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The scope of the adaptation right in South Africa, foreign and international copyright regimes

by

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University of Pretoria

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ABSTRACT

As a pervasive feature in modern society, the adaptation right within the context of infringement and fair dealing has been a frequent subject of heated debate for several years. The power disparity between copyright owners and users makes it difficult for the user to determine when it is appropriate to pay for permission and when to use the work without permission, resulting in numerous legal debates over what is considered lawful or permissible use. Moreover, the complexities of copyright law and its application within the context of the various forms of adaptation set out in the Copyright Act (i.e., an *arrangement, transcription, translation, transformation*) remain primarily undefined, leaving those attempting to create a work of adaptation or resolve a dispute over one in a state of considerable ambiguity. This is exacerbated by the absence of case law meant to provide clarifications.

The findings in *Blind SA v Minister of Trade, Industry, and Competition*, and the almost decade-long debate of the Copyright Amendment Bill, indicate numerous gaps in South Africa's legal system concerning adaptations and their role in legal proceedings. Accordingly, a need to revise existing copyright laws and the intended forthcoming changes by way of the Copyright Amendment Bill is justifiable to protect the rights of creators while facilitating the equitable use of works in the digital age. Through an in-depth analysis of the available evidence (i.e., existing South African legislation and case law, foreign legislation and case law, and the Copyright Amendment Bill B13-17), this dissertation seeks to determine which approaches and forms of assessment are best suited for the South African framework in adaptation cases and, based on this discovery, to make recommendations for their adoption.

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Finally, to my Lord and Saviour. You witnessed every instance of uncertainty, fear, and doubt. Matthew 11:28-29 carried me through every difficulty and trial. It served as a reminder that I could always turn to God for comfort and strength and that He would never abandon me. It gave me the courage to persevere even when the situation appeared hopeless.

"The best imitation in the world is not half as good as a poor original."

- Luise Rainer

LIST OF ABBREVIATIONS

CAB -	Copyright Amendment Bill
IP –	Intellectual Property
IPR –	Intellectual Property Rights
SA –	South Africa
US –	United States
TRIPS -	The Agreement on Trade-Related Aspects of Intellectual Property Rights
WIPO -	World Intellectual Property Organisation

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Chapter one

Introduction

1.1 Introductory Remarks:

Copyright, being rooted as a *benefit to all*, is regarded as one of the most important and valuable forms of protection in the field of intellectual property law (IP). Its primary function serves to protect the fruits of someone's labour, skill, or taste from exploitation by third parties while providing incentives which encourage the public to continue the development of creative works.[1] Although amidst providing a measure of protection and security to the copyright owner, one may argue that the underlying focus of copyright is to ensure the continued advancement of science, innovation, and valuable arts for knowledge.[2] This may necessitate providing rights that are strong enough to promote the creation of intellectual goods but not to an extent where it restricts widespread use. This underlying focus draws attention to the fact that even though copyright grants authors exclusive rights, it must also be balanced with public interest considerations.[3] Despite the potential implications of power that can accompany copyright, it is nevertheless essential to balance protection for creators and to foster continued innovation. Copyright should therefore be seen as a tool to advance knowledge and innovation rather than giving an author complete control over how others use the work.[4]

South Africa's current legal framework for copyright protection stems from a set of rules adopted in the nineteenth century.[5] A time when no one could have foreseen the extent to which technologies would advance or, for instance, the role that information technology

[1] AL Brown *Intellectual Property, Human Rights and Competition: Access to Essential Innovation and Technology* (2012) at 1.

[2] JE Cohen, LP Loren & RL Okediji et al *Copyright in The Global Information Economy* (2010) at 5.

[3] *Google LLC Petitioner v Oracle America Inc* (2021) US at 593: '[B]ecause such exclusivity may trigger negative consequence […] the courts have limited the scope of copyright protection to ensure that a copyright holder's monopoly does not harm the public interest.'

[4] C Talkmore 'The Role of Intellectual Property Rights' Protection in Advancing Development in South Africa' (2022) 26 *Law, Democracy and Development* at 168-189.

[5] Copyright Act 98 of 1978.

would eventually play in national and global economies.[6] This reality is especially prevalent in infringement cases, as technological advancements allow creators easy access to protected content and the ability to replicate it with minimal effort.[7] Thus, authors' existing rights are particularly susceptible to unauthorised use in the digital age. Furthermore, when an author or a copyright owner refuses to grant permission for use or, alternatively, grants permission on arbitrary and unfounded grounds, a creator and prospective copyright user has little recourse.[8] Consequently, legislators have had to grapple with ensuring a delicate balance between promoting and rewarding creativity while protecting the public's interest, which is no easy task.[9]

One of the exclusive rights under copyright law is the right of adaptation. The Copyright Act set out the following definition(s) of the adaptation in section 1(i)(a)-(d) as it pertains to each category of work, namely adaptation in relation to -

> *a) A literary work, includes –*
> *i. In relation to a literary work in a non-dramatic version form a version of the work in a dramatic form;*
> *ii. In relation to a literary work in a dramatic form a version of the work in a non-dramatic form;*
> *iii. A translation of the work; or*
> *iv. A version of the work in which the story or action is conveyed wholly or mainly by means of pictures in a form suitable for reproduction in a book or in a newspaper, magazine or similar periodical;*
> *b) Musical work, includes any arrangement or transcription of the work, if such arrangement or transcription has an original creative character;*
> *c) An artistic work, 'includes a transformation of the work in such a manner that the original or substantial features thereof remain recognisable."*
> *d) a computer program includes-*
> *i. A version of the program in a programming language, code or notation different from that of the program; or*

[6] Cohen et al op cit note 2 at 35.

[7] B Mencher 'Digital Transmissions: To Boldly Go Where No First Sale Doctrine Has Gone Before' (2002) *UCLA Entertainment Law Review* 10 at 47-57.

[8] This was part of the events leading to the dispute in *Google Oracle* where Google attempted negotiation for licence agreement with Oracle, but no agreement was reached. Google thus continued with their use of Oracle's Java APIs in an effort to accommodate, and for the benefit of, their users.

[9] A recent example of this is in the matter of *Blind SA v Ministry of Trade, Industry and Competition and Others* (14996/21) (2021) ZAGPPHC 871; 2021 BIP 14 (GP) para 66 'The rights to incorporeal property that the Copyright Act protects may not become and instruments to disadvantage a class of person who have the same need of access…[as] persons without impediments'. Further, the Marrakesh Treaty serves an important mechanism which represent this delicate balance in attempting to protect IPRs and expand access to information and resources.

ii. A fixation of the program in or on a medium different from the medium of fixation of the program'.[10]

As a pervasive feature in modern society, the adaptation right within the context of infringement and fair dealing has been a frequent subject of heated debate for several years.[11] The power disparity between copyright owners and users makes it difficult for the user to determine when it is appropriate to pay for permission and when to use the work without permission, resulting in numerous legal debates over what is considered lawful or permissible use.[12] The most prevalent and, in a sense, traditional adaptations involve literary works. Numerous books, such as the *Harry Potter* series by J.K. Rowling and the *Lord of the Rings* series based on J.R. Tolkien's works, have been adapted into award-winning film franchises.[13] Another recent example is the popular television series *Bridgerton*.[14] *Shondaland production company* acquired the rights from the author and copyright owner, Julia Quin, to adapt the *Bridgerton* book series for *Netflix's streaming service*.[15] The *Bridgerton Netflix series* became a cult classic within its first two seasons, inspiring many young influencers and content creators to develop their interpretations of the show and its characters.[16] Amongst the various content creators, *Barlow and Bear's TikTok videos*, heavily inspired by the Netflix series, became an overnight sensation drawing millions of viewers and likes.[17] From an original literary work to a television series adaptation, Barlow and Bear created the well-known and award-winning production, *the Unofficial Bridgerton Musical*, earning the praise of both fans and critics alike.[18] The original expression inspired others to create, yet originality does not irrevocably justify unauthorised use or infringement. While it is clear what constitutes wrongful conduct in this case, i.e., not acquiring a license agreement,

[10] Sections 1(i)(a)-(d) of the Copyright Act - definition of adaptation.
[11] RM Shay 'Fair deuce: An uneasy fair dealing-fair use duality' (2016) 49 *De Jure Law Journal* at 105-117.
[12] Ibid at 105-117.
[13] JK Rowling *Harry Potter Book Series* (1997 - 2007) in the *Harry Potter Movie Series* (2001-2011); and JR Tolkien *The Hobbit* and *Lord of the Rings Series* (1937 – 1954) in the *Lord of the Rings Trilogy* (2001-2003) and *The Hobbit Trilogy* (2012-2014).
[14] JQ Julia *Bridgerton Book Series* (2000 – 2006) in the *Bridgerton TV Series* (2020 – 2022).
[15] *The Bridgerton TV Series* (2020 – 2022).
[16] D Davies-Evitt '*Bridgerton season 2 Breaks Its Own Record As The Most-Watched English-language Series on Netflix*' (2022) available at *https://www.tatler.com/article/bridgerton*, accessed on 18 February 2023.
[17] E Shafer 'Bridgerton: The Musical' Blew Up on TikTok. Could Broadway Be Next?' available at *https://variety.com/2021/music/news/bridgerton-the-musical-tiktok*, accessed on 18 February 2023.
[18] J Tangcay 'Unofficial Bridgerton Musical' Becomes First Grammy-Winning Album to Originate on TikTok' available at *https://variety.com/2022/artisans/news/unofficial-bridgerton-musical-tiktok-grammy*, accessed on 18 January 2023.

proving wrongful conduct to be unlawful under the Copyright Act is a complex process. Analyses of copyright infringement involve a myriad of factors, including access to the original work and the similarity of the allegedly infringing work.[19] With the advent of digital technology and the prevalence of works accessible to a worldwide audience, this task has become increasingly complex. Identifying and eliminating wrongdoing within, for example, millions of lines of software code require a time-consuming and intricate analysis.[20]

Foreign jurisdictions have struggled to examine, evaluate, and compare allegedly infringing works. As copyright jurisprudence has evolved, so has the debate over the best method for assessing copyright infringement, resulting in various broad and divergent approaches. Specifically, it has been argued that a holistic approach is more conducive to qualitative evaluations, whereas a traditional approach incorporates quantitative criteria more readily.[21] However, evaluating a senior and subsequent junior work presents unique challenges in adaptation cases. For example, a quantitative assessment must consider whether the junior work quantitatively altered elements of the senior work, while a qualitative approach considers how much of the overall look and feel the junior work has maintained. This dichotomy of approaches makes determining whether copyright infringement has occurred even more challenging and can lead to complex decisions that require a deep understanding of the original work, its changes, and its relative importance.

In addition to the infringement test, other qualifiers affect the broader infringement consequences. These include but are not limited to the validity of the existing copyright in the senior work and any defences that may be available to the alleged infringer, such as copyright exhaustion, fair dealing, or doctrine of equivalents. Finally, the potential for exceptions and

[19] *Moneyweb (Pty) Ltd v Media 24 Ltd 2016 3 All SA 193 (GJ). Moneyweb (Pty) Limited v Media 24 Limited and Another* (31575/2013) (2016) ZAGPJHC 81; (2016) 3 All SA 193 (GJ); 2016 (4) SA 591 (GJ).

[20] *Google Oracle* supra note 3.

[21] *Feist Publications Inc v Rural Tel Serv Co* (1991) 499 US 340-361; *Positive Black Talk Inc v Cash Money Records Inc* (2004) 394 F3d (5th Cir) 357-367; *Ready Productions Inc v Cantrell* (2000) 85 F (SD Tex) 672- 682; and Fasthoff 'Anatomy of a Copyright Infringements case: elements of a copyright infringement claim' available at https://www.fasthofflawfirm.com/anatomy-copyright-infringement-case-elements-copyright-infringement-claim/, accessed 18 February 2023.

limitations to optimise or burden the infringement test should be analysed, on a case-by-case basis, considering their ability to affect outcomes and help or hinder the infringement test.

Through an in-depth analysis of the available evidence (i.e., existing South African legislation and case law, foreign legislation and case law, and the Copyright Amendment Bill B13-17), this dissertation seeks to determine which approaches and forms of assessment are best suited for the South African framework in adaptation cases and, based on this discovery, to make recommendations for their adoption. This research will add to the existing literature on copyright law and enhance the current state of copyright law in South Africa. In addition, this dissertation will consider the classic conflict of copyright law, which seeks to compensate creators by granting them a temporary monopoly over their works while attempting to avoid stifling innovation and creation. This conflict is particularly evident in the field of computer programs.[22] It is anticipated that by establishing a comprehensive evaluation and examining how adaptation is interpreted and potentially excused, the assessment of adaptation-related infringement and how creators view the copyright system can be clarified.

1.2 Research problem

The complexities of the debate surrounding the scope of the adaptation right have grown in modern times, mainly with advancements in digital technology leading to concerns about access, creativity, and the ability to innovate unrestrictedly. One can easily question whether the current framework still holds a satisfactory position in terms of *being beneficial to all* when, for instance, the copyright pertains to what could be termed essential technologies or perhaps to functional and/or mundane subjects.[23] Given the pace of technological development and the complexity of copyright law, it is crucial to remain agile in addressing these modern copyright challenges. Additionally, the recent efforts to address the gaps in the

[22] CSU experts on explaining the impact of *Google LLC, Petitioner v. Oracle America Inc.* (2021) US held that it 'adds to a growing body of case law recognizing the fundamental right of fair use. A big win for innovation, this ruling sets a new precedent in extending the application of the fair use provision to the realm of software, opening the door for future creativity'.

[23] *Info Colour Pages v South African Tourism Board* (1998) 818 JOC (T).

law regarding adaptations, infringement, and exceptions make these developments especially significant.

Under South Africa's Copyright Act 98 of 1978 (hereafter 'the Copyright Act'), it is an act of infringement for any person to, without the copyright owner's consent, do anything that, by the Act, only the copyright owner has the right to do.[24] It is generally accepted in the field of copyright law that the owner retains the right to determine who may or may not exercise their exclusive rights; if not for a licence granted by the copyright owner, a user's actions would constitute a violation of the copyright under the Act.[25] The infringement provisions are set out in section 23(1), duly termed direct or primary infringement. Based on that section, a user need not copy the entire work to commit infringement; a substantial portion is sufficient.[26] The extent or nature of the amount copied from the copyright-protected work determines whether such a portion has been copied, not its significance concerning the alleged infringing work.[27] Nonetheless, this approach to the infringement is broad enough to encompass all of the exclusive rights granted to a copyright holder. Regarding its application, there is still considerable uncertainty regarding the adaptation right.

The dearth of relevant case law that addresses adaptation-related infringement, not only for the court's benefit but also for third-party users seeking to comprehend the limits of copyright, further exacerbates this problem. Overall, the severe *lacuna* in case law is problematic because, while international law and South African law provide some guidance, they only offer general guidelines for copyright infringement, especially concerning the right of adaptation. As a result, South Africa's Copyright Act, which many consider obsolete and objectionable, is ultimately interpreted and relied upon, with few relevant precedents available to assist claimants.[28] Moreover, while these guidelines are still applicable, the tests are formulated in a broad manner, whereas adaptation infringement issues are inherently

[24] Section 23(1) of the Copyright Act.
[25] O Dean & A Dryer '*Introduction to Intellectual Property Law*' (2017) at p 29.
[26] Section 1(2A) of the Copyright Act.
[27] *Cavendish Textiles Ltd v Manmark (Pty) Ltd* ITLD) unreported case no 2218/82 of 1984.
[28] M Riby-Smith 'South African copyright law—the good, the bad and the Copyright Amendment Bill' (2017) *Journal of Intellectual Property Law & Practice* Vol 12 Issue 3 at 216–225; *Blind SA* supra note 9 at para 12, argument made before the court concerning the Copyright Act.

complex and nuanced.[29] This discrepancy results in a somewhat unpredictable legal landscape for those seeking a resolution to the complex copyright infringement issues caused by the unauthorised exercising of the adaptation right.

It is important to note that the recent Constitutional Court ruling, issued in September 2022 in *Blind SA v Ministry of Trade, Industry and Competition and Others*, does offer some insight and guidelines on how one may approach 'use without the authorisation of the copyright owner'. It highlights the challenges of deciphering the scope of the adaptation right.[30] However, these guidelines are intended for the creation of accessible format copies of literary works (including particular artistic works) concerning a specific category of 'beneficiary person(s)' and 'permitted entities' as identified by the court.[31] In addition, the court clarified that its 'remedial remit...does not go beyond the challenges that have been made'.[32] In this context, 'use without authorisation' refers only to reproductions or adaptations that 'introduce no changes other than those necessary to make the work accessible to a beneficiary person'.[33] Despite this being a step in the right direction, the current issues are more significant than one might expect and extend beyond the severe access limitations faced by the visually impaired.

