

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT306/24

In the *ex parte* matter of:

**PRESIDENT OF THE REPUBLIC OF
SOUTH AFRICA**

Applicant

and

**SPEAKER OF THE NATIONAL
ASSEMBLY**

First Interested Party

**CHAIRPERSON OF THE NATIONAL
COUNCIL OF PROVINCES**

Second Interested Party

**ALL INTERESTED POLITICAL
PARTIES REPRESENTED IN THE
NATIONAL ASSEMBLY**

Third Interested Party

BLIND SA

Fourth Interested Party

and

**NATIONAL ASSOCIATION OF
BROADCASTERS**

First amicus curiae

**COPYRIGHT COALITION OF SOUTH
AFRICA**

Second amicus curiae

RECREATE ACTION

Third amicus curiae

JONATHAN SHAPIRO

Fourth amicus curiae

**CENTRE FOR CHILD LAW AND
ANOTHER**

Fifth amicus curiae

**RECORDING INDUSTRY OF SOUTH
AFRICA**

Sixth amicus curiae

**COMPOSERS, AUTHORS AND
PUBLISHERS ASSOCIATION AND
OTHERS**

Seventh amicus curiae

**SOUTH AFRICAN NATIONAL
EDITORS' FORUM AND ANOTHER**

Eighth amicus curiae

In re: Constitutionality of Copyright Amendment Bill and the Performers' Protection Amendment Bill



RECREATE ACTION'S WRITTEN SUBMISSIONS

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INTRODUCTION

1. The President has referred the Copyright Amendment Bill [B-13F-2017] (“**CAB**”) and the related provisions of the Performers’ Protection Amendment Bill [B24F-2016] (“**PPB**”) (together, “**the Bills**”) to the Constitutional Court for a decision on the constitutionality of certain provisions of the Bills.
2. The President has reservations about the constitutionality of sections 6A, 7A, 8A, 12A to 12D, 19B and 19C of the CAB, and provisions incorporated by reference into the PPB (“**the impugned provisions**”).
3. These submissions are filed on behalf of the third amicus curiae, ReCreate Action (“**ReCreate**”).¹
4. ReCreate is a voluntary association formed by activists and trade unionists in 2018. ReCreate’s membership consists of a range of diverse and broad interest groups, including teachers, writers, actors, film producers, directors, education content producers, artists, researchers, librarians, and software developers to name a few. This broad membership consists of creators of copyright, users of copyrighted work and owners of copyright, which positions ReCreate as a crucial stakeholder in the copyright reform process.
5. ReCreate provided extensive submissions and research to Parliament during the public participation processes on the Bill and these materials have been relied on for what is set out below. ReCreate submits that the President’s reservations concerning the constitutionality of the Bills are without substance.

¹ Court order admitting amici curiae dated 23 January 2025.

6. In these submissions, we deal with the following:

6.1. First, we discuss the key legal principles with which the President's referral is concerned. In particular, we deal with the nature of intellectual property in our law, and the meaning of the prohibition against arbitrary deprivations of property.

6.2. Second, we demonstrate that sections 6A, 7A and 8A, properly interpreted, do not operate retrospectively. But even if they were to be interpreted to operate retrospectively this would not result in any arbitrary deprivation of property.

6.3. Third, we contend that sections 12A to 12D do not give rise to an arbitrary deprivation of property, do not violate the rights to freedom of trade, occupation and profession, and do not conflict with international law obligations.

6.4. Fourth, we make comments regarding section 19B and 19C.

APPLICABLE LEGAL PRINCIPLES

i) Intellectual property and arbitrary deprivations

7. The President's reservations are that the Bills entail unconstitutional deprivations of property.

8. The first question is thus whether the rights that attach to ownership of the copyright in a work constitute "property" for the purposes of section 25 of the Constitution.

9. This question has been addressed extensively by Blind SA in its submissions.² ReCreate associates itself with Blind SA's submissions and we do not repeat that analysis here. ReCreate simply emphasises that:

9.1. The question of whether section 25 applies to copyright has not been meaningfully considered and decided by the Courts.³

9.2. In order to rely on section 25 of the Constitution, the President was required to show that it applies to copyright. He has not done so.

10. However, out of caution and for the purposes of this argument, we will assume that the rights associated with the ownership of copyright in a work constitute "property" in terms of section 25 of the Constitution. On that assumption, the next question regards what an arbitrary deprivation of property would entail in this context.

11. In a series of cases, the Constitutional Court has set out the test for arbitrary deprivation of property contrary to section 25. The following principles apply:

11.1. A deprivation of property occurs where there is "*any interference with the use, enjoyment or exploitation of private property*."⁴ Interference significant enough to have a legally relevant impact on the rights of the

² Blind SA Written Submissions dated 15 November 2024, para 18 – 33.

³ In *Law Society of South Africa*, this Court held that the meaning of "property" in section 25 is to be understood broadly, and includes both corporeal and incorporeal property, but the Court did not consider whether intellectual property rights constitute property. *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) at para 83. In *Moneyweb (Pty) Ltd v Media 24 Ltd and Another* 2016 (4) SA 591 (GJ) at para 108 the Court held that copyright is an intellectual-property right that is protected by section 25 (1) of the Constitution. However, it made this statement without engaging in any analysis of the question.

⁴ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) ("**FNB**") at para 57.

affected party amounts to deprivation.⁵ In *Mkontwana*, the Constitutional Court restated the test for deprivation as follows:

“Whether there has been a deprivation depends on the extent of the interference with or limitation of use, enjoyment or exploitation....(S)ubstantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation.”⁶

11.2. A deprivation of property is arbitrary when the law does not provide sufficient reason for the regulatory deprivation in question, or when it is procedurally unfair.⁷ In *FNB*, the Constitutional Court stated the test for arbitrariness as follows:

“[A] deprivation of property is ‘arbitrary’ as meant by s 25 when the ‘law’ referred to in s 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair. Sufficient reason is to be established as follows:

- (a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question and ends sought to be achieved, namely the purpose of the law in question.
- (b) A complexity of relationships has to be considered.
- (c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.
- (d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.
- (e) Generally speaking, where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for

⁵ *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) at para 66.

⁶ *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC) at para 32.

⁷ *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) at para 68.

the depriving law to constitute sufficient reason for the deprivation than in the case when the property is something different and the property right something less extensive. This judgment is not concerned at all with incorporeal property.

- (f) Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.
- (g) Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by s 36(1) of the Constitution.
- (h) Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with 'arbitrary' in relation to the deprivation of property under s 25."⁸

11.3. In the circumstances of a particular case, this test may require more than a rational connection between the law and the ends sought to be achieved. It may be required that the deprivation be proportionate to the purpose for which it is effected.⁹

ii) General principles of statutory interpretation

- 12. When interpreting legislation there are two important principles that must be borne in mind.
- 13. The first principle relates to section 39(2) of the Constitution.

⁸ FNB at para 100.

⁹ *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* 2009 (6) SA 391 (CC) at para 52.

13.1. Section 39(2) of the Constitution requires that, when interpreting any legislation, a court must promote the spirit, purport and objects of the Bill of Rights.¹⁰

13.2. The Constitutional Court has pronounced on the obligations arising from section 39(2) for the interpretation of legislation. There are two independent obligations that emerge from the Constitutional Court's jurisprudence in this regard.

