

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CC case no.: CCT 320/21
HC case no.: 14996/21

In the matter between:

BLIND SA Applicant

and

**MINISTER OF TRADE, INDUSTRY AND
COMPETITION** First Respondent

**MINISTER OF INTERNATIONAL RELATIONS
AND COOPERATION** Second Respondent

SPEAKER OF THE NATIONAL ASSEMBLY Third Respondent

**CHAIRPERSON OF THE NATIONAL COUNCIL
OF PROVINCES** Fourth Respondent

**PRESIDENT OF THE REPUBLIC OF
SOUTH AFRICA** Fifth Respondent

and

OWEN DEAN First *Amicus Curiae*

MEDIA MONITORING AFRICA TRUST Second *Amicus Curiae*

INTERNATIONAL COMMISSION OF JURISTS Third *Amicus Curiae*

**APPLICANT'S SUPPLEMENTARY HEADS OF ARGUMENT:
RESPONSE TO FIRST *AMICUS CURIAE***

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INTRODUCTION

- 1 In an order dated 28 February 2022, this Court admitted Professor Owen Dean (“Dean”) as *amicus curiae*, granting him leave to (a) make written and oral submissions, and (b) adduce three annexures as evidence.¹ In related directions issued on 1 March 2022, the Acting Chief Justice directed Dean to file his written submissions by 14 March 2022, and permitted Blind SA to file a response to Dean’s written submissions by 31 March 2022. This is that response.
- 2 To some extent, we have already considered Dean’s two main submissions in our heads of argument filed on 17 February 2022.² In these supplementary heads of argument, we respond to the detail provided in Dean’s written submissions. We do so mindful of the fact that, at least in part, Dean is raising issues that were not brought to the parties’ attention in the High Court, and in respect of which that court had no opportunity to consider.
- 3 Insofar as the issue of section 13 of the Copyright Act is concerned,³ Dean is asking this Court to sit as a court of first and last instance, despite this Court making it clear, frequently, that this is ordinarily undesirable.⁴ Moreover, this Court has also held that “*courts have an interest in a constitutional issue being raised timeously*”,⁵ noting that –

¹ The three annexures (“OHD7”, “OHD8”, and “OHD9”) are attached to Dean’s founding affidavit in his application to be admitted as *amicus curiae*.

² See our main heads of argument at paras 30, 30-51, and 115.

³ We accept that the issue of appropriate relief has always been central to this matter.

⁴ See *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) at para 246, and the cases cited in footnote 210 thereto.

⁵ *Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC) at para 31

“[t]here is an obligation on litigants to raise constitutional arguments in litigation at the earliest reasonable opportunity in order to ensure that our jurisprudence under the Constitution develops as reliably and harmoniously as possible.”⁶

- 4 In what follows, we consider the following four issues in turn:
- 4.1 First, Dean’s over-reliance on international copyright instruments in dealing with the context within which the Copyright Act ought to be interpreted;
- 4.2 Second, Dean’s assertion that copyright is property as contemplated by section 25 of the Constitution;
- 4.3 Third, Dean’s reliance on regulations being promulgated in terms of section 13 of the Copyright Act, at some unspecified point in the future, as a solution to the current failure of the legislative framework to respect, protect, promote and fulfil the rights of persons with visual and print disabilities; and
- 4.4 Finally, in respect of his submissions on an appropriate remedy, Dean’s assertion that any reading-in of section 19D, as set out in clause 20 of the Copyright Amendment Bill [B 13B—2017] (“the CAB”), would not only be inappropriate, but impermissible in light of the provisions of the Marrakesh VIP Treaty.

⁶ *Carmichele* at para 41

DEAN'S SUBMISSIONS ON CONTEXT LACK CONTEXT

5 In this section, we deal with the following four issues:

5.1 Dean's failure to consider South Africa's international human rights obligations, and what these mean for our obligations under the Berne Convention for the Protection of Literary and Artistic Works ("Berne") and the World Trade Organization ("WTO") Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS");

5.2 Dean's flawed approach to section 233 of the Constitution;

5.3 the nature of South Africa's obligations under Berne and TRIPS; and

5.4 whether and to what extent the Copyright Act has been "*drafted to conform to international law requirements*".⁷

Dean's failure to consider other international obligations

6 Dean sets out South Africa's existing international obligations under the Berne Convention and the TRIPS Agreement.⁸ Neither the existence nor applicability of these obligations is controversial. But in so doing, he ignores South Africa's

⁷ Dean's submissions at para 14

⁸ Dean's submissions at paras 7 – 25

human rights obligations under the International Covenant on Economic Social and Cultural Rights (“ICESCR”) and the Convention on the Rights of Persons with Disabilities (“CRPD”).

- 7 We submit that when giving domestic effect to international obligations under the Constitution, our lawmakers must *cumulatively* consider the “*the inter-locking grid of conventions, agreements and protocols*” that are relevant to the issue.⁹ The focus cannot be on just two specialist treaties.
- 8 Such an approach is of particular concern in circumstances where the ICESCR and CRPD both include provisions that seek to ensure that intellectual property does not act as a barrier to realising the right to education, freedom of expression, and participation in cultural life for people with disabilities.