The complexities of copyright law and its application within the context of the various forms of adaptation defined in the Copyright Act (i.e., an *arrangement, transcription, translation, transformation*) remain primarily undefined, which creates significant ambiguity for those attempting to create a work of adaptation or settle a dispute over one. Moreover, exceptions and limitations placed on copyright may no longer be a valuable tool for ensuring the harmonisation and equilibrium of copyright because of the shortfallings of the current Copyright Act. The findings in *Blind SA v. Minister of Trade, Industry, and Competition*, and the almost decade-long debate of the Copyright Amendment Bill B13-17 (hereafter 'the CAB'), indicate a clear gap in South African copyright law. Accordingly, a need to revise existing

[29] *Moneyweb* supra note 19 sets out the general test for copyright infringement.
[30] *Blind SA* supra note 9 para 112.
[31] *Blind SA* supra note 9 para 112.
[32] *Blind SA* supra note 9 para 63.
[33] *Blind SA* supra note 9 para 112.

copyright laws and the intended forthcoming changes by way of the CAB is justifiable to protect the rights of creators while facilitating the equitable use of works in the digital age.

1.3 Research aim and objectives

As a result, the primary question that this dissertation intends to respond to is as follows:

> *How should unauthorised adaptations be evaluated and compared in instances of South African copyright infringement, taking into account the valuable findings from international law and foreign jurisdictions?*

In addressing this question, this dissertation will investigate four issues. The first issue concern infringement that involves adaptation and the way, as a result of the wording of the infringement provisions, any alteration to a protected work carries the potential to infringe upon the adaptation right. It will be found that the current standing of South African law results in legal uncertainty for potential users and creators, as it is unclear what counts as an infringing adaptation in any given case. This dissertation will offer suggestions on how to address such ambiguities by exploring the formulation and application of the adaptation right in the copyright systems of other countries.

The second issue is the possibility of an author being held liable for infringement even if copyright has been established in a work produced by making unauthorised use. On the one hand, this issue is related to the question of whether or not unauthorised adaptations constitute an infringement of copyright. On the other hand, it is connected to the issue of whether or not the law protects owners of copyright adequately in circumstances in which infringement takes the form of unauthorised adaptations.

The third issue is whether the available copyright exceptions and defences to infringement provide sufficient legal recourse for users.[34] A proposal will be made to address their inadequacies. These proposals will call for measures already implemented in foreign jurisdictions and proposed in the CAB, with minor modifications. It is proposed that the fair

[34] 'User' in this context refers to those who utilise a work without authorisation or without obtaining a licence.

dealing exemptions should be more generous, making it easier for users to access copyright-protected works while not significantly affecting the interests of copyright owners.

The final issue concerns how the interests of the general public and individuals should be weighed against one another. It will emphasise the importance of balancing human rights and constitutional standards. Specific recommendations will be made regarding recent developments in case law, the future of the CAB, and technological advancements that allow users to access content via innovative means.

These issues and recommendations will be weighed against both creators' economic interests and individuals' rights, with the understanding that a fair balance must be struck between the two.

1.4 Justification for the research and potential contribution

Copyright law has long acknowledged the significance of exceptions to the legal monopoly that advances the public interest and ensures that private interests do not jeopardise the general welfare and the rights of others. Exceptions, such as fair dealing, are instrumental to maintaining the balance and integrity of copyright law; therefore, it is vital to consider exceptions and limitations not only in the context of how they affect outcomes but also how they optimise or burden the infringement test. By doing so, it is possible to establish an appropriate level of protection that ensures that copyright owners can protect their rights while also allowing for the use of copyright-protected materials in ways which are beneficial to society as a whole.

This understanding can provide the necessary insight to create an approach that accurately reflects the degree of infringement of creative work and its overall impact while also considering the need to protect copyright. In an effort to ensure a copyright system that is just and equitable, it is essential to take into account not only the legal implications of exceptions and limitations but also the economic, social and cultural impact they can have on access to knowledge and innovation.

In addition, it is hoped that the findings of this dissertation will aid those who have no choice but to play dangerously close to the edge when creating adaptations by providing a

solution to the complex copyright infringement issues caused by an unauthorised adaptation. Thus, this dissertation sets to establish guidelines that will offer protection for those who wish to engage in this activity while still providing protection for the original creator and allowing them to continue their work without fear of copyright infringement.

1.5 Research methodology

In an effort to gain a comprehensive understanding of the copyright framework as it pertains to the scope of this study, this dissertation employs a comparative methodology that compares copyright law in various jurisdictions.[35] More specially, this dissertation will utilise a conceptual comparison method to explore, compare and delineate competing concepts to examine two different copyright jurisdictions competing for the same phenomenon, namely the balance between copyright and public interest.[36] Specifically, this method will focus on analysing the meaning, similarities and variances of different copyright aspects within each jurisdiction to understand how the court can apply adaptations, unauthorised use, infringement and fair dealing in numerous ways.[37]

This comparative study aims to identify potential issues that have arisen, critically analyse the South African legal position on adaptations giving rise to infringement and provide acceptable foreign precedents as remedies for such issues due to the lack of national case law. Thus, it is appropriate to examine the United States of America's (hereafter the US) copyright legalisation and case law to gain an understanding of the success of downfalls within the local copyright framework.[38]

Moreover, this approach is motivated by the severe *lacuna* of applicable case law in South Africa; therefore, from a comparative standpoint, this dissertation will examine the case law of South Africa and the US and make appropriate comparisons between the different legal systems. Such is a prudent course of action, as US courts have addressed the unauthorised

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[35] L Hantrais *International Comparative Research: Theory, Methods and Practice (*2008).
[36] M Mills *Comparative research: persistent problems and promising solutions* (2008) at 621.
[37] Ibid holds that 'the underlying goal of comparative analysis is to search for similarity and variance' at 621.
[38] G Wilson '*Comparative Legal Scholarship'* in M McConville & W Chui (eds) *Research Methods for Law in Research Methods for Law (2017)* at 88 para 1.

creation of derivative works more extensively than most foreign jurisdictions. Furthermore, South Africa can learn valuable lessons from the evolution of copyright law in relatively advanced legal systems, such as the US, when reforming its copyright laws. In addition, South Africa utilises a closed system that specifies limitations and exceptions.[39] In contrast, the US employs an open-ended fair use doctrine to determine the use of a work.[40]

Given the paucity of South African case law on the subject, this dissertation will focus on legal developments pertaining to the scope of copyright protection related to derivative works in the US, particularly concerning computer programs protected as works of literature.[41] In addition, the fact that computer programs are not regarded as a *sui generis* category of work in the US, as in South Africa, does not diminish the persuasive power of such case law in determining the appropriate parameters of copyright protection.[42] For all intents and purposes, on closer investigation, computer programs are only nominally literary works, as case law implies that computer programs are recognised, *de facto*, as a separate category of copyright work.[43] This is evidenced by copyright protection for computer programs which tends to be stricter than copyright protection for literary works, indicating that computer programs are instead accorded their own broader form of copyright protection.[44]

Consequently, it is not problematic from a research standpoint to consider US case law, regardless of the various legal definitions and classifications of computer programs. At its core, the protection afforded to computer programs under either heading is essentially the same; both are forms of copyright protection that seek to prevent the reproduction,

[39] The South African Copyright Act 98 of 1978.
[40] The United States Copyright Act 17 of 1976.
[41] R Oman 'Computer software as copyrightable subject matter: Oracle v Google, legislative intent, and the scope of rights in digital works' (2018) *Harvard Journal of Law & Technology* at 649.
[42] O Dean 'Protection of computer programmes by copyright in South Africa' (1995) Stellenbosch Law Review at 89.
[43] Ibid at 87: '[I]n short it was argued that while the clothing of a literary work could be worn by a computer program it was by no means a comfortable or perfect fit.'
[44] *Computer Associates Int Inc v Altai* Inc (1992) 91-7893: 'Consequently, the interface and functionality of a computer program could be subjects to copyright protection only if they meet the prescribed conditions and regardless of the non-literal aspect of a computer program'; R Oman op cit note 53 at 640: 'It seems to me that Professor Menell, in his valuable contribution to this volume, implicitly embraces the view that Congress meant for the protection afforded computer software to be different from the protection afforded other works, because computer software is functional'.

distribution, or modification of computer programs without the owner's permission.[45] In fact, it may be argued that because it mirrors the *de facto* stance in the US, South Africa's choice to classify computer programs as a *sui generis* form of copyright work is more acceptable.[46]

Lastly, the aim of this approach is to argue, by drawing on the nature of the statutory adaptation right as clarified by the theoretical study and related case law, that there is perhaps room to create a statutory licensing regime to protect and maintain the harmonisation and balance of rights between the copyright owner and users including prospective authors.[47] A solid foundation of comparative methodology supports this dissertation's recommendations for reforming copyright laws.

1.6 Overview of chapters

The structure of the remainder of this paper is as follows:

Chapter two will focus on the scope and extent of the adaptation right. First, as an introduction, a brief overview of the influence held by international law will be presented. Second, the distinction between reusing and repurposing will be explained within the context of the Copyright Act. This will be supplemented by the significance of permitting the creation of subsequent works, under certain circumstances, to balance the rights of the copyright holder and the user. This will also consider the different rights and powers each party may have. The right will be examined in practice with an overview of copyright enforcement, focusing on infringement and fair dealing issues, laying the groundwork for the dissertation's central argument in the subsequent chapters.

Chapter three provides an overview of the adaptation right in practice. This chapter examines all judicially relevant aspects of unauthorised adaptations to better comprehend the issues at hand. This will be accomplished by continuously comparing and analysing the

[45] Both jurisdictions comply with WIPO Copyright Treaty Article 11, which requires 'adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used [...] in connection with the exercise of their rights'.

[46] E Galbi *Proposal for New Legislation to Protect Computer Programming* (1970) at 280-292 proposing that the Copyright Act be amended specifically to add protection to computer programs.

[47] Shay op cit note 11 at 105-117.

South African and US approaches to identify any inconsistencies and opportunities for modification and improvement. Then, the right will be discussed in terms of its practical application, including a comprehensive overview of broad but relevant case law and the difficulties presented by computer programs as the subject matter. Finally, this chapter concludes with additional considerations pertaining to the identified gaps and issues throughout the remainder of the dissertation.

Chapter four provides a foreign law overview of the adaptation right in practice. This chapter provides an analysis of US copyright law. It focuses on establishing the fundamental approaches to infringement and how courts have dealt with derivative works, particularly concerning computer programs. This chapter will also consider factual versus actionable copying, and the two recognised modes of assessing infringement will then be addressed. Finally, the significance and application of the fair use doctrine will be examined in great detail.

Chapter five concludes by examining how the findings of this research can be applied locally in South Africa and how they can contribute to establishing legal certainty and adequate protection for rights holders. It will then formulate a legal analysis and applicable recommendations based on foreign and local perspectives, incorporating all of the factors discussed in this research. Next, this chapter will review how the law can shape society and what society expects of the law. In doing so, individual interests and the interests of the general public will be weighed against one another within the context of balancing human rights and upholding Constitutional standards. Finally, this chapter concludes with a discussion of how recent changes in local case law and legislation may affect the future of copyright law.

Chapter two:

The scope and extent of the adaptation right

2.1 Introduction

When an author creates an original work, copyright protection ensures in such work, and they may license, sell, or publicly claim copyright ownership. Thus, as soon as an author fixes a work on a tangible medium, the author acquires protection and ownership of the work, subject to the Act's provisions.[48] Copyright law in South Africa recognises two types of rights: first, economic rights, and second, moral rights. While the former serves a financial purpose, the latter seeks to preserve and protect the author's connection to their work. Further, the Act provides the owner with sole discretion or authorisation over any and all reproduction, adaptation, distribution, performance, and exhibition of the work in question. [49]

According to the WIPO Guide to the Berne Convention, the 'right of reproduction' is where the 'right of adaptation' 'find[s] its origins'. [50] This is due to the fact that the adaptation right is viewed as the broader sister right to reproduction because it involves 'a combination of pre-existing elements of the works concerned [...], the use of which in the adaptation may as well be regarded as a reproduction of those elements with some new ones, as a result of which a new work normally emerges'.[51]

Herein lies the essence of copyright: to promote the development of creations by protecting authors' economic benefits and exclusive rights while ensuring that the public has access to the information they need.[52] By allowing for reuse and repurposing, copyright law provides an avenue for authors to receive recognition and compensation for their original work while at the same time providing others with the opportunity to build upon or make use

[48] Section 2 of the Copyright Act - works eligible for copyright protection.
[49] Sections 6 -11 the Copyright Act - nature of copyright.
[50] WIPO 'Summary of the Berne Convention for the Protection of Literary and Artistic Works' available at https://www.wipo.int/treaties/en/ip/berne/summary_berne.html, accessed in July 2022.
[51] J Vanderbilt 'The Derivative Right' (2013) Vol. 15.4.785 at 821; Article 12 of the Berne Convention.
[52] WIPO 'About IP: Copyright' available at https://www.wipo.int/copyright/en/, accessed on 1 November 2022 - 'Copyright law aims to balance the interests of those who create content, with the public interest in having the widest possible access to that content'.

of that original work.[53] In addition, this prevents an owner from having a monopoly over the work, which would impede its progressions and allows for furthering ideas and creativity, helping to create a more vibrant intellectual climate.[54]

This concept of reuse and repurpose has been a part of copyright law since the early nineteenth century.[55] For long international law has significantly influenced the protection afforded by copyright law, especially in relation to the protection of the creation of subsequent works. For example, the Berne Convention mandates protections for 'translations, adaptations, arrangements of music, and other alterations of literary or artistic work'.[56] This provision has also been incorporated into the TRIPS Agreement.

The reuse or repurposing of an original work appears in the Copyright Act under three circumstances: the actual method of creation (*adaptation* and *reproduction*) as listed in the definition section of the Copyright Act; the exclusive rights afforded to the copyright owner; and the restricted acts that may give rise to infringement. The subsequent parts of this chapter will thoroughly consider each aspect as it relates to the scope of this dissertation.

2.2 The creation of a subsequent work

Those instances where the creation of a work required the utilisation and copying of an existing copyright-protected work are the primary focus of this dissertation—henceforth referred to as the *'senior work'* (i.e., the existing work) and the *'junior work'* (i.e., the subsequent work). According to the definition provided in the Copyright Act, a 'copy' means 'a reproduction [in written form or in the form of a recording or cinematograph film or any other material form] of a work, and in the case of a literary […] work, or a computer program,

[53] PN Leval 'Commentaries toward a fair use standard' (1990) *Harvard Law Review* at 1136: '[T]he stimulation of creative thought and authorship for the benefit of society depends assuredly on the protection of the author's monopoly. But it depends equally on the recognition that the monopoly must have limit'.

[54] Ibid at 1107: 'Copyright is not an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations. It is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public'.

[55] S Ricketson & J Ginsburg 'International Copyright and Neighbouring Rights' (2022) *Oxford University Press* at p 615–690 'The reproduction right is one of the most basic, and earliest-recognized, rights in copyright'; Berne Convention through to the 1971 Paris Revision.

[56] Art 2(3) of the Berne Convention.

also an adaptation thereof'.[57] Consequently, a subsequent work manifests itself in one of two ways: either as a reproduction or as an adaptation. This process occurs under the following conditions: either the copyright owner decides to reuse or repurpose their original work, or a third party uses the senior work as a source of inspiration for their new junior work.[58] Regardless of the situation, the original work must be used and made per applicable copyright law.[59] When a copyright holder decides to create a work based on their original work, the process is relatively straightforward, as the holder exercises one of their exclusive rights to create a reproduction or adaptation.[60] However, in the alternative, the process is not always as straightforward when a third party approaches the owner for permission to use a copyright-protected work.[61]

A person who wishes to reuse or repurpose a work has little recourse if the copyright owner refuses permission, as this is their prerogative.[62] Permission may be denied for a variety of reasons, including 1) the owner's intentions for the work, 2) another junior work may already be in the process of being created, or 3) a desire for the work to remain unchanged in its original form; therefore, it is essential to obtain permission before beginning a project involving a senior work. Furthermore, when permission is not obtained or is refused, and a junior work is created, the creator exposes themselves to the possibility of infringing by means of the unauthorised use of a senior work.[63]

As this dissertation is focused on the adaptation right, it is essential first to establish what qualifies as an adaptation within the meaning of the Act and what precisely sets it apart from its broader sister right, the reproduction right. Furthermore, examining the breadth and depth of one's entitlement to the adaptation right is necessary to ascertain the parameters that must be adhered to by a user to avoid infringing upon another's copyright. To be more

[57] Section 1(1) of the Copyright Act - definition of 'copy'.
[58] Section 1(1) of the Copyright Act - definition of 'adaptation'.
[59] *Cavendish* supra note 33; *Bosal Afrika (Pty) Ltd v Grapnel (Pty) Ltd and Another* 1985 (4) SA 882 (C); *Apple Computer Inc v Rosy t/a Computer Comptronic Corporation and Another* 134 JOC (D); *Rapid Phase Entertainment CC v SABC* 597 JOC (W).
[60] Section 1(1) of the Copyright Act - definition of 'adaptation'.
[61] Section 22 of the Copyright Act – ownership of copyright.
[62] Section 22 of the Copyright Act - assignment of licenses.
[63] Section 23 of the Copyright Act - infringement of copyright.

specific, aspects such as what amounts to reuse or repurpose; what constitutes use in the ordinary sense and unauthorised use in terms of the Act, and the role that certain exceptions and limitations may play must be considered.

