NAVIGATING THE COMPLEXITIES OF THE ADAPTATION RIGHT IN COPYRIGHT LAW: ADDRESSING AMBIGUITIES, GAPS AND THE NEED FOR REFORMS IN SOUTH AFRICA

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ABSTRACT

As a pervasive feature of modern society, the adaptation right in the context of infringement and fair dealing has frequently been a subject of heated debate for several years. However, the current Copyright Act 98 of 1978 does not adequately address either aspect. 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 in the context of the various forms of adaptation set out in the Copyright Act (ie arrangement, transcription, translation and transformation) remain largely undefined, leaving those attempting to create a work of adaptation or resolve a dispute over one in a state of considerable uncertainty. 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 clarification. Additionally, the exceptions and restrictions associated with the adaptation right are extremely limited. *Blind SA v Minister of Trade, Industry, and Competition* and the almost decade-long debate about the Copyright Amendment Bill indicate a need for reform in South Africa's legal system concerning adaptations and their role in legal proceedings.

KEYWORDS: copyright; subsequent work; senior work; junior work; adaptation right; copyright infringement; fair dealing

1. Introduction

Copyright, 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. Its primary function is 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 providing

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

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a measure of protection and security to the copyright owner, 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 this 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 their work.[4]

South Africa's current legal framework for copyright protection stems from a set of rules adopted in the nineteenth century,[5] when no one could have foreseen the extent to which technologies would advance or the role that information technology 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 give them the ability to replicate it with minimal effort.[7] Thus, an author's 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]

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.

6 Cohen et al (n2) 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 a licence agreement with Oracle, but no agreement was reached. Google thus continued with its use of Oracle's Java APIs to accommodate, and for the benefit of, their users.

9 A recent example of this is *Blind SA v Ministry of Trade, Industry and Competition and Others* [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 as an important mechanism which represents this delicate balance in attempting to protect intellectual property rights and expand access to information and resources.

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One of the exclusive rights under copyright law, which seemingly fosters such continued innovation, is the right of adaptation.[10] The most prevalent and, in a sense, traditional adaptations involve literary works. Numerous books, such as the *Harry Potter*[11] series by JK Rowling and the *Lord of the Rings*[12] by JR Tolkien, have been adapted into award-winning film franchises and have branched out into numerous other spheres of the creative industry, such as toys, games and merchandise – the continuous creations stemming from these original works are endless. However, as a pervasive feature of modern society, the adaptation right in the context of infringement and fair dealing has frequently been a subject of heated debate for several years.[13] Most predominantly, 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 about what is considered lawful or permissible use.[14] A recent example is the popular television series *Bridgerton*.[15] Shondaland production company acquired the rights from the author and copyright owner, Julia Quin, to adapt the *Bridgerton* book series[16] for Netflix's streaming service.[17] 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.[18] Amongst the various content creators, Barlow and Bear's TikTok videos, heavily inspired

10 The Copyright Act sets out the following definition(s) of adaptation in s 1(i)*(a)–(d)* as it pertains to each category of work:
- *(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
  - (ii) A fixation of the program in or on a medium different from the medium of fixation of the program'.

11 JK Rowling *Harry Potter* book series (1997–2007) in the *Harry Potter* movie series (2001–2011).

12 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).

13 RM Shay 'Fair deuce: An uneasy fair dealing-fair use duality' (2016) 49 *De Jure* 105–117.

14 Ibid.

15 JQ Julia *Bridgerton* book series (2000–2006) in the *Bridgerton* Netflix series (2020–2022).

16 Ibid.

17 Ibid.

18 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 18 February 2023).

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by the Netflix series, became an overnight sensation, drawing millions of viewers and likes.[19] From an original literary work to a television series adaptation to a fan-inspired creation – Barlow and Bear created the well-known and award-winning production, the 'Unofficial Bridgerton Musical', earning the praise of both fans and critics.[20] 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, ie not acquiring a licensing agreement, proving wrongful conduct to be unlawful under the Copyright Act 98 of 1978 is a complex process.

2. Background

Copyright law in South Africa recognises two types of rights: economic rights and moral rights. While the former serves a financial purpose, the latter seeks to preserve and protect the author's connection to their work. Further, copyright provides the owner with sole discretion or authorisation over any and all reproduction, adaptation, distribution, performance and exhibition of the work in question.[21] 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 that they need.[22] The fundamental objective of copyright, safeguarding the public interest while encouraging and compensating originality, is firmly established in South Africa's national and international obligations.

2.1 Constitutional framework

The methodology employed for protecting and enhancing copyright is firmly grounded in the principles upheld by the Bill of Rights in the Constitution of the Republic of South Africa, 1996.[23] As confirmed by the court, the constitutional protection afforded to intellectual property is based on s 25:

> Section 25(1) of the Constitution states that no one may be deprived of property except in terms of a law of general application, and no law may permit arbitrary deprivation of property. Subsection (4)(b) states that property is not limited to land. Although the primary focus of the section is land, the inclusion of section 25(4)(b) appears to be a catch-all subsection to include property in general.[24]

19 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 18 February 2023).

20 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 18 January 2023).

21 Sections 6–11 of the Copyright Act – nature of copyright.

22 WIPO 'About IP: Copyright' available at https://www.wipo.int/copyright/en/ (accessed 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.'

23 Section 25 of the Constitution of the Republic of South Africa, 1996.

24 Section 25 of the Constitution, as contemplated in *Ex parte Chairperson of the Constitutional Assembly In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC).

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The inclusion of intellectual property rights plays an important part in the consideration of the balance of protection afforded to copyright as it upholds the purport, spirit and values enshrined in the Bill of Rights in that any limitations upon a vested right, or in this instance, any use of an exclusive right, must be weighed against the interests of the public.[25] From a user's or creator's point of view, the need to uphold the provisions of s 25 often involves a battle of justification when rights enshrined in the Bill of Rights come into play.[26] This is because it is 'important to achieve a balance between the tenets of copyright law and the Bill of Rights', which allows copyright to be interpreted in accordance with the accepted principles of copyright law, as applied internationally, in a manner consistent with the Bill of Rights.[27] Additionally, by grounding an intellectual property right, such as the right to adaptation, in this constitutional provision, it is acknowledged that the Constitution emphasises the significance of copyright in the broader context of human rights. A prominent example is ensuring a balance between intellectual property rights and a fundamental human right such as freedom of expression, 'which is considered to have bearing on copyright' in particular:[28]

> In terms of s 16(1) of the Constitution, everyone has the right to freedom of expression, which includes:
> *(a)* Freedom of the press and other media;
> *(b)* Freedom to receive or impart information or ideas;
> *(c)* Freedom of artistic creativity; and
> *(d)* Academic freedom and freedom of scientific research.