13.2.1. The first obligation might conveniently be referred to as the "*Hyundai obligation*". This is that if a provision is reasonably capable of two interpretations and one interpretation would render it unconstitutional and the other not, the courts are required to adopt the interpretation that would render the provision compatible with the Constitution.¹¹

13.2.2. The second obligation is the "*Wary obligation*". This is that if a provision is reasonably capable of two interpretations, section 39(2) requires the adoption of the interpretation that "*better*" promotes the spirit, purport and objects of the Bill of

¹⁰ This duty is one in respect of which "*no court has a discretion*" and must "*always be borne in mind*" by the courts. This is so even if a litigant has failed to rely on section 39(2). *Phumelela Gaming and Leisure Limited v Grundlingh and Others* 2007 (6) 350 (CC) at paras 26 – 27.

¹¹ *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit* NO 2001 (1) SA 545 (CC) ("*Hyundai*") at paras 22-23:

"The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution.

... judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section."

Rights. This is so even if neither interpretation would render the provision unconstitutional.¹²

14. The second principle is that the provisions of a statute must be construed in context.¹³ The context of a statutory provision includes:

14.1. The text of the legislation as a whole (internal context) and of other legislation (external context). As this Court has observed, “every part of a statute should be construed so as to be consistent, so far as possible, with every other part of that statute, and with every other unrepealed statute enacted by the Legislature”¹⁴; and

14.2. The mischief that the legislation aims to address.¹⁵

iii) Interpretative presumption against retrospectivity

15. The retrospective operation of legislation raises a number of constitutional concerns. These concerns arise from the “basic notions of fairness and justice which are integral to the rule of law” and the principle of legality.¹⁶ Legality

¹² *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC) at paras 46, 84 and 107.

¹³ *Democratic Alliance v African National Congress and Another* (CCT 76/14) [2015] ZACC 1 (19 January 2015) at para 136 (per Cameron J); *Cool Ideas* 1186 CC v *Hubbard and Another* 2014 (4) SA 474 (CC) at para 28; *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at paras 17-9.

¹⁴ *Independent Institute of Education (Pty) Limited v Kwazulu-Natal Law Society & others* at 2020 (2) SA 325 (CC) (“**Independent Institute of Education**”) at para 38 citing *Chotabhai v Union Government (Minister of Justice) and Registrar of Asiatics* 1911 AD 13 at 24 with approval. See also *Department of Land Affairs and Others v Goedegelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) at para 53. In *Goedegelegen* this court, per Moseneke DCJ, recognised that “(w)e must understand the provision within the context of the grid, if any, of related provisions and of the statute as a whole including its underlying values”.

¹⁵ *Independent Institute of Education* at para 42.

¹⁶ *Veldman v Director of Public Prosecutions, Witwatersrand Local Division* 2007 (3) SA 210 (CC) (“**Veldman**”) at para 26.

requires that legislative enactments must “give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed”.¹⁷

16. As a result of these concerns, the law contains a strong presumption against retrospectivity. This is a presumption against a statute being construed as having retrospective effect (in the sense of “extinguishing”, “taking away” or “impairing” a “vested right acquired under existing laws”) unless the statute provides otherwise or its language “clearly shows such a meaning”.¹⁸
17. The general rule is that “in the absence of express provision to the contrary, statutes should be considered as affecting future matters only” (our emphasis).¹⁹ Statutes should, if possible, be interpreted so as not to take away rights actually vested at the time of their promulgation.²⁰

iv) *Validity of retrospective legislation*

18. Even though it may be undesirable, there is nothing in our Constitution which prohibits Parliament from passing retroactive or retrospective legislation. Nor is there anything internal in the rule of law which renders retrospective legislation per se unconstitutional.²¹

¹⁷ Veldman at para 26.

¹⁸ *Katzenellenbogen Ltd v Mullin* 1977 (4) SA 855 (A) at 884A; *National Director of Public Prosecutions v Carolus and Others* 2000 (1) SA 1127 (SCA) at para 31; Veldman (ibid) at para 26.

¹⁹ Veldman at para 27, quoting from *Curtis v Johannesburg Municipality* 1906 TS 308 at 311 with approval. In *Du Toit v Minister of Safety and Security and Another* 2009 (1) SA 176 (SCA) at para 10, it was explained that the presumption against retrospectivity “may be rebutted, either expressly or by necessary implications, by provisions or indications to the contrary in the enactment under consideration”.

²⁰ Veldman at para 27, quoting from *Curtis v Johannesburg Municipality* 1906 TS 308 at 311 with approval.

²¹ *Pienaar Brothers (Pty) Ltd v Commissioner, South African Revenue Service and Another* 2017 (6) SA 435 (GP) (“*Pienaar Brothers v SARS*”) at para 102.

19. The question is “what is the standard by which the constitutional validity of retrospective legislation is judged?” The constitutional validity of retrospective legislation must be judged with reference to the standards of review laid down by our courts when challenging the constitutional validity of statutes. There are three such standards:²²

19.1. The first is the rationality test. This standard applies to all legislation under the rule of law entrenched in s 1(c) of the Constitution;²³

19.2. The second is the more exacting standard of reasonableness or proportionality. This applies when legislation limits a fundamental right in the Bill of Rights.²⁴

19.3. The third is an intermediate standard that applies in only one context — when assessing whether a law violates the prohibition of arbitrary deprivation of property in s 25(1) of the Constitution. A deprivation is arbitrary within the meaning of s 25 if it is made “without sufficient reason”. This standard is more exacting than the rationality standard

²² *Pienaar Brothers v SARS* at para 80 – 81.

²³ In *Ronald Bobroff & Partners Inc v De La Guerre* 2014 (3) SA 134 (CC) at para 7 (“**Ronald Bobroff & Partners Inc**”), the Constitutional Court described the rationality enquiry as follows:

“A rationality enquiry is not grounded or based on the infringement of fundamental rights of the Constitution. It is a basic threshold enquiry, roughly to ensure that the means chosen in legislation are rationally connected to the ends sought to be achieved. It is a less stringent test than reasonableness, a standard that comes into play when fundamental rights under the Bill of Rights are limited by legislation.

²⁴ In *Ronald Bobroff & Partners Inc* at para 8, the Constitutional Court described this enquiry as follows:

“In those cases the courts have a more active role in safeguarding rights. Once a litigant has shown that legislation limits fundamental rights, the limitation may only be justified under s 36 of the Constitution. Section 36 expressly allows only limitations that are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.”

in terms of s 1(c) of the Constitution, but less exact than the reasonableness standard in terms of s 36(1) of the Constitution.

20. In *Pienaar Brothers*, the court summed up this approach as follows:

“The question then is which of these standards applies when a retrospective law is enacted. It was submitted that the answer was quite clear: if the law limits a fundamental right, the exacting 'reasonableness' standard applies. If the law permits a 'deprivation of property' under s 25(1) of the Constitution, the intermediate standard of 'sufficient reason' applies. If, however, the law does not infringe upon the Bill of Rights, the question is merely whether it passes muster under s 1(c) of the Constitution; then the basic 'rationality' standard applies. I agree with this contention.”²⁵

SECTIONS 6A, 7A AND 8A ARE NOT RETROSPECTIVE IN EFFECT

i) The President's reservations - Sections 6A and 7A of the CAB

21. Section 6A of the CAB entitles the author of literary or musical works to receive equitable remuneration, or a fair share of the royalty received by a copyright owner, subject to any agreement to the contrary.²⁶ Section 7A confers comparable rights on authors of visual artistic works.²⁷

22. An earlier version of the CAB (prior to its amendment and referral to this Court) contained provisions that expressly stated that sections 6A, 7A and 8A would operate with retrospective effect. In particular, section 6A(7)(a) provided that:

“6A(7)(a) This section applies to a literary or musical work where copyright in that work was assigned before the commencement date of the Copyright Amendment Act, 2019, if that literary or musical work-

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

²⁵ *Pienaar Brothers v SARS* at para 82.