In addressing the above, the circumstances leading to the decision of the Constitutional Court of South Africa in *Blind SA v Minister of Trade, Industry and Competition* are relevant.[64] While this matter spoke largely towards the inadequacies of the current 44-year-old piece of legislation that is the Copyright Act of 1978, the government's failure to ratify the Marrakesh treaty, and to some extent, the forthcoming CAB, the scope of reproductions and adaptations played a significant role in this matter. Consequently, the considerations, findings and criticism emerging from this matter will frequently appear throughout the following.

2.3 Blind SA v Minister of Trade, Industry and Competition

Blind SA v. Minister of Trade, Industry, and Competition (hereafter *Blind SA*) challenged the South African government's failure to implement the Marrakesh Treaty, an international agreement designed to improve access to published works for blind, visually impaired, and other print-disabled individuals.[65] The treaty requires signatory countries to provide exceptions in their copyright laws to allow for the creation and distribution of accessible format copies of copyright-protected works for the benefit of persons with disabilities without requiring permission from the copyright owner.[66]

As a signatory of the Marrakesh Treaty formulated at the WIPO Conference held in 2013, South Africa had yet to ratify the Treaty and have it reflected in its copyright statute.[67] The delay in ratifying was due to the CAB, which the Government proposed to have signed before

[64] *Blind SA* supra note 9.

[65] WIPO 'Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled' available at https://www.wipo.int/treaties/en/ip/marrakesh/, accessed 21 December 2022.

[66] WIPO Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled: 'requires Contracting Parties to introduce a standard set of limitations and exceptions to copyright rules in order to permit reproduction, distribution and making available of published works in formats designed to be accessible to VIPs, and to permit exchange of these works across borders by organizations that serve those beneficiaries.'

[67] The Treaty text was adopted on June 27, 2013, in Marrakesh.

the Marrakesh Treaty could be ratified.[68] However, this delay in this ratification resulted in a legal gap for organisations and individuals who wish to produce and distribute accessible format copies of copyright-protected work for the benefit of persons with visual disabilities.[69]

Blind SA, a non-profit organisation that advocates for the rights of the visually impaired, filed a lawsuit against the Minister of Trade, Industry, and Competition to challenge the Copyright Act, which does not permit the creation of accessible versions of copyright-protected works without the permission of the copyright owner.[70] SECTION 27, acting on behalf of Blind SA, argued that this restriction prevented visually impaired individuals from accessing important educational, cultural, and informational resources.[71] The organisation also argued that this restriction violated the South African Constitution, which guarantees the right to access information.[72]

Blind SA's application was granted unopposed, and the High Court found that the government had violated the rights of persons with disabilities by failing to implement the Marrakesh Treaty and ordered the government to take steps to rectify the situation.[73] Blind SA then filed an application for confirmation of the order by the Constitutional Court. The Constitutional Court unanimously upheld the previous findings, stating that the Copyright Act

[68] Christ de Klerk, chairman of the Braille committee at Blind SA: '*Unfortunately, this has been delayed for years because of a continuous bickering about the bill*' referenced in African News Agency 'Blind SA blames lack of books for the blind on delay in passing copyrights bill' (2019) available at *https://www.iol.co.za/news/south-africa/blind-sa-blames-lack-of-books-for-the-blind-on-delay-in-passing-copyrights-bill-21779119*, accessed 30 July 2022.

[69] African News Agency 'Blind SA blames lack of books for the blind on delay in passing copyrights bill' (2019) '*Data shows that blind people have access to only about five percent of all publications globally, and to alleviate this the Marrakesh Treaty was adopted in 2013 to facilitate access to published works by the visually impaired*' available at *https://www.iol.co.za/news/south-africa/blind-sa-blames-lack-of-books-for-the-blind-on-delay-in-passing-copyrights-bill-21779119*, accessed July 2022.

[70] *Blind SA* supra note 9.

[71] In this matter SECTION27, acting on behalf of Blind SA, argued that since Parliament was in the midst of a protracted process of amending the Copyright Act to include an accessible format shifting provision, the appropriate interim remedy to cure the constitutional defect would be for the Court to read in Parliament's proposed section 19D with minor modifications to make it operational without additional regulations. The proposed provision 19D specifically permits the transfer of accessible formats and the international exchange of accessible content.

[72] Section 2 of the Constitution provides that it is the Supreme law of the country and that any law inconsistent with it is invalid. This provision necessitates that all IP legislation be interpreted in accordance with the Constitution at the risk of the legislation or particular provisions of it being declared invalid.

[73] *Blind SA* supra note 9.

of 1978 was unconstitutional and unfairly discriminatory insofar as it failed to accommodate people with visual and print disabilities.[74]

However, the court was very clear in its finding that the proposed reading-in section 19D remedy was unclear, lacked essential definitions and was beyond the scope of that which was pleaded, namely visual and print disabilities and literary and artistic works.[75] Therefore, using Marrakesh Treaty standards, the court created its own legislative interim reading-in remedy for accessible format shifting of literary and artistic works, namely section 13A.[76] Furthermore, the court suspended the Copyright Act's constitutional invalidity while Parliament finalised the CAB.[77]

This ruling was a significant victory for Blind SA and the visually impaired community in South Africa, as it recognized the importance of access to information for all citizens, including those with disabilities.

2.3.1 The significance of the case towards this research

In addition to the main parties in the case, Professor Dean acted as *amicus curiae* in the matter. Dean argued that the proposed section 19D was incoherent because it lacked vital definitions and additional rules.[78] According to Dean, section 13 of the Copyright Act permits regulations to expand copyright exceptions for reproduction uses, thereby saving the Copyright Act from invalidity.[79] In his opinion, the definition of reproduction determined by

[74] *Blind SA* supra note 9 para 2, the Constitutional Court, authored by Unterhalter AJ, confirmed the High Court's finding 'It is declared that sections 6 and 7, read with section 23 of the Copyright Act 98 of 1978, are unconstitutional, invalid and inconsistent with the rights of persons with visual and print disabilities, as set out in sections 9(3), 10, 16(1)(b), 29(1) and 30 of the Constitution, to the extent that these provisions of the Copyright Act limit the access of such persons to published literary works, and artistic works as may be included in such literary works, in accessible format copies.'

[75] Ibid para 105 'Once the ambit of the case is properly demarcated, the wholesale adoption of section 19D cannot be ordered as interim relief. It covers grounds beyond the challenge established by Blind SA. It is legislation intended to permit South Africa to ratify the Marrakesh Treaty. Whether it does so adequately is beyond the bounds of the case before us.

[76] Ibid para 108: The section was also drafted to avoid relying on regulations to define concepts because the court has no power to direct that regulations must be passed to support the provision it reads in.

[77] The court afforded Parliament 24 months to amend copyright laws to allow for accessible format changes.

[78] Ibid para 34 'section 19D is not consistent with the Marrakesh treaty and creates various lacunae if the reading-in does not include other provisions of the Copyright Amendment Bill'.

[79] Ibid para 35-39 Dean proposed compelling the Minister to issue regulations in accordance with Section 13 of the Act at para 31; Section 13 of the Copyright Act 'the reproduction of a work shall be permitted as prescribed, but in a manner that the reproduction is not unreasonably prejudicial to the legal interest of the author'.

the Copyright Act is broad enough for this purpose.[80] Nevertheless, Blind SA, Media Monitoring Africa Trust (second amicus curiae), and the Minister concurred that accessible format conversion encompasses more than simple reproduction; for instance, activities such as creating image captions or distribution and transmission are also included.[81] On this basis, the court rejected Dean's proposition of section 13 as a remedy in finding that its application was limited by its wording and only applies to reproductions.[82] Thereby effectively supporting the reasoning that accessible format conversion requires more than reproduction. [83]

In addressing authorisation requirements for those with print and visual disabilities, the court reaffirmed the importance that 'legislation that protects the rights of copyright owners must take account of the differential impacts of such protection upon different classes of persons.'[84] It is argued, however, that this may have broader implications for the interpretation and application of fair use and other exceptions in South African copyright law and could affect how infringement proceedings are handled. These implications will be contemplated further in the following chapters.

2.4 Reproduction versus adaptation

The scope and differences between reproduction and adaptation lay at the forefront of *Blind SA*. The court was tasked with determining whether the reproduction of a literary work is sufficient to convert the work into an accessible format copy for the use of individuals with print or visual impairments or whether an adaptation of the work was also necessary.[85] The court held that the Copyright Act does not provide a comprehensive definition of reproduction or adaptation as 'the definitions state what these concepts include' but necessarily goes to the extent of defining each term.[86]

[80] *Blind SA* supra note 9 para 37.
[81] Ibid para 22, 23, 32 and 40.
[82] Ibid.
[83] Ibid.
[84] Ibid para 67.
[85] Ibid para 58.
[86] Ibid para 80.

Dean reaffirmed the meaning of reproductions and adaptations in his submissions to the Constitutional Court.[87] In discussing the permitted use within accessible formats, Dean explained to the court that reproduction 'is broad enough to incorporate the making of any derivative version where the reproducer does not add any contribution of their own, or change the ideological content of the work'.[88] Dean emphasised the wording of section 6 (a) of the Copyright Act, which states '[r]eproducing the work in any manner or form'.[89] In the alternative, however, Dean explains adaptation requires 'the person making the adaptation to embroider on, or transform, the original work by contributing to the work's content', resulting in a new version that enjoys copyright protection.[90]

It follows that reproduction involves making a copy of the original work without significant changes.[91] Generally, this involves making a physical copy of a book or painting or creating a digital copy of a sound recording or video. On the other hand, an adaptation involves taking an existing work and creating a new work based on it.[92] This can involve changing the original work's form, medium, or language or making significant additions, deletions, or modifications to the original work.[93] For example, a movie adaptation of a novel involves taking the story and characters from the novel and creating a new work in the form of a movie.[94]

Similarly, in broader terms, Dean puts forth in his *Handbook of South African Copyright Law* that to 'reproduce' means to make a copy, while 'adapting' means to alter, modify, or transform.[95]

2.5 Adaptations in copyright law

[87] Ibid.
[88] Ibid.
[89] Ibid para 81.
[90] OH Dean 'Handbook of South African Copyright Law' (2015) *Jutastat e-publications* at 76 para 8.5.2-8.5.10.
[91] Section 1(h) of the Copyright Amendment Act 125 of 1992 substitution for the definition copy: 'copy means a reproduction [in written form…or any other material form] of a work, and, in the case of a literary…or computer program, also an adaptation thereof'.
[92] Dean op cite note 192 at 76 para 8.5.2-8.5.10.
[93] *Blind SA* supra note 9 para 38.
[94] Rowling op cite note 9.
[95] Dean op cite note 192 at 76 para 8.5.2-8.5.10.

One of the earliest discussions regarding the meaning of the term 'adaptation' was held in *Bosal Afrika (Pty) Ltd v Grapnel (Pty) Ltd*.[96] The issue was the difference between the English word '*adaptation*' and the Afrikaans '*aanwending*'. Burger J held that the definition contained in the Copyright Act is not exhaustive and pointed out that '[t]he English version appears to be ambiguous…even if it was clearly exhaustive…the Afrikaans version was signed, and the meaning of 'aanwending' must be accepted.[97] Further, the Afrikaans term emphasised 'use', while the English term emphasised 'conversion'.

Recently, in *Quad African Energy (Pty) Ltd v the Sugarless Company (Pty) Ltd* (hereafter 'the Quad case'), Ponnan J reasoned that the court incorrectly concluded that the original work in question had been used in the making of another and, as a result, amounted to making an adaptation.[98] In reaffirming that Burger J erred in his reasoning, Judge Ponnan concluded that -

> 'It was not necessary to hold that there is a conflict between the two version or enquire into which version was signed. Both the English word 'adaptation' and the Afrikaans word 'aanwending' bear the meaning of altering or changing something that already exists, without fundamentally departing from the original, as in the adaptation of a novel into a film or television show'. [99]

What was important from this matter is that the Supreme Court of Appeal pointed out that the mere fact that a prior work has been used does not automatically equate to an adaptation and a subsequent work infringing because of it.[100]

In assessing whether a junior work is an adaptation, it is necessary that the work falls within the meaning of the term as set out in the Act and that there is a similarity to the actual creative composition of the senior work and not just the idea itself.[101]

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[96] *Bosal* supra note 137.
[97] *Bosal* supra note 137.
[98] *Quad African Energy (Pty) Ltd v the Sugarless Company (Pty) Ltd and Another* (2020) (6) SA 90 (SCA) at 27.
[99] Ibid at 27.
[100] Ibid at 28.
[101] Ibid at 28; The idea-expression dichotomy implies that if the work's expression has not been copied, there will be no copyright infringement for works based on the same ideas. It is an expression of an idea in which copyright vests; to this end, infringement will not be established if the unauthorised use relates to an idea rather than an expression of a significant portion.

2.5.1 What constitutes an adaptation under the provisions of the Copyright Act?

The concept of transforming a work is evident in the Act's definition of 'adaptation' and is substantiated by the species of 'adaptations' listed in the Act.[102] For this purpose, however, the following two works categories will be examined as examples.

Firstly, the Act defines an adaptation in relation to literary works as-

> *a) A literary work includes -*
>
> *i. In relation to a literary work in a non-dramatic version form a version of the work in a dramatic form;*
>
> *ii. In relation to a literary work in a dramatic form a version of the work in a non-dramatic form;*
>
> *iii. A translation of the work; or*
>
> *iv. A version of the work in which the story or action is conveyed wholly or mainly by means of pictures in a form suitable for reproduction in a book or in a newspaper, magazine or similar periodical.*[103]

For a junior work to be an adaptation of a senior literary work, it is required to be 'transformed in such a manner that the original or substantive features of it remain recognisable.'[104] Such was the question raised in *Rapid Phase Entertainment CC v SABC*.[105] However, based on what was observed in *Blind SA*, there should be some leeway and consideration given to the definition of a literary adaptation. For example, in referring to the definition of a literary work in the reading-in of section 13A, the court held that 'literary work means literary work as defined in section 1 of this Act and shall be taken to include artistic works forming part of a literary work'.[106]

Furthermore, the same can be said of the decision in *Apple Computer v Rosy t/a S.A. Commodity Brokers (Pty) Ltd,* where the adaptation of a computer programme was in issue. Following the 1992 amendment to the Copyright Act, adaptations in reference to computer programs include –

> *d) A computer program includes –*

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[102] Dean op cite note 192 at 76 para 8.5.3
[103] Section 1(1) of the Copyright Act - definition of 'adaptation'.
[104] *Rapid Phase* supra note 137.
[105] *Rapid Phase* supra note 137.
[106] *Blind SA* supra note 9 reading-in of section 13A.

i. a version of the program in a programming language code, or notation different from that of the program; or

ii. a fixation of the program in or on a medium different from the medium of fixation of the program'.[107]

In *Apple Computers,* the court confirmed that 'object codes of a computer may obtain copyright protection if they are adaptations or translations of source codes.'[108] This ruling is significant because it recognises that computer programs are subject to copyright protection, not just as literary works but also as a form of creative expression. It also highlights the importance of protecting software developers' rights.

Another matter of interest is *Technical Information Systems (Pty) Ltd v Marconi Communications (Pty) Ltd*, which also dealt with the adaptation of a computer program. The court held that removing an essential component, such as a licence agreement, constituted a substantial adaptation of the programme and was an act of infringement by adaptation.[109] The inference here is that the scope of adaptation also extends to transforming a senior work by removing an essential component. While removing a portion of a work may be considered 'adapting' it in the broadest sense, Dean contends that such an act does not fall within the scope of what the Copyright Act considers an 'adaptation' to mean.[110]

What is clear from the above is that the legal boundaries between senior works and adaptations in different media forms can be complex and challenging to define; this is further exacerbated in instances where the court is limited to what is pleaded before them, such as in *Blind SA.*[111] This raises questions about the extent to which the original creator's rights should extend to adaptations of their work and whether adaptations significantly different from the original should be allowed without permission.