The accepted obligation of copyright law stemming from the right to freedom of expression and the justification that the public should have access to copyright works to develop are clear manifestations of the principle that copyright should be *a benefit for all*.[29] Additionally, the Constitution's commitment to fostering a free exchange of ideas, information and artistic expression directly impacts the interpretation of the right to adaptation. By allowing for re-use and re-purposing, copyright law provides an avenue for authors to receive recognition and compensation for their original work (right to property) while at the same time providing others with the opportunity to

25 In this spirit, the constitutional property clause aims to 'advance the public interest in relation to property': F*irst National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 64.

26 Section 36 of the Constitution states that the rights in the Bill of Rights may be limited by a law of general application that is reasonable and justifiable in an open and democratic society based on dignity, freedom and equality.

27 B Mhlongo 'Balancing the protection for intellectual property rights of copyright holders against the constitutional right to freedom of expression: A comparison of the South African approach and the United States of America's approach' (2018) at 2, available at https://researchspace.ukzn.ac.za/server/api/core/bitstreams/d8c697a9-80db-40d7-ab9a-d08535c7f820/content, referring to the *First Certification* judgment (n24). The court justified its decision by explaining that intellectual property is included under the catch-all term of 'property' covered in s 25(4)*(b)* of the Constitution, and it is therefore not necessary to deal with it separately in the Bill of Rights.

28 Mhlongo (n27) at 3 para 3.

29 Ibid.

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build upon or make use of that original work (right to freedom of expression).[30] In addition, this prevents an owner from having a monopoly over the work, which would impede its progression, and allows for the furthering of ideas and creativity, helping to create a more vibrant intellectual climate.[31]

2.2 Legislative framework

This process of re-using or re-purposing a work occurs under the following conditions: either the copyright owner decides to re-use or re-purpose their original work, or a third party uses the senior work as a source of inspiration for their new junior work. Those instances where the creation of a work requires the utilisation and copying of an existing copyright-protected work are the primary focus of this paper – hereafter referred to as the 'senior work' (ie the existing work) and the 'junior work' (ie the subsequent work). 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.[32] Regardless of the situation, the original work must be used and made in terms of applicable copyright law.[33] However, the process is not always as straightforward when a third party approaches the owner for permission to use a copyright-protected work.[34] 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

30 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 limits.'

31 Leval (n30) 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.'

32 Section 6 of the Copyright Act:
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 *(e)* inclusive.

33 *Cavendish Textiles Ltd v Manmark (Pty) Ltd* unreported case no 2218/82 of 1984; *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).

34 Section 22 of the Copyright Act – ownership of copyright.

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themselves to the possibility of infringing because of the unauthorised use of a senior work.[35]

Under the Copyright Act, it is an act of infringement for any person, without the copyright owner's consent, to do anything that, in terms of the Act, only the copyright owner has the right to do.[36] Based on the infringement provisions, a user need not copy the entire work to commit infringement; a substantial portion is sufficient.[37] 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.[38] Consequently, an individual who wishes to re-use or re-purpose a work may appear to have limited options if the copyright holder denies permission, given that this is their prerogative.[39] However, while copyright grants exclusive rights to protect the interests of the copyright owner, the enforcement of copyright is not absolute.[40] Certain limitations and exceptions exist to uphold the fundamental purpose of copyright, ensuring a balance between protection and fostering innovation and creativity and also taking into account the public's best interests.[41] A considerable number of these safeguards, which have been rigorously enforced in South Africa since well before the inception of the Constitution, are the result of the nation's duty as a member state to uphold the standards set by international agreements. In addition, these standards are supplemented by the Constitution, which requires the court to consider international law and potentially foreign law when interpreting the Bill of Rights.[42]

2.3 A balancing act

For a long time, international law has significantly influenced the protection afforded by copyright law, especially in relation to the protection of the creation of subsequent works. The limitations and exceptions to copyright serve as lawful balancing mechanisms permitted by the Berne Convention and the TRIPS Agreement,[43] which 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 the normal exploitation of the work.[44] These vital instruments aim to strike a

35 Section 23 of the Copyright Act – infringement of copyright; O Dean & A Dryer *Introduction to Intellectual Property Law* (2017) at 29.
36 Section 23(1) of the Copyright Act.
37 Section 1(2A) of the Copyright Act.
38 *Cavendish Textiles* (n33).
39 Section 22 of the Copyright Act – assignment of licences.
40 Mhlongo (n27) at 4: 'In *Laugh it Off Promotions CC v The South African Breweries International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* the Constitutional Court held that the right to freedom of expression and intellectual property rights enjoyed equal status under the Constitution.'
41 Section 36 of the Constitution.
42 Section 39(1) of the Constitution.
43 WIPO *Intellectual Property Handbook* (2014).
44 Article 13 of the TRIPS Agreement and Art 9(2) of the Berne Convention.

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balance between safeguarding the rights of creators and granting the public access to benefit from their works. Accordingly, the Berne Convention and the TRIPS Agreement require member states to impose stringent minimum standards for copyright law,[45] stating 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.[46]

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.[47] Article 13 of the TRIPS Agreement and Art 9(2) of the Berne Convention provide 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.[48] 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.[49]

The most significant limitation to the scope of the adaptation right is South Africa's 'fair dealing' provisions, which allow for the limited use of copyright-protected material without the permission of the copyright owner.[50] Fair dealing was developed as an exception to infringement for work used for private study, research, criticism, review or news summaries.[51] Accordingly, under the provisions of s 12 of the Copyright Act, as amended, the use of literary, musical and artistic works, broadcasts and published editions will qualify as fair dealing in the following circumstances:

> 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

45 Cohen et al (n2) at 35.
46 TRIPS Agreement Art 7.
47 Berne Convention for the Protection of Literary and Artistic Works 1886, as amended, Art 10, available at http://www.wipo.int/treaties/en/ip/berne/ (accessed 11 December 2022); TRIPS Agreement.
48 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'.
49 Berne Convention Art 9(2); TRIPS Agreement Art 13 available at https://www.wto.org (accessed 11 December 2022); WIPO Copyright Treaty 1996 Art 10.
50 Section 12(1) read together with ss 15(4), 16, 17, 18, 19A and 19B of the Copyright Act.
51 Accordingly, under the provisions of s 12 of the Copyright Act.

