works through means such as photocopying, for educational and academic purposes, as well as for the purposes listed.

[113] The traditional differentiation between fair dealing and fair use characterises the former as a rule and the latter as a standard.[96] It has been argued that the key advantage of the fair dealing model lies in the legal certainty it offers.[97] When applying the fair dealing provision under section 12(1), the first step is to determine whether the use in question falls within the scope of that section. If it does, the next and final step is to assess whether the use is fair. However, the Act does not define what constitutes fairness.[98] In *Moneyweb*,[99] this Court held that it is difficult to lay down any hard-and-fast definition of fair dealing, for it is a matter of fact, degree and impression. Fairness is an elastic concept. A determination of fair dealing, too, involves a value

---

(i) Any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary."

[92] By way of the Copyright Amendment Act 125 of 1992.

[93] *Folsom v Marsh* 9 F Cas 342 (CCD Mass 1841).

[94] See Shay "Fair Deuce: An Uneasy Fair Dealing-Fair Use Duality" (2016) 49 *De Jure* 105.

[95] See, for example, section 65 of the Taiwan Copyright Act, 2007-07011 and section 185.1 of the Philippines Copyright Law of 1997, Republic Act No. 8293.

[96] Australian Law Reform Commission *Copyright and the Digital Economy: Final Report* (2013) at 98.

[97] Shay above n 94 at 106.

[98] Zungu "The Copyright Amendment Bill and the Right to Property in Section 25 of the Constitution: A Discussion in Support of Expansive Copyright Exceptions and Limitations for Educational Purposes" (2024) 12 *South African Intellectual Property Law Journal* 11.

[99] *Moneyweb (Pty) Ltd v Media 24 Ltd* 2016 (4) SA 591 (GJ).

judgment and will depend on the particular facts and circumstances at the time of dealing.[100]

[114] This highlights a key insight, discussed in academic literature, that the strict distinction between "fair dealing" and "fair use" is no longer appropriate.[101] A number of countries have implemented schemes that, while being labelled fair use, contain relatively clear categories of permitted use, having combined these schemes with elements more traditionally associated with fair dealing.[102] On the other hand, Canada, on paper, has a traditional fair dealing regime, which in practice is interpreted widely, making it operate more akin to a fair use regime.[103] It must therefore be emphasised that fair use and fair dealing are not to be seen as completely distinct simply because of their terminology, but instead may "lie on two ends of a continuum, with both requiring the case-by-case balancing of multiple fairness factors".[104] The implementation of fair use regimes has not produced the expansive, unpredictable outcomes feared by US-based copyright industries; rather, these regimes have often been implemented in a narrower and more restrained manner than the US jurisprudence itself.[105]

[115] Section 12A of the CAB substantially mirrors section 107 of the US Copyright Act.[106] This includes the provision for an open list of purposes of use and a list of

---

[100] Id at para 114.

[101] Yu "Customizing Fair Use Transplants" (2018) 7 *Laws* 1 at 5.

[102] Id at 7-8.

[103] Id at 10; O'Heany "Fair is Fair: Fair Dealing, Derivative Rights and the Internet" (2012) 12 *Asper Review of International Business and Trade Law* 75; Okorie "The Proposed Fair Use Exception under South Africa's Copyright Amendment Bill" *South African Research Chair: Intellectual Property, Innovation and Development* (24 March 2019), available at https://law.uct.ac.za/ip-chair/articles/2019-03-24-proposed-fair-use-exception-under-south-africas-copyright-amendment-bill.

[104] Yu id at 11.

[105] See, for example, Elkin-Koren and Netanel "Transplanting Fair Use across the Globe: A Case Study Testing the Credibility of U.S. Opposition" (2021) 72 *Hastings Law Journal* 1121. While this is not necessarily relevant to our constitutional analysis, it should be pointed out that US-based copyright industries have widely lobbied and tried to employ US governmental institutions to exert pressure on other countries to not incorporate fair use in their legal schemes; Id at 12.

[106] See section 107 of the US Copyright Act:

> "Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including

particular factors to be considered in assessing whether the use is fair in terms of subsection 12A(b). The shift from fair dealing to fair use denotes an open and adaptable approach to copyright exceptions, one better able to evolve alongside creative and cultural developments. Furthermore, the open list of purposes is preferable to the more restricted and closed list of purposes in subsection 12(1) of the Act. It mirrors the same underlying rationale of the present purposes, that of public benefit, and it appears to be of equal importance as those present in subsections 12(1)(a)-(c) of the current Act, those purposes being criticism and review, reporting on current events and research and private study. Rather than limiting use to a closed list of permitted purposes, the provision is best understood as a mechanism for determining whether a user's conduct is fair, rather than as a set of requirements to be met. Ultimately, the facts will indicate whether the conduct is fair.

[116] Although the doctrine of fair use can be traced to the US, several other countries have incorporated it into their law. Taiwan's Copyright Act[107] contains a similar fair use provision in Article 65, which provides:

> "Fair use of a work shall not constitute infringement on economic rights in the work.
>
> In determining whether the exploitation of a work complies with the provisions of Articles 44 through 63, or other conditions of fair use, all circumstances shall be taken into account, and in particular the following facts shall be noted as the basis for determination:

> multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.
>
> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors."

[107] Taiwan Copyright Act above n 95.

(1) The purposes and nature of the exploitation, including whether such exploitation is of a commercial nature or is for non-profit educational purposes.

(2) The nature of the work.

(3) The amount and substantiality of the portion exploited in relation to the work as a whole.

(4) Effect of the exploitation on the work's current and potential market value."

[117] The Philippines Copyright Law[108] also contains specific fair use language:

"185.1. The fair use of a copyrighted work for criticism, comment, news reporting, teaching including multiple copies for classroom use, scholarship, research, and similar purposes is not an infringement of copyright. Decompilation, which is understood here to be the reproduction of the code and translation of the forms of the computer program to achieve the inter-operability of an independently created computer program with other programs may also constitute fair use. In determining whether the use made of a work in any particular case is fair use, the factors to be considered shall include:

(a) The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit education purposes;

(b) The nature of the copyrighted work;

(c) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(d) The effect of the use upon the potential market for or value of the copyrighted work."

[118] While the lack of challenges in the international context against fair use provisions is not decisive of their conformity to international law, it serves as an indication that, in allowing limited fair use for specified purposes that are part of a

[108] Philippines Copyright Law above n 95.

statutory framework, such fair use provisions pass the test in Article 9(2) of the Berne Convention.

[119] The fair use standard set out in section 12A of the CAB mirrors fundamentally that of the US and other countries that have incorporated the doctrine into their law. The various components of the provision reasonably convey its meaning and what it expects from copyright owners. There are instances when copyright infringement will not occur. The phrase "such as" can only have the effect of including other purposes not yet contemplated by the Legislature but which share the same purposes as the named purpose. Section 12A goes further and provides some guidance on which factors will be taken into account when determining whether the fair use exceptions will apply. Therefore, not only does the provision provide a conspectus of purposes for fair use, but it also provides a framework (guidelines) for the factors to be taken into account to determine such fair use.

[120] RISA submits that subsection 12A(a)(i) threatens creators, because the exceptions open the door to individuals evading liability by copying works and distributing them to others under the guise of "private study or personal use".

[121] This concern is misplaced. Subsection 12A(a) must be read in conjunction with subsection 12A(b), which protects against this occurrence by taking into account various factors, including "the substitution effect of the Act upon the potential market for the work in question". This clause protects against the aforementioned fact pattern because an individual copying a work only threatens a creator's rights when the individual distributes the work. If the individual copies a work in order to distribute it to others, they affect the "potential market for the work". This reading accords with the legislation of the US, Taiwan and the Philippines, which have limitations akin to the US exception where there is an "effect of the use upon the potential market for or value of the copyrighted work".

[122] The "private study or personal use" exception allows an individual the flexibility to maximise his or her use of the work in their personal capacity (for example, by copying it onto the individual's various personal devices) without threatening the market of the creator's work through third-party distribution. An individual who copies a work in order to distribute it to third parties is not using the work for "private" study or "personal" use. These adjectives refer to use by the very individual who does the copying. Copying for the benefit of any person other than that individual is no longer "private" or "personal" use. This is so even if the copies are distributed non-commercially and only to friends.

[123] CCSA argues that the inclusion of the phrase "such as" in section 12A unduly widens the scope of works that can be used freely. It says that there is also no criterion that limits what "such as" means; in other words, what other works, other than the ones mentioned, can and cannot be used freely.

[124] I disagree. The context of the provision provides sufficient guidance on the types of works contemplated, namely, works for scholarship, teaching and educational purposes. So, it is reasonably ascertainable that the works to which an exemption will apply are those works that are used for the stated purposes. Therefore, section 12A is not vague.

[125] Sections 12A-D create exceptions for specific uses (quotation, parody, education, etc.). The scope of these exceptions is defined and targeted toward public interest goals such as education, transformation and freedom of expression. These exceptions do not extinguish copyright but qualify its exercise in line with constitutional rights in sections 16 and 29. As such, the extent of deprivation is limited, and the purpose is compelling. There is a rational connection between means and ends. When assessed individually, many of the impugned provisions, particularly sections 12A-D, serve constitutionally permissible and compelling objectives. They are tailored to advance rights such as education, freedom of expression and access to information, and

the extent of the deprivation they impose on copyright owners is generally limited and justified.

Does the fair use exception constitute an arbitrary deprivation of property?

[126] The President submits that the fair use exception constitutes an arbitrary deprivation of property. It provides greater flexibility than fair dealing, but introduces uncertainty. South African authors may lack resources to litigate, making them vulnerable to exploitation, and the shift from fair dealing to fair use requires constitutional scrutiny to determine if it impermissibly invades copyright owners' rights. The President refers to *FNB* and submits that this Court should take the following factors into consideration when assessing arbitrariness, namely the relationship between the deprivation and its purpose and the relationship between the purpose of the deprivation and the person whose property is affected.[109]

[127] This leads me to a closer analysis of the particular "fair use" scheme in section 12A of the CAB. In allowing for uses for the specified purposes, subsection 12A(1)(a) expands the scope of permissible uses by adding new categories of copyrighted works and broadening the range of potential uses that qualify as "fair use". Consequently, it curtails the copyright owner's exclusive entitlement to use or authorise use of their works under sections 6-8 of the Act.

[128] Copyright is constitutional property under section 25(1) of the Constitution. The question to be asked is: when exactly are the boundaries of the constitutional right to property in copyright crossed so as to become a deprivation? Deprivation, as the "threshold" step in the constitutional property analysis, must be given a wide meaning. Simply because a law interferes with only some incidents of the property right does not mean it is not a deprivation. This is a step to consider in judging the arbitrariness of

[109] *FNB* above n 55 at para 100.

such deprivation.[110] As this Court said in *FNB*, "[i]n a certain sense any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned".[111]

[129] Fair use restricts the complete exclusivity of copyright in a number of settings authorised by section 12A. Therefore, the fair use limitation of the exclusive right to authorise use must be considered a deprivation of property under section 25(1) of the Constitution.

[130] In this instance, fair use is a broad concept that allows various uses, provided that they are considered fair by weighing the impact on the copyright owner against the importance of the use. The types of uses that subsection 12A(1) provides as potentially "fair use" include research, personal use or private study, teaching and scholarship, reporting of current events, criticism or review of the copyrighted work, comment, parody, satire, caricature, illustrations, the preservation of collections of archives, libraries and museums and ensuring the proper performance of public administration.

[131] Subsection 12A(b) sets out additional guidelines in a non-exhaustive list of factors to take into consideration when determining whether the individual instance of use of copyrighted work amounts to fair use. The first factor is the nature of the work in question; the second is the amount and substantiality of the part of the work affected by the use in relation to the whole of the work; the third is the purpose and character of the use; and the fourth is the substitution effect of the use upon the potential market for the work in question. To safeguard the creator's moral rights and the copyright owner's rights, subsection 12A(c) mandates that the source and the author's name be cited.

[132] I do not agree with the submission that the provision is fatally vague or that the inclusion of the phrase "such as" in section 12A unduly widens the scope of works that

---

[110] Bishop and Woolman "Freedom and Security of the Person" in Woolman et al (eds) *Constitutional Law of South Africa* Service 5 (2013) at 40-34.

[111] *FNB* above n 55 at para 57.

can be used freely. If one examines the various components of the provision, it is reasonably possible to ascertain its meaning and what it expects of users, or the burden it imposes on them. In subsection (a) one can clearly see in which instances copyright infringement will not apply and for what purposes. The phrase "such as" implies that there are other purposes not mentioned that would fall into the exception. To interpret this as "any other potential use", however, would be an absurd interpretation of section 12A if regard is had to the purpose of the express exceptions. The purpose of the express exceptions is to allow for the use of copyrighted work for important public purposes or for individuals to use works in their personal capacity. Therefore, the phrase "such as" can only have the effect of including other purposes not yet contemplated by the Legislature but which share attributes similar to the named purposes, that is, public benefit or private and personal use.

[133] Subsection 12A(b) goes further by providing guidance on which factors will be taken into account in determining when the fair use exceptions will apply. Not only does the provision provide a range of express purposes for fair use, but it also sets out a framework of the factors to be taken into account in determining such fair use. Again, the phrases "including but not limited to" and "including" do not leave the door entirely open to any factors. The factors that are "included" but do not form part of the list are not random. These must be factors that align with the purpose of the exception. As this Court emphasised in *Affordable Medicines*[112] and *Savoi*,[113] generality does not mean that a provision is vague. In fact, generality may be necessary to provide for flexibility in the event that persons are confronted with circumstances that do not neatly fall within the express provisions. This is precisely the function of the phrases "such as", "including" or "included, but not limited to", namely, to provide flexibility for exemptions which the Legislature has not yet contemplated.

[112] *Affordable Medicines* above n 84 at para 108.

[113] *Savoi* above n 86 at paras 15-17.

[134] Therefore, the deprivation of the property in copyright is not vague and can be reasonably applied and developed by the courts in the future. It should further be emphasised that, while the President and other parties highlighted the established jurisprudence on "fair dealing" and the lack of such in relation to "fair use", this is, in the first place, the nature of any amendment to the law. Secondly, while fair use is distinguishable from fair dealing, which was part of the previous South African copyright scheme, such jurisprudence does not thereby become wholly unusable. Thirdly, there appears to be a very limited number of decisions that substantially engage with fair dealing in section 12 as it currently stands.[114]

[135] Therefore, the submission that the term "fair use" is undefinable and unusable in contrast to the current concept of "fair dealing" is without merit.

Arbitrariness

[136] For the section to be unconstitutional, the deprivation must be arbitrary. The standard of arbitrariness review is flexible and dependent on the weight of the deprivation, ranging from rationality review to a proportionality analysis akin to that in section 36 of the Constitution.[115] In *Jordaan*,[116] this Court held:

> "The notion that owning property comes with burdens for the public good is not outlandish. This Court has increasingly emphasised the constitutional limitations on private property as well as the constitutional vision that property utilisation must conduce to the public good."[117]

[137] In my view, the deprivation is not arbitrary. The potential exceptional uses have been outlined in section 12A, and I have pointed out that they all follow a clear public

---

[114] Primarily, this appears to be *Moneyweb* above n 99 and *South African Broadcasting Corporation SOC Ltd v Via Vollenhoven and Appollis Independent CC* 2016 BIP 371 (GJ).

[115] *FNB* above n 55 at paras 97-100 and *Mkontwana* above n 64 at paras 34-5.

[116] *Jordaan v Tshwane Metropolitan Municipality* [2017] ZACC 31; 2017 (6) SA 287 (CC); 2017 (11) BCLR 1370 (CC).

[117] Id at para 51.

benefit rationale. Copyright, far from being an absolute right, aims to strike a balance between individual rights and the public benefit. Copyright, while being an incentive for knowledge production, can also be a hindrance to such when it is overregulated and access is not possible. There have been concerns and criticism about the duration of copyright protection on this basis, resulting in arguments that placing works beyond the public domain stifles secondary creative work and innovation. When copyright is overly exclusive, far from providing appropriate incentives, it leads to exclusion and undermines the freedom of expression of other creators and the right to education, among other rights. These negative impacts may, at some point, far outweigh the legitimate benefits (including monetary) to creators or, more properly, copyright owners.[118]

[138] With regard to the debated effects of fair use, it is important to emphasise that a number of countries have transitioned from fair dealing to fair use schemes without decimating their creative industries.

[139] The categories provide a clear orientation that remains true to the fact that property is not absolute and is subject to societal boundaries and obligations. The criterion of fairness in subsection 12A(b) further limits the potential deprivation and provides an intelligible balancing tool for these potentially opposing rights and concerns. It does not allow for the simple copying and proliferation of a work. Instead, as Zapiro rightly emphasises with regard to parody and satire, what fair use envisions is primarily a transformative use, that is, utilising a limited part of an original work to create another, new, original work. Regard must be had to the listed factors. In particular, it is worth pointing out that "the substitution effect of the act upon the potential market for the work in question" must be taken into account.[119] This explicitly necessitates considering whether a use would "eat into" the commercial exploitation of the original work, which might render that use not fair.

---

[118] Koboldt "Intellectual Property and Optimal Copyright Protection" (1995) 19 *Journal of Cultural Economics* 131.

[119] The CAB at subsection 12A(b)(iv).