2.5.2 The originality of an adaptation

[107] Copyright Amendment Act 125 of 1992 at section 1(a) - definition of an adaptation.
[108] *Apple Computers* supra note 137.
[109] *Technical Information Systems (Pty) Ltd v Marconi Communications (Pty) Ltd and Another* (WLD) unreported case no 06/11666.
[110] Dean op cite note 192 at 76 para 8.5.9.
[111] *Blind SA* supra note 9 para 63 'our remedial remit, however, does not go beyond the challenges that has been made'.

Once it is established that a junior work is an adaptation of a senior work, the questions of originality and, by association, copyright protection of the junior work comes into question. In *Blind SA*, referring to an adaptation, Dean argued that it results in 'a version which is a new work, that enjoys its own copyright protection.'[112] This statement is in line with section 2(3) of the Copyright Act concerning works eligible for copyright, which provides the following –

> *'A work shall not be ineligible for copyright by reason only that the making of the work, or the doing of any act in relation to the work, involved an infringement of copyright in some other work'.*[113]

Furthermore, this provision and creating a 'new work' version align with the originality requirements expressed in various case laws.[114] For example, in *Apple Computer,* the court held that because the 'object codes were adaptations and translations of the original source code', it established a *prima facie* right.[115] Moreover, in *Haupt v Softcopy Brewers*, which specifically addressed the originality requirements concerning an adaptation, the Supreme Court of Appeal (hereafter SCA) confirmed that 'if a work is eligible for copyright, an improvement or refinement of that work would similarly be eligible for copyright, even if the improved work involved an infringement of copyright in the original work, if it meets the originality requirements'.[116]

Originality is determined in South African copyright law by assessing whether the work is the product of the author's intellectual effort and whether it is sufficiently original to warrant copyright protection.[117] The degree of originality required is not high, but the work must display some creativity and not be a copy of pre-existing work. However, the mere use of a prior work does not indicate that the subsequent work is an adaptation and, thus, an

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[112] *Blind SA* supra note 9 para 38.

[113] Section 2(3) of the Copyright Act.

[114] *Klep Valves (Pty) Ltd v Saunders Valve Co Ltd 1987* (2) SA 1 (A); *Waylite Diaries CC v First National Bank Ltd* 1995 (1) SA 645 (A); *Appleton and Another v Harnischfeger Corporation and Another* 1995 (2) SA 247 (A); *Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd* 2006 (4) SA 458 (SCA).

[115] *Apple Computer* supra note 137.

[116] *Haupt* supra note 263 at 22 the Supreme Court of Appeal referred with approval to the *CCH Canadian Ltd v Law Society of Upper Canada* (2004) 1 SCR 339 at para citing '[A]n original work . . . must be the product of the author's exercise of skill and judgment. The exercise . . . must not be so trivial that it could be characterised as a purely mechanical exercise. While creative works will by definition be 'original' and covered by copyright, creativity is not required to make a work 'original'.'

[117] *Haupt* supra note 263.

infringement.[118] Not only the concept but also the actual creative composition must be similar.[119]

As was stated in *Klep Valves v Saunders Valves* -

> *'The requirement that work should emanate from the author himself and not be copied must not be interpreted as meaning that a work will be regarded as original only where it is made without reference to existing subject matter. Indeed, were this so, the great majority of works would be denied the benefit of copyright protection. It is perfectly possible for an author to make use of existing material and still achieve originality in respect of the work which he produces. In that event, the work must be more than simply a slavish copy; it must in some measure be due to the application of the author's own skill or labour'.*[120]

It follows that copyright may subsist in a work containing an arrangement of features that have existed beforehand. The final product is what qualifies for copyright protection and not the process, which may draw on pre-existing features. Originality as a requirement for the vesting of copyright does not require that the work be unique or inventive but a product of the author's labour and endeavours and not a slavish copy of some other work.

Referring back to the arguments made in *Blind SA*, in explaining the appropriateness of section 13 as a potential remedy based on reproduction, Dean argued that what was required was a mere format shifting, and no aspect of originality was required. Dean contended that reproduction involves converting an existing work into a different format, i.e., printing the words so that a visually impaired individual can identify the letters/words by touch. Dean submitted that this entails a mechanical process that falls within the broad scope of reproduction as defined by the Copyright Act. [121]

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[118] *Galago Publishers (Pty) Ltd v Erasmus* 1989 (1) SA 276 (A) at 285: the court approved the following remarks of Lord Reid in Ladroke v William Hill 'To my mind it does not follow that, because the fragments taken separately would not be copyright, therefore the whole cannot be. Indeed, it has often been recognised that if sufficient skills and judgement has been exercised in devising the arrangement of the whole work, that can be an important or even decisive element in deciding whether the work as a whole is protected by copyright'.

[119] *Quad* supra note 212 para 28: 'There is no copyright for ideas and thoughts'.

[120] *Klep Valves* supra note 263 at 22.

[121] *Blind SA* supra note 9 para 37 - Dean submits that 'conversion of an existing work into a different format – for example, braille entails the reproduction of an existing work into a different format'.

However, considering the significant effort and skill required to *alter or transform* the literary work, and even more so an artistic work, the court's resolution is more plausible.[122] In disagreement with Dean's argument, the court reasoned that the issue was 'whether the rendering of literary works into accessible format copies for the use of persons with print and visual disabilities is also a process of copying a literary work into another format'.[123]

Not to mention what is required to transform, for example, an English literary work into a compatible braille version in another language such as Sesotho, Zulu, Afrikaans etc. In addition, while the scope of Blind SA was limited to what was pleaded (literary and artistic works), what is required of this accessible format initiative extends far beyond this scope and encompasses multiple categories of works, such as the creation of computer programmes or software that interact with the original work in different formats. Thus, this creation process involves interpretative and creative input from the creator of the junior work, thereby involving an aspect of originality. The following extract for *Blind SA* speaks to this sentiment-

> *Those who serve the interests of persons with print and visual disabilities should be given the greatest latitude to produce literary works in accessible format copies and to develop technologies to do so that are ever better at rendering the original work in the best possible way, tailored to the varied incidents of the impairments such persons suffer. That requires, as a matter of probability, the freedom to make adaptations and not merely reproductions.*[124]

While this speaks to the degree of originality in adaptation versus reproduction, it is essential to note that *Blind SA* was only concerned with the creation of accessible format copies for the visually and print impaired.[125] The adaptations created for this purpose are intended for the sole use of the identified beneficiary and are to be undertaken on a strictly non-profit basis. Originality does not imply that the creator or user may freely exploit the work from which it emanates.

[122] *Blind SA* supra note 9 para 78-86.
[123] *Blind SA* supra note 9 para 78-86.
[124] *Blind SA* supra note 9 para 89.
[125] *Blind SA* supra note 9 para 107.

An adaptation seems superior to a reproduction in that what is required is 'more than just a slavish copy' and beyond a format shift.[126] Both adaptations and reproductions can potentially infringe on the copyright owner's exclusive rights, depending on the circumstances. However, the level of originality and creativity involved in an adaptation is generally higher than in a reproduction, which may impact the scope of protection afforded under copyright law.

2.6 The adaptation right under the Copyright Act

Until this point, the meaning and process of creating an adaptation have been looked at in isolation from the act of creating a subsequent work. However, the following considers adaptations as it pertains to the exclusive rights afforded to an author of an original work.[127]

Generally, the author becomes the copyright owner when copyright exists in an original work.[128] As the Copyright Act outlines, the owner retains control over their work for the

[126] *Klep Valves* supra note 263 at 22.

[127] The Copyright Act. –

6. Copyright in a literary work or any substantial part thereof vests the exclusive right to do or to authorise the doing of any of the following in the Republic:

- *a) Reproducing the work in any manner or form;*
- *b) publishing the work if it was hitherto unpublished; performing the work in public;*
- *c) broadcasting the work;*
- *d) causing the work to be transmitted in a diffusion service, unless such service transmits a lawful broadcast, including the work, and is operated by the original broadcaster;*
- *e) making an adaptation of the work;*
- *f) doing in relation to an adaptation of the work, any of the acts specified in relation to the work in paras (a) to I inclusive.*

11. Copyright in a computer program vests the exclusive right to do or authorise the doing of any of the following acts in the Republic:

- *a) Reproducing the computer program in any manner or form:*
- *b) publishing the computer program if it was hitherto unpublished;*
- *c) performing the computer program in public;*
- *d) broadcasting the computer program;*
- *e) causing the computer program to be transmitted in a diffusion service, unless such service transmits a lawful broadcast, including the computer program, and is operated by the original broadcaster;*
- *f) making an adaptation of the computer program;*
- *g) doing, in relation to an adaptation of the computer program. Any of the acts specified in relation to the computer program in paragraphs (a,) to I inclusive.*
- *h) letting or offering or exposing for hire by way.*

[128] Section 1(iv) and section 3 of the Copyright Act. Notably, section 22 of the Copyright Act provides for exceptions to the general rule of ownership.

duration of the copyright and is entitled to certain exclusive rights, including the adaptation right.

Overall, the Copyright Act sets out the scope and extent of a copyright owner's exclusive rights.[129] For example, section 6(e) prohibits the making of an adaptation of a literary work and (f) doing any of the acts specified concerning the work listed in subsections (a) to (e). Section 11B holds the same concerning computer programs. [130] Most importantly, these provisions afford the copyright owner exclusive control over the translation, adaptation, arrangement, or other transformation of their copyright-protected work.

In affording these rights, the Copyright Act provides the copyright owner significant control over the use and transformation of their copyright-protected work. However, this control over their work is not to such an extent that it enables to owner to monopolise the work and impede development. Moreover, as addressed below, some exceptions and limitations allow specific unauthorised uses of a copyright-protected work.[131]

Thus, adaptation-related infringement and the Copyright Act's current wording significantly impact the scope of the copyright owner's adaptation right, as do any limitations and exceptions to the rights outlined in the Copyright Act.

2.6.1 The traditional framework of copyright infringement

As it is their right as a copyright owner, the Copyright Act permits the owner to institute infringement proceedings against anyone who unlawfully uses their original work without first acquiring permission.[132] The elements of a copyright owner's claim for infringement are supported by section 23(1). In it, it is said:

> *'Copyright shall be infringed by any person, not being the owner of the copyright, who, without the licence of such owner, does or causes any other person to do, in the Republic, any act which the owner has the exclusive rights to do or to authorise'.*[133]

[129] Section 6-11B of the Copyright Act.
[130] Section 6 of the Copyright Act.
[131] Section 13-19 of the Copyright Act.
[132] Section 23 infringement provision of the Copyright Act.
[133] Section 23(1) of the Copyright Act.

Based on the Act's wording, it is evident that direct infringement occurs when someone other than the copyright holder produces unauthorised copying, adaptation or publication of a work without permission. In addition, section 1(2A) states that unless the context indicates otherwise, the performance of any exclusive acts reserved to a work shall be interpreted as the performance of any such acts to a substantial portion of that work. Thereby, it is 'not only infringed by misusing or misappropriating the whole of the work but also by misusing or misappropriating a substantial part of the work'.[134] However, copying itself is not unlawful. For example, suppose one were to copy a single verse from a literary work. In that case, one has engaged in copying, but not necessarily to the extent that it gives rise to copyright infringement.[135] For copying to constitute an infringement, it must contain more than the *de minimis* quantity of the copyright-protected expression.[136] This, however, applies to the broad form of testing for copyright infringement which involves an assessment of the substantial similarity between the original work and the alleged infringing work.[137]

Generally, when the issue of copying is in dispute, the copyright owner may use either direct or circumstantial evidence to prove copying; however, direct evidence is often rare in general infringement cases. Typically, courts will infer unlawful copying based on evidence of the defendant's access to the plaintiff's work and what is known as the dual test for copyright infringements.[138] The dual test is probative; the idea is that if the defendant had access to the plaintiff's work and if the defendant's work is substantially similar to the plaintiff's work, then the most plausible conclusion is that the defendant copied from the plaintiff. Conversely, if either of these tests brings a negative conclusion, then there can be said to be no copying.

The problem here, however, relates to adaptation-infringement matters. Ideally, when an original work is copied, it amounts to unlawful use and invokes infringement. The objective is to examine instances in which a creator is accused of using a work, or a substantial portion

[134] Section 1(2A) of the Copyright Act.
[135] *Juta & Company Ltd and Others v De Koker and Others* 415 JOC (T).
[136] Dean op cite note 192 at 1-20: Section 1(2A) is consistent with the test for infringement being primarily qualitative and not quantitative in nature. As long as what is taken has substance in the original work (and is not de minimis) or has sufficient pith to constitute the embodiment of original intellectual activity in a material form.
[137] *Galago Publishers* supra note 267 para 5-6.
[138] Section 23 of the Copyright Act.

thereof, without permission from the owner. The difficulties the owner encounters in adaptation-infringement cases centre on the burden of establishing that the allegedly infringing junior work is an adaptation as defined by the Copyright Act and that the unauthorised use is not exempt from finding infringement. This follows the courts' considerations in *Quad* and *Technical Information,* where it was shown that not all subsequent works amount to adaptations[139], and not all adaptations amount to infringement.[140]

However, due to the wording of section 23(1) infringement provision - namely, that 'copyright shall be infringed' when someone who is not the owner and without permission 'does or causes' any act in relation to the protected work that only 'the owner of the copyright may authorise' - any addition, transformation or modification to a copyright-protected work triggers the adaptation right.[141] Further, by the provisions of sections 6-11B, when read in conjunction with subsection 1(2A) and 23(1) of the Copyright Act, the creation of a junior work may constitute an infringement of the copyright in a senior work if it involves the adaptation of specific categories of works or a substantial portion thereof. Consequently, by creating a subsequent work, a third party may therefore infringement the copyright holder's exclusive rights. While in such an instance, the traditional substantial similarity test is intended to be applied to determine whether an act of infringement has occurred, the test becomes problematic when comparing an adaptation (junior work) to the original work (senior work), as the plaintiff has a more significant burden to prove in *adaptation-infringement* matters. This research contends that a more objective evaluation of first determining whether the junior work in question is considered an adaptation under the Copyright Act and second, whether it violates the rights of the copyright owner of the senior work.

2.6.2 Limitations and exceptions to copyright protection

[139] *Quad* supra note 65
[140] *Technical Information* supra note 76.
[141] Section 23(1) of Copyright Act.

In an effort to preserve the purpose of copyright and ensure the harmony between providing protection and promoting the continued development of innovation and creation, as well as the public's interests, the adaptation right is subject to certain limitations and exceptions. These copyright limitations and exceptions are lawful balancing mechanisms that the Berne Convention and TRIPS Agreement permit.[142]

South Africa is mandated to facilitate access to information and knowledge in all national legislation and policies to advance its national, regional and international development and transformation strategies. Therefore, it should come as no surprise that these agreements require members to implement restrictions, exemptions, and exceptions to exclusive rights in exceptional cases when doing so will not adversely affect the owner's legitimate interests or prevent normal exploitation of the work.[143] For example, as was seen in the *Blind SA* matter concerning the visually and print disabled. Overall, these exceptions and limitations to copyright are vital instruments to ensure a balance between protecting the creator's rights and allowing access for the public to benefit from their works.

The Berne Convention and the TRIPS Agreement require member states to impose stringent minimum standards for copyright law. [144] Citing that -

> *'The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and the transfer and dissemination of technology to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.'*[145]

In addition to establishing a system of equal treatment that harmonises copyright among signatories, international copyright regimes provide essential, albeit limited, principles or norms that national legislatures should consider when incorporating exception provisions into their laws. [146] Furthermore, Article 13 of the TRIPS Agreement and Article 9(2) of the

[142] Article 13 of the TRIPS Agreement and Article 9(2) of the Berne Convention.
[143] WIPO '*Intellectual Property Handbook'* (2014) WIPO Publication.
[144] Cohen et al op cit note 2 at 35.
[145] Article 7 of the TRIPS Agreement.
[146] Article 10 of Berne Convention for the Protection of Literary and Artistic Works 1886 as amended, available at http://www.wipo.int/treaties/en/ip/berne/, accessed on 11 December 2022: TRIPS Agreement on Trade Related Aspects; the Marrakesh Treaty.

Berne Convention provides principles or norms, also known as the 'three-step test', which serve as a set of fundamental guidelines frequently used to interpret and apply exception clauses. [147] It is founded on the basis that copyright exceptions ought to be allowed in a) exceptional circumstances, b) that do not prevent the copyright-protected work from being used for common economic purposes, and c) that do not unreasonably hurt the legitimate interests of the copyright holder. [148] The *Blind SA* case spoke directly to how a copyright owner's rights may be limited to preserve the harmony that copyright seeks to strive for and ensure compliance with the standards and obligations set by international law, such as the Marrakesh treaty. Moreover, the above-referenced three-step test was also a matter of discussion in the *Blind SA* case, as submitted by Dean in his argument.