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(c) for the purposes of reporting current events–
(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.[52]

The fair dealing provisions under s 12 of the Act stipulate that not every unauthorised use of another's copyright-protected material will be regarded as an infringement.[53] Unfortunately, only a few South African judicial authorities have interpreted and applied the fair dealing exception in South Africa.[54] The landmark judgment of *Moneyweb (Pty) Ltd v Media24 Ltd* is the most relevant.[55] 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.[56] The court noted that a user could not be expected to foresee or anticipate the potential loss that may be incurred by the copyright owner. Therefore, the fairness test should objectively evaluate whether the user, when creating their subsequent work, complied with their obligation of fairness based on the existing facts of that time and place.[57] The court continued by stating that fairness requires a value judgement of a matter of fact, degree and opinion, which must be weighed against a non-exhaustive list of factors relevant to the consideration of fairness within the meaning of the relevant section in the Copyright Act.[58] For example, under the provisions of s 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.[59]

The inclusion of exceptions and limitations to a copyright owner's exclusive right is evidently done to maintain the equilibrium mandated by national and international obligations. Nevertheless, examining whether the Copyright Act has successfully established a harmonious balance between the rights of copyright owners and users is imperative. The unfortunate outcome, as will be demonstrated, is categorically negative. Numerous deficiencies in the Copyright Act contribute to an unwarranted advantage for copyright owners.

52 Section 12(1) read together with ss 15(4), 16, 17, 18, 19A and 19B of the Copyright Act.
53 Section 12(1) read together with ss 15(4), 16, 17, 18, 19A and 19B of the Copyright Act.
54 *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.
55 *Moneyweb (Pty) Ltd v Media24 Ltd and Another* [2016] 3 All SA 193 (GJ) para 112.
56 Ibid.
57 Ibid: 'the relevant facts must be limited to those existing at the time of dealing.'
58 *Moneyweb* (n55) paras 112–113.
59 Ibid.

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One of the main challenges that contributes to this imbalance is the ambiguity about the creation of subsequent works and their implications for creators and dispute resolution. As this paper will illustrate, this ambiguity poses a significant challenge in determining whether an action constitutes reproduction or adaptation-infringement, thereby creating an unnecessary legal advantage for copyright owners. Furthermore, given these perceived shortcomings, it is imperative to question the effectiveness of exceptions and limitations in the law in maintaining copyright harmonisation and equilibrium.

3. The Creation of a Subsequent Work

The concept of re-use or re-purposing has been part of copyright law since the early nineteenth century. For example, the Berne Convention mandates protection for 'translations, adaptations, arrangements of music, and other alterations of literary or artistic work'. According to the WIPO Guide to the Berne Convention, the 'right of reproduction' is where the 'right of adaptation' 'find[s] its origins'. 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.' The re-use or re-purposing of an original work appears in the Copyright Act in three circumstances: the actual method of creation 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. 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, also an adaptation thereof'.[60] Consequently, a subsequent work manifests itself in one of two ways: either as a reproduction or as an adaptation. However, the complexities of copyright law and its application in the context of the various forms of adaptation defined in the Copyright Act (ie an arrangement, transcription, translation or transformation) remain primarily undefined, which creates significant uncertainty 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 failings of the current Copyright Act. This lack of clarity can lead to prolonged legal disputes and uncertain outcomes, as exemplified in *Blind SA v Minister of Trade, Industry, and Competition*.[61]

While *Blind SA*[62] spoke largely about the inadequacies of the current 44-year-old Copyright Act of 1978, the government's failure to ratify the Marrakesh

60 Section 1(1) of the Copyright Act – definition of 'copy'.

61 *Blind SA* (n9).

62 For a detailed discussion of the case, see B Zungu 'Case note: *Blind SA v Minister of Trade, Industry and Competition*' (2022) *IPLJ* 131–143.

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Treaty, and to some extent, the forthcoming Copyright Amendment Bill B13-17, the scope of reproductions and adaptations played a role in this matter. 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.[63]

During its deliberations, the court noted that the Copyright Act does not offer explicit definitions for the terms 'reproduction' or 'adaptation', instead specifying the constituent elements that constitute these concepts (eg adaptation comprises transformation, transcription and arrangement).[64] While preserving an agile and non-exhaustive definition of reproduction and adaptation is important, the result is that in the absence of a clear-cut demarcation between what qualifies as an adaptation and what does not, a considerable amount of time was spent on ascertaining the categorisation of a format copy as either an adaptation or a reproduction. This inherent ambiguity raises concerns as it not only impacts on the assessment of copyright infringement, but also influences the determination of fair use and the delicate balance between the interests of creators and users.

One of the most prominent arguments was raised by leading academic Owen Dean, who acted as an *amicus curiae* and aimed to reaffirm the meaning of reproductions and adaptations in his submissions to the Constitutional Court.[65] In discussing permitted use in accessible formats, Dean explained 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'.[66] Dean emphasised the wording of s 6*(a)* of the Copyright Act, which refers to '[r]eproducing the work in any manner or form'.[67] In the alternative, however, Dean explained that 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.[68] Similarly, in broader terms, Dean states in his *Handbook of South African Copyright Law* that to 'reproduce' means to make a copy, while 'adapting' means to alter, modify or transform.[69]

Based on this submission, reproduction involves making a copy of the original work without significant changes.[70] 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

63 *Blind SA* (n9) para 58.
64 *Blind SA* (n9) para 80.
65 Ibid.
66 Ibid.
67 *Blind SA* (n9) para 81.
68 OH Dean *Handbook of South African Copyright Law* (2015) at 76 paras 8.5.2–8.5 10.
69 Dean (n68) at 76 paras 8.5.2–8.5 10.
70 Section 1*(h)* of the Copyright Amendment Act 125 of 1992 – substitution for the definition of 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.'