[140] A further important factor in the appropriate balance struck by section 12A is the recognition of the moral rights of authors.[120] It might be true that an author will have a legitimate concern about their work being associated with or utilised in a certain context. This consideration can properly carry some weight in this balancing exercise.

[141] Therefore, the deprivation that the fair use exception of section 12A of the CAB entails is not arbitrary. It follows that the provision does not infringe the right to property under section 25(1) and is constitutional. The same applies to corresponding provisions of the PPAB.

The copyright exceptions in sections 12B and 12C

[142] Sections 12B and 12C state:

> "**Specific exceptions from copyright protection applicable to all works**
>
> 12B. (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 it shall be compatible with fair practice; and
>
> (ii) the source and the name of the author, if it appears on the work, shall be mentioned in the quotation;
>
> (b) the reproduction of such work by a broadcaster by means of its own facilities where such reproduction or any copy of the reproduction is intended exclusively for lawful broadcasts of the broadcaster and is destroyed before the expiration of a period of six months immediately following the date of the making of the reproduction, or such longer period as may be agreed to by the owner of the relevant part of the copyright in the work: Provided that any such reproduction of a work may,

[120] Firstly, the authors have to be acknowledged by being cited, alongside the source of the work. Secondly, such factors as the purpose of the use are taken into account in the fairness criteria in subsection 12A(b).

if it is of an exceptional documentary nature, be preserved in the archives of the broadcaster, but shall, subject to the provisions of this Act, not be used for broadcasting or for any other purpose without the consent of the owner of the relevant part of the copyright in the work;

(c) the reproduction in the press or by broadcasting of a lecture, address or other work of a similar nature which is delivered in public, if such reproduction or broadcast is for information purposes: Provided that the source and the name of the author should be indicated, if it appears on the work, and that the author of the lecture, address or other work so reproduced shall have the exclusive right of making a collection thereof;

(d) subject to the obligation to indicate the source and the name of the author, if it appears on the work—

(i) the reporting of current events, or the reproduction and the broadcasting or communication to the public of excerpts of a work seen or heard in the course of those events, to the extent justified by the purpose; or

(ii) for purposes of providing current information, the reproduction in a newspaper or periodical, or the broadcasting or communication to the public, of a lecture, address, or sermon or other work of a similar nature delivered in public, to the extent justified by such purpose;

(e) the translation of such work by a person giving or receiving instruction: Provided that such translation is—

(i) done for non-commercial purposes;

(ii) used for personal, educational, teaching, judicial proceedings, research, the furtherance of language and culture, or professional advice purposes only: Provided that such use shall be compatible with fair practice; and

(iii) communicated to the public for non-commercial purposes;

(f) the use of such work in a bona fide demonstration of electronic equipment to a client by a dealer in such equipment;

(g) the use of such work is for the purposes of judicial proceedings or preparing a report of judicial proceedings; or

(h) the making of a personal copy of such work by a natural person for their personal use and made for ends which are not commercial: Provided that such use shall be compatible with fair practice.

(2) For the purposes of subsection (l)(h), 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.

(3) The provisions of subsection (1) shall also apply with reference to the making or use of an adaptation of a work and shall also include the right to use the work either in its original language or in a different language.

(4) An authorization to use a literary work as the basis for the making of an audiovisual work, or as a contribution of the literary work to such making, shall, in the absence of an agreement to the contrary, include the right to broadcast such audiovisual work.

(5) The provisions of subsection (l)(c) and (d) shall apply also with reference to a work or an adaptation thereof which is transmitted in a diffusion service.

(6) Notwithstanding anything to the contrary in this Act, the Trademark Act, 1993 (Act No. 194 of 1993), and the Counterfeit Goods Act, 1997 (Act No. 37 of 1997), the first sale of or other assignment of an assigned original or copy of a work in the Republic or outside the Republic, shall exhaust the rights of distribution and importation locally and internationally in respect of such assigned original or copy.

Temporary reproduction and adaptation

12C. Any person may make transient or incidental copies or adaptations of a work, including reformatting, where such copies or adaptations are an integral and essential part of a technical process and the purpose of those copies or adaptations is—

(a) to enable the transmission of the work in a network between third parties by an intermediary or any other lawful use of the work; or

(b) to adapt the work to allow use on different technological devices, such as mobile devices,

as long as there is no commercial significance to these acts."

Submissions by the parties regarding the copyright exceptions in sections 12B and 12C

[143] RISA submits that sections 12B(1)(c), (d)(i), (e) and (h); 12B(2); 12D and 19C also constitute arbitrary deprivations of property, for the reasons stated above. It argues that section 8(2)(f) of the PPAB would be similarly unconstitutional, as it limits a performer's entitlement to exploit their performance, and the deprivation is arbitrary because the PPAB aims to protect performers' rights, but the section does the opposite.

[144] By making translations not subject to the consent of the copyright owner, subsection 12B(1)(e) runs into conflict with the Berne Convention, so contends CAPA. This is not mitigated by requiring compatibility with fair practice; it still remains open to blanket translation and publication of a work under the guise of "educational purposes".

[145] NAB submits that subsection 12B(1)(b) provides for the so-called "ephemeral exception", which is crucial for broadcasters. It allows them to use copyright works without prior consent if this occurs in the context of a lawful broadcast and if the copy is destroyed after six months. NAB submits that this is constitutional, in that it appropriately balances the rights of copyright owners with those of broadcasters who, through no fault of their own, might reproduce copyrighted works incidentally and in

situations in which they could not obtain prior permission. The exception is narrowly tailored and requires the destruction of the reproduction, and thus does not arbitrarily infringe the owner's constitutional property rights. With reference to the statement in *Glenister* that it is a "manifest constitutional injunction to integrate . . . international law obligations into our domestic law",[121] NAB cites Article 11(3) of the Berne Convention and Article 5.2(d) of the EU Copyright Directive[122] in support of the ephemeral exception.

[146] SANEF highlights various judgments of this Court where the importance of the right to freedom of expression is emphasised, including *SANDU*,[123] *Democratic Alliance*[124] and *Print Media*.[125] SANEF then considers that media organisations both report on copyright material in the public interest and also create their own copyright material when developing their reporting.

[147] Subsection 2A(4)(b)(ii) of the CAB states that "news of the day that are mere items of press information" do not enjoy copyright protection. SANEF argues that "original contributions in reporting by the media" require copyright protection and that media organisations need to retain the ability to generate revenue from the content they create. If the organisations cannot generate revenue, then they will not be able to continue reporting. SANEF submits that subsection 12B(1)(d) "allows the media to use copyright works (i.e. an exception), whereas [subsection 2A(4)(b)(ii)] does not give copyright protection to certain items of the press (i.e. a limitation)".

---

[121] *Glenister v President of the Republic of South Africa* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) at para 202.

[122] 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.

[123] *South African National Defence Union v Minister of Defence* [1999] ZACC 7; 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 (CC).

[124] *Democratic Alliance v African National Congress* [2015] ZACC 1; 2015 (2) SA 232 (CC); 2015 (3) BCLR 298 (CC).

[125] *Print Media South Africa v Minister of Home Affairs* [2012] ZACC 22; 2012 (6) SA 443 (CC); 2012 (12) BCLR 1346 (CC).

[148] CCSA avers that the "ephemeral exception" in section 12C, which is modelled on Article 5 of the EU Copyright Directive, is not suitable for the South African market.[126] Allowing live streaming without compensation impoverishes copyright owners and adversely affects the development of the music industry, hampering the development of streaming services and unreasonably depriving copyright owners of the opportunity to exploit their property.

Analysis – sections 12B and 12C

[149] As set out above, a deprivation is arbitrary when there is insufficient reason for it. A sufficient reason requires an examination of the relationship between means employed and ends sought. Each exception in sections 12B and 12C expressly states its purpose and includes internal safeguards to prevent overbroad application. For instance, subsections 12B(1)(a), (c) and (d) serves information dissemination and public discourse. Subsection 12B(1)(a) permits quotations subject to three limitations: the extent must not exceed what is reasonably justified by the purpose; the use must be compatible with fair practice; and the source and author must be mentioned. Subsections 12B(1)(c) and (d) expressly states its purpose: reproduction of public lectures "for information purposes" and use of works for "the reporting of current events". Both subsections limit permissible use to what is "justified by the purpose" and require attribution.

[150] Subsections 12B(1)(b) and (h) addresses technological necessities. Subsection 12B(1)(b) permits ephemeral reproduction by broadcasters to enable necessary technical copies for lawful broadcasting. The provision requires that the reproduction must be made using the broadcaster's own facilities, be intended exclusively for lawful broadcasts and be destroyed within six months. Subsection 12B(1)(h) permits natural persons to make personal copies for non-commercial use, including back-up copies, time/format-shifting and storage. The

[126] However, this appears to be an erroneous reference as the "ephemeral exception" is located in subsection 12B(1)(b).

Copyright Review Commission[127] recommended this exception in 2011 to update the law for the digital era. Both provisions connect their means to their technological purposes.[128] Similarly, subsection 12C(a), regarding the temporary reproduction exception, serves a precise technological purpose. It allows browsing and caching to take place on a computer connected to the internet without amounting to an infringement of copyright. It also enables transmission systems to function efficiently.[129]

[151] The remaining subsections in 12B(1) address specific, limited contexts. Subsection 12B(1)(e) permits translations for non-commercial purposes, limited to personal, educational, teaching, judicial or research use, and compatible with fair practice. Subsection 12B(1)(f) permits use in bona fide (good faith) demonstrations of electronic equipment by dealers to clients. Subsection 12B(1)(g) permits use for judicial proceedings. Each provision's narrow scope indicates rational design targeting specific situations.

[152] Therefore, sections 12B and 12C contain limitations, namely, fair practice requirements, non-commercial restrictions and attribution requirements, and provide for a narrow scope and sufficient purpose that confine the deprivations to specific circumstances. Therefore, the deprivation is not arbitrary.

The copyright exceptions in section 12D

[153] Section 12D provides for educational and academic exceptions to, or exemptions from, the provisions of copyright infringement. It provides:

"**Reproduction for educational and academic activities**

[127] Established on 18 November 2010 by then-Minister of the Department of Trade and Industry Robert Haydyn Davies.

[128] Myburgh et al *Copyright Reform or Reframe? A Critical Analysis of the Copyright Amendment Bill B13D of 2017 and the Performers' Protection Amendment Bill B24D of 2016* (Juta & Co Ltd, Cape Town 2023) at 62-3.

[129] Id at 90.

12D. (1) Subject to subsection (3), *a person may make copies of works or recordings of works, including broadcasts, for the purposes of educational and academic activities.*

(2) *Educational institutions may incorporate the copies made under subsection (1)* in printed and electronic course packs, study packs, resource lists and in any other material to be used in a course of instruction or in virtual learning environments, managed learning environments, virtual research environments or library environments hosted on a secure network and accessible only by the persons giving and receiving instruction at or from the educational establishment making such copies.

(3) *Educational institutions shall not incorporate the whole or substantially the whole of a book or journal issue, or a recording of a work*, unless a licence to do so is not available from the copyright owner, collecting society or an indigenous community on reasonable terms and conditions.

(4) *The right to make copies contemplated in subsection (1) extends to the reproduction of a whole textbook—*

(a) where the textbook is out of print;

(b) where the owner of the right cannot be found; or

(c) where authorised copies of the same edition of the textbook are not for sale in the Republic or *cannot be obtained at a price reasonably related to that normally charged in the Republic for comparable works.*

(5) *The right to make copies shall not extend to reproductions for commercial purposes.*

(6) Any person receiving instruction may incorporate portions of works in printed or electronic form in an assignment, portfolio, thesis or a dissertation for submission, personal use, library deposit or posting on an institutional repository.

(7) (a) The author of a scientific or other contribution, which is the result of a research activity that received at least 50 per cent of its funding from the state and which has appeared in a collection, has the right, despite granting the publisher or

editor an exclusive right of use, to make the final manuscript version available to the public under an open licence or by means of an open access institutional repository.

(b) In the case of a contribution published in a collection that is issued periodically at least annually, an agreement may provide for a delay in the exercise of the author's right referred to in paragraph (a) for up to 12 months from the date of the first publication in that periodical.

(c) When the contribution is made available to the public as contemplated in paragraph (a), the place of the first publication must be properly acknowledged.

(d) Third parties, such as librarians, may carry out activities contemplated in paragraphs (a) to (c) on behalf of the author.

(e) Any agreement that denies the author any of the rights contemplated in this subsection shall be unenforceable.

(8) (a) The source of the work reproduced and the name of the author, if it appears on the work, shall as far as is practicable, be indicated on all copies contemplated in subsections (1) to (6).

(b) The use of the work as contemplated in subsections (1) to (6) shall not exceed the extent justified by the purpose and shall be compatible with fair practice.

(9) Copyright in a work shall not be infringed by any illustration in a publication, broadcast, sound or visual record for the purpose of teaching: Provided that such use shall not exceed the extent justified by the purpose, and shall be compatible with fair practice: Provided further that the source as well as the name of the author, if it appears on the work, shall be mentioned in the act of teaching or in the illustration in question." (Emphasis added.)

Submissions by the parties regarding the copyright exceptions in section 12D

[154] The submission is that the exceptions interfere with the copyright owners' market. The President argues, in line with the three-step test in the Berne Convention,

that it is necessary for the exception to the rights of the copyright owner to be clearly defined and narrow in its reach and scope; the intended use must not interfere with the market of the copyright owner; and there must be a balance between the harm caused to the copyright owner and the benefits for the beneficiaries of the exception, to ascertain whether there is unreasonable prejudice to the copyright owner. Whilst some level of harm is anticipated, it must be proportional. The term "legitimate interests" implies a normative claim calling for the protection of interests that are "justifiable", supported by relevant public policies or other social norms. Therefore, any exceptions or limitations to copyright that do not comply with the three-step test fall afoul of the Berne Convention and TRIPS Agreement and would accordingly not be recognised by foreign copyright owners who exercise their rights to copyright work in South Africa. The President further argues that the right to education is circumscribed and does not extend to reproduction for commercial purposes; the term commercial is not defined; and in the context of the four provisions under section 12D, the ambit of commercial purpose is unclear.

[155] Blind SA submits that section 12D regulates the reproduction of works under copyright for educational and academic purposes and does not include commercial use. This, says Blind SA, is in accordance with comparative practice. Blind SA denies that the phrase "commercial purpose" is not defined in the CAB.[130] Furthermore, subsection 12D(1) prohibits the reproduction of a whole work for education purposes unless a licence cannot be obtained on reasonable terms and conditions, whilst subsection 12D(4) permits the reproduction of whole textbooks only if certain requirements are met, namely: where the textbook is out of print or the owner of the right cannot be found or where authorised copies of the same edition of the textbook are not for sale in South Africa or cannot be obtained at a price reasonably related to that normally charged in South Africa for comparable works. Blind SA asserts that copyright is not absolute, and exceptions similar to the impugned provisions are an important component of the copyright framework.

[130] Section 1 of the CAB defines "commercial" as "the obtaining of economic advantage or financial gain in connection with a business or trade".

[156] CCSA submits that section 12D would, in extreme cases, permit not only the verbatim reproduction of materials, but also the wholesale copying of an entire textbook, where the user considers the licence terms to be unreasonable. The section does not specify how the reasonableness of licence terms is to be assessed. The section fails to recognise that education can be a commercial activity, conducted by private institutions. Course packs as provided for in subsection 12D(2) must be licensed so as not to interfere with the rights of copyright owners. Subsection 12D(4) severely interferes with literary authors' markets. CCSA argues that the exceptions constitute arbitrary deprivations of property and further relies on *SADPO* to submit that the provisions violate freedom of trade, occupation and profession under section 22 of the Constitution and run counter to the purposes of the CAB. CCSA further submits that section 12D does not appropriately balance the copyright owners' rights and their concerns, and fails the first step of the Berne Convention three-step test. In addition, "commercial" and "producer" are not defined, which creates uncertainty. For these reasons, CCSA contends that section 12D does not enhance access to education and is constitutionally invalid.

[157] CAPA submits that subsections 12D(1)-(4) are unduly wide as they do not prescribe which persons can take advantage of the exception, they include all types of works, and allow reproduction based solely on the subjective opinion of a person as to the reasonable price. This risks the destruction of the publishing market and is compounded by subsection 12D(6).

[158] CCL submits that copyright is not property under section 25(1) of the Constitution. However, if it is deemed as such, the educational exceptions are justified as they serve important constitutional purposes. The exceptions are calibrated for educational use and are limited in scope to non-commercial uses. Thus, even if they constitute a deprivation of property, the limitation is justifiable under section 36.

Analysis – section 12D

[159] This Court, in *Offit Enterprises*, emphasised that the physical taking of property is not necessary for deprivation to occur and that it is sufficient for one or more of the entitlements of ownership to be affected.[131] However, there must at least be a substantial interference or limitation that goes beyond the normal restrictions on property use and enjoyment, in order to amount to a deprivation engaging section 25(1).[132]

[160] The provisions of section 12D permit the reproduction of works by an educational institution, subject to subsection (3). Subsections 12D(1)-(5) allow any person to make copies of the copyright material for the purposes of academic and educational activities. In particular, subsection (4) permits the reproduction of a whole book, subject to the specified conditions. These are that the book must be out of print, or the owner cannot be found, or authorised copies cannot be obtained at a reasonable price related to the one charged in South Africa for comparable works. Subsection 12D(6) allows students to incorporate portions of copyright materials in their work. Subsection 12D(7)(a) allows the author of a work "which is the result of a research activity that received at least 50 per cent of its funding from the state and which has appeared in a collection", and who has given their publisher or editor exclusive rights of use, to make their manuscript available to the public under an open licence. Subsection 12D(9) allows for any illustration for the purpose of teaching where the illustration does not exceed the extent justified by the purpose, is compatible with fair practice and provided that the source and name of the author is mentioned in the act of teaching or illustration if it appears on the work As framed, these provisions enable educational institutions to obtain the full benefit of an author's work without payment where the statutory conditions are met.