The most significant limitation to the scope of the adaptation right is South Africa's 'fair dealing' approach which is based on the international three-step test, which serves as a mechanism that allows for the limited use of copyright-protected material without the permission of the copyright owner.[149] Fair dealing was developed as an exception to infringement for work used for private study, research, criticism, review, or news summaries.[150] Accordingly, under the provision of section 12 of the Copyright Act, and as amended, the use of literary, musical and artistic works, broadcasts, and published editions will qualify as fair dealing if the use is –

> *Any fair dealing with a literary, musical or artistic work, or with a broadcast or a published edition, does not infringe that copyright when it is—*
>
> *a) for the purposes of research or private study by, or the personal private use of, the person using the work;*
> *b) for the purposes of criticism or review of that work or of another work; or*
> *c) for the purposes of reporting current events—*

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[147] Article 13 of the TRIPS Agreement states that *'[m]embers shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder'*. Article 9(2) of the Berne Convention states that *'[i]t shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author'*.

[148] Berne Convention, Article 9(2); Article 13 Agreement Trade-related Aspects of Intellectual Property Rights, 1994 (Annex 1C to the Marrakesh Agreement Establishing the WTO) available at https://www.wto.org/33nglish/tratop_e/trips_e/t_agm0_e.htm, accessed on 11 December 2022; WIPO Copyright Treaty 1996, Article 10.

[149] Section 12(1) read together with subsections 15(4), 16, 17, 18, 19A and 19B of the Copyright Act.

[150] Accordingly, under the provision of section 12 of the Act.

i. in a newspaper, magazine or similar periodical; or

ii. by means of broadcasting or in a cinematograph film.

Paragraphs (b) and (c) apply also to cinematograph films, sound recordings and computer programs. In the case of all works fair dealing in terms of paras (b) and (c)(i) must be accompanied by the required acknowledgement, more particularly the source of the work must be mentioned as well as the name of the author if it appears on the work.[151]

This exemption to the scope of copyright protection attempts to strike a balance between the need to protect those who own copyright and the importance of granting individuals the right to use copyright-protected works in certain circumstances through establishing a safe harbour based on the principle of fair dealing. This equilibrium is meant to allow a copyright-protected work to be used, without authorisation, fairly and reasonably. However, the debate over the CAB illustrates that this exemption is not without flaws and that the *Blind SA* case is not the first to call into question its effectiveness.[152]

Overall, it is clear that owners, creators, and users of copyright-protected material face difficulties due to the South African copyright law's constrained application and ambiguous definition of fair dealing. Further, thought is needed regarding its effects on the scope of the adaptation process and the development of a thriving, dynamic, multi-class creative industry.

2.7 Concluding remarks

The reproduction and adaptation rights give the copyright holder the authority to control the duplication of their work. However, the converse is also true: it encourages and safeguards creative endeavours. This practice has given the original works new life over time by inspiring new interpretations from the minds of talented individuals. This made it possible for one work to legitimately serve as the basis for another, albeit reused or repurposed, and for new rights to be derived from the original work. In such a case, copyright protection is afforded to both the senior and junior works, ensuring each one retains its identity.

[151] Section 12(1) read together with subsections 15(4), 16, 17, 18, 19A and 19B of the Copyright Act.

[152] OH Dean 'Copyright Blind Spot' (2021) The Anton Mostert Chair of Intellectual Property available at https://blogs.sun.ac.za/iplaw/2021/04/19/copyright-blind-spot/, accessed December 2022.

Based on the language used in the Copyright Act, it is clear that South Africa, in keeping with its origins in the United Kingdom, follows a rule-based approach by defining precisely which forms of adaptation fall under the owner's right.[153] This approach is beneficial as it ensures that the owner's rights are unambiguously respected and delineated while providing clarity for those needing to interpret the law. However, as discussed in chapter four of this dissertation, the owner is not granted a broad, unrestricted right to control all adaptations, as provided by a standard-based approach in other foreign jurisdictions, such as the United States. Therefore, courts have less discretion in determining which adaptations constitute copyright infringement.[154] In light of this, determining whether a protected work has been infringed upon presents its unique challenges, especially regarding the scope of the owner's adaptation right.

Not only does the concept of originality play a vital role as a prerequisite for the conferral of copyright, but it also significantly impacts how copyright infringement is viewed. A copyright owner must prove both actual copying and relevant conduct concerning a work that is identical to, or sufficiently similar to, that protected by the copyright to establish an infringement. A particular aspect or feature of a junior work can simultaneously be infringing and original as exempted by section 2(3) of the Copyright Act. In other words, if a junior work is determined to infringe on a senior work, this does not necessarily indicate that every aspect of the work infringes. Some elements can be original and exempt from claims of infringement. Originality is, therefore, not only the most basic requirement for copyright to subsist but can also be viewed as the mirror image of copyright infringement.

Additionally, limitations and exceptions to copyright further highlight that the current approach to adaptation(s), and by association, copyright infringement may be too broad and subjective to adequately protect the intellectual interest of the parties involved. It may also be susceptible to being declared unconstitutional, as seen in the *Blind SA* case. Therefore, it is essential to balance protecting the original work and allowing for adaptations that can

[153] P Goold 'Why the U.K. Adaptation Right is Superior to the US Derivative Work Right' (2014) *Nebraska Law Review* at 3.
[154] Ibid at 4.

contribute to developing new ideas and creativity. This balance can be achieved through a more nuanced approach to copyright law that considers each case's specific circumstances.

The ruling in the *Blind SA* case highlighted the importance of balancing the interests of copyright owners with the right to access information and cultural works. Furthermore, it demonstrated the need for copyright laws to be responsive to the needs of persons with disabilities. This highlights the importance of ensuring that copyright laws are flexible enough to adapt to changing societal needs and technological advancements while upholding the fundamental principles of intellectual property rights. It also underscored the need for ongoing reform of South African copyright law to ensure it is fair, balanced, and reflective of the public interest. However, the CAB proposes several changes to South African copyright law, including introducing a fair use provision and further exceptions, which may have implications for future cases related to copyright and accessibility in South Africa.

While this chapter provides an overview of the history, purpose, and components of reusing and repurposing a work protected by copyright laws, it also establishes the significant difference between reproduction and adaptation. Accordingly, the following will conduct a more in-depth examination of the issues that have been identified concerning the scope and depth of the adaptation right. Particular emphasis will be placed on the practical considerations associated with adaptation-infringement proceedings and the availability and efficacy of the available defences in response to such proceedings. In addition, the current difficulties that legislators are encountering, the gaps still present in the wake of the *Blind SA* judgement, and the potential solutions or approaches to these issues will be discussed. This discussion aims to provide a comprehensive overview of the challenges and opportunities in the context of adaptation-infringement proceedings. By examining these issues in detail, it is hoped that a more nuanced understanding of the legal landscape can be developed, facilitating more effective decision-making by all parties involved.

Chapter three:

Overview of the adaptation right in practice in South Africa

3.1 Introduction

This chapter addresses the dissertation's central argument, namely the underlying challenges in infringement cases where the adaptation right is at issue. The objective is to examine instances in which a creator is accused of using a work, or a substantial portion thereof, without permission from the owner. The difficulties the owner encounters in adaptation-infringement cases centre on the burden of establishing that the allegedly infringing junior work is an adaptation as defined by the Copyright Act and that the unauthorised use is not exempt from finding infringement.

In *Blind SA*, Dean argued that 'adaptation requires the person making the adaptation to embellish or transform the original work by contributing to the work's content'.[155] As a result, it produces a version that is a distinct work with its own copyright protection. Thus, enforcing the adaptation right when a work has little to no creative or expressive element is more difficult. Its secondary use is limited to a small portion of the original work, or the similarities between the plaintiff's and defendant's works appear to be coincidental, as this may not be considered adaptation within the meaning of the Act. Conversely, defendants in copyright disputes frequently argue that their use conforms to fair dealing standards. Otherwise, defendants bear the burden of proof when contesting the validity of a copyright.

In reproduction-infringement, the owner must establish a subjective similarity and a causal link between the senior work and the alleged infringing junior work—however, adaptation-infringement calls for a more objective approach. Aside from the original aspects, an infringing portion in the junior work must be identified and established to prove infringement. [156] Namely, the similarity sought to be established is not to the extent of what is generally

[155] *Blind SA* supra note 9 para 38.
[156] *Galago Publishers* supra note 267 para 5-6.

required in a reproduction-infringement matter but an examination of the interpretive element of the senior work, which suggests the original to the user's mind.

In his opinion piece, Dean discussed the implications of the ruling in *Blind SA* for copyright law in South Africa and highlighted the importance of balancing the interests of copyright owners and users, particularly in cases with public interest concerns, such as access to information for persons with disabilities.[157] He also noted that the ruling could have broader implications for the interpretation and application of fair use and other exceptions in South African copyright law.[158]

Following is an examination of all aspects of infringement as it has been applied by the courts to understand better the issue at hand, which has dominated several copyright infringement cases.[159] The underlying purpose is to highlight the inconsistency of the current approach to infringement as it relates to the adaptation right and how it can be modified and improved. Then, the right will be discussed in terms of its practical application, including a detailed overview of case law, the challenges associated with the various subject matters, and an overview of the impact of the digital age.

3.2 The scope of an owner's adaptation right in infringement claims

The second chapter of this dissertation pointed out that the adaptation right manifests itself in two ways: 'adaptation' of an original senior work and 'adaptation', which gives rise to infringement claims.

In the unreported matter of *Cavendish Textiles Ltd v Manmark (Pty) Ltd,* where the adaptation right was in issue, the court held that –

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[157] OH Dean 'Copyright Blind Spot' (2021) The Anton Mostert Chair of Intellectual Property' available at https://blogs.sun.ac.za/iplaw/2021/04/19/copyright-blind-spot/, accessed December 2022.

[158] Ibid.

[159] *Cavendish* supra note 33; *Haupt* supra note 263; *Info* supra note 29; *Quad* supra note 212*; Rapid Phase* supra note 137; *Apple* supra note 137.

> *'In determining whether or not there had been infringement, it had to be determined whether or not a substantial feature of the artistic work in which the plaintiff held the copyright remained recognisable in the defendant's [work]'.*[160]

Further, in *Quad*, the court rejected as a misconception the argument that the use of a senior work to create a junior work amounted to making an adaptation due to the mere fact that there was a causal connection between the two works in question, irrespective of any resemblance between them. [161] One must remember that copyright can only be infringed if an unauthorised junior work was created using the senior work. In order for there to be actual copying, the junior work must be an actual subsequent work of the original work.[162] This means that creating a work that is substantially similar to or identical to another will not constitute an infringement if the second work was created independently and without reference to the first.[163]

Additionally, the court reaffirmed in *Quad* that 'the mere fact that the prior work has been used does not mean that the subsequent work is to be considered an adaptation, and thus an infringement'.[164] It follows that it is not enough to have a similar concept; the actual 'creative composition' must also be the same. Finally, the court once again emphasised that copyright does not extend protection for ideas or thoughts. Based on the above reasonings, it is clear that while copyright prohibits copying a work or even a portion of a work, it does not bar the creation of a work that is precisely the same without actual copying. Further, if there is actual copying through adaptation, this does not automatically infer infringement.

By the provisions of sections 6-11B, when read in conjunction with subsection 1(2A) and 23(1) of the Copyright Act, the creation of a junior work may constitute an infringement of

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[160] *Cavendish* supra note 33 at para 8.
[161] *Quad* supra note 212 para 28.
[162] Dean op cite note 192 at 77 para 8.6; *Juta* supra note 327 held that 'where the subject matter of two works is the same, caution should be exercised when assessing whether or not the one work constituted an infringement of the copyright of the other. Though there might be similarities and connections between the two works, a substantial part of the copyright work will not be shown to have been reproduced in the other work where the alleged infringer can show that his work originates in a source other than the copyright work'.
[163] Dean op cite note 192 at 77 para 8.6.
[164] *Quad* supra note 212 at para 28.

the copyright in a senior work if it involves the adaptation of specific categories of works or a substantial portion thereof.

However, it is argued that the test for adaptation infringement is more limited in scope than the broad traditional infringement approach. In addition to the dual test for copyright infringement discussed in chapter two, when it comes to adaptation-infringement matters, the plaintiff has a more significant burden to establish that 1) there is actual copying by means of a junior work derived from the senior work, which is copyright protected; 2) the subsequent junior work is an adaptation of the senior work within the meaning of the Act; and 3) aside from the new additions, there remains an objective similarity of the creative composition which results in infringement.

To fully comprehend the scope of the adaptation right, it is necessary to consider what is required of the copyright owner to assert a claim of infringement, what is required to establish infringement and how this is evaluated, and what defences are available to the alleged infringer.

3.3 Prerequisites for an adaptation-infringement claim

Quad most recently reaffirmed that in addition to meeting the Act's formal requirements, a plaintiff must first establish that: 1) they are the owner of an original work, 2) that the work qualifies for protection under the Act's provisions, and 3) the defendant has engaged in one or more of the reserved acts for which the owner has an exclusive right.[165] Accordingly, when all three of the above elements are inherently, or upon examination, present, the infringement investigation will commence.

Based on these prerequisites, an infringement claim is dependent on first establishing the subsistence of copyright, namely establishing the existence of an original work. Accordingly, *Galago Publisher* upheld *Natal Picture Framing Co Ltd v Levin*, which upholds the idea-

[165] *Quad* supra note 212.

expression distinction used in our legal system: 'There is no copyright in ideas, thoughts, or facts, but only in the form of their expression; and if their expression is not copied, there is no copyright infringement.'[166]

In general, this serves as a potential safeguard against finding copyright in a work that is not eligible.[167] An example is *Info Colour Pages v South African Tourism Board*, where Swart J expressed that it is essential when considering infringement concerning mundane items where copyright may subsist; however, '[…] the scope for proving that copyright does so subsist is limited'.[168] Swart J reasoned that the risk here lies in finding infringement. In doing so, one may effectively confirm copyright subsists in a mundane item, thereby creating a 'monopoly over something of limited scope, originality and will'.[169]

Ultimately, establishing the existence of copyright aids the court in its findings by eliminating what is ineligible for copyright and determining which 'collection of ideas, pattern of incidents, or compilation of information may constitute such a substantial part of the work that to take it would constitute an infringement of copyright'.[170] This is especially relevant in adaptation infringement; as pointed out above, the alleged infringement must be in the material form as expressed, not the idea itself.

3.4 Infringement of adaptation right

As to the inference of infringement, establishing this requires, unsurprisingly, proof of copying. In certain situations, the defendant may admit to copying the work or a portion of it but assert that such copying was permissible, for instance, under the fair dealings defence. If this defence prevails, as will be discussed further on, the alleged infringement claim will be dismissed. Overall, if the defendant's defence is unsuccessful, the battle is over on whether

[166] *Galago Publishers* supra note 267.
[167] *Waylite Diaries* supra note 263 affirmed *Francis Day and Hunter Ltd v Twentieth Century Fox Corporation Ltd and Others (1940) AC 112 PC*, dealt with a subject matter that was too insubstantial to warrant copyright protection.
[168] *Info* supra note 29 at 820.
[169] *Info* supra note 29 *Board* at 834.
[170] L Prescott *The Morden Law of Copyright* (2011) at para 33.

the defendant's junior work was copied from the plaintiff's senior work. Accordingly, a two-step approach is applied when determining the infringement of the adaptation right. In *Quad Africa Energy (Pty) Ltd v The Sugarless Company (Pty) Ltd*, Ponnan VM outlined the following test as it relates to the alleged infringement of a subsequent work -

> *'First, there must be sufficient objective similarity between the infringing work and the copyright work, or a substantial part thereof, for the former to be properly described, not necessarily as identical with, but as a reproduction or adaptation of, the latter; and second, the copyright work must be the source from which the infringing work is derived'.*[171]

It is clear that the test for infringement requires: 1) to first look at the *original work*, 2) encompasses consideration of the *objective similarities* between the original work or a *substantial part* thereof and the alleged infringing work, and 3) a *causal link* must be subjectively considered between the original work and subsequent work. When sufficient resemblance is shown between the two marks, the court may infer access and copying, although the similarity may be due to mere chance.[172] Considering that an adaptation is in itself a copy of an original work, a *prima facie* causal link is already present. However, establishing objective similarities between the two works requires further consideration.