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and creating a new work based on it.[71] This can include changing the original work's form, medium or language, or making significant additions, deletions or modifications to the original work.[72] 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.[73]

Referring back to the task at hand, the court had to determine whether 'the reproduction … is sufficient to convert the work into an accessible format copy'.[74] The word 'convert' implies a 'change fitting something for a new or different use or function'.[75] This raises the question of whether Dean's submission to the court and the inference drawn from it could potentially be in conflict. To address this, it is imperative to establish what qualifies as an adaptation in the context of copyright law and to precisely differentiate it from the broader sister right, the reproduction right. This differentiation lays the foundation for a comprehensive analysis of the adaptation right and the legal parameters.

Therefore, the following section examines the depth and breadth of one's entitlement to the adaptation right to ascertain the precise boundaries that govern the creation of adaptations. This includes considerations such as what constitutes re-use or re-purposing within the meaning of an adaptation, the role that originality plays in an adaptation, the unauthorised use as defined by the Copyright Act, and the role that specific exceptions and limitations may play in shaping the contours of the adaptation right.

4. The Adaptation Right

One of the earliest discussions about the meaning of the term 'adaptation' was in *Bosal Afrika (Pty) Ltd v Grapnel (Pty) Ltd*.[76] The issue concerned the difference between the English word 'adaptation' and the Afrikaans word '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.'[77] 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*, Ponnan J reasoned that the court incorrectly concluded that the original

71 *Blind SA* (n9) para 38.
72 Dean (n68) at 76 paras 8.5.2–8.5 10.
73 Rowling (n11).
74 *Blind SA* (n9) para 58: 'having considered the submissions and the relief sought from this Court, the following issues require consideration … (b) is the reproduction of a literary work sufficient to convert the work into an accessible format copy for the use of persons with print or visual disabilities, or is an adaptation of the work also required?'
75 Definition of 'convert' available at https://www.merriam-webster.com/dictionary/convert (accessed 7 November 2023).
76 *Bosal Afrika* (n33).
77 Ibid.

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work in question had been used in the making of another work and, as a result, amounted to making an adaptation.[78] In reaffirming that Burger J erred in his reasoning, Ponnan J concluded:

> It was not necessary to hold that there is a conflict between the two versions 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.[79]

What is important from this matter is that the Supreme Court of Appeal (SCA) 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.[80] In assessing whether a junior work is an adaptation, the work must fall within the meaning of the term as set out in the Copyright Act and there must be a similarity to the actual creative composition of the senior work and not just the idea itself.[81]

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

The concept of transforming a work is evident in the Copyright Act's definition of 'adaptation' and is substantiated by the species of 'adaptations' listed in the Copyright Act.[82] For this purpose, however, the following two works categories will be examined as examples. First, the Copyright Act defines an adaptation in relation to literary works as follows:

> *(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.[83]

For a junior work to be an adaptation of a senior literary work, it must be 'transformed in such a manner that the original or substantive features of it remain recognisable'.[84] Such was the question raised in *Rapid Phase*

78 *Quad African Energy (Pty) Ltd v The Sugarless Company (Pty) Ltd and Another* 2020 (6) SA 90 (SCA) at 27.
79 Ibid.
80 *Quad African Energy* (n78) at 28.
81 Ibid. 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.
82 Dean (n68) at 76 para 8.5.3.
83 Section 1(1) of the Copyright Act – definition of 'adaptation'.
84 *Rapid Phase* (n33).

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Entertainment CC v SABC.[85] However, based on what was observed in *Blind SA*, some leeway and consideration should be given to the definition of a literary adaptation; for example, in referring to the definition of a literary work in the reading-in of s 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'.[86]

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 program was in issue. Following the 1992 amendment to the Copyright Act, adaptations in reference to computer programs include:

> *(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
> (ii) a fixation of the program in or on a medium different from the medium of fixation of the program.[87]

In *Apple Computer*, the court confirmed that 'object codes of a computer may obtain copyright protection if they are adaptations or translations of source codes.'[88] This decision is important because it acknowledges that computer programs, like literary works, are eligible for copyright protection as expressive forms of creativity. In addition, it emphasises the significance of safeguarding the rights of software developers. Another case 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 program and was an act of infringement by adaptation.[89] 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 disagrees with this reasoning and contends that such an act does *not* fall within the scope of what the Copyright Act regards as an 'adaptation'.[90]

What is clear from the above is that the legal boundaries (adaptation versus reproduction) between a senior work and junior work 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 it, as in *Blind SA*.[91] It seems that when the meaning of the terms 'reproduction' or 'adaptation' does not clarify how a specific re-use or re-purpose would be classified, the next logical step is to look at whether any changes or additions are made to

85 Ibid.
86 *Blind SA* (n9) – reading-in of s 13A.
87 Copyright Amendment Act 125 of 1992 s 1*(a)* – definition of an adaptation.
88 *Apple Computer* (n33).
89 *Technical Information Systems (Pty) Ltd v Marconi Communications (Pty) Ltd and Another* (WLD) unreported case no 06/11666.
90 Dean (n68) at 76 para 8.5.9.
91 *Blind SA* (n9) para 63: 'our remedial remit, however, does not go beyond the challenges that has been made'.

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the ideological content of the senior work. This also raises questions about the extent to which the original creator's rights should extend to any junior work and whether a junior work, significantly different from a senior work, should be afforded protection. The reasoning for this is that the distinction between reproduction and adaptation is not a mere legal technicality but a pivotal determinant in the broader evaluation of copyright infringement.

4.2 The originality of an adaptation

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 come into play. 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'.[92] This statement is in line with s 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.[93]

This provision recognises that an adaptation, even if it incorporates elements from a pre-existing work, can still be considered a new and original work deserving of its own copyright protection. However, it is important to note that the extent of copyright protection afforded to the adaptation may depend on the level of creativity and originality involved in its creation, which aligns with the originality requirements expressed in various cases.[94] For example, in *Apple Computer*, the court held that because the 'object codes were adaptations and translations of the original source code', this established a *prima facie* right.[95] Moreover, in *Haupt v Softcopy Brewers*, which specifically addressed the originality requirements concerning an adaptation, the 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.'[96]

Originality, however, is not determined based on creativity in South African copyright law; instead, what is required is a 'substantial (or not trivial) degree

92 *Blind SA* (n9) para 38.