[131] *Offit Enterprises* above n 65 at para 41.

[132] Id at paras 38-9, citing *Mkontwana* above n 64 at para 32.

[161] The issue is not whether the exceptions are wise policy choices, but whether the exceptions are wide in scope and application to an extent that they go further than necessary to achieve the purpose of the limitation and improperly displace the state's duty to fund textbooks and learning materials. As stated in *FNB*, there must be an evaluation of the relationship between the deprivation and the end sought to be achieved.[133] Moreover, in evaluating the deprivation, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.[134]

[162] Subsections 12D(1)-(5) indeed affect the use and enjoyment of copyright owners. They provide not only for the verbatim reproduction of materials but also for the wholesale copying of entire textbooks, where the user considers the licence terms unreasonable. How this will be done is not specified. The section fails to recognise that education can be a commercial activity conducted by private institutions and that, but for the provision of section 12D, these institutions would be customers of the copyright owners. Similarly, education is a constitutional right; but it is the state that bears the duty to fund that right in public institutions, not private authors whose works are the product of legitimate commercial activity. The publication of textbooks is a legitimate commercial activity, even when they are used by government schools and state-funded universities. The conditions permitting the reproduction of a whole textbook in subsection 12D(4) are stated disjunctively. If the copyright owner cannot be located, this is a sufficient basis for copying the entire book, even if it is not out of print and even if it might be available at a reasonable price. Conversely, if the owner of the copyright can be traced, but the price is not reasonably related to that normally charged in South Africa for comparable works, there is no duty to approach the copyright owner. The reasonableness of the price when the copying is done will inevitably be a matter of opinion on the part of the person doing the copying, and the copying may never come to the notice of the copyright owner.

---

[133] *FNB* above n 55 at para 100.

[134] Id.

[163] Therefore, I agree with the argument that the section affects the copyright owners' market. This is because a private educational institution may invoke the provisions of subsections 12D(1) and (2) to make partial copies of copyright material, notwithstanding the fact that the material forms part of student fees. Similarly, a public institution may reallocate the budget of study materials to other non-academic necessities, relying on subsections 12D(1)-(3) to copy works rather than purchase them. This could result in copyright owners losing a substantial market share due to the impugned provisions, while the state escapes its obligation to fund the acquisition of textbooks and other learning materials.

[164] It is worth noting that the CAB introduces into section 1 of the Act a definition of "commercial", namely "the obtaining of economic advantage or financial gain in connection with a business or trade". This definition can be construed to exclude private educational institutions from the benefits of section 12D because they are commercial. Nonetheless, it is difficult to reconcile the definition of "commercial" with section 12D. When counsel for CCL was asked whether the provisions on non-commercial use are sufficient, he argued that the right to education includes access to learning materials and that the best interests of children are engaged; thus, there should be no difference between public and private educational institutions. On that view, if private institutions fall within the definition of "commercial", they are nevertheless a vehicle for education and perform a public function.[135] This would mean educational institutions are entitled to the section 12D exception, regardless of their financial capacity or that of their students, and regardless of the state's duty to fund materials in public schools. Furthermore, a private institution might contend that copying only falls foul of the "commercial purposes" prohibition in subsection 12D(5) where material is copied for purposes of being sold to learners. Copying might be done at a private institution

[135] See, in another context, *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC) at paras 52-3.

without any intention of charging learners for the copies, eroding the market of copyright owners.

[165] Clearly, the Bill does not define the parameters of the deprivation by affording a blanket right to all private and public educational institutions, including many that neither lack means nor have any constitutional claim, to receive textbooks free of charge from private authors. The provisions do not balance the interests of the copyright owners and the beneficiaries of the exception. It cannot be controverted that there are educational institutions and learners who are suitable beneficiaries of assistance in accessing materials. However, the deprivation can only be justified where it removes a genuine barrier to educational access that the state cannot reasonably overcome through funding. In such circumstances, the copyright exception would advance the constitutional right to education by enabling access that would not otherwise exist, despite reasonable state measures. It cannot be justified as a mechanism for relieving the state of its obligations by conscripting private rights holders.

[166] In my view, the Legislature did not consider the interests of the copyright owners. Instead, it placed undue weight on granting reproduction rights to advance educational access, without defining the scope of that right against the corresponding interference with copyright owners' markets, and without recognising that it is the state, not authors, that must fund public education.

[167] Additionally, the term "commercial purposes" in subsection (5) is not defined. The definition of "commercial" in subsection 1(e) is insufficient when applied to educational institutions within section 12D. Many educational institutions have a hybrid character: they pursue educational purposes through commercial means. For instance, some private educational institutions operate as for-profit commercial enterprises listed on the Johannesburg Stock Exchange. Yet, they perform educational functions identical to public institutions. It is not clear from the impugned provisions whether these institutions are excluded from the provisions of section 12D of the Bill. Nor is it clear why, if the state must fund textbooks for public institutions, private

institutions unable or unwilling to pay should be allowed, in effect, to obtain them free of charge through copying.

[168] This then vindicates the argument that the lack of a definition of an "educational institution" has the effect of arbitrarily depriving the copyright owners of their market, which is an entitlement of copyright. Therefore, by failing to define "commercial use" within the contemplation of section 12D, the Legislature overlooked the fact that some institutions might unduly benefit from the exception to the detriment of copyright owners. There must be an indication whether certain educational institutions are excluded from the scheme of section 12D, otherwise the rights of the copyright owners are disregarded without a justifiable reason.

Is section 12D in conflict with international law?

[169] The other complaint by the President is that this section is in conflict with international law. This argument cannot be controverted. Article 9(1) of the Berne Convention vests in authors of literary and artistic works "the exclusive right of authorising the reproduction of these works, in any manner or form". Article 9(2) requires that any copyright exceptions or limitations satisfy a three-step test, which mandates that exceptions in national legislation should (a) be confined to certain special cases, (b) that do not conflict with the normal exploitation of the work and (c) that do not unreasonably prejudice the legitimate interests of the copyright owner. This is further codified in Article 13 of the TRIPS Agreement, Article 10 of the WCT, Article 16 of the WPPT and Article 11 of the Marrakesh Treaty.

[170] A limitation, like section 12D, must, therefore, be confined to special circumstances (education), must not conflict with the normal exploitation of work (sales or markets) and must not unreasonably prejudice the interests of the copyright owner (for example, through the absence of a clear definition of "educational institution" and "commercial use"). By applying broadly to undefined "educational institutions" and "commercial use", the provision operates without clear boundaries and prejudices copyright owners by depriving them of their market without requiring any showing that

access to education demands such deprivation or that it cannot reasonably be secured through state funding and commercial acquisition.

[171] Moreover, these are not the only limitations brought by section 12D. It also directly affects the interests of authors of educational textbooks, who have no legal duty to provide their works for free. An exception that is framed so broadly that it permits extensive unremunerated copying of textbooks and other learning materials for educational use significantly weakens authors' financial incentives to produce and regularly update these works. In turn, this undermines their legitimate economic interest and, ultimately, the overall quality and availability of educational materials, which depend on sustained investment and ongoing authorship.

[172] Regarding the *lex specialis* argument raised by CCL in relation to the conflict between Articles 9 and 10 of the Berne Convention, this would fit within the conventional understanding of *lex specialis*. Article 10(2) authorises Member States to permit the use of works by way of illustration for teaching, subject to requirements of proportionality and fair use. This provision operates within the general framework for exceptions set out in Article 9(2).

[173] Therefore, even if it is accepted that the proper interpretation of the limitation entails that the provisions of Article 10(2) rather than the general test in Article 9(2) of the Berne Convention apply, section 12D in its current form nevertheless fails to satisfy the standard in Article 10(2). The purpose of section 12D is to grant persons who otherwise would not have the means to access such materials the right of access to necessary materials. But that purpose must be achieved, in the first instance, through reasonable state funding and procurement of textbooks, not by authorising educational institutions to copy entire works free of charge. The objective of educational access can still be achieved when the term "commercial use" is defined, private and public institutions are excluded from benefiting and when the state accepts its duty to procure textbooks rather than relying on copying. This is the balance required by section 25(1) of the Constitution. The right to education cannot be viewed in isolation, as it has the

result of arbitrarily affecting the right to use and enjoyment of property. It follows that the ends do not justify the means. The justifiable purpose and fair practice required by Article 10(2) are not satisfied where there is unrestricted access to copyright work.

[174] One must also consider, in interpreting the various international law obligations, the national context of these rights. As laid out above, South Africa is bound by and has ratified human rights conventions such as the ICESCR[136] and others. The obligations contained in those conventions, to a large degree, mirror the constitutional obligations under sections 9, 10, 28, 29 and 30 of the Constitution. To focus on the obligations under intellectual property law would neglect the need to proportionately balance these conflicting obligations, as is necessary for constitutional rights under section 36 of the Constitution.

[175] The property in question is the ownership of copyright by copyright owners, and the extent of the deprivation in subsections 12D(1)-(5) is quite broad. However, individual rights and private ownership are not absolute, and must be balanced with social needs and the public good. Therefore, from a purposive reading of the limitation, the right to property must be proportionately balanced with the rights to freedom of expression and education and the best interests of the child. That balance is not struck where the state's duty to fund textbooks is effectively replaced by a statutory power for institutions to copy whole works without remuneration.

[176] The educational exceptions in terms of Article 10(2) of the Berne Convention require that the use be both purpose-driven ("by way of illustration" for teaching) and compatible with fair practice. When read with Article 10(1), which permits only limited quotations that do not exceed what is justified by the educational purpose, for example, reproducing a paragraph from a literary work to highlight a stylistic feature or a newspaper article to illustrate satirical reporting, it is clear that these exceptions are quite narrow and do not extend to authorising the reproduction of a substantial part, let

[136] International Covenant on Economic, Social and Cultural Rights, 16 December 1966. The ICESCR was ratified by South Africa on 12 January 2015.

alone the whole, of a published work. The limitation must serve a specific, legitimate purpose. If the purpose is to further the right to education, the limitation must be narrowly directed at a clearly defined segment of beneficiaries, and there must be a justifiable basis for imposing the limitation in order to advance that right. The right to reproduce copyrighted work in terms of section 12D cannot be a fair practice within the contemplation of Article 10(2) of the Berne Convention.

Does section 12D constitute an arbitrary deprivation under section 25(1)?

[177] Fair practice must be interpreted within the meaning of section 25(1) of the Constitution. This is based on the principle stated in *FNB*, namely that determining whether a deprivation is arbitrary requires evaluating the interplay between variable means and ends, the nature of the property in question and the extent of its deprivation.[137] There may be circumstances when a sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others, this might only be established by a proportionality evaluation closer to that required by section 36(1) of the Constitution.[138]

[178] Even if solely assessing whether the deprivation is justifiable and reasonable in an open, democratic society based on human dignity, equality and freedom, and considering, among others, less restrictive measures to achieve the purpose, section 12D would still fail. Where the purpose is to extend the right to education, a provision that balances the rights of copyright owners with the right to education should define the specific beneficiaries of the right, distinguish clearly between public and private obligations and require the state to meet its funding obligations before resorting to uncompensated copying. This requires either limiting the exception to narrowly defined situations where state funding cannot reasonably secure access to materials, or defining "commercial use" and "educational institution" with sufficient clarity to satisfy the

[137] *FNB* above n 55 at para 100(g).

[138] Id.

requirement of fair practice and to avoid substituting copying for normal market transactions.

[179] The constitutional prescripts of section 25(1) of the Constitution cannot be satisfied where a component of the right of use and enjoyment is limited in the present manner. First, regarding subsection 12D(4), where there is no agreement with foreign copyright owners on the reasonable price, the beneficiary is entitled to copy the entire book. A copyright owner cannot bargain within the normal exploitation of a copyright. I agree with the President that section 12D affords insufficient protection to copyright owners, since it interferes with the normal exploitation of the copyright and permits the copying of a whole book where the asking price is unreasonable in relation to the normal price charged in South Africa. Second, the section conflicts with international law, because it clearly interferes with copyright owners' normal exploitation by preventing them from bargaining over the price of the book. This is a clear violation of the copyright owners' right to the normal exploitation of their work. Moreover, the width of the phrase "non-commercial use" includes institutions that do not deserve the right in terms of section 12D. Lastly, there is no definition of commercial use in relation to private and tertiary educational institutions, nor any recognition that public institutions should be resourced by the state rather than by free access to copyrighted works.

[180] Therefore, the exceptions in subsections 12D(1)-(5) constitute an arbitrary deprivation of property. This is because the exceptions go further than necessary to vindicate the constitutional right to education. They do not specify which institutions are worthy of protection and which situations genuinely require an exception beyond what adequate state funding can provide. They do not provide a clear scope for the exercise of such an exception, and the interests of copyright owners have not been taken into account. It follows that the President's reservation must be upheld insofar as it concerns subsections 12D(1)-(5). The same applies to corresponding provisions of the PPAB.

[181] The constitutional defect identified in this analysis is confined to subsections 12D(1)-(5). Those provisions create the entitlement to reproduce copyrighted works for educational and academic activities, to incorporate such copies into any materials to be used in a course of instruction or learning environments and, in certain circumstances, to reproduce the whole of a textbook without payment or prior agreement. The arbitrariness identified in this judgment, namely the failure to define the beneficiaries of the exception with sufficient precision, the uncertainty surrounding the exclusion of commercial use, the breadth of the entitlement conferred and the resulting interference with the normal exploitation of copyright works, arises from these provisions.

[182] By contrast, subsections 12D(6)-(9) stand on different footing. Subsection 12D(6) is directed to the use by a person receiving instruction of portions of works in assignments, portfolios, theses and dissertations for submission, personal use, library deposit or institutional repository posting; it does not confer a general entitlement upon institutions to reproduce works in substitution for purchase, nor does it authorise the copying of entire works on the broad terms contemplated in subsection 12D(4). Subsection 12D(7), in turn, concerns the retained right of an author of certain state-funded scholarly contributions to make the final manuscript version available under an open license or through an institutional repository notwithstanding a prior grant of exclusive rights; that provision implicates a balance between authors, publishers and public access to publicly-funded research. Subsection 12D(8) and (9) is, respectively, limiting and ancillary in character. Subsection 12D(8) imposes conditions of attribution, proportionality and compatibility with fair practice on uses contemplated elsewhere in the section, while subsection 12D(9) permits the use of illustrations for teaching only to the extent justified by the purpose and compatible with fair practice. These provisions do not generate the broad deprivation identified in the above analysis. Accordingly, subsections 12D(6)-(9) are constitutional.

[183] I have read the well-reasoned judgment prepared by my Colleague, Majiedt J (second judgment), which deals with the one point of disagreement between us, that is,

whether subsections 12D(1)-(5) of the CAB amounts to an unconstitutional, arbitrary deprivation of property. The second judgment accepts that copyright is constitutionally protected property but finds that subsections 12D(1)-(5) do not amount to an arbitrary deprivation. For the reasons articulated above, I disagree with his conclusion.

The copyright exceptions in sections 19B

[184] Section 19B provides:

"**General exceptions regarding protection of computer programs**

19B. (1) A person having a right to use a copy of a computer program may, without the authorization of the copyright owner, observe, study or test the functioning of the program in order to determine the ideas and principles which underlie any element of the program, if that person does so while performing any of the acts of loading, displaying, executing, transmitting or storing the program, which they are entitled to perform.

(2) The authorization of the copyright owner shall not be required where reproduction of the code and translation of its form are indispensable in order to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs, if the following conditions are met:

(a) The acts referred to in subsection (1) are performed by the licensee or another person having a right to use a copy of the program, or on their behalf by a person authorised to do so;

(b) the information necessary to achieve interoperability has not previously been readily available to the persons referred to in paragraph (a); and

(c) those acts are confined to the parts of the original program which are necessary in order to achieve interoperability.

(3) The information obtained through the application of the provisions of subsection (2) may not be—

(a) used for goals other than those to achieve the interoperability of the independently created computer program;

(b) given to others except when necessary for the interoperability of the independently created computer program;

(c) used for the development, production or marketing of a computer program substantially similar in its expression to the program contemplated in subsection (1); or

(d) used for any other act which infringes copyright.

(4) For the purposes of this section, 'interoperability' means the ability to exchange information and to use the information which has been exchanged."

[185] None of the parties have made substantive submissions regarding this section, save for ReCreate, which submits that the content of section 19B is a common provision in other countries that allows software and product suppliers to create interoperable products, and it fairly balances the competing rights and interests of parties.