3.4.1 Test for infringement

Application of these components in any particular case can vary widely depending on the nature of the defendant's activity concerning the original work. For example, in more traditional instances, where the defendant did not copy the plaintiff's work literally or in its entirety - there may be a substantial factual question of whether the defendant knew of the work and assuming the fact of copying, whether the defendant copied enough of the work to find an 'objectively similarity'.[173]

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[171] *Quad* supra note 212.
[172] Dean op cite note 192 at 77 para 8.6.3; *Marick Wholesalers (Pty) Ltd v Hallmark Hemdon (Pty) Ltd*.
[173] Dean op cite note 192 at 77 para 8.6.3.

However, preparing an adaptation has made determining infringement even more difficult as an adaptation, by definition, is based upon a pre-existing work. Thus, copying inevitably occurs whenever a junior work has been prepared.[174] It is usually not contested that the plaintiff's work was used in whole or in part in cases involving an unauthorised adaptation; the issues are whether the use is '*not* negligible or inconsequential' to the senior work, thereby implicating the copyright owner's adaptation right, and if so, to what extent it is unlawful.[175] This consideration is not a simple task and frequently requires consideration of numerous factors.

i. Objective similarities

The objective similarity is a matter of fact and refers to the 'sameness' of the original work and the allegedly infringing work. The criterion for determining when an adaptation is sufficiently transformative to merit independent copyright is a matter of degree.[176] However, it is frequently challenging to determine the degree of similarity between two creative expressions when the original is fundamentally altered. Those dealing in infringement matters are often faced with determining whether a sufficient degree of a protected expression was taken from an original that would infringe the copyright in the absence of any defences.[177] Consequently, this begs the question; precisely what level of transformation or reconstruction is needed for an act of infringement, and more importantly, on what scale is this determined.

In *Quad,* the court held that in reaching a decision regarding the potential infringement caused by an adaptation of the original work, 'a court must accordingly compare the two works to see if the new one so closely resembles the original that it was likely adapted'.[178] It is required that such a comparison be made based on whether the average person would confuse the junior work for the senior work; if that is the case, there is a strong likelihood that

[174] *Quad* supra note 212 para 30-2
[175] *Quad* supra note 212 para 28 citing *Erasmus v Galago Publishers (Pty) Ltd and Another* 227 JOC (T).
[176] *Cavendish* supra note 33; *Galago Publishers* supra note 267.at 6.
[177] *Rapid Phase* supra note 137.
[178] *Quad* supra note 212 para 30-2.

a court would reach the same conclusion. It is important to note that 'the two works involved […] should be considered and tested not with meticulous scrutiny, but by the observations and impression of the average reasonable reader and spectator'.[179]

Whilst this may serve as an adequate yardstick in addressing the question as to whether the subsequent work is independent of the original, especially where the entire original work was used, it does not always apply when concerning the use of a small part of the work. What may seem similar to the average eye may not be the same as that of an expert, which creates a unique challenge for lower courts when answering a question of substantial similarity.[180] In some, it may be readily apparent when an adaptation of a senior work has been made. For example, an adaptation, in the form of a television program, was made in 2019 based on the novel 'Trackers' written by bestselling crime author Deon Meyer. In this instance, the average South African could readily appreciate the relation between the two works. However, establishing the same in other more commercialised mediums of copyright may prove difficult in instances where 'the general resemblance is not so good a test, since resemblance may be due to common subject-matter or […], and it is necessary to make a close examination of detail to see whether there has been infringement'.[181]

ii. Substantial part

In addressing the meaning of 'substantial', Judge Harms held that the term holds 'no special or esoteric meaning in copyright law, [but] it involves a value judgement not capable of an a *priori* definition and cannot in the present context mean pre-dominant.'[182] Instead, it infers something not legible or inconsequential but material to the copyright-protected work. Dean believes that 'the concept 'substantial' in respect of a part of a work relates primarily to quality and not quantity'.[183]

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[179] *Twentieth Century Fox Film Corp v Stonsfer* (1994) 140 (9th Cir) F 2d at 579-582 cited with approval *in Quad* supra note 212 para 29.
[180] *Quad* supra note 212 para 30.
[181] *Laubscher v Vos and Others* 3 JOC (W) at 6.
[182] *Galago Publishers* supra note 267 at para 238.
[183] Dean op cite note 192 at 74 para 8.3.1.

This reasoning is consistent with section 1(2A) of the Copyright Act, which states that, unless the context indicates otherwise, the performance of any exclusive acts reserved to a work shall be construed as the performance of any such acts to a substantial part of that work. The inclusion of '*any*' in section 1(2A) lends credence to the concept of a qualitative evaluation, as it allows the court to consider '*any*' role played, regardless of its significance. There is no differentiation between the different amounts. Undoubtedly, the parts taken must have substance in that they must contain material that distinguishes them from the original; they cannot be insubstantial.[184] Dean contends that section 1(2A) is 'consistent with the test for infringement being primarily qualitative'.[185]

Nonetheless, despite the inherent preference for qualitative evaluations, quantitative evaluations are not without value. Even though the courts should consider both assessments, a copyright infringement determination should be made based on a qualitative analysis if the elements that make a work distinctive and original are copied.[186] A qualitative approach allows for a more holistic evaluation that is attentive to the unique, expressive and artistic elements of a work that were copied rather than simply measuring the amount of material taken.[187] In contrast, the quantitative assessment appears to be value oriented. Such evaluations are useful in certain circumstances, such as when making an exact calculation of the amount of material used required to determine infringement.[188]

Such was the case in *Rapid Phase Entertainment CC v South African Broadcasting Corporation.* In this case, characters from a cartoon strip were at issue; it was claimed that a television commercial featuring characters with similar personal characteristics was an adaptation of the cartoon strip's characters. Consequently, it was claimed that the plot of the comic strip infringed upon the literary work. The court ultimately ruled that there had been

[184] Ibid para 8.3.3.
[185] Ibid para 8.3.1.
[186] A Rogowski 'How to copy a song with impunity: a legal persoective on copyright infringement cases for musical works' (2015) Stellenbosch University available at *https://scholar.sun.ac.za*, accessed 5 January 2023.
[187] Ibid.
[188] Ibid.

no infringement of a literary work because none of the individual cartoon strips' storylines or plots was replicated in the television advertisement.[189] However, Dean remains sceptical of the correctness of this decision, arguing that the central concept of the cartoon strips, which gives them their 'look and feel', should be protected and that turning this concept into a television commercial may be considered an adaptation of a previously broadcast idea.[190]

Overall, it is clear why preference is given to qualitative analysis in copyright infringement cases, mainly when the adaptation right is at stake. This is due to the possibility that a small portion, which may be qualitatively insignificant to the junior work, is substantial to the senior work and remains recognisable even after being altered.

3.5 Exemption from copyright infringement

Chapter two of this research provided a baseline for the fair dealing exemption and how it relates to the scope of the adaptation right; however, the sections to follow intend to explore the inadequacies further, as briefly identified.

3.5.1 Current fair dealing framework

The fair dealing provisions of the Copyright Act, which were covered in the preceding chapter, stipulate that not every unauthorised use of another's copyright-protected material will be regarded as an infringement.[191] The idea is to theoretically strike a balance between the broader public interest and the protection of creative authors' rights. For instance, the general effect of fair dealing is to serve as a complete defence to infringement when the legality of an adaptation of an original work is contested. Thus, when the latter work is used for research, private study, criticism, review, or to report current events, it effectively allows for an 'infringement' on the authors' exclusive rights in their work.

[189] *Rapid Phase* supra note 137; Dean op cite note 192 at 75 para 8.5.10
[190] Ibid at 76 note 31.
[191] Section 12(1) of the Copyright Act read together with subsections 15(4), 16, 17, 18, 19A and 19B.

While fair dealing seems like an adequate defence against an infringement claim on paper, it may not prove so in practice. Unfortunately, only a few South African judicial authorities have interpreted and applied the fair dealing exception in South Africa.[192] The landmark judgement of *Moneyweb (Pty) Ltd v Media24 Ltd* (hereafter '*Moneyweb*') is the most relevant in its application.[193] In this matter, the court held that in considering the issue of fair dealing, the relevant question is whether the dealing was fair when the alleged infringer used the copyright-protected work.[194] The court noted that a user could not be expected to foresee or anticipate the potential loss that may be incurred at the hands of the copyright owner. Therefore, the fairness test should objectively evaluate whether the user, when they created their subsequent work, complied with their obligation of fairness based on the existing facts of that time and place. [195] The court continued by stating that fairness requires a value judgement of a matter of fact, degree, and opinion, which is to be weighed against a non-exhaustive list of fair-based factors, according to the relevant section contained in the Act. For example, under the provisions of section 12(1)*(c)(i)* the court set forth the following -

> *'The nature of the medium in which the works have been published; whether the original work has already been published; the time lapse between the publication of the two works; the amount (quality and quantity) of the work that has been taken; and the extent of the acknowledgement given to the original work'.*[196]

The ruling mentioned above is commendable in that it highlights the Act's shortcomings in defining fairness when addressing concerns of fair dealing and the necessity of legislative intervention in this area. It is also commendable since it can be used as a guideline for legislative action to close the definitional gap.[197] Its restriction, however, is that the above-mentioned elements would generally only be relevant in situations involving the fair dealing exception in section 12(1)(c)(i), namely 'for the purposes of reporting current events in a

[192] *Laugh it Off CC v South African Breweries International (Finance) BV t/a Sabmark* (2005) (8) BCLR 743 (CC) illustrated the importance of incorporating balance into trademark law to be fair to the competing rights of owners and users.
[193] *Moneyweb* supra note 19 para 112.
[194] *Moneyweb* supra note 19 para 112.
[195] *Moneyweb* supra note 19 para 112 'the relevant facts must be limited to those existing at the time of dealing'.
[196] *Moneyweb* supra note 19 para 112 -3.
[197] *Moneyweb* supra note 19 para 113.

newspaper, magazine, or similar periodic', and not in any other circumstance.[198] Moreover, the factors do not appear sufficiently all-encompassing to include the additional fair dealing cases listed in section 12(1).

This seems to be supported by the court's assertion that 'fairness' is an elastic notion, citing that it is 'impossible to lay down any hard-and-fast definition of what fair dealing is, for it is a matter of fact, degree and impression'.[199] A value judgment is required to determine 'fair dealing' and is to be based on the specific facts or circumstances present at the time of the action.[200] While this provides some insight into the viability of fair dealing as an exemption to a single instance of infringement, it does not apply to fair dealing in the broader sense. Ultimately, the fair dealing provisions of the Copyright Act as currently written are insufficient to serve their intended purpose.

3.6 Concluding remarks

The concept of fair dealing and transformative works challenge the traditional understanding of copyright infringement and originality. As such, there is a need for a more nuanced approach to copyright law that considers the interests of creators and users of copyright.

Overall, the judgment in *Blind SA* has been a subject of intense debate and discussion in South African legal and policy circles, reflecting the complex and often conflicting interests at stake in copyright law. On the one hand, disability rights advocates and proponents of access to information and cultural works hailed the judgment as a significant victory for persons with disabilities.[201] The judgment was seen as a recognition of the importance of ensuring that copyright laws are responsive to the needs of vulnerable groups and that access to information and cultural works is a fundamental right that should be protected. On the other

[198] Section 12(1)(c)(i) of the Copyright Act.
[199] *Moneyweb* supra note 19 citing L Prescott *The Morden Law of Copyright* (2011) para 114.
[200] *Moneyweb* supra note 19 para 114.
[201] Blind SA 'Constitutional Court judgment on copyright act a momentous victory for persons who are blind and their access to books' (2022) *https://Blind SA.org.za/2022/09/21/constitutional-court-judgment-on-copyright-act-a-momentous-victory-for-persons-who-are-blind-and-their-access-to-books/*, accessed January 2023.

hand, some copyright owners and proponents of strong copyright protection expressed concerns about the potential impact of the judgment on copyright holders.[202] They argued that the judgment could undermine the value of an owner's copyright and lead to widespread infringement.[203]

The ruling has sparked calls for further review of the CAB to ensure that it is aligned with the country's constitutional values and promotes innovation and access to knowledge.[204] It remains to be seen how the government will respond to these calls and what implications this will have for the future of copyright law in South Africa. The current state of fair dealing is insufficient to address situations such as the use of digital and internet content, educational use, and the conversion of works into formats accessible to individuals with disabilities, which would generally apply to adaptation efforts/activities. In contrast to the position held in foreign jurisdictions such as the United States of America, the South African Copyright Act provides an explicit, limited list of fair-use exceptions. A defendant must demonstrate that it falls within one of the specified exceptions.[205]

[202] OH Dean 'Copyright Blind Spot' (2021) The Anton Mostert Chair of Intellectual Property available at *https://blogs.sun.ac.za/iplaw/2021/04/19/copyright-blind-spot/*, accessed December 2022)
[203] Ibid.
[204] OH Dean 'Defects in Copyright Amendments Exposed' (2022) The Anton Mostert Chair of Intellectual Property available *at https://blogs.sun.ac.za/iplaw/2022/09/23/defects-in-copyright-amendments-exposed/*, accessed December 2022.
[205] Dean op cite note 192 para 9.2.

Chapter four:

Overview of the adaptation right in the United States

4.1 Introduction

The United States of America's copyright law (hereafter the 'US') will be discussed in this chapter, with particular emphasis on how US courts have handled copyright infringement of the adaptation right, or as they refer to it, the derivative right. Of course, it goes without saying that methods adopted in foreign jurisdictions, such as the US, will invariably differ from those implemented in South Africa's national legislation. Overall, these approaches deviate significantly from South Africa; however, the purpose of this chapter is not to deal with the differences in frameworks; instead, it is to elucidate valuable fundamental information about how copyright systems have dealt with the unauthorised creation of subsequent works throughout history.

United States Copyright Act of 1976 17 USC (hereafter, 'the US Copyright Act') offers derivative right protection in two distinct ways.[206] First, the derivative work is protected by the original work's copyright, which indicates that the copyright owner also owns the rights to derivative works.[207] Consequently, the owner of the original work may initiate an infringement claim against anyone who creates or distributes a derivative work without permission.[208] Second, the derivative work itself is subject to copyright protection. This is because the author of the derivative work owns the copyright to that work. This may be the original author or a third party who has obtained a licence from the owner of the original work to create a derivative work. On this basis, the rights associated with a derivative work are distinct from those associated with the original work; the copyright owner will retain ownership of the original work even if they grant permission to another person to create a derivative work.

[206] Chapter 1 of the US Copright Act.
[207] Section 102 of the US Copright Act - subject matter of copyright.
[208] Section 106 of the US Copyright Act - infringement provisions.

Based on the wording of section 103 of the US Copyright Act that it is clear that 1) US copyright does not extend to any part of the work in which the material has been unlawfully used, and 2) when it comes to the creation of such a work, protection of ideas falls under the material form requirement rather than the originality requirement.[209] Together, these two points illustrate the limitations of US copyright law concerning the unauthorised use of copyright-protected work and the criteria for originality in copyright protection. Therefore, if an unauthorised derivative is created from a copyright-protected work that does not meet the criteria for originality, it may not be considered an infringement. However, if the derivative work is substantially similar to the original, it may still be considered an infringement.

Although different jurisdictions may have different laws and regulations concerning copyright, certain essential elements of copyright law are universally recognised. For example, most jurisdictions generally accept that an adaptation by a person other than the copyright owner and without the copyright owner's authorisation amounts to *prima facie* infringement if a substantial part of the original work has been used. Overall, the primary objective of copyright remains clear on a global scale – to protect the original works' authors from having their creations used without due accreditation or compensation, as well as from having their rights infringed. It is clear that the US has equivalent constructions of the relevant copyright works when compared to South Africa; thus, drawing fundamental parallels between them is plausible. Furthermore, comparing the various methods and applications of the fair use doctrine versus the fair dealing defence will offer a fresh perspective on the scope of the adaptation right.

[209] (a) The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing pre-existing material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully; and (b) The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the pre-existing material employed in the work, and does not imply any exclusive right in the pre-existing material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the pre-existing material.

[209] Section 106 of the US Copyright Act - infringement provisions.

4.2 Derivative works in US copyright law

Similar to South Africa, the US Act grants exclusive rights or protection for '*original works of authorship*'.[210] With the purpose of promoting art and culture, US law grants authors a set of exclusive rights: the right to make and sell copies of their works, the right to create derivative works, and the right to perform or display their works publicly.[211] However, while granting these rights to authors, US copyright law also includes provisions to limit the duration of copyright protection, as well as limitations and exceptions that allow members of the public to use copyright without the author's permission.[212]

The US terminology and framework concerning the right to create a 'subsequent work' from an 'original work' differs from South Africa. In the US, a subsequent work is considered a derivative work which is based on one or more pre-existing works.[213] The US embraces a standard-based approach instead of a rule-based approach utilised in South Africa.[214] The US approach is more flexible in its interpretation and application of the law. In contrast, South Africa's approach relies on rules often codified in copyright statutes, regulations, and case law. It is intended to provide clear and consistent guidance to copyright users and owners.