93 Section 2(3) of the Copyright Act.

94 *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).

95 *Apple Computer* (n33).

96 *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.'

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of skill, judgment or labour' to render the work original.[97] However, the mere use of a prior work does not indicate that the subsequent work is an adaptation and therefore an infringement.[98] Not only the concept but also the actual creative composition must be similar.[99] 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.[100]

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 s 13[101] 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 based this argument on the reasoning that accessible format copies merely entailed converting an existing work into a different format (ie printing the words so that a visually impaired individual can identify the letters or words by touch). Such a conversion entails a mechanical process which falls within the broad scope of reproduction as defined by the Copyright Act, and therefore an adaptation was not required.[102] Indeed, *Blind SA* dealt with the fact that those with print and visual disabilities have limited access to literary works because of the lack of accessible format copies available, which is further exacerbated by the stringent rules imposed by the Copyright Act.[103] However, the argument presented by Dean is flawed because it is assumed that there is no change to the content of the original work and it does not account for the level of interpretation that may be required

97 *Haupt* (n94) para 35: the SCA referred with approval to *CCH Canadian Ltd v Law Society of Upper Canada* (2004) 1 SCR 339 at para 25 stating: '[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".'

98 *Haupt* (n94).

99 *Quad African Energy* (n78) para 28: 'There is no copyright for ideas and thoughts.'

100 *Klep Valves* (n94) at 22.

101 *Blind SA* (n9) paras 35–39. Dean proposed compelling the Minister to issue regulations in accordance with s 13 of the Act at para 31; s 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.'

102 *Blind SA* (n9) 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'.

103 *Blind SA* (n9).

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in creating an accessible format copy for any individual falling within the scope of print and visually disabled persons.[104] If one were to consider a text that relies heavily on an individual's visual or prior visual exposure, such as a textbook on the history of art, does a format shift from letters to braille provide those who are visually impaired with adequate knowledge to discern what the text is trying to convey, or even the meaning thereof, or will this be a classic instance of lost in translation, or better yet, lost in format shifting?

When considering the significant effort and skill required to *alter or transform* a literary work, and even more so to interpret an artistic work sufficiently and to convey its meaning, it is clear that this process is well beyond the scope of reproduction. This was the argument presented by the second *amicus curiae*, Media Monitoring African Trust (MMA), which reasoned that 'works often need to be adapted into accessible format copies ... [and] modifications and adjustments to original works are required to ensure that persons with visual and print disabilities can enjoy and exercise, on an equal basis with others, their expressive rights and freedoms'.[105] Additionally, the International Commission of Jurists (ICJ), acting as the *amicus curiae*, submitted that Dean's arguments failed 'to consider South Africa's obligations regarding international human rights law'.[106] The court reached the same conclusion:

> While these may amount to artistic works within a literary work, the issue remains as to whether pictures, photographs, and other multi-media presentations can be rendered in accessible format copies by merely reproducing them. This does not seem possible. The form in which such content appears requires some translation, indeed transformation that requires interpretation and an effort to render the meaning in another accessible format.[107]

However, the court was clear that the disagreements raised in *Blind SA* 'are not capable of definitive resolution on the evidence before us' as the court was tasked to determine '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'.[108] However, Unterhalter AJ[109] does provide some insight in that the exact boundary between a reproduction and an adaptation of literary work is hard to draw as the distinction is not always clear-cut.[110] When words are changed in a text

104 *Blind SA* (n9) para 37: 'There is no change to the content of the original work during this process and it is, in essence, a mechanical process which seeks to present the exact original work in a new form.'

105 *Blind SA* (n9) paras 40–41: 'MMA submits that South Africa's current copyright regime is in conflict with the right to freedom of expression and access to information and that a balance must be struck between the rights of copyright and intellectual property owners and the rights of all people to access and impart knowledge and ideas.'

106 *Blind SA* (n9) para 42.

107 *Blind SA* (n9) para 87.

108 *Blind SA* (n9) para 89.

109 *Blind SA* (n9) paras 82–85.

110 *Blind SA* (n9) para 83: 'We know that the translation of a literary work, by definition, is an adaptation. That assists us to understand what makes an adaptation distinctive [but] within a language community, there are shades of meaning, and differences that arise as to what a text means.'

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(ie in an act of plagiarism), it might seem like a reproduction because there is still significant similarity in content.[111] However, there is also an acknowledgement that the content has been altered to some extent.[112] Alternatively, in the case of an adaptation such as a translation, it is not simply a slavish copy because the act of translation involves an interpretative process to convey the original text's meaning in a different language.

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 programs or software that interact with the original work in different formats.[113] 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 from *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.[114]

Overall, an adaptation seems superior to a reproduction because what is required is 'more than just a slavish copy'[115] and beyond a mere change in format, as submitted by Dean. Both adaptations and reproductions can potentially infringe the copyright owner's exclusive rights, depending on the circumstances. However, the level of originality involved in an adaptation is generally higher than in a reproduction, which may impact the scope of protection afforded under copyright law. Unterhalter AJ's conclusion is that 'it will be apparent that these are fine-grained distinctions, and they are more easily applied in concrete cases of infringement.'[116]

5. Copyright Infringement

The Copyright Act permits the copyright owner to institute infringement proceedings against anyone who unlawfully uses their original work without first acquiring permission.[117] The elements of a copyright owner's claim for infringement are supported by s 23(1):

111 *Blind SA* (n9) para 83: 'When words are changed in a text, in an act of plagiarism, we might want to conclude that the text is nevertheless a copy because there remains sufficient objective similarity, and hence the work is a reproduction. However, its content has, in some measure, also been changed.'

112 *Blind SA* (n9) para 83: 'An adaptation that is a translation is not merely a copy because there is an interpretative engagement with the text so as to render its meaning.'

113 *Blind SA* (n9) paras 86–88.

114 *Blind SA* (n9) paras 86–88.