²⁶ S 6A(2)(b) of the CAB.

²⁷ S 7A(2) & (3) of the CAB.

(ii) is still exploited for profit.”²⁸

23. Sections 7A(7)(a)²⁹ and 8A(5)(a) of the earlier version of the CAB contained materially similar wording regarding visual artistic works and audiovisual works.
24. In response to the President’s concerns about the retrospective application of the amendments (which were set out in his referral to the Speaker of Parliament), Parliament deleted sections 6A(7)(a), 7A(7)(a) and 8A(5)(a).³⁰ These provisions do not appear in the version of the CAB (Bill 13F-2017) that is before this Court.³¹

²⁸ The earlier, inapplicable version of the CAB is attached as Annexure B to the Notice of Referral to the Constitutional Court, Part A Record, p 17 – 91. The correct version of the CAB (version B13F-2017) is at Part B Record, p 1267 – 1310. This is the version of the Bill referred to by the President in the body of his referral to this Court: See Notice of Referral to Constitutional Court, Part A Record, p 1.

²⁹ Section 7A(7)(a) of the earlier version of the CAB provided that:

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

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

(ii) is still exploited for profit.”

Section 8A(5)(a) of the original version of the CAB provided that:

“8A(5)(a) This section applies to an audiovisual work where copyright in that work was assigned before the commencement date of the Copyright Amendment Act, 2019, if that audiovisual work-

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

(ii) is still exploited for profit.”

³⁰ Notice of Referral to Constitutional Court, Part A Record, p 2 - 3, para 8.1.1 – 8.1.2; President’s Heads of Argument, p 16, para 33.

³¹ The President’s Heads of Argument acknowledge this fact (President’s Heads of Argument, p 16, para 33). However, in paragraph 40 of the President’s Supplementary Heads of Argument (filed on 20 March 2025) the submissions appear to be based on an earlier, outdated and inapplicable version of the CAB. In particular, paragraph 40 states that “*The President adds only that, as at April 2023, the Department of Trade, Industry and Competition (“DTIC”) was of the view that all references to the retrospective nature of royalties contained in sections 6A, 7A and 8A of the CAB were removed following the referral to the Speaker on 16 June 2020. As is evident from the contents of CAB, this is not the case and sections 6A(2) and (7), 7A(2) and (7), and 8A(5) of the CAB continue to apply to copyrighted works where the copyright was assigned before*

25. Despite this deletion, the President contends that sections 6A and 7A (particularly sub-sections 6A(2)(a) and 7A(2)(a)) still operate retrospectively.

Section 6A(2)(a) provides that:

“(2) Notwithstanding—

- (a) the assignment of copyright in a literary or musical work; or
- (b) the authorization by the author of a literary or musical work of the right to do any of the acts contemplated in section 6,

the author shall, subject to any agreement to the contrary, be entitled to receive equitable remuneration, or a fair share of the royalty received, for the execution of any of the acts contemplated in section 6.”

26. The “royalty” is defined in section 6A(1) of the CAB as the “gross profit made on the exploitation of a literary work or musical work by a copyright owner or a person who has been authorised by the author to do any of the acts contemplated in section 6.”

27. Sections 7A(1) and (2)(a) of the CAB contain almost identical wording in relation to equitable remuneration or a share in royalties regarding visual artistic works.³²

the commencement date of the Amendment Act. The President is not satisfied that the insertion of subsections 7A(7)(c), 7A(7)(c) and 8A(5)(c)48 cure the unjustifiable infringement of section 25(1) of the Constitution.” (our emphasis) This error has been corrected in the new version of the President’s Supplementary Heads of Argument (filed on 27 March 2025), in which the sentences underlined, above, have been deleted.

³² Section 7A(1) and (2) provide that:

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

(2) Notwithstanding—

- (a) the assignment of the copyright in a visual artistic work; or
- (b) the authorization by the author of a visual artistic work of the right to do any of the acts contemplated in section 7,

the author shall be entitled to receive equitable remuneration, or to share in the royalty received, for the execution of any of the acts contemplated in section 7.

28. The President contends that these sections 6A(2)(a) and 7A(2)(a) are retrospective in effect, for the following reasons:

28.1. The sections entitle an author to share in the royalty “notwithstanding the assignment of the copyright [in a work]”. The President points out that this wording does not confine authors’ entitlement to royalties for works in respect of which the copyright is only assigned after the commencement of section 6A of the CAB. Rather, “*it applies to any work of which the copyright has been assigned, whenever [that assignment] might have occurred*”.³³

28.2. Given this ambiguity, the President asserts that “*the new section 6A still applies to any work of which the copyright has been assigned, even if it occurred before the enactment of the new section 6A.*”³⁴

29. As we demonstrate below, the President’s argument is unsustainable. Properly interpreted, sections 6A(2)(a) and 7A(2)(a) apply only to works in respect of which copyright is assigned after the commencement of these provisions.

ii) The proper interpretation of sections 6A(2) and 7A(2)

30. The wording of sections 6A(2)(a) and 7A(2)(a), being “Notwithstanding the assignment of copyright in a [work]”, is ambiguous. It could be interpreted in two ways:

³³ Notice of Referral to Constitutional Court, Part A Record, p 3, para 8.1.3 – 8.1.4; President’s Heads of Argument, p 16 – 17, para 34 – 35.

³⁴ Notice of Referral to Constitutional Court, Part A Record, p 3, para 8.1.5.

30.1. First, the provisions can be read as applying to all assignments³⁵ of copyrights in such works, regardless of whether an assignment was made before or after the commencement of sections 6A and 7A of the CAB (**"the retrospective interpretation"**); or

30.2. Second, the provisions can be read as only applying to assignments³⁶ of copyrights in such works made after the commencement of sections 6A and 7A (**"the prospective interpretation"**).

31. The prospective interpretation must be preferred, for the following reasons:

31.1. The presumption of retrospectivity stipulates that statutory provisions must be construed to operate prospectively, unless there are express provisions to the contrary.

31.2. There are no express provisions in the CAB stating that it must apply retrospectively. Sections 6A(2)(a) and 7A(2)(a) are ambiguous, at best.

31.3. Sections 6A(7), 7A(7) and 8(5) expressly stated that the provisions of the CAB must apply to assignments of copyright made before the

³⁵ Section 22(1) of the Copyright Act stipulates that copyright may be transferred, inter alia, by assignment. It provides:

"22 Assignment and licences in respect of copyright

(1) Subject to the provisions of this section, copyright shall be transmissible as movable property by assignment, testamentary disposition or operation of law."

³⁶ Section 22(1) of the Copyright Act stipulates that copyright may be transferred, inter alia, by assignment. It provides:

"22 Assignment and licences in respect of copyright

(1) Subject to the provisions of this section, copyright shall be transmissible as movable property by assignment, testamentary disposition or operation of law."

commencement of the CAB, but these have been deleted by Parliament.

31.4. Therefore, the presumption against retrospectivity applies and the provisions must be interpreted as applying to future matters only.

iii) *Even if sections 6A and 7A apply retrospectively, they are valid*

32. For purposes of these proceedings, ReCreate submits that, even if sections 6A(2)(a) and 7A(2)(a) were to be interpreted as applying retrospectively, they would nonetheless be valid.

33. As set out above, the standard used to determine whether the retrospective legislation is valid (in circumstances where it results in the deprivation of property under section 25 of the Constitution) is whether there is "sufficient reason" for such deprivation.