The difference between these two approaches is evident from the definition in the US Copyright Act, which provides that a derivative work entails a right to control a translation, musical arrangement, dramatization, fictionalisation, motion picture version, sound recording, art reproduction, abridgement, condensation, 'or any other form in which a work may be recast, transformed, or adapted*'*.[215] The inclusion of '*any other form'* is representative of the flexibility and adaptability that US copyright law affords to the courts in their judicial

[210] Section 102(a) of the US Copyright Act: 'Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression'.
[211] Section 106 of the US Copyright Act.
[212] Sections 107 to 122 of the US Copyright Act.
[213] Section 101 of the US Act states 'a 'derivative work' is a work based upon one or more pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.'
[214] Goold op cit note 352 at 1.
[215] Section 106 of the US Act provides for the exclusive rights in copyrighted works – 'subject to section 107 through 122, the owner of copyright under this title has the exclusive right to do or to authorise […] the following: to prepare derivative works based upon the copyrighted work.'

decisions by allowing them to rely on general principles or standards to determine whether a particular use of a copyright-protected work is permitted or not.[216]

The US has dealt with a significantly greater number of infringement cases that concern a derivative (junior) work being created from a senior work compared to South Africa.[217] The most recent is the matter of *Google LLC Petitioner v Oracle America Inc* (hereafter *Google Oracle*). The court was challenged to consider two aspects concerning the alleged infringed work, namely 1) whether a portion of the work could be copyright protected; and, if so, 2) whether the alleged infringer's copying constituted fair use.[218] Although the considerations, findings and criticism emerging from this matter will be important in the following sections to better determine which approach is more suitable, it is necessary to compare its practical outcomes.

4.3 Google LLC Petitioner v Oracle America Inc

Oracle and Google have been engaged in a lengthy legal dispute regarding the use of Java application programming interfaces (APIs) in Android.[219] Oracle filed a lawsuit against Google, alleging that Google had violated Oracle's patents and copyright by using Java APIs in its Android mobile operating system without obtaining permission or paying licencing fees. Oracle stated that this action constituted an infringement of Oracle's patents and copyright. On the other hand, Google argued that its use of Java APIs fell under the fair use doctrine of copyright law.[220] After a decade-long legal dispute, the Supreme Court ruled on the assumption that a software interface may be subject to copyright protection, that Google's

[216] Cohen et al op cit note 2 at 99-100.

[217] *Campbell v. Acuff-Rose Music Inc* 510 U.S. 569 (1994); *Castle Rock Entertainment Inc. v. Carol Publishing Group* 150 F.3d 132 (2d Cir. 1998); *Feist Publications* supra note 21 *at* 340-361; *Positive Black Talk* supra note 21 at 357-367; *Ready Productions* supra note 21 at 672-682; and *Fasthoff* op cit note 21.

[218] *Google Oracle* supra note 3.

[219] Oracle accused Google of copying portions of the declaring code of Java SE for use in Android and the 'structure, sequence, and organisation' of the declaring code. Furthermore, application programming interfaces (APIs) are the building blocks of software interoperability. APIs provide the specifications for different software programs to communicate and interact with each other.

[220] This doctrine of copyright law permits a limited use of copyrighted material without permission for purposes such as criticism, commentary, news reporting, teaching, scholarship, or research.

limited copying of taking only what was required to allow users to put their accumulated talents to work in a new and transformative programme constituted fair use.[221]

The decision was hailed as a significant victory for software developers because it clarified the scope of fair use in software development and prevented the imposition of extensive copyright protections on application programming interfaces (APIs).[222] In addition, this case illustrates the usefulness of fair use for those denied a licence agreement, as was the case in this instance.

In addition, the case highlighted the importance of interoperability and open standards in information technology. The ruling paved the way for innovation and competition in the software industry by ensuring developers can freely use and build upon existing APIs without fear of legal repercussions. Thus, increased collaboration and the creation of more user-friendly and effective software applications result.

4.4 Copyright infringement

Copyright infringement is committed by anyone who exercises the owner's exclusive rights, as granted and limited by the US Copyright Act, without the owner's permission. Thus, any activity that falls within the owner's exclusive rights or is not excused by a defence, such as fair use or any other relevant exemption, amounts to copyright infringement. The components of a copyright owner's claim for infringement are supported by section 106 of the US Copyright Act. However, all copyright infringement claims must adhere to two prerequisites. Namely, in order to successfully bring an action for copyright infringement, the

[221] *Google Oracle* supra note 3 at 35.

[222] R Barnes & G De Vynck 'Supreme Court sides with Google on multibillion-dollar copyright dispute with Oracle' (2021) available at *https://www.washingtonpost.com/politics/courts_law/supreme-court-google-oracle,* accessed January 2023 - 'The Supreme Court's clear ruling is a victory for consumers, interoperability and computer science,' said Kent Walker, Google's senior vice president of global affairs. The decision gives legal certainty to the next generation of developers whose new products and services will benefit consumers.'

plaintiff must demonstrate two elements: 1) ownership of a valid copyright; and 2) actionable copying by the defendant of constituent elements of the work that are original.[223]

As to the first element, to prove ownership of a valid copyright, a plaintiff must demonstrate the work's originality, copyrightability, and conformity with applicable legislative requirements.[224] The second element concern the burden of proof placed on the plaintiff, namely that the defendant used the copyright owner's work in an actionable manner.[225] Establishing the second element, however, often entails a complicated process and requires an in-depth analysis of the plaintiff's work and an examination of the defendant's alleged infringing work. This process involves the consideration of three levels of similarity: probative similarity, striking similarity, and substantial similarity. Although one would assume these terms to represent a sliding scale that indicates increasing degrees of similarity between works, such an assumption would be incorrect.[226] Instead, this relates to two levels of assessments involved in infringement matters. The first test looks for *factual copying* (probative similarity and striking similarity) and involves two separate analytical tools that can be utilised.[227] The second test looks for *actionable copying* (substantial similarity) and is employed by the court to determine whether or not factual copying, once established, amounts to actionable copying. The underlying reason for the above is that not all instances of factual copying qualify as legally actionable copyright infringement.[228]

Compared to the US, South Africa's approach to copyright infringement is more fixed. While there is some merit to this, it is essential to bear in mind that one of the most significant differences between the South African and US legal systems is the extent to which public

[223] *Feist Publications* supra note 21 *at* 340-361; *Positive Black Talk* supra note 21 at 357-367; *Ready Productions* supra note 21 at 672-682; and *Fasthoff* op cit note 21.
[224] *Norma Ribbon & Trimming, Inc v Little* (1995) 51 (5th) F3d at 45- 7; *Ready Productions* supra note 21 at at 682.
[225] Ibid at 45-7.
[226] *Fasthoff* op cit note 21.
[227] Probative similarity requires showing that the works, when compared as a whole, are adequately similar to establish appropriation whereas striking similarity entails the works are so startlingly identical as to preclude the possibility of independent invention.
[228] *Ready Productions* supra note 21 at 672-682 citing *Feist Publications* supra note 21.

opinion through jury trials influences US judicial proceedings.[229] In order to ensure that the jury, the ordinary observers, can fully comprehend and understand any complex matter surrounding the copyright subject matter and its potential infringement, it is necessary to explain and take into account every aspect relating to the infringement matter. This is especially important in cases where the defendant may not have intentionally infringed upon the copyright, as public opinion may be more likely to favour harsh punishment without considering the nuances of the situation.

4.5 Fair use doctrine

Fair use is a legal doctrine that promotes freedom of expression by permitting the unauthorised use of copyright-protected works under specific conditions. Fair use is defined in section 107 of the US Copyright Act, which also identifies specific uses as examples of conduct that may fall within this category, such as criticism, comment, news reporting, teaching, scholarship, and research.[230] The fair use doctrine is as follows –

> *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 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 non-profit 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.*[231]

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[229] MA Lemley 'Our Bizarre System for Proving Copyright Infringement' (2010) available at http://ssrn.com/abstract=1661434, accessed on 22 January 2023.
[230] Section 107 of the US Copyright Act.
[231] Section 107 of the US Copyright Act.

The fair use doctrine played a significant role in the *Google Oracle* matter. The Supreme Court had to determine whether Google's copying constituted a permissible 'fair use' of Java's SE's API, freeing Google from copyright liability.[232] In describing the doctrine, the Supreme Court referred to the fair use doctrine 'as an equitable rule of reason that permits courts to avoid the rigid application of the copyright statutes when, on occasion, it would stifle the very creativity which that law is designed to foster'.[233] The court reaffirmed that the four open-ended factors as set out in section 107 indicate, rather than dictate, how to court should apply the doctrine. Also, as was seen in the courts' applications, the value given to one factor towards the rest may shift depending on a case-by-case basis.

4.5.1 The four elements of the fair use doctrine

i. Purpose and character of the use

In examining the first element, the court noted that the issue was whether the use was 'transformative' or whether it 'adds something new, with a further purpose of different character'.[234] Accordingly, the court considered whether Oracle's work had been copied in its entirety or whether Google's use of the Java API had been transformative. The court found that Google's use was transformative because it created a new platform that programmers could readily use; its use was consistent with that creative progress that is the fundamental constitutional objective of copyright.[235] As to the additional considerations of 'commerciality and good faith' - the court held that even 'though Google's use was a commercial endeavour, that is not dispositive of the transformative role that the reimplementation played in the new Android system'.[236] As a result, the consideration of this factor weighed favourably in favour of fair use.[237]

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[232] *Google Oracle* supra note 3 at 1.
[233] *Google Oracle* supra note 3 citing *Stewart v Abend* 495 US 207, 236 (1990) at 13.
[234] *Google Oracle* supra note 3 at 24 - 'the purpose and character of the use'.
[235] *Google Oracle* supra note 3 at 25 - 'Google's use of the Sun Java API seeks to create new products. It seeks to expand the use and usefulness of Android-based smartphones'.
[236] *Google Oracle* supra note 3 at 27.
[237] *Google Oracle* supra note 3 at 27 [T]hese and the related facts convince us that the 'purpose and character' of Google's copying was transformative-to the point where this factor too weighs in favour of fair use'.

Clearly, transformative uses are more likely to be viewed favourably when new meaning, purpose, expression, and personality rather than replacing merely its original use. Therefore, the transformative nature of the use is essential in determining whether a particular use is fair or not. However, it is not to say that all transformative uses are automatically fair. It is evident that, when applying this factor, the court will weigh the purpose and nature of the use against the remaining factors listed below.

ii. The nature of the copyright-protected work

In assessing the second factor, the court considered the characteristics of the Java APIs, which were entirely functional and lacked any expressive capacity. [238] The court concluded that the APIs were not highly creative works and that the amount of copying that took place was restricted to the methods and declarations required to provide access to the functionality of the APIs.[239] In addressing the concerns raised about the nature of the APIs, the court held that the copyright lines are 'inherently bound with uncopyrightable ideas'.[240] As a result, the consideration of this factor weighed favourably in favour of fair use.

Thus, this factor speaks to how closely the used work relates to the purpose of copyright, which is to encourage creative expression. Therefore, using a fictional or creative work is less likely to support a fair use claim than using a factual work. For instance, using a small portion of a novel in a book review may be considered fair use, while using the entire novel in a new work would not.

iii. The amount and substantiality of the portion used

The court considered the total amount of copied API code to assess the third factor. The court reasoned that Google copied a substantial amount which was excusable 'because programmers had already learned to work with the Sun Java API's system. It would have been difficult, perhaps prohibitively, to attract programmers to build its Android smartphone

[238] *Google Oracle* supra note 3 at 21 - 'the nature of the copyrighted work'.
[239] *Google Oracle* supra note 3 at 23-4.
[240] *Google Oracle* supra note 3 at 23-4.

system without them.'[241] The court concluded that although Google copied a sizeable portion, the company had taken those portions of the code necessary for interoperability and innovation and had not taken any creative elements from the original work.[242] As a consequence of this, the consideration of this factor provided additional support for the legitimacy of fair use.[243]

From the court's consideration, it is clear that using a smaller portion of the work is more likely to be considered fair use than using a more significant portion of the work is likely to be considered fair use. On the other hand, the scope of the use is evaluated not only to the work as a whole, but also the reason for the use. Meaning that using a small portion of a work for educational or non-profit purposes is more likely to be considered fair use while using a large portion of the work for commercial gain is less likely to be considered fair use.

iv. Market effects

Lastly, the court investigated the potential market effect Google's use of the Java API may have.[244] The court ruled that Android did not pose a threat to Java because Android did not compete with Java in the market.[245] In addition, the court concluded that enabling developers to use APIs would encourage both interoperability and innovation in the sector. As a result, the consideration of this factor weighed favourably in favour of fair use.[246]

The final consideration is the impact on the potential market or value of the copyright-protected work. Based on the court's investigation, it is clear that this entails whether and to

[241] *Google Oracle* supra note 3 at 29.

[242] *Google Oracle* supra note 3 at 28 'If one considers the declaring code in isolation, the quantitative amount of what Google copied was large […] Those lines of codes amount to virtual all the declaring code needed to call up hundreds of different tasks'.

[243] *Google Oracle* supra note 3 at 28 'copying a larger amount of material can fall within the scope of fair use where the material copied captures little of the material's creative expression or is central to copier's valid purpose'.

[244] *Google Oracle* supra note 3 at 30 market effects.

[245] *Google Oracle* supra note 3 at 30 'the two products are on very different devices,' and the Android platform, which offers 'an entire mobile operating stack,' is a 'very different typ[e] of produc[t]' than Java SE, which is 'just an applications programming framework.'

[246] *Google Oracle* supra note 3 at 35 'The uncertain nature of Sun's ability to compete in Android's market place, the sources of its lost revenue, and the risk of creativity-related harms to the public, when taken together, convince that this fourth factor—market effects— also weighs in favour of fair use'.

what extent the unauthorised use affects the copyright holder's current or potential market for the original work. Accordingly, the courts evaluate this factor by determining if the use harms the original work's current market and/or if its diversification could cause significant harm to its value.

Based on the analysis of these factors, the Supreme Court concluded that Google's use of the Java APIs was fair use and did not infringe on Oracle's copyright. Considering the amount of time and consideration spent deciding on *Google Oracle*, it is clear that the fair use doctrine is not a straightforward and definitive approach to exempting one from being held liable for copyright infringement. It is open to much consideration, and to this day, *Google Oracle* is open to much deliberation and will continue to be. The consideration of relevant factors in matters such as *Google Oracle* can be complex, and each of the four elements is equally important. Still, in practice, however, it is based on a case-by-case basis. Overall, the court's decision to find in favour of Google demonstrated the legitimacy of fair use in technology as it allows users to integrate copyright-protected material into their creations.

4.6 Concluding remarks

One can see the different impacts of a rule-based approach versus a standard-based approach on a broader scope. For example, this US standard-based approach may lead to an in-depth consideration of the facts, which ensures that the final decision is well thought out and based on solid evidence. On the other hand, South Africa's rule-based approach may result in quicker decisions but may not always consider all the nuances and complexities of a situation.

Alternatively, commentators have consistently criticised the US's expansive interpretation of the derivative work right.[247] Many have argued that such strong control over derivative works is unnecessary to provide authors with incentives to create new works, that this control raises the cost of future creation, and that it restricts the ability of others to express

[247] Goold op cit note 352 at 2 'These problems have led scholars to call derivative work 'highly problematic', label it the 'most troublesome' area of copyright and questions its constitutionality'.

themselves freely.[248] Due to these issues, scholars have deemed the derivative work right 'extremely problematic,' dubbed it the 'most troublesome' area of copyright, and questioned its constitutionality. This distinction is one of accuracy. Rules are extremely precise legal directives, whereas standards are vague directives. The rules are fixed and unambiguous, while the standards are flexible and give the court discretion in determining the content of the law. This expansive interpretation carries throughout copyright matters, such as in infringement and fair use.

From the finding of the *Google Oracle* case, it is clear that the fair use exception to copyright is adaptable and flexible towards the needs of each matter. This proves that fair use is a flexible doctrine that may change over time, particularly regarding technology. However, can the same be said about South Africa's fair dealing provision when one considers that it is limited in the nature of its application and its method?

Using the *Blind SA* case as an illustration, the court's discretion under the standard-based approach would not have been limited to specific, predetermined rules or principles in determining whether accessible format copying for the benefit of the visually impaired may be permitted without permission. Instead, the court would have been able to consider the facts of the case in a context-specific and nuanced manner. For example, a rule-based approach may dictate that reproducing more than 10% of a copyrighted work without permission constitutes copyright infringement. In contrast, a standards-based approach embraces fair use. It requires a more nuanced analysis of factors such as the purpose and character of the use, the nature of the copyrighted work, and the potential effect on the market for the original work in determining whether a particular use is permissible under the fair use doctrine.