Analysis – section 19B

[186] Section 19B permits certain actions concerning computer programs. In terms of subsection 19B(1), observation, study and testing of program functionality is permitted only during the actions a person is already entitled to perform (loading, displaying, executing, transmitting or storing). It is important to note that subsection 2A(1)(b) provides that copyright does not protect interface specifications underlying computer programs.[139] Under subsection 19B(2), code reproduction and translation are permitted under the following cumulative conditions: when indispensable to achieve interoperability, where the person has a right to use the program, where the interoperability information is not readily available and where the activities are confined to parts necessary for interoperability. Under subsection 19B(3), information obtained cannot be used for other goals, shared except when necessary for interoperability, used

[139] Subsection 2A(1) provides:

"Copyright protections subsists in expressions and not—

(a) in ideas, procedures, methods of operation or mathematical concepts; or

(b) in the case of computer programs, in interface specifications."

to create substantially similar programs or used for any other infringing act. In the referral letter and written submissions, the President broadly challenges section 19B as an arbitrary deprivation of property. However, he makes no specific arguments as to why this is the case.

[187] The purpose of section 19B is to promote software interoperability, which is the ability of independently created programs to exchange and use information with other programs.[140] It clearly relates only to the information necessary for interoperability and not to the program's commercial value or protected expression. The exception does not permit commercial exploitation of the copyrighted work; it permits only technical analysis for compatibility purposes. Subsection 19B(3)(c) expressly prohibits using the information obtained to develop substantially similar programs. Without this exception, creating computer programs that work with existing systems would be quite difficult or much more expensive, as there are only so many efficient ways to design them. Therefore, section 19B does not amount to an arbitrary deprivation of property.

The copyright exceptions in section 19C

[188] Section 19C provides:

> "**General exceptions regarding protection of copyright work for libraries, archives, museums and galleries**
>
> 19C. (1) A library, archive, museum or gallery may, without the authorization of the copyright owner, use a copyright work to the extent appropriate to its activities in accordance with subsections (2) to (13): Provided that the work is not used for commercial purposes.
>
> (2) A library, archive, museum or gallery may lend a copyright work incorporated in tangible media to a user or to another library, archive, museum or gallery.
>
> (3) A library, archive, museum or gallery may provide temporary access to a copyright work in digital or other intangible media, to which it has

[140] As defined in subsection 19B(4).

lawful access, to a user or to another library, archive, museum or gallery.

(4) A library, archive, museum or gallery may, for educational or research purposes, permit a user to view a whole audiovisual work, listen to a full digital video disc, compact disc or other sound recording or musical work on its premises, in an institutional classroom or lecture theatre, or view such work or listen to such digital video disc, compact disc or other sound recording or musical work by means of a secure computer network, without permission from copyright owners, but may not permit a user to make a copy or recording of the work for commercial purposes.

(5) A library, archive, museum or gallery may make a copy of—

(a) any work in its collection for the purposes of back-up and preservation; and

(b) a publicly accessible website for the purposes of preservation.

(6) If a work or a copy of such work in the collection of a library, archive, museum or gallery is incomplete, such library, archive, museum or gallery may make or procure a copy of the missing parts from another library, archive, museum or gallery.

(7) A library, archive, museum or gallery may, without the consent of the copyright owner engage in format-shifting or conversion of works from aging or obsolete technologies to new technologies in order to preserve the works for perpetuity, and to make the resulting copies accessible consistent with this section.

(8) This Act does not prevent the making of copies in accordance with section 5 of the Legal Deposit Act (Act No. 54 of 1997).

(9) A library, archive, museum or gallery may make a copy of a copyright work for its own collection when the permission of the owner of copyright, collecting society or the indigenous community concerned cannot, after reasonable endeavour, be obtained or where the work is not available by general trade or from the publisher.

(10) Notwithstanding any other section, a library, archive, museum or gallery may buy, import or otherwise acquire any copyright work that is legally available in any country.

(11) A library, archive, museum or gallery may reproduce for preservation purposes, in any format, any copyright work which has been retracted or withdrawn from public access, but which has previously been communicated to the public or made available to the public by the copyright owner, and make such work available for scholarship, research or any other legal use.

(12) (a) A library, archive, museum or gallery may make a copy of any copyright work and make it available to another library, archive, museum or gallery or for a public exhibition of a non-profit nature for the purposes of commemorating any historical or cultural event or for educational and research purposes.

(b) A library, archive, museum or gallery contemplated in paragraph (a) may also, for the purposes of that paragraph—

(i) take and show a photograph of such work or show video footage of such work;

(ii) create other images such as paintings of buildings; or

(iii) photograph artworks on public buildings such as wall art and graffiti, memorial sites, sculptures and other artworks which are permanently located in a public place.

(13) (a) Subject to paragraph (b), a library, archive, museum or gallery may supply to any other library, archive, museum or gallery a copy of a copyright work in its collection, whether by post, fax or secure digital transmission.

(b) The receiving library, archive, museum or gallery must delete any digital file received from the other library, archive, museum or gallery immediately after supplying the person who has requested it with a digital or paper copy of the work.

(14) An officer or employee of a library, archive, museum or gallery acting within the scope of their duties shall be protected from any claim for damages, from criminal liability and from copyright infringement when the duty is performed in good faith and where there are reasonable grounds for believing that—

(a) the work is being used as permitted within the scope of an exception in this Act or in a way that is not restricted by copyright; or

(b) the copyright work, or material protected by related rights is in the public domain or licensed to the public under an open licence.

(15) Nothing in this section shall diminish any rights that a library, archive, museum or gallery otherwise enjoy pursuant to other provisions of this Act, including those in section 12A: Provided that, in exercising rights provided for in this section or elsewhere in the Act, such library, archive, museum or gallery shall take reasonable steps to ensure that any digital copy supplied by it is accompanied by information concerning the appropriate use of that copy."

Submissions by the parties regarding the copyright exceptions in section 19C

[189] CCSA submits that section 19C is not sufficiently clear about what qualifies as lawful access, and poses a serious threat to copyright owners, disrupting the relevant markets. In particular, the inclusion of galleries, which are generally commercial businesses, is not justified. It further argues that if a library, archive, museum or gallery has a copy of the latest movie, music video or sound recording, it can store it in its collection and give access to it to any person visiting the premises without the need to go to a cinema or to buy the latest album. CCSA argues that this will erode copyright owners' markets and their ability to derive economic benefit from the use of their work.

[190] CAPA argues that section 19C permits unspecified uses by libraries, archives, museums and galleries, making available to the public all works. It also argues that the Bill does not define the terms "library, archive, museum or gallery" and that there is no requirement that they must have a public character or that they be publicly funded. Furthermore, the section permits such use for non-commercial purposes without defining this term. CAPA argues that this means that these exceptions will be left to guesswork or open to potential abuse.

[191] CAPA submits that the section allows institutions to upload copies of works to the internet, potentially destroying the commercial market for those works by enabling

free access. Further, it permits reproduction of works not in the institution's collections, violating the copyright owner's moral and economic rights. The section grants indemnity to librarians against liability for infringement, weakening enforcement and accountability, and recasts exceptions as enforceable "rights" that institutions cannot waive even by agreement, effectively overriding copyright owners' control and contractual freedom.

Analysis – section 19C

[192] Section 19C outlines the exceptions to the protection of copyright works for libraries, archives, museums, and galleries. It provides an exemption for the use of works for knowledge, archival and historical purposes. This is evident in the following: first, the focus is on a "library, archive, museum or gallery" as the custodian of the copyrighted work; second, the express prohibition on the use of that work for "commercial purposes" and third, it is aimed at educational and research or "preservation" as a goal, which entails that the works must be kept for historical and legacy purposes.

[193] In my view, section 19C is not vague. The language clearly states what the exemptions are for, when the exemptions apply and how the works can be used if a user seeks protection for the use of copyrighted works from this exemption. What constitutes access in section 19C is not explicitly defined, but should be given its common meaning, being the ability to see or obtain copyrighted material.

[194] Section 19C does not amount to an arbitrary deprivation of property because the limitation it imposes upon copyright owners is neither capricious nor unjustified. Inasmuch as section 19C creates a wide exception, the extent of the exception on the limitation of the copyright owner's property rights is rationally related to the purpose of realising the rights to education, research and the preservation of cultural heritage. The exception created by this section is rationally connected to its objective: it ensures that libraries, archives, museums and galleries can use copyright-protected works solely for non-commercial, educational or historical purposes, safeguarded by express

prohibitions against commercial exploitation. Moreover, the exceptions are clear and specific as to when copyright works may be utilised and appropriated for non-commercial ends. Though "use" is not specifically defined in the context of subsection 19C(1), the fact that "use" is limited to libraries, archives, museums and galleries, and is allowed only "to the extent appropriate" to the activities of such users, preserves the reasonable rights of the public to enjoy ordinary facilities that curate media in a variety of publicly-accessible forms without unduly impacting upon the rights of copyright owners.

[195] Libraries, archives, museums and galleries will know when the use of the works will be exempted, and when not. Creators will know when a library, archive, museum or gallery can use their work, for which purposes, and how they will go about using their work. All parties are capable of reasonably ascertaining when the use of copyrighted work by libraries, archives, museums and galleries will be exempted from copyright infringement. If the use of copyrighted works does not fall within this provision, libraries, archives, museums and galleries will be aware that they are committing copyright infringement.

[196] Section 19C promotes substantive equality and the right to education by removing unjustifiable barriers to access. The deprivation it imposes on copyright owners is limited in scope, purpose-driven and aligned with the state's obligations under section 7(2) of the Constitution to respect, protect, promote and fulfil fundamental rights.

[197] Therefore, section 19C is not vague, nor does it constitute an arbitrary deprivation of property. It follows that the President's reservations that section 19C constitutes an arbitrary deprivation of property cannot succeed.

The consequences of confirming constitutional validity by abstract review

[198] This is the first occasion in which this Court has been called upon, by way of a presidential referral under section 79(4)(b) of the Constitution, to undertake an abstract

review of the substance of a Bill prior to its enactment. This Court's enquiry is confined to the President's stated reservations, and the findings that sections 12A-C, 12D(6)-(9), 19B and 19C are constitutional are no more than a finding that those specific reservations do not disclose unconstitutionality on the face of the text. The question that can be asked is whether the declaration that these provisions are constitutional will close the door for any party that may wish to raise a constitutional challenge after the provisions are signed into law. The answer is a resounding NO. The ordinary avenues of constitutional challenge remain available once the Bill is enacted and operative. Sections 80 and 122 of the Constitution permit members of the Legislature, once an Act has been signed, to approach this Court for an order declaring all or part of it unconstitutional. Any other person retains the ordinary right, under sections 38 and 172(1)(a), to bring a substantive constitutionality challenge to the enacted legislation and to seek just and equitable relief in the High Court (subject to confirmation by this Court under section 167(5), where applicable), based on the practical and evidentiary impact of the legislation as applied.

Conclusion

[199] In summary, this Court has considered the President's reservations within the confines of the section 79 referral procedure. I have evaluated the impugned provisions of the CAB, read with the corresponding provisions of the PPAB, against the requirements of section 25(1) of the Constitution and South Africa's international law obligations.

[200] This Court's jurisprudence in terms of section 79 of the Constitution affirms that presidential referrals are tightly circumscribed mechanisms of abstract, pre-enactment review. This Court's jurisdiction is confined to those specific constitutional reservations articulated by the President and the Legislature's response to those reservations and does not entail a general certification of the constitutionality of the entire CAB and the PPAB.

[201] In light of the breadth of the issues traversed and the technical nature of the legislative scheme under scrutiny, I deem it necessary to provide a summary of my principal findings before setting out the order.

[202] I conclude that the referral of sections 6A, 7A and 8A of the CAB to this Court was not competent in terms of section 79 of the Constitution. This is because Parliament removed the text which had been identified by the President as constituting retrospective and arbitrary deprivations of property in that the proposed amendments would have decreased the entitlement of copyright owners to the fruits of their property.

[203] Subsection 12A(a) of the CAB enumerates legitimate exceptions under the framework of fair use that allow works to be used for the public benefit and personal individual use. This clause is read in conjunction with subsection 12A(b), which provides further guidance on the factors courts must consider when determining whether to apply the fair use exception. Section 12A is not vague, can be reasonably applied and developed by the courts and is not arbitrary. It follows that the deprivation that flows from section 12A does not constitute an infringement of the constitutionally protected right to property.

[204] Similarly, sections 12B and 12C do not allow arbitrary deprivations because their internal safeguards protect against overbroad application. Each subsection is limited in its scope of potential deprivation and is adequately justified. Since these limitations sufficiently prevent the deprivation from being arbitrary, sections 12A, 12B and 12C do not amount to an unconstitutional infringement.

[205] Subsections 12D(1)-(5) go further than necessary to vindicate the right to education, fails to specify which institutions are proper beneficiaries, lacks clear parameters for the exercise of the exception and disregards the legitimate interests and market of copyright owners. The educational exceptions in subsections 12D(1)-(5) amount to an arbitrary deprivation of property. However, subsections 12D(6)-(9), also

relating to educational and academic activities, are not arbitrary deprivations of property, as the limitations are sufficiently targeted and narrow in scope.

[206] Section 19B of the CAB is not an arbitrary deprivation of property since the copyrighted material is not permitted to be used commercially, but only to promote software interoperability. Section 19C is not vague and does not amount to an arbitrary deprivation of property, as the limitation it imposes on copyright owners is neither capricious nor unjustified, and is rationally connected to the objective of realising the rights to education, research and the preservation of cultural heritage. The exceptions provided in this section are clear and specific, so users and copyright owners will know when copyright protections apply.

[207] These findings apply with equal force to the corresponding provisions of the PPAB. To the extent that the PPAB adopts or mirrors the legislative scheme, exceptions and limitations analysed above in respect of the CAB, the same reasoning and conclusions apply. The PPAB's provisions must likewise be understood as constrained by the safeguards identified in respect of fair use and related exceptions, and as subject to the same requirements of non-arbitrariness, clarity and rational connection to legitimate constitutional objectives. Accordingly, save where otherwise expressly indicated, the analysis and outcomes set out in this judgment also apply to the PPAB.

Costs

[208] None of the parties sought costs since they approached this Court as interested parties in this matter. Therefore, costs do not arise.

Order

[209] The following order is made:

1. The referral by the President in terms of section 79 of the Constitution in respect of sections 6A, 7A and 8A of the Copyright Amendment Bill, 2017 (CAB) as a whole is incompetent.

2. The fair use exception in section 12A of the CAB is not arbitrary and does not infringe the right to property under section 25(1) of the Constitution and is constitutional within the scope of the President's referral.
3. The exceptions in sections 12B and 12C of the CAB are not arbitrary, do not infringe the right to property under section 25(1) of the Constitution and are constitutional within the scope of the President's referral.
4. The exceptions in subsections 12D(1)-(5) of the CAB constitute an arbitrary deprivation of property under section 25(1) of the Constitution and are unconstitutional.
5. The exceptions in subsections 12D(6)-(9) of the CAB are not arbitrary, do not infringe the right to property under section 25(1) of the Constitution and are constitutional within the scope of the President's referral.
6. Section 19B of the CAB is not arbitrary, does not infringe the right to property under section 25(1) of the Constitution and is constitutional within the scope of the President's referral.
7. Section 19C of the CAB is not vague and does not constitute an arbitrary deprivation of property under section 25(1) of the Constitution.
8. The orders in paragraphs 1-7 in relation to the CAB also apply to the relevant sections of the Performers' Protection Amendment Bill, 2017.

MAJIEDT J:

Introduction

[210] I have read the comprehensive, strongly reasoned judgment of my Colleague, Mhlantla J (first judgment), with which I generally agree. My disagreement with the first judgment is narrow, and concerns one aspect only: its upholding of the President's reservations in relation to subsections 12D(1)-(5) of the CAB, that the exceptions constitute an arbitrary deprivation of property which renders the subsections unconstitutional. The first judgment holds that the reasons for this are—

(a) because the exceptions go further than necessary to vindicate the constitutional right to education;
(b) they do not specify which institutions are worthy of protection;
(c) they do not provide a clear scope for the exercise of such an exception; and
(d) lastly, the interests of the copyright owners have not been taken into account.[141]

[211] The divergence in our two judgments may be narrow, but it is crucial because subsections 12D(1)-(5) are the only provisions that the first judgment holds to be unconstitutional. But for that conclusion, the impugned sections in the CAB and the PPAB would pass constitutional muster. As I see the matter, section 12D does not constitute arbitrary deprivation of property and passes constitutional muster. The Bill is therefore constitutional. First, I make some general remarks.

General

[212] Sections 12A-D are integral to the system of copyright in order to achieve the requisite balance between the owners of copyright on the one hand, and the users of their copyrighted materials, on the other. Section 12D concerns the reproduction of works under copyright for educational and academic purposes, and it is limited to non-commercial practices.

[213] I agree with my Colleague that copyright is entitled to constitutional protection against arbitrary deprivation under section 25(1) of the Constitution.[142] Generally speaking, in respect of all exceptions to be found in sections 12A-D, 19B and 19C, if the test for substantive arbitrariness is applied, as I see it, these do not constitute violations. It must be said, though, that, as this is prospective legislation under challenge, the difficulty we encounter is that we are obliged to conduct an abstract

[141] See the first judgment at [180].

[142] Id at [49].

proportionality analysis without knowing the true impact the provisions might have on the rights of copyright holders. Questions that arise include: how many individuals would be impacted; how many works would be affected; and what would be the potential economic cost of the exceptions? More will be said about this presently.