34. The President submits that sections 6A(2)(a) and 7A(2)(a) result in the imposition of a retrospective clause (entitling authors to royalties or remuneration) being read into all existing copyright agreements by operation of law. He contends that this would constitute an arbitrary deprivation of the property of copyright owners (i.e. a deprivation without sufficient reason) for the following reasons:³⁷

34.1. He contends that the retrospective application of the sections is based on the assumption that authors and artists had little or no bargaining

³⁷ Founding Affidavit, President's *Ex Parte* application, Part A Record, p 169, para 50.3.

power in the past and were accordingly pressured to let go of their copyright at prices below their value.

34.2. However, the President argues, this assumption does not hold for all past copyright agreements. Thus he concludes, the imposition of a retrospective clause in all past agreements by operation of law is inappropriate.

35. The retrospective application of sections 6A and 7A of the CAB is not arbitrary. There is sufficient reason for it. In addition, there are provisions that ensure that the rights of the copyright owner will be protected. This is so for the following reasons:³⁸

35.1. First, the degree of the restriction is important. The court in *Mkontwana* (quoted above) stated that “*deprivation depends on the extent of the interference with or limitation of use, enjoyment or exploitation.*”

35.2. The deprivation resulting from sections 6A and 7A is limited in extent. In this regard:

35.2.1. The deprivation does not embrace “all incidents of ownership” of the copyright. The copyright owner retains the exclusive rights listed in sections 6 and 7 of the Copyright Act. These include the exclusive right to “do or authorise the doing” of a number of acts, including reproducing the work,

³⁸ This analysis is conducted with reference to the considerations set out in the *FNB* case, listed above.

publishing an unpublished work, performing the work in public, broadcasting the work, and making an adaptation of the work. Sections 6A and 7A do not prevent the owner of the copyright from doing or authorising these acts. They only entitle the author, subject to an agreement to the contrary, to receive equitable remuneration or a fair share in the royalty received, for the execution of the above acts. Thus, the extent of the deprivation is limited.

35.2.2. In addition, the extent of the deprivation is also limited because sections 6A and 7A do not provide the author with an open-ended right to remuneration or shares in the royalty. The provisions entitle them to receive “equitable” remuneration or a “fair” share in the royalty. This means that if an author had received equitable remuneration or a fair share in the royalty before the commencement of the CAB, they would not be entitled to receive same after the commencement of the CAB.

35.2.3. The parties must agree, in writing, the author’s “fair” share of the royalty or “equitable” remuneration.³⁹ If they cannot agree, the matter may be referred to the Copyright Tribunal to make a determination.⁴⁰ It is highly unlikely that the

³⁹ S 6A(3) and s 7A(3) of the CAB.

⁴⁰ S 6A(4), 7A(4) & 8A(3) of the CAB.

Tribunal will undo existing agreements relating to future work where the terms are fair between the contracting parties.

35.3. Second, an author is entitled to deviate from the default position of being entitled to equitable remuneration by entering into an agreement to that effect.⁴¹ Thus, if it is more advantageous for the author to assign the copyright in a work to a third party without retaining the right to royalties or remuneration, the author is free to do so.

35.4. Third, the limited deprivation must be contrasted with the important purpose served by sections 6A and 7A.

35.4.1. If one considers the relationship between the purpose of the deprivation and person whose property is affected, in this instance, it is the historically powerful entity (i.e. the owners of copyright) as opposed to the historically powerless entity, (i.e. the authors) whose ownership of property is subject to restriction. These provisions are aimed at protecting authors who, given their relatively poor bargaining position, sold the copyright in their works for far less than it was worth. The CAB seeks to correct for this historical imbalance.

35.4.2. These provisions also incentivise creativity and innovation by allowing authors to receive royalties or remuneration for work when they no longer own the copyright.⁴² The fact that

⁴¹ S 6A(2)(b) of the CAB.

⁴² ReCreate's Founding Affidavit for admission as amicus curiae, Part A record, p 458, para 17.7.1.

an author can still earn royalties in work they no longer own serves as motivation for authors to keep creating new works, knowing that they will receive this benefit for every new creative work that they produce. This reflects the objectives of the CAB, which include promoting science, innovation and useful creative activities.

35.5. Thus, in terms of the test set out in the FNB case, any deprivation of property that results from sections 6A and 7A is done with sufficient reason. On this basis, any retrospective operation of these provisions is valid.

36. The President also argues that the retrospective application of the provisions is contrary to the principle of legality, in that legislation is presumed to be public, clear, prospective, and generally stable. Even if the provisions are interpreted to apply retrospectively this would not be contrary to the principle of legality for the following reasons:

36.1. Even if retrospective in effect, they are nonetheless valid because they are underpinned by “sufficient reason”.

36.2. Second, the concept of legislative provisions or legal developments operating retrospectively is not novel in South African law. In this respect, we point out that:

36.2.1. There are a number of examples of legislation affecting existing contracts by operation of law. One such example is the National Minimum Wage Act 9 of 2018. The equitable

remuneration/fair share in the royalty provisions in the CAB are comparable to the introduction of minimum wage in certain sectors, which has a direct impact on the contractual relationships between the employers and employees in such sectors. In terms of the National Minimum Wage Act, the national minimum wage takes precedence over any contrary provision in any contract, collective agreement, sectorial determination or law (except a law amending that Act).⁴³

36.2.2. Our courts have always developed common law with retrospective effect, despite the fact that the development may sometimes change the common law altogether, or introduce a new rule.⁴⁴ The Constitutional Court recognised these implications of development of the common law, and for the first time accepted in *Masiya*⁴⁵ that the court may, by exception, limit their development of the common law to operate only with prospective effect.

36.2.3. Under the doctrine of objective constitutional validity, an unconstitutional law is rendered invalid with full retrospective effect from the outset.⁴⁶ This default rule is however subject

⁴³ S 4(6) of the National Minimum Wage Act.

⁴⁴ *Pienaar Brothers (Pty) Ltd v Commissioner, South African Revenue Service and Another* 2017 (6) SA 435 (GP) at para 69, citing *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) at para 16; *Mukaddam v Pioneer Foods (Pty) Ltd and Others* 2013 (5) SA 89 (CC) at para 68.

⁴⁵ *Masiya v Director of Public Prosecutions, Pretoria and Another (Centre for Applied Legal Studies and Another, Amici Curiae)* 2007 (5) SA 30 (CC) at para 51.

⁴⁶ *Pienaar Brothers (Pty) Ltd v Commissioner, South African Revenue Service and Another* 2017 (6) SA 435 (GP) at para 69, citing *Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd and Others* 2015 (5) SA 370 (CC) at paras 13 – 20.

to the wide discretion vested in the courts by s 172(1)(b) of the Constitution, to limit or suspend the retrospective operation of the declaration of invalidity of a law.⁴⁷

37. Therefore, the President's arguments are unsustainable.

iv) Section 8A

38. Section 8A entitles a performer to receive equitable remuneration or to share in the royalty received by the copyright owner of which equitable remuneration or share shall be determined by a written agreement.⁴⁸

39. It appears that the President's concerns relating to section 8A were based on the inclusion of section 8A(5) of an earlier version of the CAB. This provision expressly stated that section 8A applied retrospectively. As is explained above, this section has been deleted and does not appear in the version of the CAB that is before this Court. Therefore, there are no remaining grounds of complaint against section 8A in the Referral.

SECTIONS 12A TO 12D ARE CONSTITUTIONALLY SOUND

40. The provisions of sections 12A to 12D will extend the Copyright Act's fair dealing provisions, and create new limitations and exceptions under the rubric of "fair use".