[248] Goold op cit note 352 at 1.

Both approaches have their benefits and drawbacks. However, in determining copyright law and policy, especially in a complex matter such as *Blind SA*, a hybrid approach that combines elements of both approaches may have been more appropriate.

Chapter five:

A new modernised approach

5.1 Introduction

This final chapter intends to reiterate the findings from the previous chapters and connect the dots in such a way that contributes to establishing legal certainty and adequate protection for rights holders. In doing so, individual interests and the interests of the general public will be weighed against one another within the context of balancing human rights and upholding Constitutional standards.

As explored in this research, the scope of the adaptation right is limited by two pertinent factors: the conditions for establishing an infringement and the fair dealing provisions. In neither instance, however, can it be argued that the current Copyright Act adequately addresses either aspect. Consequently, there are numerous gaps in South Africa's legal system concerning adaptations and their role in legal proceedings. This is exacerbated by the absence of case law meant to provide clarifications. Consequently, the exceptions and restrictions associated with the adaptation right are extremely limited. While the CAB attempts to address this issue, a specific aspect can only evolve and develop through the court system. This implies that the courts will need to interpret and apply the law to clarify the scope and limitations of the adaptation right. It remains to be seen how this will manifest itself in actuality.

The US fair use doctrine and its application are evidence of this, as what is stated in the law may be intended to be applied in one way, but in practice, the opposite is true. While there are similarities between South Africa's adaptation right and the US's derivative right in terms of scope and flexibility, there are also significant differences. For instance, the US fair use doctrine allows for a more flexible approach to copyright infringement cases. In contrast, South Africa's adaptation right is more limited in scope and only applies to certain types of works. In addition, the US derivative right permits the creation of new works based on existing works, whereas South Africa's adaptation right only allows adaptations under certain

conditions. These differences in copyright laws reflect each country's diverse cultural and economic priorities. Consequently, they can impact the creators' ability to express themselves freely and innovate within their respective industries.

In addressing the infringement aspect, the court noted in *Blind SA* that those with print and visual impairments had limited access to literary works, whereas those without these impairments did not.[249] In addressing this disparity, the court stated the following –

> *'Whatever limitations the exclusive rights conferred by the Copyright Act may cause to those without disabilities who would access literary works, they bear no comparison to the deprivations suffered by those with print and visual disabilities. The rights to incorporeal property that the Copyright Act protects may not become an instrument to disadvantage a class of persons who have the same need to have access to literary works that persons without impairments enjoy. The requirement of authorisation leads to the scarcity of literary works in accessible format copies.'*[250]

The court reasoned that the requirement could not be applied as if all individuals who require access to a copyright-protected work are in the same position when it is evident that they are not. The court's assumptions that the 'exclusive right conferred upon owners of copyright that subsist in literary works has drastically restricted the availability of literary works in accessible format copies for use by print- and visually-impaired individuals' were accurate.[251] The court's assertion that whether permission is denied or difficulty and delay in identifying the author is irrelevant; in this instance, the only obstacle was the need to obtain permission beforehand.[252] This highlights the importance of balancing the interests of copyright owners and users, especially when the public interest is at stake. Those with print and visual disabilities are subjected to significant and unique hardships due to the authorisation requirement. This speaks to a broader import concerning unauthorised use and the scope of the adaptation right. The court held that -

> *'Sometimes, for the state to avoid unfair discrimination, it must treat people in the same way or make available the same entitlements. But sometimes what is required of*

[249] *Blind SA* supra note 9 para 65.
[250] *Blind SA* supra note 9 para 66 'this scarcity goes to the heart of the constitutional challenge that Blind SA brings before this court'.
[251] *Blind SA* supra note 9 para 64.
[252] *Blind SA* supra note 9 para 64.

> *the state is to recognise the differences between persons and to provide different or more favourable treatment to some, so as to secure non-discriminatory outcomes for all'.*[253]

The above highlights the importance of balancing equal treatment with the need to address systemic inequalities. It also emphasises that treating everyone in an equal manner may not always result in fair outcomes and that targeted measures may be necessary to achieve true equality. It is essential to consider the impact of these hardships on the accessibility and inclusivity of information for individuals, not only with print and visual disabilities but also for those who may face language barriers, technological limitations, or other socio-economic challenges. As was cited with approval in *Moneyweb,* 'it is impossible to lay down any hard-and-fast definition of what fair dealing is, for it is a matter of fact, degree and impression'.[254]

5.2 An overview of the practicality of fair dealing versus fair use

The fair use doctrine in the US provides more flexibility for using copyright-protected works, including derivative works, than the fair dealing provisions in South Africa. For example, the open-ended factors are unique to the fair use system and its standard-based approach. While it is difficult to directly compare the fair use doctrine and South Africa's fair dealing provisions as they are based on different legal frameworks and have different historical, cultural, and economic contexts. There are a few reasons why the US fair use doctrine may be more beneficial than South Africa's fair dealing provisions in addressing challenges with the scope of the adaptation right.

First, the fair use doctrine allows for a broader approach affording the court flexibility and room for consideration in their judicial proceedings. Unlike the fair dealing provision, the court is not bound to a statute's scope. Second, when taking into account the four-factor balancing test, the fair use doctrine is more lenient than South Africa's fair dealing provisions. This provides more room for interpretation and application to different contexts and

[253] *Blind SA* supra note 9 para 68-9.
[254] *Moneyweb* supra note 402 para 113.

circumstances. Third, the fair use doctrine has a long history and more legal precedent than South Africa's fair dealing provisions. This allows lawmakers to interpret and apply the doctrine consistently and predictably.

Both fair use and fair dealing are legal doctrines that aim to strike a balance between the rights of those who own copyrights and the public's desire to have access to and use works that those rights have protected. The identified issue with South Africa's approach is that the scope of fair dealing is limited and excludes other uses that may be considered fair use in other jurisdictions, such as the United States. Furthermore, it burdens the defendant to demonstrate that their actions fall under one of these provisions and are reasonable and fair. As a result, this limits the ability of individuals, and most importantly, organisations, to use copyright-protected material for purposes such as education, parody, or satire, which may be considered fair use in the US. Consequently, it is necessary to consider the factors that must be established when determining fairness in all instances of fair dealing under the Act. Specifically, the factors associated with the US doctrine of fair use include the purpose and nature of the use, the nature of the work, the amount and substantiality of the portion used, and the impact of the use on the work's potential market or value. Fair dealing can be better adapted to meet contemporary needs and challenges if these factors are considered. Establishing a safe harbour based on the principle of fair dealing is necessary to balance protecting copyright owners and granting individuals the right to use copyright-protected works under certain conditions.

5.3 The suggested framework

Adopting a more nuanced approach that considers the diverse needs and experiences of different groups in society is crucial – as such, it is necessary to re-evaluate the current copyright laws to ensure that they do not impede the rights of this marginalised group. With that being said, it is essential to keep in mind that the rules and guidelines for ‘fairness’ do not come in a single, universal form that applies to every circumstance and may need to be tailored to fit the unique circumstances of each jurisdiction. Instead, a great deal of it is contingent on the requirements of the law, society, and the economy. Although many have

argued for and against each approach and its inclusion in our law, it is argued here that a more contemporary approach is required to accommodate both the one-of-a-kind constitutional values of South Africa and the expectations of its society. This approach should consider the diverse needs of the country's citizens and prioritise protecting their fundamental rights and freedoms while promoting economic growth and development. Achieving this balance will require careful consideration and collaboration between lawmakers, civil society organizations, and other stakeholders.

In addition, it must be noted that the issues highlighted in this research concerning evaluating unauthorised adaptations cannot be fully addressed solely by switching to fair use or retaining fair dealing. It is essential to recognise that infringing adaptations could potentially escape liability based on factors beyond fair dealing/fair use exceptions. While adopting a fair use approach or retaining fair dealing provisions may enhance certain aspects of copyright law, it may not fully resolve the complexities surrounding adaptations in instances of copyright infringement. Consequently, there are various considerations and factors that could influence the outcome of copyright infringement cases involving adaptations. These factors may extend beyond the scope of fair use or fair dealing. Addressing these multifaceted issues requires a comprehensive approach that considers both fair use and fair dealing principles and broader legal considerations. A careful examination of each case's unique circumstances and context is crucial in determining the appropriateness of fair use or fair dealing exceptions.

Furthermore, the copyright reform efforts in South Africa should not solely rely on adopting fair use or fair dealing. Instead, a broader examination of the entire copyright framework, including adaptation rights, licensing mechanisms, and the enforcement of rights, is essential. Striving for legal certainty and equitable protection necessitates a holistic approach that considers various aspects of copyright law to safeguard creators' rights while promoting access to information and creativity.

5.4 The Copyright Amendment Bill

Over the past several years, the Copyright Amendment Bill B13D-2017 has been the subject of extensive debate, with many awaiting the next development with bated breath. Numerous individuals have argued for and against its implementation, resulting in a significant delay.[255] Despite this, the process to revise South Africa's copyright law, originally enacted in 1978, began in 2011, and many interest groups with a public voice have fiercely contested it.

First, until recently, the development of the law concerning the scope and extent of rights associated with adaptation in South African law was marginally limited. However, the CAB has become a heated topic since its introduction, sparking multiple discussions and demands amongst lawmakers and society. The need to update copyright legislation to reflect the digital age and multilateral developments spurred the current policy revision and the debate surrounding it. The CAB aims to introduce several restrictions and exceptions to authors' exclusive right to reproduce or copy works to accommodate the blind and other people with print disabilities, among the most essential concerns. The President referred the CAB back to the National Assembly for reconsideration in 2020 due to the constitutional challenges it may face. On 1 September 2022, the CAB was (re)approved by the National Assembly and submitted to the National Council of Provinces.

The CAB seeks to amend and update the country's copyright laws to align with the digital age and better balance the interests of copyright owners and users. The key provisions of the CAB include the following: 1) The Bill introduces a flexible fair use provision that would allow for the use of copyright-protected works for purposes such as education, research, and criticism, without requiring permission from the copyright owner, 2) The Bill introduces various user rights, such as the right to access copyright-protected works for educational and research purposes, the right to use orphan works, and the right to create and use accessible format copies of copyright-protected works for the benefit of persons with disabilities, 3) The Bill introduces measures to improve the functioning of collective management organizations

[255] City Press 'Click, copy, paste: Is our proposed copyright bill futureproof?' available at *https://www.news24.com/citypress/News/click-copy-paste-is-our-40-year-old-copyright-bill-futureproof-20180907*, accessed September 2022

(CMOs), which are entities that administer the licensing and distribution of copyright-protected works on behalf of copyright owners, and 4) The Bill expands the protection of moral rights, which are the non-economic rights of creators to be attributed as the author of their works and to object to any modification or distortion of their works that would prejudice their reputation. A discussion of the benefits and drawbacks of the Bill as well as the impact it might have in its entirety is outside the purview of this research. As such, the following discussion will focus solely on the proposed changes and the argument for the breadth and depth of the adaptation right.

The Bill seeks to introduce various user rights that may impact the making of adaptations. For example, the right to use orphan works and the right to create and use accessible format copies for persons with disabilities may allow for reproductions and adaptations without requiring permission from the copyright owner, Namely, the introduction of terminology concerning permission to use –

> *'Open licence' means a royalty-free, non-exclusive, perpetual, irrevocable copyright licence granting the public permission to do an act for which the permission of the owner of copyright, or the author, is required;*
> *'Orphan work 'means a work in which copyright subsists and the owner of a right in that work—*
> *(a) cannot be identified; or*
> *(b) is identified, but cannot be located.*[256]

The proposed changes will directly impact adaptations of copyright-protected works and the scope of protection, especially concerning the proposed flexible fair-use provision in the Bill. Moreover, introducing an 'open licence' and 'orphan work' will provide relief to potential creators and lift the burden of tracking down a copyright owner. These changes could lead to a more balanced copyright system that benefits creators and users.

However, the extent and limitations of this provision remain open to inspection and will depend on the specific provisions and how they will be interpreted and applied in practice. Moreover, there may be challenges in implementing and enforcing these new provisions,

[256] Section 1(i) of the Copyright Amendment Bill B13D-2017.

which will require careful consideration and monitoring. The biggest concern is the importance of striking a balance between the interests of copyright owners and users in a way that promotes creativity, innovation, and access to information in South Africa.

The most recent event on the passage of this bill occurred on March 7, 2023, when a public hearing was held to reduce the division this process has caused in the community.[257] Supporters of the bill argue that it is necessary to update South Africa's copyright laws to reflect technological advancements and promote access to information and creativity. Opponents of the bill argue that it goes too far in expanding exceptions and limitations to copyright, which could harm the creative industries in the country and discourage investment in intellectual property. Dean has written and commented extensively on CAB, expressing concerns about certain aspects of the bill in his writings and public comments, particularly the provisions related to fair use and the proposed exceptions.[258] Additionally, along with Dean, other academics and legal experts have expressed concerns that the bill may not adequately balance the interests of copyright owners and users, particularly regarding the proposed fair use provisions.[259] Organisations representing artists and copyright owners, such as the Southern African Music Rights Organisation (SAMRO) and the Independent Black Filmmakers Collective, have opposed the bill, arguing that it could harm creators' livelihoods and discourage investment in creative works.[260] On the other hand, organisations representing libraries, archives, and educational institutions, such as the Library and Information Association of South Africa (LIASA), have supported the bill, arguing that it could promote access to information and cultural heritage.[261]

[257] National Council of Provinces 'Copyright Amendment Bill & Performers Protection Amendment Bill: Public Hearing' 7 March 2023.
[258] OH Dean 'Defects in Copyright Amendments Exposed' (2022) The Anton Mostert Chair of Intellectual Property available at *https://blogs.sun.ac.za/iplaw/2022/09/23/defects-in-copyright-amendments-exposed/*, accessed December 2022.
[259] National Council of Provinces 'Copyright Amendment Bill & Performers Protection Amendment Bill: Public Hearing' 21 February 2023.
[260] Ibid.
[261] Ibid.

Overall, there is a range of opinions on the CAB, with stakeholders on both sides of the debate. As a result, the bill remains a contentious issue in the country, and its future remains uncertain as it continues to undergo revisions and amendments.

5.5 Concluding remarks

The central research problem addressed in this research is 'how should unauthorised adaptations be evaluated and compared in instances of South African copyright infringement, taking into account the valuable findings from international law and foreign jurisdictions?' Throughout the preceding chapters, this research has examined the scope of the adaptation right, explored the practical aspects associated with the right, such as infringement, and considered the impact of the fair dealing provisions. The CAB has also been a critical topic of discussion, introducing potential changes that could impact the adaptation rights and copyright landscape in South Africa.

The findings of this research have revealed significant gaps in South Africa's legal system concerning adaptations, exacerbated by the scarcity of relevant case law. The lack of clear legal guidelines and precedents in South Africa's legal system has created a challenging environment for copyright adaptations. To achieve legal certainty and equitable protection for rights holders, adopting a nuanced approach that considers the diverse needs and experiences of different groups in society is imperative. Striking a balance between the interests of copyright owners and users, mainly when the public interest is at stake, requires careful deliberation and collaboration among lawmakers, civil society organizations, and other stakeholders. This approach should also consider the rapid technological advancements and the digital age, significantly impacting how intellectual property is created, shared, and accessed. By promoting a fair and flexible legal framework that encourages innovation while respecting the rights of creators, society can foster creativity and ensure that intellectual property remains an asset for individuals and society.

The road ahead for the CAB remains uncertain as it continues to undergo revisions and amendments. The polarised perspectives of stakeholders indicate the complexity and significance of the issues. Striking a delicate balance between protecting creators' livelihoods

and fostering access to information and creativity will require further scrutiny and an informed and measured approach.

In conclusion, while this research has shed light on critical aspects of South African copyright law and the challenges surrounding adaptations, there is no definitive answer to the research problem; At the same time, fair use and fair dealing play a vital role in shaping copyright law, addressing the complexities surrounding adaptations and copyright infringement requires a comprehensive analysis of multiple factors and a broader examination of the copyright framework. The ongoing debates and evolving nature of copyright law make it clear that the issue requires continuous examination and adaptation. Further research and collaboration among stakeholders are necessary to navigate the complex landscape of copyright and ensure a fair and sustainable system for all parties involved. Instead, it highlights the need for continued discourse and exploration to find a solution that best serves the diverse interests of society while respecting creators' rights. By embracing a forward-looking and inclusive approach, South Africa can pave the way for a copyright framework that reflects its unique constitutional values and fosters innovation, creativity, and accessibility for all.

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