[214] While these facts would plainly have been very useful in a proportionality analysis, to my mind, there can be little doubt that there is a strong relationship between the deprivations of losing copyright profits and the benefits that flow from the exceptions, specifically, the rights to education,[143] to participate in cultural life,[144] of access to information,[145] to freedom of expression[146] and other rights implicated by increased access to traditionally copyrighted materials. There is also a rational link between the purpose of the exceptions and the means used to achieve that purpose. While it is true that rights are implicated on both sides of the equation, it bears consideration that many more people would benefit from the exceptions (such as those who use libraries or would take advantage of exceptions for educational purposes), than would be harmed by the exceptions.

The first judgment

Abstract challenge

[215] The first judgment holds that subsections 12D(1)-(5) are unconstitutional on an abstract basis, as this matter concerns an abstract constitutional challenge. That type of challenge presents a heightened burden.[147] As this Court said in *Savoi*:

> "Abstract challenges ask courts to peer into the future, and in doing so they stretch the limits of judicial competence. For that reason the applicants in this case bear a heavy

[143] Section 29 of the Constitution.

[144] Section 30 of the Constitution.

[145] Section 32 of the Constitution.

[146] Section 16 of the Constitution.

[147] *Savoi* above n 86 at para 13.

> burden – that of showing that the provisions they seek to impugn are constitutionally unsound merely on their face."[148]

[216] In an abstract challenge, absent a concrete factual matrix, the applicant must show that the impugned provisions are unconstitutional in all, or at least a substantial range of, their applications. Hypothetical or speculative abuses will not discharge that burden. What is required is a demonstration that, on a proper construction of the statute, its ordinary operation produces unconstitutional results. In the context of the CAB, that is a demanding standard. The scheme of the Bill is structured, qualified and context-dependent. Its provisions are capable of constitutionally compliant application and their operation will in any event be shaped by courts on a case-by-case basis. To invalidate them in the abstract, on the basis of conjectured misuse rather than demonstrated effect, would be to collapse the distinction between permissible interpretation and constitutional defect.

[217] An abstract challenge, which the referral of inchoate legislation necessarily involves, requires the applicant to show that the provisions are constitutionally unsound on a bare, facial reading, in the absence of concrete examples of rights infringements arising from the operation of the legislation. By implicitly conducting a pre-emptive section 36 analysis of the right to education and the right to property without examples of how such rights will *actually* be affected by the passage of the CAB, the first judgment is "peer[ing] into the future" with a smudged crystal ball as cautioned in *Savoi*. There is no way of knowing at this point whether the exceptions go further than necessary to vindicate the constitutional right to education, because we have no evidence of how these exceptions will function in practice. It seems to me, therefore, that, on its face, there is nothing in section 12D that is inherently unconstitutional.

[218] The balancing of copyright owners' right to property and the right to education is naturally fact-intensive and case-specific. Considerations will include the extent of

---

[148] Id.

the limitation in each case as compared to the scope of the right being protected.[149] Deciding fact-specific, unique situations in light of factual nuances is a task best left to individual judges based on the particular facts and circumstances of the case before them. It is less satisfactory for this Court to make a blanket decision in the abstract on the permissibility of every circumstance pertaining to this issue. This is especially true when the Bill is yet to be enacted.

[219] In an abstract challenge, the applicant is required to show that the provision is unconstitutional in its ordinary operation, not merely capable of unconstitutional application. We will do well to heed the caution in *Savoi* that courts must avoid "peer[ing] into the future" through speculation.

[220] It is not possible to do a reliable proportionality analysis in the abstract, because the practical impact of section 12D is unknown and variable. Constitutionality depends on context, proportionality, impact and practical operation, and so, concrete facts matter. A related difficulty is the lack of a section 36 analysis in the first judgment to determine the constitutionality of section 12D.

No section 36 balancing of rights

[221] A major shortcoming in the first judgment's analysis is the lack of a facial section 36 balancing exercise with regard to section 12D. It is common cause that section 12D of the CAB attempts to strike a balance between the right to property and the right to education. In *Arena Holdings*,[150] this Court held that when—

> "rights come into conflict, there is no magical hierarchy that one can resort to in order to resolve the conflict. The conflict is invariably approached through the lens of

[149] An example that comes to mind is a well-resourced former Model C school copying entire books from a self-publishing author and a less well-resourced public school copying books from a national publishing house. This will impact differently on section 36 considerations, and will require a different balancing of the competing rights to property and to education. The specifics of that particular case will bear consideration in determining how, in that situation, the scales should tilt.

[150] *Arena Holdings (Pty) Ltd t/a Financial Mail v South African Revenue Service* [2023] ZACC 13; 2023 (5) SA 319 (CC); 2023 (8) BCLR 905 (CC).

> the Bill of Rights by balancing those rights and interests in the manner contemplated by the limitation exercise in section 36 of the Constitution."[151]

[222] In *Makwanyane*,[152] this Court held that no one single analysis or standard can be applied to determine reasonableness in light of proportionality exercises. Rather, "the application of those principles to particular circumstances can only be done on a case-by-case basis".[153] Even if we accept in this instance that section 12D violates section 25 of the Constitution insofar as it constitutes an arbitrary deprivation of property, this is not the end of the inquiry. Such a violation could be permitted under the limitation exercise of a section 36 analysis.[154] Indeed, *FNB* suggests "that an infringement of section 25(1) of the Constitution is subject to the provisions of section 36".[155] It is not sufficient for the first judgment to end the analysis at section 25(1) without determining if there is a permissible limitation under section 36.

[223] The following passages from *FNB* are instructive:

> "The fact that an owner of a corporeal movable makes no or limited use of the object in question, is irrelevant to the categorisation of the object as constitutional property. It may be relevant to deciding whether a deprivation thereof is arbitrary and, if it is, whether such deprivation is justified under section 36 of the Constitution."[156]

[224] This Court continued:

---

[151] Id at para 129.

[152] *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).

[153] Id at para 104.

[154] *Ex parte Minister of Safety and Security: In re S v Walters* [2002] ZACC 6; 2002 (4) SA 613 (CC); 2002 (7) BCLR 663 (CC) at para 27 and *One Movement SA NPC v President of the Republic of South Africa* [2023] ZACC 42; 2024 (2) SA 148 (CC); 2024 (3) BCLR 364 (CC) at para 254.

[155] *FNB* above n 55 at para 110 and *Harksen v Lane N.O.* [1997] ZACC 12; 1997 (11) BCLR 1489 (CC); 1998 (1) SA 300 (CC) at para 53: "If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (section 33 of the interim Constitution)."

[156] *FNB* id at para 54.

> "In its context 'arbitrary', as used in section 25, is not limited to non-rational deprivations, in the sense of there being no rational connection between means and ends. It refers to a wider concept and a broader controlling principle that is more demanding than an enquiry into mere rationality. At the same time, it is a narrower and less intrusive concept than that of the proportionality evaluation required by the limitation provisions of section 36. This is so because the standard set in section 36 is 'reasonableness' and 'justifiability', whilst the standard set in section 25 is 'arbitrariness'. This distinction must be kept in mind when interpreting and applying the two sections."[157]

[225] Lastly:

> "It might be contended that once the deprivation has been adjudged to be arbitrary, no scope remains for justification under section 36. By its terms, section 36 of the Constitution draws no distinction between any rights in the Bill of Rights when it provides that '[t]he rights in the Bill of Rights may be limited'. Neither the text nor purpose of section 36 suggests that any right in the Bill of Rights is excluded from limitation under its provisions. In view of the conclusion ultimately reached on this part of the case, it is not necessary to decide this question finally here. It will be assumed, without deciding, that an infringement of section 25(1) of the Constitution is subject to the provisions of section 36."[158]

The term "commercial" can easily be defined

[226] Contrary to the President's contentions and the first judgment's conclusions, I take the view that the term "commercial" is capable of easy definition – it is frequently used in statutes, amongst others in sections 20, 36, 42, 64 and 68 of the Promotion of Access to Information Act[159] and in sections 1, 3(1), 4(3) and 8(3)(e) of the Competition Act.[160] It is even used in section 20(1) as well as section 28G of the Copyright Act[161]

---

[157] Id at para 65.

[158] Id at para 110.

[159] 2 of 2000.

[160] 89 of 1998.

[161] 98 of 1978.

as envisioned in the Intellectual Property Laws Amendment Act.[162] Lastly, it is also in section 22C (which is not being challenged) of the very Bill now under consideration. And lastly, the term "commercial" can be found in some of the international treaties that the President himself cites – Article II(9)(a)(iv) of the Paris Appendix[163], Article 26.1 of the TRIPS Agreement, and Article 15(1) of the WPPT.

[227] Subsection 12D(1), read with subsections (3) and (4), are designedly crafted to restrict the reproduction of whole works under copyright for educational purposes to only very limited, carefully circumscribed circumstances. Thus, subsection (3) only allows for the reproduction of works for academic and educational activities where a licence is not available on reasonable terms and conditions. That means, by necessary implication, that educational institutions wishing to utilise subsection 12D(1) must first seek to obtain such a licence and prove that they have done so.

[228] From what I have just said, it follows that I do not agree with the first judgment that "by failing to define 'commercial use' within the contemplation of section 12D, the Legislature overlooked the fact that some institutions might unduly benefit from the exception to the detriment of copyright owners".[164] In my view, there is no basis to suggest that certain educational institutions stand to benefit and thus disadvantage copyright owners. This approach, as also adopted by the President, places property rights in general, and copyright ownership, in particular, above educational needs, an aspect to which I will return presently.

---

[162] 28 of 2013.

[163] Appendix to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971), 24 July 1971.

[164] See the first judgment at [168].

Failure to interpret section 12D in accordance with sections 39(2) and 233 of the Constitution

[229] A further consideration is the extent to which the first judgment's interpretation of section 12D is contrary to provisions of statutory interpretation and section 233 of the Constitution.[165] This Court held in *Hyundai*:[166]

> "[W]hen the constitutionality of legislation is in issue, [judicial officers] are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution. . . . [J]udicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section."[167]

[230] The first judgment fails to illustrate why section 12D is not reasonably capable of an interpretation in compliance with the Constitution and relevant international law. When one considers section 12D on its face without speculating on how the CAB will operate in practice, in conjunction with the obligation to interpret the Bill in line with international obligations and with the Constitution, it would abdicate this Court's responsibility to fail to interpret the section in a manner that is constitutionally compliant. A constitutional interpretation of section 12D, as well as one which complies with South Africa's obligations under the Berne Convention, is not only feasible but also reasonable and within the wording of the section. In light of this, the first judgment's conclusion that section 12D both constitutes an arbitrary deprivation of property and violates the Berne Convention is untenable.

---

[165] Section 233 of the Constitution provides:

> "When interpreting any legislation, every court must prefer *any* reasonable interpretation of the legislation that is consistent with international law over *any* alternative interpretation that is inconsistent with international law." (Emphasis added.)

[166] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit N.O.* [2000] ZACC 12; 2000 (10) BCLR 1079 (CC); 2001 (1) SA 545 (CC).

[167] Id at paras 22-3.

Concessions in the first judgment

[231] The last point to be made regarding the first judgment is this. As I read it, the first judgment makes a series of concessions that substantially support my approach. It accepts, at the outset, that copyright, while protected as property under section 25, is a qualified form of property whose incidents may be regulated in the public interest.[168] It further affirms that not every interference amounts to a constitutionally impermissible deprivation, requiring instead a "substantial" or "legally relevant" impact before section 25(1) is even engaged.[169]

[232] Most importantly, its articulation of arbitrariness makes clear that the inquiry is context-sensitive and turns on the relationship between means and ends, with a sliding standard that tolerates lesser justification where the deprivation is limited in scope.[170] Read together, these propositions confirm that copyright exceptions, which qualify rather than extinguish rights and pursue recognised public purposes such as education and access, fall comfortably within the constitutional framework contemplated in *FNB*. It is unclear why these justifications for the constitutionality of the other provisions in the CAB, as the first judgment correctly finds, cannot apply to section 12D as well. That brings me to an analysis of section 12D.

Section 12D analysis

[233] Subsection 12D(4), which is restricted to textbooks, permits the reproduction of the whole book only under the circumstances outlined there. Those are: if the book is out of print; if the owner of the copyright cannot be found; or if the same edition of the book is either unavailable for sale in the country, or cannot be bought on the market at a price reasonably related to the price of similar works for sale in the country. The rest of section 12D is to my mind uncontentious and unobjectionable.

---

[168] See the first judgment at [48] to [49].

[169] Id at [50] to [51].

[170] Id at [52] to [54].

The Berne Convention

[234] Due to its importance in my divergence on section 12D, I need to say something in brief about Article 9 of the Berne Convention. First, though, I examine the *lex specialis* (law governing a specific subject matter) principle. This is a generally accepted principle of interpretation in international law. The International Law Commission has defined the maxim thus:

> "[I]f a matter is regulated by a general standard as well as by a more specific rule, then the latter should take precedence over the former. . . . [P]riority falls on the provision which is 'special', that is, the rule with a more precisely delimited scope of application."[171]

[235] *Lex specialis* primarily applies when addressing conflicting obligations under international law. This can apply to circumstances where a specific branch of law conflicts with a general branch of law, or one in which a provision provides a specific exception to a general rule.[172] However, when a country's obligations under two separate treaties conflict, there is first a duty to interpret the treaty obligations in a way which would reconcile the differences and allow the country to fulfil both sets of obligations. If this is impossible, such as "when treaty conflict involves conflicts between different value systems",[173] there is no single accepted approach to address the conflict.[174]

[236] From a domestic law perspective, especially in a situation such as this where human rights (in varying forms) are on both sides of the equation, the proper methodology is to consider domestic forms of reconciling the conflicting rights, such as section 36 of the Constitution, the justification clause. It is further important to

---

[171] Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc A/CN.4/L.682 (13 April 2006) (*ILC Fragmentation Report*) at paras 56-7.

[172] Id at para 58.

[173] Klabbers "Beyond the Vienna Convention: Conflicting Treaty Provisions" in Cannizzaro (ed) *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press, New York 2011) at 201.

[174] Id at 204.

consider the ways in which each relevant right is permitted to be limited under the international treaty, and the extent to which South Africa could pursue such a limitation in accordance with her own domestic laws, particularly the Constitution, to the extent that is permissible to facilitate harmonious interpretation.

[237] In relation to the conflict between Articles 9 and 10 of the Berne Convention, one must turn to the conventional understanding of *lex specialis*, as Article 10(2) provides for *specific educational exceptions compared to the overarching test for exceptions found in Article 9(2)*. Articles 9(2) and 10(2) were drafted to operate together rather than to be in conflict with each other. It would effectively render Article 10(2) nugatory to interpret the educational exceptions of the draft bills, in particular for present purposes section 12D, in accordance with Article 9(2), and would be contrary to general rules of treaty interpretation. In this regard, I disagree with the approach adopted in the first judgment.

[238] The first judgment appears to apply the incorrect test (at least regarding the international law justification) that interference with the normal exploitation is based on Article 9 of the Berne Convention rather than the previously applied Article 10(2).[175] I acknowledge that my Colleague states that "even if it is accepted that the proper interpretation of the limitation entails that the provisions of Article 10(2) rather than the general test in Article 9(2) of the Berne Convention apply, section 12D in its current form nevertheless fails to satisfy the standard in Article 10(2)".[176] That observation is, however, incongruent with the reasoning and conclusion reached in the first judgment. As will appear, section 12D does in fact meet the standard set out in Article 10(2) of the Berne Convention.

[239] Most of the exceptions here should be considered in light of the specific exception articles under the Berne Convention instead of the Berne three-step test.

[175] See the first judgment at [169] to [170].

[176] Id at [173].

Educational exceptions, in particular, should be considered under Article 10(2) of the Berne Convention and reporting exceptions should be considered under Articles 10(1) and 10bis of the Berne Convention. For these, the standard of review is that usage must comply with "fair practice".[177]

[240] The first judgment's reasoning proceeds contrary to the intended interpretation of the Berne Convention. In the drafting of Article 10(2) of the Berne Convention, which, I emphasise, is the education exception within that treaty, the drafters acknowledged that the education exception is not discriminatory between public and private schools, nor between primary and tertiary institutions. While the intention of the framers of the Berne Convention is potentially a small consideration for this case, it does make it very difficult to argue that Article 12D violates South Africa's international law obligations.

The impermissibly narrow and overemphasised focus on property law

[241] The President's concerns, which are upheld in the first judgment, appear to me to place an inordinate focus on property law and largely disregard other rights, both on the domestic and international planes. In the latter instance, IHRL is ignored. This narrow focus effectively elevates international copyright treaties to the constitutional standard, supplanting constitutional analysis with an exclusive copyright international law frame, while neglecting other international human rights obligations that also constitute constitutional obligations. That approach runs counter to the constitutional obligation to have regard to international law when interpreting fundamental rights.[178]

---

[177] The Berne Convention itself does not define "fair practice", nor is there an accepted international standard around the phrase. In Alpin and Bently *Global Mandatory Fair Use: The Nature and Scope of the Right to Quote Copyright Works* (Cambridge University Press, Cambridge 2020) at 141, they suggest considering a pluralistic conception of fairness in determining fair practice, which can include—

> "the nature or purpose of the use, the type of expressive use, the size of the quotation and its proportion in relation to the source work, the nature of the source work, harm to the market of the source work and the integrity interests of the author of the source work".