⁴⁷ *Pienaar Brothers (Pty) Ltd v Commissioner, South African Revenue Service and Another* 2017 (6) SA 435 (GP) at para 69, citing *Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa* 1995 (4) SA 877 (CC) para 107

⁴⁸ S 8A(1) & (2) of the CAB.

41. The combined effect of those new limitations is that there are a wider range of purposes for which copyright works may be used without such use constituting an infringement, and that fair use would apply to all categories of works.
42. Far from infringing rights, the fair use provisions of the CAB would serve to respect, protect, promote and fulfil a range of rights.
43. Without adequate limitations and exceptions, copyright by its nature limits certain rights. Perhaps the most obvious of these is the right to basic education, the right to further education, the best interests of the child principle, and the right to freedom of expression (including the right to receive and impart ideas).
44. Equally, as this Court held in *Blind SA*,⁴⁹ the absence of adequate exceptions may violate the right to equality, which is inextricably linked with the right to dignity.
45. Accordingly, it is necessary for appropriate exceptions and limitations to be introduced into the Act. Failing which, the Act as it stands would be deficient and fall foul of the limitations analysis in section 36. This is the purpose for which the extended fair use provisions are employed.
46. Fair use is a flexible and lawful approach employed in many countries.⁵⁰ Notably, the United States has had Fair Use codified in its copyright law for 48 years, and it attracts the largest and wealthiest publishing, entertainment and

⁴⁹ *Blind SA v Minister of Trade, Industry and Competition and others* 2023 (2) BCLR 118 (CC) para 66-71

⁵⁰ See Samtani et al 'Third Joint Academic Opinion on the South African Copyright Amendment Bill [B13D-2017]' ("Third Joint Academic Opinion"), and FN 67 J Band and J Gerafi, Fair Use/Fair Dealing Handbook (May 7, 2013) available at SSRN: <https://ssrn.com/abstract=2333863>

information technology industries in the world.⁵¹ Indeed, fair use contributes trillions to the United States' economy.⁵²

47. Far from presenting constitutional challenges then, the move to fair use is a legitimate policy decision for the promotion of constitutional rights. The record makes the need for such changes, or at the very least the rationality of them, clear. By way of example, the Portfolio Committee on Trade and Industry received a submission from Professor Kristin Krauss of the University of South Africa, highlighting that the current copyright law is "extremely restrictive and prohibitive", and "non-functional". Professor Krauss writes that their scholarly work is hampered daily by the lack of exceptions to address the needs of the digital era, and that the provisions for fair use are "long overdue".⁵³ Julia Reda, an affiliate of the Berkman Klein Centre for Internet & Society at Harvard University, made a similar submission.⁵⁴ There are several other examples of submissions expressing the need or rationality of the move toward fair use in our law.⁵⁵

48. We deal with the notable features of each of sections 12A to 12D in turn.

⁵¹ ReCreate South Africa "Written Submission in Support of Copyright Amendment Bill [B13D-2017], 26 January 2023", ("ReCreate Submissions, 26 January 2023") p8

⁵² ReCreate Submissions, 26 January 2023; p8-9, FN 12 and 13

⁵³ Letter from Prof Krauss "Re: Copyright Amendment Bill [B-13B of 2017] – Submission, Record Part B, Vol 45, p 4902

⁵⁴ Email from Julia Reda, Record Part B, Vol 45, p 4905

⁵⁵ See for example email from Aysha Patel of the University of the Witwatersrand "Comments on select sections of the Copyright Amendment Bill", dated 7 July 2021, Record Part B, Vol 45, p 4938; Email from Cory Doctorow of the Electronic Frontier Foundation "In relation to the Copyright Amendment Bill [B13B-2017], dated 7 July 2021, Record Part B, Vol 45, p 4945

The fair use clause in section 12A

49. Section 12A, which provides the main purposes that constitute fair use, has three notable features.

50. First, section 12A introduces permissible use for:

50.1. “scholarship, teaching and education”;

50.2. “comment, illustration, parody, satire, caricature, cartoon, tribute, homage or pastiche”;

50.3. “preservation of and access to the collections of libraries, archives and museums”; and

50.4. “ensuring proper performance of public administration”.

51. Second, section 12A creates a measure of flexibility by stating that uses “such as” the listed uses do not constitute an infringement of copyright.

52. Third, section 12A introduces a four-factor test for determining whether an act constitutes fair use. The test provides that the determination of whether an act done in relation to a work constitutes fair use shall take into account all relevant factors, including the four enumerated ones.

Specific exceptions

53. Section 12B provides specific exceptions that relate to all works.

54. Examples include quotations, reproduction in the press or by broadcasting of a lecture, address or other work of similar nature, reporting of current events,

translation of works (for non-commercial purposes), and the making of personal copies for personal use.

Transient or incidental copies or adaptations

55. Section 12C allows for temporary reproduction and adaptation for limited purposes provided the acts have no commercial significance.

Exceptions for educational purposes

56. Section 12D provides for reproduction for purposes of educational and academic activities.
57. Blind SA deal extensively with these exceptions in their written submissions (dated 15 November 2024). To avoid repetition, we do not address these exceptions here.

Sections 12A to 12D do not create arbitrary deprivations of property

58. The President expresses a concern that sections 12A to 12D violate section 25(1) of the Constitution, in that they constitute an arbitrary deprivation of property.
59. ReCreate submits that the concern is misplaced.
60. The President, under the rubric of submitting that sections 12A-D (and 19B and C) may constitute arbitrary deprivations of property, contends that this Court is tasked with determining whether the exceptions are “necessary to align with [the] Copyright Act and international law”.⁵⁶ But that is not so. We

⁵⁶ President’s Heads of Argument, 8 November 2024, p.32, para 69

have already outlined the correct test: the question is squarely whether there is a deprivation and, if there is, whether there is sufficient reason to render it non-arbitrary.

61. To the extent that the fair use provisions deprive copyright owners of any right in their property, the deprivation is not arbitrary. We say so for three reasons.

62. **First**, any deprivation has a legitimate and indeed a constitutionally important purpose.

62.1. A deprivation that promotes fundamental constitutional rights is plainly for sufficient reason. That is precisely the reason for any deprivations that may be implicated by sections 12A to 12D.

62.2. The provisions of the CAB on fair use are designed to serve a similar purpose to the public health safeguards in patent law.

62.3. The latter are designed to ensure that patent law is not a barrier to access to medicines.

62.4. Equally, the CAB is designed to ensure that copyright is not a barrier to education, satire, comment, illustration and the similar uses articulated in section 12A.

62.5. In its design, the fair use provisions of the CAB advance the right to freedom of expression and the rights to education, in section 16 and 29 of the Constitution, respectively.

63. **Second**, the nature of the property, being incorporeal, means the threshold for sufficient reason is lower.⁵⁷

63.1. For the reasons set out above, and in light of the critical constitutional purposes advanced by the CAB, a high threshold for sufficient reason would also be met.

63.2. However, for completeness, ReCreate highlights that the threshold is in any event lower, and so the scope for a constitutionally sound deprivation is wider.

63.3. We submit then that the constitutional goals at the core of the proposed new exceptions and fair use provisions are manifestly sufficient reasons to render any deprivation of incorporeal rights justifiable.

64. **Third**, the CAB strikes an appropriate balance between the exceptions and limitations of copyright protections, on the one hand, and the rights of the property holder, being the copyright author and/or owner, on the other.

64.1. Fair use is not a license to infringe the rights of copyright holders.

64.2. Research placed before Parliament by ReCreate demonstrates that fair use provisions and flexible limitations benefit innovation and economies, without harming traditionally copyright intensive industries.⁵⁸

⁵⁷ FNB, at para 57.