115 *Klep Valves* (n94) at 28.

116 *Blind SA* (n9) para 85.

117 Section 23 – infringement provision of the Copyright Act.

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> 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.[118]

Based on the Copyright Act's wording, it is evident that direct infringement occurs when someone other than the copyright holder performs unauthorised copying, adaptation or publication of a work without permission. In addition, s 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. Therefore, copyright 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'.[119] However, copying itself is not unlawful.[120] 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.[121] 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.[122] 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 no copying occurred. When the issue of copying is in dispute, for copying to constitute an infringement, it must contain more than the *de minimis* quantity of the copyright-protected expression.[123]

In reproduction-infringement, the owner must establish a subjective similarity and a causal link between the original copyright-protected work and the alleged infringing subsequent work[124] – 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.[125] The similarity sought to be established is not to the extent of what is generally required in a reproduction-infringement matter, but an examination of the interpretative element of the senior work, which suggests the original to the user's mind. The problem here, however, relates to the difficulties experienced by the owner with regard to the burden of

118 Section 23(1) of the Copyright Act.
119 Section 1(2A) of the Copyright Act.
120 *Klep Valves* (n94) at 28.
121 *Juta & Company Ltd and Others v De Koker and Others* 415 JOC (T).
122 Section 23 of the Copyright Act.
123 Dean (n68) 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.
124 *Galago Publishers* (n96) at 280: 'Consequently it is not necessary for a plaintiff in infringement proceedings to prove the reproduction of the whole work: it is sufficient if a substantial part of the work has been reproduced.'
125 ibid.

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establishing that the alleged infringing junior work is an adaptation as defined by the Copyright Act and that the unauthorised use is not exempt from finding infringement.

5.1 Infringement of the adaptation right

In *Quad African Energy*, 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 simply because there was a causal connection between the two works in question, irrespective of any resemblance between them.[126] This reasoning is in line with *Cavendish Textiles Ltd v Manmark (Pty) Ltd*, where the court held the following concerning adaptation-infringement:

> 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].[127]

The court reaffirmed 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.'[128] The court held that in addition to meeting the Copyright Act's formal requirements, a plaintiff must first establish that (1) they are the owner of an original work; (2) 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.[129] Accordingly, when all three of the above elements are inherently, or upon examination, present, the infringement investigation will commence. On this basis, this paper contends that what is required is a more objective evaluation of first determining whether the junior work in question is considered an adaptation under the Copyright Act, and then determining whether it violates the rights of the copyright owner of the senior work. The reasoning behind this suggestion is that the implications of this distinction between reproduction-infringement and adaptation-infringement are far-reaching and profoundly impact the intricate balancing mechanisms for safeguarding the public interest and ensuring a harmonious equilibrium between the owner and the user or creator. One of the most tangible consequences of this distinction is its effect on the efficacy of the exceptions and limitations provisions.

5.2 The adaptation-infringement claim

Based on these so-called prerequisites for an adaptation-infringement claim, a claim is dependent on first establishing the subsistence of copyright, namely establishing the existence of an original work. This is laid in the foundation that copyright does not vest in ideas. In *Galago Publishers*, the court upheld the reasoning of *Natal Picture Framing Co Ltd v Levin*, which states that

126 *Quad African Energy* (n78) para 28.
127 *Cavendish Textiles* (n33) para 8.
128 *Quad African Energy* (n78) para 28.
129 *Quad African Energy* (n78).

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'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.'[130] Additionally, in *Rapid Phase Entertainment CC v South African Broadcasting Corporation*, the court stated that when it comes to adaptation-infringement claims, 'the idea might be adapted, even if it was original, but if the embodiment of such idea or a substantial part thereof was not copied, no copyright was infringed.'[131] This distinction refers to the so-called idea/expression dichotomy, which upholds the principle that copyright does not vest in ideas or information, but instead vests in the material expression of such ideas.[132]

The purpose of the prerequisite of first establishing the subsistence of copyright in the senior work is to serve as a potential safeguard against finding copyright in a work that is not eligible.[133] 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'.[134] Swart J reasoned that the risk here lies in finding infringement. In doing so, one may effectively confirm that copyright subsists in a mundane item, creating a 'monopoly over something of limited scope, originality and will'.[135] 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'.[136] 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.

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 later, the alleged infringement claim will be dismissed. Overall, if the defendant's defence is unsuccessful, the battle is over on whether 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*

130 *Galago Publishers* (n96).
131 *Rapid Phase* (n33) at 606.
132 Dean (n68) at 76 para 8.7: 'For purposes of assessing infringement, due attention must be given to whether the similarity between two items is attributable to common ideas or concepts embodied in them or to similarity of material expression of ideas.'
133 *Waylite Diaries* (n93) affirmed *Francis Day and Hunter Ltd v Twentieth Century Fox Corporation Ltd and Others* (1940) AC 112 PC, which dealt with a subject matter that was too insubstantial to warrant copyright protection.
134 *Info Colour Pages v South African Tourism Board* (1998) 818 JOC (T) at 820.
135 *Info Colour Pages* (n134) at 834.
136 L Prescott *The Modern Law of Copyright* (2011) para 33.

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The Sugarless Company (Pty) Ltd, Ponnan VM outlined the following test as it specifically 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.[137]

It is clear that the test for infringement requires (1) looking at the *original work*, (2) considering the *objective similarities* between the original work or a *substantial part* thereof and the alleged infringing work, and (3) subjectively considering a *causal link* between the original work and the subsequent work. When sufficient resemblance is shown between the two works, the court may infer access and copying, although the similarity may be due to mere chance.[138] 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, especially in relation to a 'substantial part'.

5.3 Test for infringement

Applying 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 'objective similarity'.[139] However, preparing an adaptation poses a challenge to the traditional approach to infringement, as an adaptation, by definition, is based upon a pre-existing work. Thus, copying inevitably occurs whenever a junior work has been prepared.[140] In addition, ss 6–11B, when read in conjunction with ss 1(2A) and 23(1) of the Copyright Act, hold that 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 infringe the copyright holder's exclusive rights. It is usually not contested that the plaintiff's work was used in whole or in part in cases involving an unauthorised adaptation; the issue at hand is whether the use is '*not* negligible or inconsequential' to the senior work, thereby implicating the copyright

137 *Quad African Energy* (n78).
138 Dean (n68) at 77 para 8.6.3; *Marick Wholesalers (Pty) Ltd v Hallmark Hemdon (Pty) Ltd* 1999 BIP 394 (T).
139 Dean (n68) at 77 para 8.6.3.
140 *Quad African Energy* (n78) paras 30–32.