[178] Section 39(1)(b) of the Constitution:

> "(1) When interpreting the Bill of Rights, a court, tribunal or forum—
>
> . . .

We are also required by the Constitution to interpret legislation to prefer any reasonable interpretation consistent with international law over any alternative interpretation that is inconsistent with international law.[179]

[242] The importance of these educational exceptions cannot be overstated. They provide access to all, including persons with visual disabilities and the poorest learners and students, and are thus necessary to fulfil constitutional and IHRL obligations. South Africa's international human rights obligations are expressed in the Constitution, specifically the right to education in section 29(1), the best interests of the child principle in section 28(2) and the principle of non-discrimination in section 9(3). Self-evidently, these rights are of particular importance within our South African context of a deeply unequal education system inherited from apartheid and colonialism. As we have been powerfully reminded by Frederick Douglass, "once you learn to read, you will be forever free".[180]

Empirical evidence of the importance of educational materials

[243] CCL correctly points out that there is a direct correlation between learning materials, such as textbooks, and educational outcomes. They argue that "[c]opyright is a barrier to access to learning material[s] and educational exceptions are necessary to mitigate the effects of that barrier". There is extensive empirical evidence of the importance of access to learning materials for educational outcomes. This is particularly relevant to mitigate the immense impact of poverty levels on access to learning materials. CCL cites studies conducted by the Southern and Eastern African

(b) must consider international law."

[179] Section 233 of the Constitution.

[180] Frederick Douglass Memorial and Historical Association "Famous Frederick Douglass Quotations", available at https://frederickdouglassmha.org/famous-frederick-douglass-quotations/. Frederick Douglass was enslaved in the United States and then became a powerful advocate for the abolition of slavery. He is widely regarded as one of the foremost leaders of the African-American civil rights movement of the 19th century.

Consortium for Monitoring Educational Quality (SACMEQ)[181] and UNESCO.[182] They also cite the 2017 report of the Commission of Inquiry into Higher Education and Training (Fees Commission Report).[183] The evidentiary value of these three sources is that they cover investigations into divergent fields, namely the position of grade 6, foundational phase and tertiary learners/students (as the case may be) respectively.

[244] In the SACMEQ III study conducted in 2007, textbooks were classified as an "essential classroom resource" on the basis that effective teaching and learning cannot take place without them.[184] The subsequent SACMEQ IV study conducted in 2017 showed improvement in the figures for average grade 6 learners in respect of access to their own reading books and mathematics textbooks.[185] However, even so, the figures were well below the desirable level. The important point of both studies is that they convincingly demonstrate a direct correlation between learner performance and learners' socio-economic status, with learners in the poorest provinces such as the Eastern Cape and Limpopo and those in lower socio-economic groups performing worse than their wealthier counterparts. There is strong empirical evidence, but I daresay that it is almost self-evident, that learners with their own reading textbooks perform significantly better than learners who have to share their textbooks with other learners.[186]

---

[181] SACMEQ is an African initiative, composed of Ministries of Education from 15 countries, in response to targets set within the framework of the United Nations Sustainable Development Goals (SDGs). Specifically, this is targeted at SDG 4 that seeks to "ensure inclusive and equitable quality education and promote lifelong learning opportunities for all" by 2030. The tests cover reading and mathematics, and are administered to grade 6 learners.

[182] UNESCO *Born to Learn: Spotlight on Basic Education Completion and Foundational Learning in Africa* (2022) (2022 UNESCO Report); UNESCO *Learning Counts: Spotlight on Basic Education Completion and Foundational Learning in Africa* (2024) (2024 UNESCO Report).

[183] The Fees Commission owed its establishment to the nationwide "Fees must fall" campaign.

[184] SACMEQ III *Project in South Africa: A Study of the Conditions of Schooling and the Quality of Education* (2010).

[185] SACMEQ IV *Project in South Africa: A Study of the Conditions of Schooling and the Quality of Education* (2017).

[186] Spaull "A Preliminary Analysis of SAQMEQ III South Africa" (2011) *Stellenbosch Economic Working Papers: 11/11*, Stellenbosch University and Bureau for Economic Research at 19.

[245] The 2022 UNESCO Report notes that a lack of textbooks and teaching and learning materials was the most commonly cited issue hindering effective teaching and learning.[187] Data from assessments shows that where learners have their own textbooks, a child's literacy scores can increase by up to 20%.[188] That report identifies three main areas that require attention with respect to teaching and learning materials, namely availability; quality, especially alignment with curricula and local context such as language and the role of local producers and distributors.[189]

[246] The 2024 UNESCO Report was the outcome of a five-country study, of which South Africa was a part. It found that improving learning outcomes at the foundational phase and other phases of learning requires "ensuring all children have textbooks and supplementary materials of good quality for free".[190] It describes this as "the best investment education systems can make".[191] Importantly, it concludes that "[w]hile no single input can 'buy' learning outcomes, the lack of such materials in the hands of children is a roadblock that undermines the chances of other reforms to succeed".[192]

[247] In respect of empirical evidence, lastly, the Fees Commission report of 2017 noted that there were many inputs from students that emphasised the need for access to learning materials and information and communications technology (ICT).[193] The report noted further that open education licensing policies and open education resources repositories in both school and post-school education and training, often driven by public policy and facilitated by the extensive use of ICT in materials development, are becoming more popular.[194] The report emphasised the need to facilitate better access

---

[187] 2022 UNESCO Report above n 182 at 90.

[188] Id at 93.

[189] Id at 92.

[190] 2024 UNESCO Report above n 182 at 148.

[191] Id.

[192] Id.

[193] Fees Commission Report at para 346.

[194] Id at para 652.

to learning materials by exploring more affordable options to learning materials.[195] But those options are plainly only possible where there is consent from a copyright holder.

[248] Based on this compelling empirical evidence, CCL submits that copyright presents a barrier to access to learning materials. They contend that this is underscored by this Court's judgment in *Blind SA I*[196] regarding this very piece of legislation. In that case, this Court held that copyright as a barrier for learners with print and visual disabilities to access books in accessible formats plainly infringed their right to a basic education.[197] The reliance on *Blind SA I* is apt. The print and visual disabilities alluded to there are not dissimilar to impairments and barriers to accessing learning materials caused by poverty. Section 12D is constitutionally sound, serves a rational purpose and is imperative to ensure equal access to learning materials and, hence, to education.

[249] CCL is correct that the factual basis on which the constitutionality of the educational exceptions falls to be assessed includes, crucially, that access to learning materials affects educational outcomes and that copyright constitutes a potential barrier to that access, which in turn imperils sound educational outcomes. As far as the legal position is concerned, since Article 10(2) of the Berne Convention contains a specific educational exception, it is a *lex specialis*. Article 10(2) provides that the educational exception must be compatible with "fair practice" and be permitted only to the extent justified by the purpose. Article 10(2) of the Berne Convention has been incorporated almost exactly to the letter into several parts of sections 12A-12D.

The importance of the relevant fundamental rights

[250] Our courts have time after time emphasised the importance of the fundamental rights to basic and further education under section 29(1) of the Constitution.[198] And

---

[195] Id.

[196] *Blind SA I* above n 6.

[197] Id at para 73.

[198] See, amongst others: *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) (*Ermelo*); *Governing Body of the Juma Musjid Primary School v Essay N.O.* [2011] ZACC 13; 2011 (8) BCLR 761 (CC) (*Juma Musjid*); *Section 27 v Minister*

concomitantly, this Court has emphasised that the right to education must always be interpreted such that it promotes redress of the ravages of apartheid education, which has had and continues to have a calamitous effect in the perpetuation of post-apartheid inequality.[199]

[251] There is also, importantly, the best interests of the child principle, entrenched in section 28(2) of the Constitution and codified in the Children's Act.[200] In *S v M*,[201] this Court emphasised that this is a self-standing enforceable right and constitutes a guideline to balancing in the form of the paramountcy principle. Lastly, the right to equality under section 9(2) and (3) need to be considered in unison. Poverty has been found to be an analogous ground to those listed in section 9(3).[202] All these render the educational exceptions necessary and constitutional, to remove barriers to access of education.

[252] Sections 12A-D are tailored respectively towards specific uses fundamental to education; they only allow for non-commercial use and subject the use to a threshold test and express limitations (fair use, naming of the author, reasonable extent, to be integral or essential for a technical process, prohibition of copying whole books except in narrow circumstances, only limited categories of actors). Sections 12A-D are therefore directed at facilitating constitutionally compliant access to educational materials in furtherance of the state's obligations under section 29(1)(a).

---

of Education [2012] ZAGPPHC 114; [2012] 3 All SA 579 (GNP); 2013 (2) SA 40 (GNP); 2013 (2) BCLR 237 (GNP). *Minister of Basic Education v Basic Education for All* [2015] ZASCA 198; [2016] 1 All SA 369 (SCA); 2016 (4) SA 63 (SCA) (*BEFA*) and *Blind SA I* above n 6.

[199] See *Ermelo* id at paras 2 and 45; *Juma Musjid* id at para 42; *MEC for Education in Gauteng v Governing Body of Rivonia Primary* [2013] ZACC 34; 2013 (6) SA 582 (CC); 2013 (12) BCLR 1365 (CC) at para 2; Samtani *The Right of Access to Educational Materials and Copyright: International and Domestic Law* (DPhil thesis, University of Oxford, 2021) at 62-7.

[200] 38 of 2005.

[201] *S v M* [2007] ZACC 18; 2007 (2) SACR 539 (CC); 2007 (12) BCLR 1312 (CC); 2008 (3) SA 232 (CC) at paras 22 and 25-6.

[202] *Minister of Finance v Van Heerden* [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) at para 28 and *BEFA* above n 198 at paras 47-9.

[253] The first judgment appears to be somewhat dismissive[203] of the CAB's introduction of the definition of "commercial" in section 1 of the Act, and also of the amici's submissions that, even if private institutions fall within the definition of "commercial", they are nevertheless a vessel for education and perform a function that is public in nature. This would mean that educational institutions are entitled to the section 12D exception, regardless of their financial capacity or that of their students. I agree with those contentions.

[254] CCL is right when they point out that the use of the phrase "purely for education purposes" and the exclusion of commercial uses to prevent abuse are significant. They also correctly point out that the educational exceptions are consistent with the Berne Convention and that the TRIPS Agreement does not derogate from the Berne Convention.[204] The proposition that educational exceptions must always be analysed through the stricter Article 9(2) or the TRIPS Agreement three-step test is untenable. Instead, Article 10(2) constitutes a *lex specialis* educational provision containing its own internal standards of "fair practice" and use "justified by the purpose".[205] Thus, educational exceptions occupy a distinct and protected position within international copyright law itself.

[255] Furthermore, in terms of the Vienna Convention on the Law of Treaties[206] (Vienna Convention), all relevant rules of international law must be considered when interpreting international treaties.[207] This Court has held that the main provisions of the Vienna Convention constitute customary international law and are to be applied by our

[203] See the first judgment at [164] and [166].

[204] Articles 2(2), 7 and 8 of the TRIPS Agreement.

[205] Samtani above n 199 at 96-9. She rightly argues that rigid application of the TRIPS Agreement three-step test risks constraining the fulfilment of the right to education, whereas Article 10(2) of the Berne Convention accommodates a more balanced and human rights-sensitive approach to educational use.

[206] Vienna Convention on the Law of Treaties, 23 May 1969.

[207] Article 31(c).

courts.[208] It bears repetition that an interpretation of the impugned provisions that accords with the position in IHRL must prevail over one that does not.

IHRL

[256] South Africa has ratified a number of international and regional human rights instruments. Our country therefore has international obligations under IHRL in respect of the right to education, the best interests of the child principle and the principle of non-discrimination in respect of specified vulnerable groups.

[257] First, with regard to the right to education, there are Article 26 of the Universal Declaration of Human Rights[209] and Articles 13 and 14 of the ICESCR.[210] Furthermore, the right to education is recognised in a number of international instruments dealing with the rights of specific vulnerable groups.[211] It is recognised that the right to education intersects with other rights. The 1989 Convention on the Rights of the Child[212] (CRC) contains detailed provisions in respect of the right to education.[213]

---

[208] *Law Society of South Africa v President of the Republic of South Africa* [2018] ZACC 51; 2019 (3) SA 30 (CC); 2019 (3) BCLR 329 (CC) at para 38.

[209] Universal Declaration of Human Rights, 10 December 1948.

[210] ICESCR above n 136. The Committee on Economic, Social and Cultural Rights General Comment No 13: Right to Education (1999) E/C.12/1999/10 states at para 1:

> "Education is both a human right in itself and an indispensable means of realising other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognised as one of the best financial investments states can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence."

[211] Article 10 of the Convention on the Elimination of all Forms of Discrimination against Women, 18 December 1979 (CEDAW); Article 24 of the Convention on the Rights of Persons with Disabilities, 13 December 2006 (CRPD); and Article 7 of the International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965 (CERD). All of these treaties have been ratified by South Africa.

[212] Convention on the Rights of the Child, 20 November 1989.

[213] Articles 23(3)-(4), 28 and 29. See Samtani above n 199 at 50-1.

[258] Secondly, in relation to the best interests of the child principle, Article 3(1) of the CRC requires that the best interests of the child be assessed and taken into account as a primary consideration in all actions or decisions that concern them, both in the public and private sphere. What bears consideration in that context is the CRC Committee's General Comment 14's guidance to State Parties' understanding of this interpretation of the principle. According to the Committee, this principle is three-pronged; it is—

(a) a substantive right;

(b) a fundamental, interpretative legal principle, that is, if a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen; and

(c) a rule of procedure.[214]

[259] Regarding equality and non-discrimination, there are a number of international treaties which bind South Africa under international law with obligations to ensure equal access of everyone, but in particular vulnerable groups, to learning materials as an important facet of education. Article 1 of the 1960 Convention against Discrimination in Education[215] prohibits discrimination in education on grounds that include poverty ("economic condition"). Article 2 of the ICESCR entrenches the anti-discrimination provision and must be understood in light of General Comment 13.[216]

---

[214] Committee on Rights of the Child General Comment No 14: Right of the Child to have His or Her Best Interests taken as a Primary Consideration (2013) CRC/C/GC/14 at para 6.

[215] Convention against Discrimination in Education, 14 December 1960.

[216] Committee on Economic, Social and Cultural Rights General Comment No 13 above n 210 at para 31 states:

> "The prohibition against discrimination enshrined in Article 2(2) of the Covenant is subject to neither progressive realisation nor the availability of resources; it applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination. The Committee interprets Articles 2(2) and 3 in the light of the UNESCO Convention against Discrimination in Education and the relevant provisions of the CEDAW, the CERD and the Convention on the Rights of the Child and the ILO Indigenous and Tribal Peoples Convention, 1989 (Convention No. 169)".

[260] Article 10 of CEDAW requires that State Parties eliminate barriers to education for women through various measures. The CRPD provides in Article 30(3) that "States Parties shall take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials".

[261] As far as regional human rights instruments are concerned, there is firstly Article 17(1) of the African Charter on Human and Peoples' Rights (ACHPR), which provides that everyone shall have the right to education. Next, there is Article 11 of the African Charter on the Rights and Welfare of the Child (ACRWC).[217] Lastly, Article 4(1) of the ACRWC also entrenches the best interests of the child principle.

---

[217] In relevant part, Article 11 reads:

> "1. Every child shall have the right to education.
>
> 2. The education of the child shall be directed to—
>
> (a) the promotion and development of the child's personality, talents and mental and physical abilities to their fullest potential;
>
> (b) fostering respect for human rights and fundamental freedoms with particular reference to those set out in the provisions of various African instruments on human and peoples' rights and international human rights declarations and convention;
>
> (c) the preservation and strengthening of positive African morals, traditional values and cultures;
>
> (d) the preparation of the child for responsible life in a free society, in the spirit of understanding, tolerance, dialogue, mutual respect and friendship among all people's ethnic, tribal and religious groups;
>
> (e) the preservation of national independence and territorial integrity;
>
> (f) the promotion and achievements of African Unity and Solidarity;
>
> (g) the development of respect for the environment and natural resources;
>
> (h) the promotion of the child's understanding of primary health care.
>
> 3. States Parties to the present Charter shall take all appropriate measures with a view to achieving the full realisation of this right and shall in particular:
>
> (a) provide free and compulsory basic education;
>
> (b) encourage the development of secondary education in its different forms and to progressively make it free and accessible to all;
>
> (c) make the higher education accessible to all on the basis of capacity and ability by every appropriate means;
>
> (d) take measures to encourage regular attendance at schools and the reduction of drop-out rate;

[262] In 2019, an international group of experts in international law and human rights adopted the Abidjan Principles,[218] a document that provides a comprehensive consolidation of state obligations in respect of both public and private education under international and regional law. Most of the international and African regional instruments on which the Abidjan Principles are based have been ratified by South Africa.

[263] The most important parts of the Abidjan Principles for present purposes are as follows:

(a) Education is a right that must be provided by a state. Where schools are private, states must regulate them by providing minimum standards.