⁵⁸ ReCreate Submissions, 26 January 2023, p 9-11, FN 19 to 24, Record Part B, Vol 74, p 8109 to 8112.

64.3. Section 12A(a) provide that in addition to uses specifically authorized, “fair use in respect of a work or the performance of that work, for purposes such as” those listed in the section do not infringe copyright in that work.

64.4. The term “such as” is given meaning by the listed purposes and the four-factor test articulated in section 12A(b). The four-factor test is inherently designed to respect commercial interests of copyright holders. It always takes into account:

64.4.1. The nature of the work in question;

64.4.2. The amount and substantiality of the part of the work affected by the act in relation to the whole of the work;

64.4.3. The purpose and character of the use (including “whether it is of a commercial nature or for non-profit research, library or educational purposes; and

64.4.4. The substitution effect of the act upon the potential market for the work in question.

64.5. Avoiding commercial prejudice is also built into other aspects of the limitations. For example, section 12B(e) provides that the translation of a work by a person giving or receiving instruction does not infringe copyright in that work, provided that the translation is, among other things, done for non-commercial purposes.

65. In the application by the Composers, Authors and Publishers Association and others (“**the seventh amicus**”) for leave to be admitted as an *amicus curiae*, it is alleged that provisions of the CAB are “overly broad and vague”.⁵⁹ It is contended also that the new exceptions to be introduced will “lead to legal and commercial uncertainty and destroy the ability of creators and performers to derive material benefits from their works and performances.”⁶⁰
66. The President offers a similar critique. He contends that the criteria utilised to determine new exceptions is not provided for in the CAB and that this uncertainty renders section 12A a potentially arbitrary deprivation of property.⁶¹
67. We submit that is not so.
68. In *Affordable Medicines Trust*,⁶² this Court held that laws must be written in a clear and accessible manner, and that “*what is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws.*” (our emphasis)
69. Building on that principle, writing for a unanimous Court in *Qwelane*,⁶³ Majiedt J held:⁶⁴

“Mere shoddy draftsmanship, impreciseness and opacity are, however, not in themselves conclusive. In order to reach a point of “a

⁵⁹ Composer’s application, founding affidavit of Stephen John Hollis, (“Hollis FA”) p 16, para 45, Record Part A, Vol 7, p620

⁶⁰ Hollis FA p18, para 50, Record Part A, Vol 7, p622

⁶¹ President’s supplementary HOA, p24-25, para 47.3-47.4

⁶² *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) para 108

⁶³ *Qwelane v South African Human Rights Commission and another* 2021 (6) SA 579 (CC) (“*Qwelane v SAHRC*”)

⁶⁴ *Qwelane v SAHRC* para 151

constitutionally fatal level of vagueness . . . the provision [must be] utterly meaningless and unworkable". If, applying the ordinary rules of construction, there are words or phrases in an impugned section or other related sections that allow for a constitutionally viable meaning, effect should be given to that interpretation. The lack of reasonable certainty has serious concomitant effects. It erodes the ability of ordinary citizens to exercise their agency and autonomy when they express *themselves*. *It undermines the norm-changing impact of the law; and undermines the deterrent goal of hate speech prohibitions.*"

70. The four-factors test is a form of future-proofing the Act against what the legislature cannot know or anticipate about what types of uses may require protection against copyright claims.
71. The four-factors test is also a species of proportionality. There is nothing different, in principle, between that test, which requires incremental assessment and development, and the limitations analysis provided in section 36 of the Constitution.
72. Both require consideration of whether an ostensible infringement of a right constitute a non-violation in the circumstances. Both also set out factors that will always be taken into account in the relevant consideration. Contrary to the President's assertion, the criteria to be utilised by the Courts in determining whether a use is fair are provided for in the CAB.
73. That there is some scope for balancing and judgment does not render the law impermissibly vague. Nor does it mean that a potential deprivation would necessarily be arbitrary. A law may in appropriate circumstances be framed in less than perfectly certain terms. In *Savoi v NDPP*⁶⁵ this Court held that "*there is some intrinsic worth in laws being framed in general terms*". The Court

⁶⁵ *Savoi and others v National Director of Public Prosecutions and another* 2014 (5) SA 317 (CC) ("*Savoi v NDPP*")

quoted with approval the Supreme Court of Canada in *R v Nova Scotia Pharmaceutical Society*,⁶⁶ which held that “laws that are framed in general terms may be better suited to their objectives”.⁶⁷

74. ReCreate submits that in an exponentially developing digital era, it is apt to include flexibility in the fair use provisions in the CAB, particularly in light of the specific constitutional imperatives which the new exceptions proposed aim to secure.

75. The seventh amicus curiae highlights certain aspects of the CAB, one in section 12B and one in section 12D, which it contends are examples of the alleged impermissible vagueness and lack of clarity in the CAB.

76. The contentions do not withstand scrutiny. We deal with them briefly and for the purpose of providing a useful example of the flaws in the general concerns about vagueness or uncertainty offered by opponents of the CAB.

77. First, the seventh amicus says that section 12B(1)(e) of the CAB “allows translations to be made of any work without permission of the copyright owner and to communicate the translation to the public by placing it on the open internet”.⁶⁸

77.1. However, the seventh amicus’ concern must be placed in the context of the CAB as a whole. The provisions of section 12B(1)(e) provide that copyright in a work shall not be infringed by:

⁶⁶ *R v Nova Scotia Pharmaceutical Society* (1992) 93. D.L.R (4th) 36

⁶⁷ *Savoi v NDPP* para 17

⁶⁸ Hollis FA, p20, para 52.3, Record Part A, Vol 7, p624

“the translation of a work by a person giving or receiving instruction: Provided that such translation is:

- (i) done for non-commercial purposes;
- (ii) used for personal, educational, teaching, judicial proceedings, research, the furtherance of language and culture, or professional advice purposes only: Provided that such use shall be compatible with fair practice; and
- (iii) communicated to the public for non-commercial purposes.”

(our emphasis)

77.2. Accordingly, read in context, the qualification that the translation may be done for a non-commercial purpose, is one of a number of conjunctive requirements, including that the translation is done by a person giving or receiving instruction, for certain specified purposes. and communicated to the public only for non-commercial purposes.

77.3. We note that one permissible purpose is the furtherance of language and culture. Section 30 of the Constitution protects the right to “use the language and to participate in the cultural life” of ones’ choice. Like much of the framework of the new exceptions then, the exception for translations promotes rather than detract from the Constitution.

77.4. We submit there is nothing inherently uncertain about that provision, read in context.

77.5. It certainly does not meet the threshold of meaninglessness which this Court has said is at the core of the doctrine of vagueness.

77.6. Equally, the provision is not a license to simply translate a work and broadcast the translation to the world without limitation. Clearly, the translation and use of that translation is limited and circumscribed by the conjunctive requirements, which are designed to advance constitutional rights to education and expression, and to participation in language and culture.

78. Second, the seventh amicus contends that section 12D is not clear as to what “commercial purposes” means, and whether the exception for educational uses applies only to “direct commercial purposes” or also to “indirect commercial purposes”.

78.1. Again, the implication is that the term “commercial purposes” is so uncertain as to render the legislation incompatible with the rule of law.