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owner's adaptation right, and if so, to what extent it is unlawful.[141] This consideration is not a simple task and frequently requires the consideration of numerous factors.

5.3.1 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.[142] Those dealing with 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.[143] 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 African Energy*, the court held that in reaching a decision about 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'.[144] Such a comparison must 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 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.'[145] While this may serve as an adequate yardstick in addressing the question as to whether the subsequent junior work is independent of the senior, especially where the entire senior work was used, it does not always apply when concerning the use of a small part of the work.

5.3.2 Substantial part

In addressing the meaning of 'substantial', Harms J 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.'[146] Instead, it infers something not legible or inconsequential but material to the copyright-protected work. Dean believes 'the concept "substantial" in respect of a part of a work relates primarily to

141 *Quad African Energy* (n78) para 28, citing *Erasmus v Galago Publishers (Pty) Ltd and Another* 227 JOC (T): 'It involves a value judgment not capable of an a priori definition. It cannot in the present context mean "pre-dominant" but means rather something which is not negligible or inconsequential, but material, to the copyrighted work.'

142 *Cavendish Textiles* (n33); *Galago Publishers* (n96) at 277.

143 *Rapid Phase* (n33).

144 *Quad African Energy* (n78) paras 30–32.

145 *Twentieth Century Fox Film Corp v Stonsfer* (1994) 140 (9th Cir) F 2d at 579–582, cited with approval in *Quad African Energy* (n78) para 29.

146 *Quad African Energy* (n78) para 28, citing *Erasmus v Galago Publishers (Pty) Ltd and Another* 227 JOC (T).

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quality and not quantity'.[147] This reasoning is consistent with s 1(2A) of the Copyright Act, which states that, unless the context indicates otherwise, the performance of an exclusive act reserved to a work shall be construed as the performance of such acts to any substantial part of that work. The inclusion of the word 'any' in s 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.[148] Dean contends that s 1(2A) is 'consistent with the test for infringement being primarily qualitative'.[149] 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.[150] 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.[151] 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 to determine infringement.[152] This was the case in *Rapid Phase Entertainment CC v South African Broadcasting Corporation*,[153] where 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 no infringement of a literary work because none of the individual cartoon strips' storylines or plots was replicated in the television advertisement. However, Dean remains sceptical about the correctness of this decision, arguing that the

147 Dean (n68) at 74 para 8 3.1.

148 Dean (n68) at 74 para 8.3.3: '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, for instance a paragraph in a book or perhaps even a sentence or sequence of sentences, copyright infringement could arise.'

149 Dean (n68) at 74 para 8.3.4: 'The criterion is what has been taken from the plaintiff's work and not what portion the infringing material makes up quantitatively of the contentious work.'

150 A Rogowski 'How to copy a song with impunity: A legal perspective on copyright infringement cases for musical works' Stellenbosch University (2015), available at https://scholar.sun.ac.za (accessed 5 January 2023).

151 Rogowski (n150) at 16: 'In *Haupt v Brewers Marketing Intelligence*, only 63 lines of source code were copied out of several thousand lines, yet the court held that this amounted to a substantial reproduction thereof. Quantitatively, this reproduction could not have amounted to more than 2%, yet the court held that the parts copied were "clearly considered to be a valuable ingredient of the program".'

152 Ibid: 'the quantitative assessment would seem to be a numbers game, in that it depends on how much was taken as opposed to what is actually taken.'

153 *Rapid Phase* (n33); Dean (n68) at 75 para 8.5 10.

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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.[154]

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.

5.3.3 Finding infringement

It follows that it is not enough to have a similar concept; the actual 'creative composition' must also be the same. Based on the above reasoning, 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. Conversely, if there is actual copying through adaptation, this does not automatically infer infringement. 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 be simultaneously infringing and original as exempted by s 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 be 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.

5.4 Limitations and exceptions

The significance of distinguishing between reproduction and adaptation-infringement transcends the scope of identifying the nature of copyright violations. It extends its influence into the realm of limitations and exceptions, playing a pivotal role in shaping the South African copyright landscape. 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 to ensure compliance with the standards and obligations set by international law, such as the Marrakesh Treaty. *Blind SA* spoke largely to how copyright must not infringe the rights of marginalised groups. The court noted that those with print and visual impairments had limited access to literary works, whereas those without these impairments did not.[155] In addressing this disparity, the court stated the following:

154 Dean (n68) at 76 para 8.5.11.
155 *Blind SA* (n9) para 65.

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> 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.[156]

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 … drastically restricted the availability … [of] accessible format copies for use by print- and visually-impaired individuals' were accurate.[157] This highlights the importance of balancing the interests of copyright owners and users, especially when the public interest is at stake. Additionally, it speaks to a broader import concerning unauthorised use and the scope of the adaptation right. The court reasoned that 'whether this comes about because authorisation is declined or on account of the difficulty and delay in identifying those from whom authorisation is required matters not'.[158] In this instance, the only obstacle was the need to obtain permission beforehand. The court held:

> 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 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.[159]

The above 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. The ruling in the *Blind SA* case demonstrated the significance of striking a balance between the interests of copyright owners and the right to access information and cultural works, as well as the significance of ensuring that copyright laws are sufficiently flexible to adapt to changing societal needs and technological advancements while upholding the fundamental principles of intellectual property rights. It also underscored the need for the ongoing reform of South African copyright law to ensure that it is fair, balanced and reflective of the public interest. Most notably, copyright limitations and exceptions are intended to prevent the scale from tipping in favour of the copyright owner and thus granting an absolute monopoly; it is crucial to re-evaluate the current

156 *Blind SA* (n9) para 66: 'this scarcity goes to the heart of the constitutional challenge that Blind SA brings before this court.'
157 *Blind SA* (n9) para 64.
158 Ibid.
159 *Blind SA* (n9) paras 68–69.