(b) In relation to availability and accessibility, what is required includes "adequate curricula, and pedagogical material methodologies, and practices"[219], and accessibility includes "physical, economic, and information accessibility".[220]

(c) The Principles emphasise the obligation to eliminate discrimination on grounds that include "socio-economic disadvantage".[221]

(d) States are furthermore required to "address any situation breaching the rights to equality and non-discrimination with regards to the right to education, whether or not such situation results from their acts, including . . . systemic disparities of educational opportunity or outcomes for some groups in society, including people living in poverty or in rural settings".[222]

(e) take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community."

[218] Abidjan Principles: Guiding Principles on the Human Rights Obligations of States to Provide Public Education and to Regulate Private Involvement in Education, 13 February 2019.

[219] Section 14(a)(iii) of the Abidjan Principles.

[220] Section 14(b) of the Abidjan Principles.

[221] Section 24 of the Abidjan Principles.

[222] Section 25(a) of the Abidjan Principles.

[264] It cannot be gainsaid, then, that under these international and regional human rights instruments, South Africa has binding obligations to—

(a) ensure that all learners have access to learning materials, especially textbooks, including eliminating barriers to access;

(b) take measures specifically to ensure access to learning materials for vulnerable groups, including people living in poverty, women, children and people with disabilities;

(c) ensure that, where learners are children, laws or acts of the state in relation to access to educational materials treat as paramount the best interests of the child; and

(d) eliminate discrimination in access to learning materials, including on grounds of poverty, race, gender, disability and other grounds recognised in law.

Foreign law

[265] CAPA submits that it is not aware of any countries in the world that has an educational exception that is in any way similar to section 12D, except for the Cook Islands. CAPA points out that the Cook Islands was not a member of the Berne Convention when the Islands adopted the educational exception. Additionally, they mention that the Cook Islands is not a member of the TRIPS Agreement.

[266] It is so that the Cook Islands became a party to the Berne Convention on 3 August 2017.[223] But the important point is that its copyright legislation, which implements almost identical education-focused exceptions to section 12D, was adopted in 2013. While treaties do not create legal obligations for non-Member States, non-Signatories to a treaty can voluntarily implement treaty requirements through domestic legislation for a variety of internal policy, economic or strategic reasons. A

[223] World Intellectual Property Organisation "Member States of the Berne Convention", available at https://www.wipo.int/documents/d/treaties/docs-en-berne.pdf.

non-Member State's adoption of treaty standards may serve as relevant evidence of the broader influence or acceptance of certain treaty norms. This decision to implement treaty requirements while being a non-party in no way undermines the treaty's legality or significance and should not be used as evidence to that effect.

[267] The Cook Islands' copyright legislation of 2013 simply reflected the copyright standards enumerated in the Berne Convention and could possibly have been an indicator of the Islands' interest in becoming a member. Its non-member status at the time does not make it a less desirable or less persuasive example of a country that has adopted legislation in compliance with the Berne Convention and relatively similar to that which South Africa seeks to enact in the CAB.

[268] According to a study conducted in 2019,[224] every one of the 189 WIPO Member States have enacted at least one exception for access to materials for educational purposes that are under copyright. The study found that Australia had 32 exceptions of this nature, with Canada, New Zealand, Singapore and Austria each having over 20 exceptions. Across the WIPO, Member States had – on average – eight exceptions for educational purposes in their domestic laws.

[269] Thus, in terms of the number of exceptions recognised in respect of educational activities, section 12D of the CAB is hardly an outlier. Canada's Copyright Act of 1985, despite being somewhat different from our legislation, is a useful example.[225] In Canada, it is not an infringement of copyright when an educational institution or a person acting under its authority reproduces a work, or does any other necessary act, in order to display it for educational purposes.[226]

---

[224] Seng "An Empirical Review of the Copyright Limitations and Exceptions for Educational Activities", in Balganesh et al (eds) *The Cambridge Handbook of Copyright Limitations and Exceptions* (Cambridge University Press, 2021) at 279-80.

[225] Copyright Act, RSC 1985, c C-42.

[226] Id at section 29.4(1).

[270] Furthermore, in Canada, the safeguards only prevent reproduction if the work or other subject matter is "commercially available". Section 2 of that Act defines "commercially available" as follows:

> "commercially available means, in relation to a work or other subject-matter,
>
> (a) available on the Canadian market within a reasonable time and for a reasonable price and may be located with reasonable effort, or
>
> (b) for which a licence to reproduce, perform in public or communicate to the public by telecommunication is available from a collective society within a reasonable time and for a reasonable price and may be located with reasonable effort".[227]

[271] I accept that this is a very limited exception and that material cannot be copied for distribution to learners. To "display" would include, for example, making a slide for overhead projectors. I also accept that section 29.4(2) is similarly limited – it applies only to a reproduction "as required for a test or examination". This would include producing a paragraph from a literary work in an examination paper. A further difference is that "educational institution" is defined in section 1 of the Canadian legislation as a "non-profit institution".

[272] Notwithstanding these differences, Canada's educational exceptions and safeguards are in some respects similar to our section 12D, revealing that South Africa's legislation is not unique or necessarily an outlier. As a point of departure, both sets of legislation permit the reproduction of works for the purposes of instruction. Secondly, both of them require a licensing regime and ensure that the reproduction is subject to an assessment of reasonable unavailability in the market as outlined above. The main difference here is that our subsections 12D(2)-(4) permit the reproduction of works (including the whole or substantially the whole thereof) to be used in course packs and study materials, while Canada's legislation tailors the purpose of reproduction for instruction to "display".

---

[227] Id at section 2 entitled 'Interpretation'.

[273] While Canada's legislation does not explicitly permit the reproduction of whole works, it does not prevent it either, as the volume of reproduction permitted is not prescribed textually, leaving it to litigation to determine fair dealing in such circumstances. Even though some whole books cannot be reproduced for display due to length, other forms of works can and Canada rightfully decided not to make those distinctions in its legislation, as doing so would be a slippery slope for the legislative stage. In that sense, South Africa's prescription for the possible reproduction of whole books does not necessarily make its legislation an outlier as that can be possible under other legislative regimes such as Canada's.

[274] Further, our legislation permits the incorporation of copies into course materials, making this exception broader than Canada's exception. However, this broader scope is justified because of South Africa's socio-economic conditions that affect the full realisation of educational rights, as discussed previously in this judgment. Lastly, the fact that Canada's educational exceptions are limited to non-profit institutions does not affect the analysis of section 12D's compatibility with international law, because international law does not call for a limitation of educational exceptions to non-profit institutions.

[275] When analysed holistically, both South African and Canadian legislation recognise the significance of prioritising educational rights when balancing those interests against the rights of copyright owners, while simultaneously acknowledging the importance of safeguards to ensure educational institutions only engage in such usage when necessary. Canada's legislation is consistent with international law standards, and it is a fair assessment that South Africa's CAB is too. The last aspect to be considered is CAPA's wide-ranging attack on section 12D.

CAPA's various challenges against section 12D

[276] In summary, these are CAPA's concerns about section 12D:

(a) The "without permission and no payment" concern is that subsection 12D(1) permits any person to reproduce any category of copyright work simply by characterising the use as educational or academic, without consent or remuneration.

(b) The "unless" concern, which entails that subsection 12D(3), while ostensibly prohibiting reproduction of whole works, permits such reproduction *unless* a licence is available on reasonable terms, thereby enabling copying without permission or payment.

(c) The "subjective self-assessment" concern is that subsections 12D(1)and (4)(c) allow users to reproduce entire textbooks based on their own assessment of whether copies are reasonably priced, without any obligation to consult or verify with the copyright owner.

(d) The disincentivisation concern is that the cumulative effect of subsections (1) to (4) undermine the economic viability of educational publishing, which constitutes a substantial portion of the South African publishing industry and supports other sectors, by materially reducing incentives to invest in, produce and distribute educational works.

(e) The international law concern is that the scope of the section 12D exceptions exceeds what is permissible under applicable international copyright treaties.

(f) The vagueness concern is that the exceptions are framed in broad and open-ended terms that go beyond what is reasonable and justifiable, to the prejudice of copyright owners.

[277] Generally speaking, it appears to me that these criticisms arise from reading subsections 12D(1) and (3) in isolation, instead of giving effect to the CAB's internal qualifiers and structure. In dealing with these aspects sequentially, it is plain that, on a proper reading, section 12D has a limited ambit.

The "without permission and for no payment" concern

[278] This first concern can be addressed by reading section 12D with reference to its context and purpose.[228] Crucially, the Supreme Court of Appeal in *Endumeni*[229] held that, in statutory interpretation, "[a] sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose".[230] This means that, if enacted, courts will have to interpret section 12D in a commercially sensible manner, closely aligned with its purpose of enabling education. Furthermore, in light of the new "fair use" regime brought into force by the CAB, such an interpretation will necessarily involve a balancing of interests, ensuring that the facilitation of educational access does not unjustifiably prejudice the legitimate economic interests of rights holders, but instead operates within a framework of proportionality and fairness.

[279] CAPA's interpretation of subsections (1), (3) and (4) does not adopt this sensible reading approach. When the subsections are read together and in context, it is plain that subsection (1) is a general enabling clause that is firmly circumscribed by subsections (2) to (6). On that approach, subsection (1) is not a free-standing licence but a general enabling provision that is expressly and implicitly qualified by the remaining subsections.

[280] CAPA's primary concern is that subsection 12D(1) permits any person to make a copy of any kind of copyright work without permission and without payment. That characterisation of section 12D is not borne out by the text.

[281] Subsection (1) contains an internal limitation. It permits copying only to the extent justified by the educational or academic purpose, thereby embedding a

---

[228] *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at para 28.

[229] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA).

[230] Id at para 18.

proportionality requirement that excludes indiscriminate or excessive use and cannot support blanket reproduction. Importantly, South African courts have traditionally approached copyright provisions with caution, favouring structured and disciplined interpretations that avoid unduly broad or expansive readings.[231]

[282] Moreover, the cross-referencing in section 12D is crucial. Subsection (1) is expressly made "subject to subsection (3)". Subsection (3), in turn, is subject to subsection (2), because it flows directly from it and is tied to the same activity and institutional anchor – incorporation and educational institutions. It follows that subsection (1) is subject to the qualification in subsection (2) by implication, because it is explicitly subject to subsection (3). Importantly, subsection (4) is firmly integrated into this scheme, because it is about the "copies contemplated in subsection (1)".

[283] Therefore, CAPA's blanket permission concern about subsection (4) is unwarranted, because subsection (4) is explicitly confined only to copies contemplated in subsection (1), which, as established, is qualified by subsections (2)-(4). Based on this reasoning, subsection (4) cannot be read to allow for an overbroad exception that allows for free-for-all copying, because it inherits the narrow restrictions in subsections (2) and (3) through its explicit cross-reference to subsection (1). The converse is also true – the "blanket permission" concerns about subsection (1) are also alleviated by its linkage to subsections (2)-(4). Finally, subsection (5) excludes any commercial purpose, which buttresses the conclusion that the provision is directed at confined, pedagogical uses. Thus, as I see it, and to reiterate, the word "commercial" is adequately defined. On a proper reading, the subsections form a coherent whole that does not permit a general licence to copy.

[284] The only potential break in the sequential chain is the relationship between subsections (2) and (3), because subsection (3) does not explicitly cross-reference

[231] See *Bress Designs (Pty) Ltd v GY Lounge Suite Manufacturers (Pty) Ltd* 1991 (2) SA 455 (W); *Moneyweb* above n 99; and *King v South African Weather Service* [2008] ZASCA 143; 2008 BIP 330 (SCA); [2009] 2 All SA 31 (SCA); 2009 (3) SA 13 (SCA).

subsection (2). However, the link between subsections (2) and (3) is sufficiently grounded in text, context and structure to sustain the broader chain of interdependence.

[285] First, the text of subsection (3) presupposes an existing category of conduct. It does not introduce incorporation, but regulates it. The phrase "shall not *incorporate* the whole or substantially the whole" is dependent on a prior notion of permissible incorporation. (Emphasis added). Subsection (2) is the only provision in the section that actually defines what "incorporation" consists of, namely the inclusion of copies in course packs, resource lists and controlled learning environments. That gives content to the term "incorporation" used in subsection (3). Secondly, reading subsection (3) in isolation produces an indeterminate rule. If it is freestanding, one must ask: incorporation into what? The section does not otherwise describe the medium or context. Subsection (2) supplies that missing content.

[286] The interdependence of these subsections means that subsection (4) is best understood as dealing with situations of genuine unavailability. Its conditions identify cases where access cannot be secured through ordinary channels, such as where a work is out of print, the rights holder cannot be traced, or authorised copies cannot reasonably be obtained. On this approach, it complements the licensing scheme by permitting limited recourse only where market mechanisms fail.

[287] Three conclusions can be drawn from this analysis. First, CAPA's "without permission and for no payment" concern cannot be sustained. Even on the most expansive reading of subsection (1) or subsection (4), the combined effect of subsections (2) and (3) ensures that copying is confined to a defined educational context and remains subject to the availability of licensing. Secondly, subsection (3) must be read conjunctively with subsection (4), and not disjunctively. Thirdly, as a result of the text of subsection (1) and interconnection of subsection (2), all copying under section 12D must remain justified by the educational purpose. That, as a matter of law, excludes routine or wholesale reproduction.

[288] The cumulative effect is a tightly circumscribed regime. Section 12D does not establish a general licence to copy, but a layered exception in which purpose, context, licensing and non-commercial use operate together as mutually reinforcing limits. While the provision may at first blush appear broad when read in isolation, a proper, integrated reading demonstrates that it authorises only limited, justified use. The possibility of misuse in practice does not alter that conclusion, nor does it render the provision constitutionally defective.

[289] This common-sense, holistic approach – reading a provision as a whole and ensuring coherence across subsections – is to be preferred and is firmly grounded in case law. In *Clearwater Estates*,[232] the Supreme Court of Appeal was concerned with section 58 of the Companies Act,[233] which regulates shareholder proxies. Section 58(1) confers an unalterable right on a shareholder to appoint a proxy "at any time",[234] while section 58(3)(c) requires that the instrument appointing the proxy be delivered before the proxy may exercise the shareholder's rights.[235] The appellant sought to draw a distinction between the appointment and the exercise of a proxy, effectively treating subsection (1) in isolation, but the Court rejected this distinction as "artificial".[236]

[290] The Supreme Court of Appeal held that, reading the provisions together, in light of their purpose, the appointment of a proxy is not made in isolation, but is directed at

---

[232] *Barry v Clearwater Estates NPC* [2017] ZASCA 11; 2017 (3) SA 364 (SCA).

[233] 71 of 2008.

[234] *Clearwater Estates* above n 232 at para 13. Id at section 58(1) reads:

> "At any time, a shareholder of a company may appoint any individual, including an individual who is not a shareholder of that company, as a proxy to—
>
> (a) participate in, and speak and vote at, a shareholders meeting on behalf of the shareholder; or
>
> (b) give or withhold written consent on behalf of the shareholder to a decision contemplated in section 60."

[235] Section 58(3)(c) reads:

> "[A] copy of the instrument appointing a proxy must be delivered to the company, or to any other person on behalf of the company, before the proxy exercises any rights of the shareholder at a shareholders meeting."

[236] *Clearwater Estates* above n 232 at para 16.

participation in a meeting, and any interpretation that frustrates that purpose undermines the validity of the appointment itself.[237] This is consistent with the ordinary position that a general conferral of power in one subsection must be read together with, and may be limited by, the provisions that follow.[238] This reasoning supports the proposition that section 12D must likewise be understood as an integrated scheme. Subsection 12D(1) cannot be treated as a free-standing licence to copy, but must be read with the remaining subsections, which structure and confine the scope of permissible educational use. An interpretation that permits unlimited copying would risk rendering subsections (3) and (4) redundant, whereas a proper reading gives them meaningful effect as limiting provisions.

The "unless" concern

[291] The second criticism is that what looks like a restriction in subsection 12D(3), the prohibition against copying the whole work, is immediately neutralised by the "unless" clause, turning subsection 12D(3) into a *de facto* (factual) authorisation to reproduce entire works whenever the licensing route is regarded as unavailable or unsatisfactory. Here, too, the criticism of subsection 12D(3) mischaracterises the function of the word "unless". This criticism depends on a misreading of subsection (3). That subsection does not grant a free-standing permission to copy entire works. Instead, it establishes a prohibition on copying the whole, or substantially the whole, works, unless a licence is not available on reasonable terms.

[292] Properly interpreted, the provision prioritises licensing, with whole-work copying permitted only in the exceptional instances where the licensing market has failed. It thus operates as a classic market-failure mechanism rather than a blanket exception. In this, it mirrors international approaches such as the Paris Appendix licensing system, which likewise permits reproduction where works are unavailable or unaffordable.

---

[237] Id at paras 16-18.

[238] A similar interpretative approach was adopted under section 15 of the Matrimonial Property Act 88 of 1984, in *Vukeya v Ntshane* [2020] ZASCA 167; 2022 (2) SA 452 (SCA).

[293] In *Coetzee*,[239] the Supreme Court of Appeal considered the phrase "except for" in an indemnity policy and treated it as operating in the same way as a proviso. Drawing on this Court's reasoning in *Mhlungu*,[240] the Supreme Court of Appeal reaffirmed that such clauses do not function as independent empowering provisions, but serve to qualify or carve out limited exceptions to a primary rule.[241] Applied to subsection 12D(3), the phrase "unless a licence . . . is not available . . . on reasonable terms and conditions" must be read as a conditional exception to the prohibition on copying whole or substantially whole works. It does not create a broad, free-standing entitlement to reproduce entire works. Instead, it reinforces a licensing-first framework, permitting whole-work reproduction only where the market mechanism has failed.