78.2. But there is nothing uncertain about the term.

78.3. “Commercial” has a clear ordinary meaning. The Cambridge Dictionary defines the word as:

“related to making money by buying and selling things”.⁶⁹

78.4. That definition accords with the purpose of the CAB and the exception for educational purposes.

78.5. That a hard case may arise in which it could be unclear whether the use is permissible, or whether a use does or does not relate to making

⁶⁹ The Collins dictionary has the almost identical definition: “‘Commercial’ means involving or relating to the buying and selling of goods.”

money by buying or selling things, does not render the legislation meaningless so as to be impermissibly vague.

78.6. No legislation permits of perfect clarity. Hard cases are inevitable, but the possibility of hard cases in which the limits of certain concepts may need to be delineated does not, by itself, render legislation meaningless or impermissibly vague.

79. To the extent necessary then, the courts if called upon to do so will give meaning to the proviso that the use under section 12D not be for commercial purposes. We submit there will be no difficulty in doing so.

80. The President expresses two concerns that are simply not borne out by the provisions of the CAB. He asks the Court to determine whether or not there is an unconstitutional infringement of the rights of copyright holders to the free assignment and disposal of their property, and asserts that:⁷⁰

80.1. the determination of whether an exception is an unconstitutional infringement of rights cannot be made solely on the basis of section 12A(a) and 12B(1) considerations; and

80.2. the legislature “may have presumed that the courts will consider the section 12A(b) factors when determining new fair use exceptions but this is not explicit”.

81. The President appears to misread the provisions of section 12A. In particular, section 12A(b) is express, by use of the provision “shall”, that the enumerated

⁷⁰ President's heads of argument, 20 March 2025, para 47.3

factors must be taken into account.⁷¹ There are no circumstances in the CAB which suggest that the ordinary peremptory meaning of “shall” is negated.

82. Equally, the provisions make it clear that the list is non-exhaustive. The President’s concern that additional factors may require consideration is thus misplaced. Where necessary, the Courts will determine whether use is fair with reference to the Constitution, the purposes of the amended Act, and the scheme of section 12A.

83. The President also appears to misread aspects of section 12B of the CAB. For example, the President submits that the proposed new section 12B(1) would allow a person to “enter a bookstore and photocopy an entire book for the stated purpose of “personally” reading the work”.⁷²

83.1. However, section 12B(1)(h), which permits personal copies, is qualified by the fact that such use “shall be compatible with fair practice”.

83.2. Section 12B(2) amplifies the proper understanding of this qualification, by noting that permitted personal use for purposes of section 12B(1)(h) would include “the making of a back up copy, time or format-shifting, or making a copy for purposes of storage”.

83.3. In the circumstances, the example offered by the President placed an untenable and absurd construction on the provisions of section 12B.

⁷¹ *Pio v Franklin NO and Another* 1949 (3) SA 442 (C) at 451; *Motloung and Another v The Sheriff, Pretoria East and Others* 2020 (5) SA 123 (SCA) para 11; *S v Moqhoba* (R282/2016) [2017] ZAFSHC 10 (5 January 2017) para 8

⁷² President’s heads of argument, 20 March 2025, para 47.3. The President appears to refer to section 12B(1)(i) in error, and the reference must be to 12B(1)(h)

Those provisions could never be construed to allow someone to walk into a bookstore and copy a book they have not purchased.

84. Even if the President's interpretation of section 12B(1)(h) was tenable, the Court will not favour it because a constitutionally sound interpretation is readily available and can easily be ascribed to the provisions of section 12B(1)(h), and indeed to section 12B as a whole.⁷³
85. The President's referral falls far short of explaining why no constitutionally sound construction is available. Indeed, that failure pervades the entirety of the critique of the CAB and is at the core of the reason that the Court ought to find that its provisions are constitutionally sound.

Sections 12A to 12D accord with international law

86. The President expresses concern as to whether sections 12A to 12D accord with international law. ReCreate submits there is no conflict.
87. We highlight that the Berne Convention protects the scope for each party to the treaty to govern copyright. Article 5(2) provides that:⁷⁴

"The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed."

⁷³ *Hyundai* para 23; See also *Democratic Alliance v Speaker of National Assembly* 2016 (3) SA 487 (CC) para 33; *Richter v Minister of Home Affairs and others* 2009 (3) SA 615 (CC) para 62-63; *S v Singo* 2002 (4) SA 858 (CC)

⁷⁴ Berne Convention, Article 5(2), Record Part A, Vol 10, p1005

88. The President contends that the purported element of uncertainty in sections 12A to 12D would violate the Berne Convention's principle of national treatment. With respect, the contention is difficult to understand. The principle of national treatment requires that South Africa accord to nationals of other member states the same copyright protection it accords to South African citizens.⁷⁵ There is nothing in the provisions of sections 12A to 12D that violates that requirement.

89. The President is also concerned that the fair use provisions in section 12A, read with specific exceptions in 12B, 12C and 12D, would violate the "three-step test" and undermine the minimum protection that South Africa is obliged to provide for non-South African works.

90. The three-step test has its origin in Article 9(2) of the Berne Convention. It is incorporated in Articles 10(1) and (2) of the WIPO Copyright Treaty,⁷⁶ Article 16(2) of the WIPO Performances and Phonograms Treaty,⁷⁷ and Article 11 of the Marrakesh Treaty.⁷⁸

91. Article 9 of the Berne Convention provides that:⁷⁹

"(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.

(2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the

⁷⁵ Berne Convention, Article 5(1), Record Part A, Vol 10, p1005.

⁷⁶ Record Part A, Vol 10, p1063

⁷⁷ Record Part A, Vol 10, p1088

⁷⁸ Record Part A, Vol 10, p1100

⁷⁹ Berne Convention, Article 9, Record Part A, Vol 10, p1007

work and does not unreasonably prejudice the legitimate interests of the author.

(3) Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention.”

92. The President correctly posits that the “general approach under the Berne Convention is permissive and leaves the exceptions and limitations for domestic legislation”.⁸⁰ (our emphasis)

93. The three-step test accordingly proceeds from an express recognition that it “shall be for legislation in the countries of the Union to permit the reproduction of such works”. The test then provides that an exception must:

93.1. cover special cases;

93.2. not conflict with the normal exploitation of the work; and

93.3. not unreasonably prejudice the legitimate interests of the rights holder.

94. There is no exception specified or permitted in sections 12A to 12D of the CAB which falls foul of the test.

95. Equally, the flexibility afforded by the four-factor test in section 12A is necessary to ensure that copyright law is adaptable enough to rapidly changing modes of technology and communication, and accords entirely with the three-step test. The three-step test is not intended to be inflexible.

96. This emerges from the preamble to the WIPO Copyright Treaty, which incorporates the test. That preamble stresses the need to “Maintain a Balance

⁸⁰ President’s supplementary HOA, p28, para 54

Between the Rights of Authors and the Larger Public Interest, Particularly Education, Research and Access to Information, as Reflected in the Berne Convention".⁸¹

97. The Agreed Statement⁸² Concerning Article 10 of the WIPO Copyright Treaty is also informative. It provides:

"It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment. It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention." (our emphasis)

98. Ceiger, Gervais and Senftleben trace the legislative history of the Berne Convention, and surmise the following in relation to the import of that history on the interpretation of the three-step test:⁸³

"Considering the historical background to the introduction of the three-step test at the international level, it becomes apparent that it is precisely the broad and relatively vague formulation of the provision that ensured its success during the Berne, TRIPS, and WCT/WPPT negotiations. At the time of the negotiations of each instrument, there were some countries, like the United States, in which the balance achieved in the copyright system was promoted in large part through an open general clause permitting uses to be considered "fair," subject to a balancing test. Other countries, including many in the civil law tradition, promoted balance through closed lists of specific E&Ls. The open-ended wording of the three-step test allowed settling the sensitive question of E&Ls in a

⁸¹ See C Geiger, DJ Gervais and M Senftleben, "The Three-Step-Test Revisited: How to Use the Test's Flexibility in National Copyright Law" (November 18, 2013) American University International Law Review, Vol. 29, No. 3 (2014), pp. 581-626, available at SSRN: <https://ssrn.com/abstract=2356619> ("The Three-Step-Test Revisited") (Referenced at FN 28 of Third Joint Academic Opinion, Record Part B, Vol 76, p 8293)

⁸² WIPO TRT/WCT/002 Agreed Statements concerning the WIPO Copyright Treaty (adopted by the Diplomatic Conference on December 20, 1996)

⁸³ The Three-Step-Test Revisited, p591

way that countries of both the open clause and closed list traditions could accept.”