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copyright laws to ensure that they protect and balance the public's interest as well.[160]

The ruling in *Moneyweb (Pty) Ltd v Media24 Ltd* concerning fair dealing is commendable in that it highlights the Copyright 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.[161] Its restriction, however, is that it would generally only be relevant in situations involving the fair dealing exception in s 12(1)*(c)*(i), namely 'for the purposes of reporting current events in a newspaper, magazine, or similar periodic', and not in any other situation, such as what was needed in *Blind SA*.[162] Moreover, the factors do not appear to be sufficiently all-encompassing to include the additional fair dealing cases listed in the provisions of the Copyright Act.[163] This seems to be supported by the court's assertion that 'fairness' is an elastic notion, and 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'.[164] A value judgment is required to determine 'fair dealing' and it must be based on the specific facts or circumstances present at the time of the action.[165] While this provides some insight into the viability of fair dealing as an exemption to a single instance of infringement, it falls short of addressing fair dealing in a broader sense. The ambiguity and uncertainty associated with the fair dealing provision make it, in its current form, a practically unworkable provision, which is already well established. This inability to offer clear guidance leaves both copyright owners and users in a state of uncertainty and legal limbo. On the one hand, copyright owners rely on their exclusive rights to protect their creative works and derive income from them. On the other hand, copyright users, including scholars, educators, journalists and others, rely on fair dealing provisions to access and use copyrighted material for purposes such as criticism, research and reporting without infringing on copyright. Without a more coherent and comprehensive approach to fair dealing, striking a fair balance between these competing interests becomes challenging.

6. A Twenty-First Century Right: How South Africa Fails to Find the Balance

The complexities of the debate surrounding the scope of the adaptation right continue to grow in modern times, mainly with advancements in digital technology leading to concerns about access, creativity and the ability to innovate without restriction. Analyses of copyright infringement involve a

160 OH Dean 'Copyright blind spot' Anton Mostert Chair of Intellectual Property (2021), available at https://blogs.sun.ac.za/iplaw/2021/04/19/copyright-blind-spot/ (accessed December 2022).
161 *Moneyweb* (n55) para 113.
162 Section 12(1)*(c)*(i) of the Copyright Act.
163 Section 12(1) of the Copyright Act.
164 *Moneyweb* (n55) citing L Prescott *The Modern Law of Copyright* (2011) para 114.
165 *Moneyweb* (n55) para 114.

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myriad of factors, including access to the original work and the similarity of the allegedly infringing work. With the advent of digital technology and the many works being accessible to a worldwide audience, this task has become increasingly complex. Identifying and eliminating wrongdoing within, for example, millions of lines of software code is a time-consuming and intricate analysis. One can easily question whether the current framework of the Copyright Act is still satisfactory 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. 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 law regarding adaptations, infringement and exceptions make these developments especially significant.

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.[166] Moreover, while these guidelines are still applicable, the tests are formulated in a broad manner, whereas adaptation infringement issues are inherently complex and nuanced.[167] 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.

The ruling in *Blind SA* 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.[168] 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.[169] In addition, the court clarified that its 'remedial remit ... does not go beyond the challenges that have been made'.[170] 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

166 M Riby-Smith 'South African copyright law – the good, the bad and the Copyright Amendment Bill' (2017) 12(3) *Journal of Intellectual Property Law & Practice* 216–225; *Blind SA* (n9) para 12: argument made before the court concerning the Copyright Act.

167 *Moneyweb* (n55) sets out the general test for copyright infringement.

168 *Blind SA* (n9) para 112.

169 Ibid.

170 *Blind SA* (n9) para 63.

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to a beneficiary person'.[171] 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. This paper has 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.

Until recently, the development of the law concerning the scope and extent of rights associated with adaptation in South African law was limited. The Copyright Amendment Bill B13D-2017 aims to introduce several changes to South African copyright law to amend and update the country's copyright laws to align with the digital age and to balance the interests of copyright owners and users more effectively.

Since its introduction, the Bill has become a heated topic, sparking multiple discussions and demands amongst lawmakers and society.[172] The proposed changes will directly impact adaptations of copyright-protected works and the scope of protection, especially the proposed flexible fair-use provision in the Bill. The key provisions of the Bill include the following: (1) the Bill introduces a flexible fair-use provision that will allow for the use of copyright-protected works for purposes such as education, research and criticism without requiring permission from the copyright owner; and (2) the Bill seeks to introduce various user rights that may impact on 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.[173]

The proposed changes will directly affect adaptations of copyright-protected works and the scope of protection, especially the proposed flexible fair-use provision in the Bill. Moreover, introducing an 'open licence' and 'orphan work' will provide relief to potential creators and relieve 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

171 *Blind SA* (n9) para 112.

172 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).

173 Section 1(i) of the Copyright Amendment Bill B13D-2017.

https://doi.org/10.47348/SAIPLJ/v11/a3

specific provisions and how they will be interpreted and applied in practice. Additionally, there may be challenges in implementing and enforcing these new provisions, which will require careful consideration and monitoring. The main 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.

7. Concluding Remarks

The concept of the creation of a subsequent work challenges the traditional understanding of copyright. It is clear that the scope of the adaptation right is limited by two pertinent factors: the conditions for establishing an infringement and the fair dealing provisions. However, the current Copyright Act does not adequately address either aspect. While this paper 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. The ongoing debates and the evolving nature of copyright law make it clear that the issue requires continuous examination and consideration and highlight the need for continued discourse and exploration to find a solution that best serves the diverse interests of society, while respecting creators' rights. However, it is important to note that such reform efforts in South Africa should not solely rely on adopting a modified approach to fair dealing. Instead, a broader examination of the entire copyright framework, including adaptation rights, licensing mechanisms and the enforcement of rights, is essential. The road ahead for the Bill remains uncertain as it continues to undergo revisions and amendments; the polarised perspectives of stakeholders indicate the complexity and significance of the issues. 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. This approach should also consider the rapid technological advancements and the digital age, significantly impacting how intellectual property is created, shared and accessed. Consequently, further research and continued collaboration among stakeholders are necessary to navigate the complex landscape of copyright and ensure a fair and sustainable system for all parties involved.

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