[294] Thus, a proviso-type clause ("except for", "provided that" and by close analogy, "unless") is not to be treated as a free-standing empowering clause. It carves out an exception to what comes before; it does not reverse the rule. If "unless a licence not available on reasonable terms" were read expansively as a general permission to copy whole works whenever someone would rather not pay, it would collide with the point of subsection (4) (a special and carefully enumerated "whole textbook" rule) and weaken subsection (5) (non-commercial restriction). A more coherent reading, supported by the text, is that subsection (3) is a market-preserving condition: educational institutions may not incorporate whole or substantially whole works into course packs and similar distribution media if licensing is available on reasonable terms. On that reading, the word "unless" does not create a loophole. On the contrary, it is a conditional safety valve for cases of licensing unavailability.

---

[239] *Coetzee v Attorneys' Insurance Indemnity Fund* [2002] ZASCA 94; [2002] 4 All SA 509 (SCA); 2003 (1) SA 1 (SCA).

[240] *S v Mhlungu* [1995] ZACC 4; 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC).

[241] *Coetzee* above n 239 at para 14.

The "subjective self-assessment" concern

[295] CAPA contends that subsections 12D(1) and (4)(c) permit users to make their own assessment of availability, effectively allowing the reproduction of textbooks without remuneration where, in the user's own subjective view, authorised copies cannot be obtained at a reasonable price.

[296] CAPA argues further that the exception does not require the person making the reproduction to make an enquiry with the copyright owner and, as a result, it will come down to that person's subjective opinion about price. However, the premise of this objection is overstated. Self-assessment, followed by *ex post facto* (after the fact) judicial scrutiny, is a familiar and accepted feature of South African law, including copyright law.[242] Parties routinely assess for themselves whether their conduct falls within a statutory exception, with legality ultimately determined by a court if the conduct is challenged. That structure does not render a provision constitutionally defective. I might add that the fact that there is a possibility that section 12D will be abused through self-assessments potentially going undetected cannot mean that section 12D ought to be declared unconstitutional.[243]

[297] As stated, subsection 12D(3) requires individuals to seek a licence first on reasonable terms and conditions, and only when such a licence is sought can they make copies pursuant to the requirements in subsection 12D(4). This is not a subjective self-assessment as advanced by CAPA; rather, it is a due diligence step that courts are able to consider when determining whether an individual has breached the requirements for making copies for educational purposes.

---

[242] Two examples, amongst others, are taxpayers' self-assessments and contracting parties self-assessing reasonableness conditions in their contracts. Licensing requirements (vehicles, businesses, television sets and so forth) are other examples – the user assesses themselves whether and how many licences are required and acts accordingly.

[243] Compare *Van Rooyen v The State* [2002] ZACC 8; 2002 (5) SA 246 (CC); 2002 (8) BCLR 810 (CC) at para 37 and *Bernstein v Bester N.O.* [1996] ZACC 2; 1996 (2) SA 751; 1996 (4) BCLR 449 at para 52.

[298] Thus, properly construed, section 12D does not leave the matter to unbounded subjectivity. Instead, subsection (1) is internally limited by a proportionality requirement, and is expressly subject to subsection (3), which introduces a licensing priority. Read together with subsection (2), this requires engagement with a defined institutional and practical context. The inquiry whether a licence is "available on reasonable terms and conditions" is therefore not a matter of bare assertion, but one grounded in objective facts capable of judicial evaluation. A user who simply assumes that a licence is unavailable, without any basis, would be unable to justify their conduct if challenged.

[299] There are two further reasons why this subjective self-assessment is not a problem. First, copyright law is replete with standards that require evaluative judgment by users in the first instance. For example, the fair dealing provisions in subsection 12(1) require users to assess whether their use is "fair" for purposes such as research, criticism or reporting current events. Similarly, the substantiality inquiry in infringement cases turns on whether a "substantial part" has been taken. Such a determination depends on a qualitative assessment. These standards are necessarily applied *ex ante* (beforehand) by users and *ex post* (afterwards) by courts.

[300] More broadly, South African law frequently relies on self-assessment subject to later verification.[244] Taxpayers self-assess their tax liability under the Tax Administration Act;[245] parties to contracts assess compliance with reasonableness standards; and administrative decision-makers routinely form provisional views that are later reviewed by courts. In all these instances, the law does not collapse into subjectivity merely because an initial judgment is made by the actor concerned. What matters is that the standard applied is objectively justiciable.

---

[244] *Metcash Trading Ltd v Commissioner, South African Revenue Service* [2000] ZACC 21; 2001 (1) BCLR 1 (CC); 2001 (1) SA 1109 (CC) at para 16.

[245] 28 of 2011.

[301] The point can be illustrated by this example. A university that reproduces extracts from a textbook for inclusion in a course pack would be expected to consider whether a licence is available through a collecting society or directly from the publisher, and at what price. If a licence is readily obtainable at standard rates, copying without permission would fall outside the exception. By contrast, where a work is out of print, unavailable in South Africa or only obtainable at a price wholly out of proportion to comparable works, the institution may justifiably conclude that the statutory conditions are met. In either case, the correctness of that conclusion is ultimately subject to judicial scrutiny if disputed.

[302] The second reason concerns the burden of proof and the objective nature of the inquiry in copyright law. South African law adopts a strict approach: once infringement is established, an exception is not presumed to apply, but must be proved by the party seeking to rely on it. Crucially, that inquiry is objective. It does not turn on the user's own view of whether the statutory conditions are satisfied, but on whether those conditions are in fact met on the evidence. The user's assessment is therefore provisional only, and carries no legal weight unless it can be justified in court. This directly answers CAPA's concern. Section 12D does not permit copying based on a subjective belief about price or availability; it requires users to be able to demonstrate, if challenged, that no licence was available on reasonable terms and that the statutory requirements were objectively satisfied.

[303] In *Moneyweb*, the High Court considered the scope of subsection 12(8)(a) of the Copyright Act in the context of news reporting.[246] The Court emphasised that the provision is not a conventional defence, but an exclusion from copyright protection.[247] It further held that the onus rests on the party invoking subsection 12(8)(a) to show that the work in question constitutes no more than "mere items of press information".[248] The inquiry turns on whether the work contains sufficient original contribution, in which

[246] *Moneyweb* above n 99 at paras 55-7.

[247] Id at para 58.

[248] Id at para 77.

case the exclusion does not apply.[249] Properly understood, the decision underscores that the statutory conditions must be objectively established and cannot be assumed from the mere characterisation of the use.[250] This case also demonstrates that the section 12D inquiry of whether a licence is available on reasonable terms and conditions will be subject to an objective, as opposed to a subjective, test.

The disincentivisation concern

[304] This concern is premised on the claim that the cumulative operation of subsections 12D(1)-(4) will erode the economic foundations of South African publishing, particularly given that educational publishing constitutes a large portion of the market. The concern must be viewed against the economic realities of creative production. Most academics and textbook authors write primarily for professional reputation, career advancement, or intellectual interest rather than substantial financial return. In practice, the direct monetary rewards are often modest. Authors publishing through traditional publishing houses typically receive royalties averaging approximately 12–14% of the retail price, with rates in some cases falling as low as around 3%.[251] These figures illustrate that copyright rarely provides the primary economic incentive for most creators.

[305] In this regard, it is also important to recognise that the parties opposing the reforms have repeatedly framed their case as protecting the less powerful individual or entity. In reality, however, the primary beneficiaries of strong copyright enforcement in this context are often large and profitable publishing corporations rather than individual authors.

[249] Id at para 76.

[250] Id at paras 76-7.

[251] Le Roux et al *South African Book Publishing Industry Survey 2022–23* (Publishers' Association of South Africa 2024) at 31.

The international law concern

[306] Extensive reasons have been advanced as to why section 12D does not fall foul of the Berne Convention. It bears emphasis that Article 10(2) establishes a flexible educational exception that leaves substantial discretion to national legislatures.[252] Its reference to "utilisation", coupled with the absence of fixed quantitative limits, indicates that the provision is not confined to minimal excerpts.[253] This understanding finds support in the academic literature. Ricketson observes that the requirement that the use occur "by way of illustration" for teaching purposes operates as a contextual limitation, but does not in itself preclude the use of substantial portions, or even the whole, of a work.[254] Samtani similarly concludes that Article 10(2) does not exclude the use of whole works if the use of whole works can be justified by the purpose.[255]

[307] It is also significant that Article 10(2) of the Berne Convention deliberately omits any reference to "extracts", confirming that the provision is not confined to the use of short passages but permits broader forms of utilisation where justified by the teaching purpose and consistent with fair practice.[256] Nor does the provision impose any limitation on the number of copies that may be made for instructional purposes. Indeed, the *travaux préparatoires* (preparatory works) indicate that the revised wording adopted was not intended to constrain the scope of the provision, but merely to ensure that the purpose of the use was indeed to engage in teaching.[257] This understanding is reinforced by the structure of the Convention as a whole. Article 10(2) must be read together with Article 9(2), which provides a general framework for permissible limitations and

---

[252] Ricketson *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, prepared for the WIPO Standing Committee on Copyright and Related Rights, Ninth Session, Geneva, 2003, WIPO document SCCR/9/7 (5 April 2003) at 14.

[253] Id at 14-15.

[254] Id. See also Samtani above n 199 at 92-7, who states that the "fair practice" requirement in Article 10(2) is not a narrow copyright-maximising standard, but an open-textured balancing inquiry informed by distributive justice, equality, affordability, access to educational materials, and states' human-rights obligations.

[255] Samtani id at 82.

[256] World Intellectual Property Organisation, Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) (Geneva: WIPO, 1978) at 60.

[257] Samtani above n 199 at 84.

exceptions. That framework directs attention to purpose, fairness and the avoidance of undue prejudice, rather than to rigid quantitative thresholds.

[308] Samtani persuasively reasons that Article 10(2) of the Berne Convention creates a broad and flexible educational exception that permits states to legislate measures that conduce to equitable access to education for all.[258] I agree with the argument that Article 10(2) is purpose-based, applies beyond mere reproduction, and was historically intended to facilitate education broadly understood.[259]

[309] Further support is found in the Paris Appendix,[260] which contemplates that, in defined circumstances relevant to developing countries, reproduction for instructional purposes may be permitted where market access has failed, including where works are unavailable or unaffordable.[261] Although the Paris Appendix operates through a licensing mechanism rather than an exception, it reflects a recognition within the Convention itself that educational access concerns may justify broader forms of use in appropriate cases.

---

[258] Id at 79-84.

[259] Id.

[260] Paris Appendix above n 163 at Articles III–IV.

[261] The Paris Appendix reads:

> "Article III
>
> (1) Any country which has declared that it will avail itself of the faculty provided for in this Article shall be entitled to substitute for the exclusive right of reproduction provided for in Article 9 a system of non-exclusive and non-transferable licences, granted by the competent authority under the following conditions and subject to Article IV.
>
> (2)(a) If, in relation to a work to which this Article applies by virtue of paragraph (7), after the expiration of:
>
> (i) the relevant period specified in paragraph (3), commencing on the date of first publication of a particular edition of the work; or
>
> (ii) *any longer period determined by national legislation of the country referred to in paragraph (1), commencing on the same date,*
>
> *copies of such edition have not been distributed in that country to the general public or in connection with systematic instructional activities, by the owner of the right of reproduction or with his authorisation, at a price reasonably related to that normally charged in the country for comparable works, any national of such country may obtain a license to reproduce and publish such edition at that or a lower price for use in connection with systematic instructional activities*." (Emphasis added).

The vagueness concern

[310] In *Affordable Medicines*,[262] this Court explained that laws must be clear enough for people to understand what is required, but the doctrine does not demand perfect lucidity – it demands reasonable certainty, recognising government's need to pursue legitimate social and economic objectives.[263] So, even if section 12D uses standards that require judgement ("extent justified", "reasonable terms", "reasonable price"), that does not automatically make it constitutionally deficient. Courts have to enquire whether, properly construed, the law provides reasonable certainty. This is precisely what section 12D does, especially when it is construed with reference to context and purpose.

The duty of the state

[311] Finally, the criticism that the state bears the primary responsibility to provide education and should not shift that burden onto third parties such as private corporations does not bear scrutiny. First, while copyright enjoys constitutional protection as a form of property, that protection has never been understood as conferring an absolute entitlement immune from limitation. Both domestic and international copyright systems permit limitations adopted for legitimate public interest objectives, including education. Article 10(2) of the Berne Convention expressly permits the use of works "by way of illustration for teaching", to the extent justified by the purpose and compatible with fair practice.

[312] Two features are significant. First, the provision is framed as a copyright limitation that states may enact, not as a state procurement obligation. Second, it contains internal limits through purpose, extent and fairness requirements. This confirms that international copyright law itself contemplates advancing educational access through carefully framed limits on exclusivity.

---

[262] *Affordable Medicines* above n 84.

[263] Id at para 108.

[313] Secondly, international copyright law accommodates educational needs through built-in mechanisms, such as the Paris Appendix. It is rather simplistic to suggest that the state must simply purchase textbooks and that copyright holders need not tolerate copying. As stated, the Paris Appendix shows that the international copyright system itself anticipates situations of educational market failure or affordability constraints. In those circumstances, it permits states to establish compulsory licensing mechanisms that override exclusivity where works are unavailable, or not offered at prices reasonably related to local conditions. This demonstrates that international copyright law recognises that access problems in education may justify carefully structured limitations on exclusive rights.

Third, IHRL situates copyright within a broader framework of social obligations. Human rights bodies have consistently emphasised that states must regulate private actors, including commercial rights holders, in order to realise the rights to education and cultural participation. That framework requires a balancing of authors' interests with the public's interest in access to knowledge and learning materials.[264] Copyright, therefore, forms part of the state's regulatory toolkit for balancing access to education and culture with authors' economic interests. South African law should reflect the same balance.

Conclusion

[314] In the CAB, Parliament has identified the educational exceptions, including those in section 12D, as a legislative means of complying with South Africa's various international obligations. The educational exceptions have sufficient reasons to exist, are justified and are thus not arbitrary deprivations of property, as they fulfil the constitutional purposes alluded to. The exceptions are carefully calibrated to target

[264] Committee on Economic, Social and Cultural Rights General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He or She Is the Author (Article 15(1)(c) of the Covenant) (2006) UN Doc E/C.12/GC/17) at para 35.

educational use and are limited in the abovementioned way, and thus, even if they are a deprivation of property, the limitation is justifiable in terms of section 36.

[315] With the CAB, Parliament undertook a reasonable interpretation of South Africa's international obligations that fits within the objects and purposes of both copyright law and human rights law.[265] It did so by aligning the CAB with Article 10(2) of the Berne Convention, which accommodates educational uses through standards such as "fair practice" and use of "justified by the purpose". These standards must be interpreted consistently with the right to education. Ultimately, the question is not whether educational exceptions undermine copyright, but whether copyright law can legitimately be interpreted in a manner that gives effect to constitutional rights. This the CAB, and section 12D in particular, succeeds in doing.

[316] For all these reasons, I agree with CCL that the educational exceptions, particularly those contained in section 12D, are constitutionally sound as—

(a) they are directed at uses that are fundamental to education;
(b) they are generally limited to uses that are not "commercial"; and
(c) all of the exceptions are subject to an overarching threshold test and express qualifications to prevent abuse.

[317] To conclude, the section 12D exceptions meet important constitutional obligations (the rights to education, equality and the best interests of the child principle) and obligations to adhere to IHRL encapsulated in various regional and international instruments which South Africa has ratified. The section passes constitutional muster and, for that reason, I would uphold both Bills' constitutionality and dismiss all the President's reservations in respect of the impugned provisions in the two Bills.

[265] Samtani above n 199 at 237.

For the Applicant:	N Bawa SC, R Tulk and S Kazee instructed by the Office of the State Attorney, Pretoria
For the First and Second Interested Parties:	D J Jacobs SC and N Nyathi instructed by the Office of the State Attorney, Cape Town
For the Third Interested Party:	P Olivier, P Malinga and M Bishop (written submissions only) instructed by Minde Schapiro and Smith Incorporated
For the Fourth Interested Party:	I M Bredenkamp SC and A de W Alberts instructed by Otrebski Attorneys
For the Fifth Interested Party:	J Berger, Z Sujee (attorney with right of appearance) and M Rasivhetshele (written submissions only) instructed by Section27
For the First and Eighth Amici Curiae:	M de Beer instructed by Webber Wentzel
For the Second Amicus Curiae:	M Seti-Baza, N Jiba and L Ndabula instructed by Palesa Maseko and Associates Incorporated
For the Third Amicus Curiae:	D Linde, I Currie, E Webber and S Qagana (written submissions only) instructed by Legal Resources Centre
For the Fourth Amicus Curiae:	S Scott and D Mutemwa instructed by Webber Wentzel
For the Fifth Amicus Curiae:	J Brickhill and F Veriava instructed by Centre for Child Law
For the Sixth Amicus Curiae:	C Steinberg SC and I Cloete instructed by Rosengarten and Feinberg
For the Seventh Amicus Curiae:	M du Plessis SC, S Pudifin-Jones and C Kruyer instructed by Adams and Adams