99. A joint project by the Max Planck Institute for Intellectual Property, Competition and Tax Law, and Queen Mary University of London, sought to render a declaration to “restore the ‘three-step-test’ to its original role as a flexible standard precluding clearly unreasonable encroachments upon an author’s rights without interfering unduly with the ability of legislators and courts to respond to the challenges presented by shifting commercial and technological contexts in a fair and balanced manner”.⁸⁴ For present purposes, the declaration has a few notable features.

99.1. First, it suggests the three-step test is an indivisible test and that its components must be considered together and as a whole.

99.2. Second, it finds that the requirement of a “certain special case” does not prevent legislators from introducing open-ended exceptions and limitations, provided that the scope of such exception or limitation is reasonably foreseeable.

99.3. Third, it proposes that the interests that derive from human rights and fundamental freedoms as well as interests in competition and other public interests (scientific progress, cultural, social, or economic development) must be taken into account when interpreting the three-step test.

⁸⁴

The Three-Step-Test Revisited, p607-608

100. The upshot of this analysis is that the three-step test permits of flexibility in the application of exceptions and limitations. There is no reason in principle that the flexibility afforded by section 12A offends the test.
101. Indeed, as the President notes in his affidavit before this Court, section 233 of the Constitution requires every court, when interpreting legislation, to prefer any reasonable interpretation consistent with international law.⁸⁵ As Courts engage in the scope of limitations and exceptions, the prescripts of the three-step test will be considered.
102. However, we submit that the President has offered no basis for the Court to conclude that the provisions of section 12 cannot be read in compliance with the Three-Step test and the relevant treaties raised in the President's referral.
103. There are indicators in the nature of the three-step test that show that the fair use provisions in the CAB do not offend that test.
- 103.1. First, the three-step test is itself an open-ended norm. It makes little sense then to contend that it prohibits domestic norms that afford flexibility or proportionality.
- 103.2. Second, it was the UK delegation at the 1967 Stockholm Conference, which itself has fair dealing exceptions in its national law, that proposed an abstract formula for the three-step test rather than a detailed list of specific exceptions.

⁸⁵ President's affidavit, CCT 306/24, p 29, para 61.3, Record Part A, Vol 2, p 178

103.3. Third, there are parallels between the factors to be considered in the three-step test itself and in the four-factor test encapsulated in section 12A(b). For example:

103.3.1. the consideration in the three step test of the amount and substantiality of the part of the work affected in relation to the whole of the work⁸⁶ echoes the three-step test's requirement that the exception not conflict with the normal exploitation of the work and not unreasonably prejudice the legitimate interest of the rights holder; and

103.3.2. the consideration of the purpose and character of the use, including whether it serves a purpose different from that of the work, and consideration of the substitution effect of the act upon the potential market for the use in question, is even more akin to the requirement not to conflict with normal exploitation.

104. For these reasons, the Courts will interpret and apply section 12(A)(b) in accordance with the provisions of the Berne Convention and the Constitution. The design of that section not only permits of such an application, but accords with the Convention.

105. Notably, the United States was not required to amend its fair use doctrine when adhering to the 1971 Paris Act of the Berne Convention in 1989 or to the TRIPS Agreement in 1995. This is because the doctrine, which allows

⁸⁶ Section 12A(b)(ii)

flexibility in the determination of fair use, is not incompatible with the three-step test. The point was underscored at the WIPO Diplomatic Conference which adopted the WIPO "Internet Treaties", at which the United States delegation said that it was "essential that the Treaties permit the application of the evolving doctrine of 'fair use,' which was recognized in the laws of the United States of America, and which was also applicable in the digital environment".⁸⁷

106. Before concluding on this score, it is worth highlighting a point made in the submission of Denise Nicholson of "Scholarly Horizons" to the Portfolio Committee on Trade and Industry in July 2021. Ms Nicholson noted that:⁸⁸

"many of the provisions [for fair use in the draft Bill] are included in copyright laws of countries around the world and are not new, different or unusual. In fact, many developed countries and some developing countries have enjoyed similar provisions for years, meaning that South Africans have been deprived of such benefits for decades...

No country that has adopted fair use... have attracted any enforcement under Berne, TRIPS, the WCT or any of the other several international frameworks or dispute mechanisms under which they could have been contested".⁸⁹

107. Like the provisions of the fair use test in section 12A(b), our Courts will interpret the remaining new provisions in section 12A to 12D of the CAB in accordance with the Constitution and with international law, including the three-step test. For the reasons outlined above, there is nothing inherent in

⁸⁷ The Three-Step-Test Revisited, p 615.

⁸⁸ Letter from Denise R Nicholson t/a Scholarly Horizons, "Re: Submission on Sections 12A (Fair Use) of the Copyright Amendment Bill 2017 ("Nicholson submission"), Record Part B, Vol 45, p 4914

⁸⁹ Nicholson submission, Record Part B, Vol 45, p 4915

any aspect of the exceptions that renders them incompatible with such an interpretative exercise.

SECTIONS 19B AND 19C DO NOT CONSTITUTE AN ARBITRARY DEPRIVATION OF PROPERTY

108. Section 19B(1) and (2) speaks to the access and use of copyrighted works in the context of technological advancements, for example the reproduction of code to render a program inter-operable with another computer program.
109. Section 19C empowers libraries, museums, and galleries to use copyrighted work under a closed list of appropriate instances, provided that the work is used for non-commercial purposes.
110. These provisions are dealt with in the written submissions of Blind SA and will be addressed by other parties. Therefore, we limit our comments to the following:
 - 110.1. The content of section 19B is a common provision in other countries that allows software and other product suppliers to create inter-operable products, such as video games for a console or spare parts for machines.⁹⁰ It fairly balances the competing rights and interests of parties.

⁹⁰ See *Sega Enterprises Ltd v Accolade Inc.*, 977 F.2d 1510 (9th Cir. 1992) (reverse engineering of computer software was permitted to create Sega Genesis games by video game publisher Accolade, which had disassembled Genesis software in order to publish games without being licensed by Sega); Daniel Russo, et al., *Reverse Engineering: a European IPR perspective*, SAC 2016, April 04-08, 2016 (concluding from a case law analysis that the European Court of Justice “looks very permissive regarding reverse engineering, since ‘principles, or ‘ideas,’ are not copyrightable by themselves”).

110.2. The content of section 19C aligns with international standards of meeting the interests of libraries. Many libraries and educational institutions in the United States, Canada and Europe provide remote access to work. This provision works towards realising the access to information and education, particularly in times when physical access to libraries is limited.⁹¹

CONCLUSION

111. For the reasons set out above, ReCreate submits that the impugned provisions of the Bills are not unconstitutional.

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28 March 2025

⁹¹ See EIFL 2016
https://www.eifl.net/system/files/resources/201607/eifl_draft_law_2016_online.pdf.