Dean’s approach to section 233

- 9 In considering the domestic effect of international obligations,¹⁰ Dean appears to ignore the reasonableness standard explicit in the text of section 233 of the Constitution: that courts must prefer a “*reasonable interpretation*” of legislation that is compatible with international law over one that is incompatible.¹¹ We submit that Dean’s interpretation is unreasonable, as it fails to take into account South Africa’s binding obligations under the ICESCR and the CRPD.

⁹ *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) (“Glenister II”) at para 192

¹⁰ Dean’s submissions at para 13.1

¹¹ See *S v Okah* [2018] ZACC 3 at para 38.

10 These human rights obligations occupy a particularly important place in the constitutional scheme,¹² finding direct expression in provisions that guarantee rights to dignity, equality and non-discrimination, education, participation in cultural life, and freedom of expression and the free flow of information. An interpretation of South Africa’s obligations under international copyright law that circumscribes the scope of these rights cannot be a reasonable one.

The nature of South Africa’s obligations under Berne and TRIPS

11 We do not take issue with Dean’s approach to the practical effect of Berne and TRIPS,¹³ and the Marrakesh VIP Treaty.¹⁴ However, some of the language he uses to describe how treaty obligations apply is both unfortunate and incorrect.¹⁵ We submit that neither the international copyright standard nor the South African constitutional standard supports such categorical language.¹⁶

12 Of particular concern to us is Dean’s apparent failure to recognise that both Berne and TRIPS provide significant latitude to states parties when giving domestic effect to their international obligations.¹⁷

¹² Section 39(1)(b) of the Constitution

¹³ Dean’s submissions at paras 13.2 – 13.3

¹⁴ Dean’s submissions at para 13.4

¹⁵ For example, Dean states that South Africa “*must comply with the three-step test*” (para 11), and refers to “[a]dherence to the terms of the Marrakesh Treaty” (para 12). He also uses “prescriptions” to describe treaty obligations, and refers to “adherence” and “compliance” in describing how South Africa’s domestic laws must be aligned (at paras 10-12).

¹⁶ See *Glenister II* at para 98, as cited in *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) (“*State Capture Commission*”) at para 116.

¹⁷ This is a general principle of subsidiarity as recognised in *State Capture Commission* at para 119.

- 12.1 TRIPS states that members “*shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.*”¹⁸
- 12.2 It goes further, allowing members to take additional measures necessary “*to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development*”, if compatible with its other provisions.¹⁹ This was confirmed by the WTO Appellate Body in *Plain Packaging*, which held that “*encumbrances on the use of trademarks ... may also be imposed in pursuit of public health objectives.*”²⁰
- 12.3 Similarly, Berne confirms that “[*a*]ny country party to this Convention undertakes to adopt, in accordance with its constitution, the measures necessary to ensure the application of this Convention.”²¹
- 13 Understanding TRIPS and Berne in this way aligns with the Development Agenda of the World Intellectual Property Organisation (“WIPO”), which commits it to centring differential development considerations in assisting members to implement their intellectual property obligations domestically. As Netanel explains:²²

¹⁸ Article 1(1) of TRIPS (our emphasis)

¹⁹ Article 8(1) of TRIPS

²⁰ Reports of the Appellate Body, Australia – *Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirements applicable to Tobacco Products and Packaging*, AB-2018-4 and AB-2018-6 (29 June 2020) at para 6.649.

²¹ Article 36 of Berne (our emphasis)

²² Neil Weinstock Netanel, “Introduction: The WIPO Development Agenda and its Development Policy Context, in Netanel (ed.), *The Development Agenda: Global Intellectual Property and Developing Countries* (Oxford University Press, 2008) at 8

“[The Development Agenda requires WIPO to provide assistance in line with what developing countries identify as their specific needs rather than aiming to promote a one-size-fits-all model of intellectual property. It also calls upon WIPO to assist developing countries in taking advantage of the leeway given to them under IP treaties to tailor their intellectual property laws to best promote development”

- 14 A reasonable interpretation of legislation that is consistent with international law, as section 233 of the Constitution requires, does not require the type of approach advanced by Dean. On the contrary, it recognises that there is no place for strict “compliance” with and/or “adherence” to Berne and/or TRIPS, particularly in circumstances where any such compliance or adherence would be at odds with South Africa’s international human rights obligations.

Aligning the Copyright Act with international law requirements

- 15 Dean’s assertion that the Copyright Act has been “*carefully drafted to conform to international law requirements*”²³ is only partially accurate. While the Act was indeed drafted with Berne in mind,²⁴ the same cannot be said in respect of TRIPS. As Dean notes,²⁵ South Africa is party to TRIPS by virtue of its membership of the WTO, which it only joined in 1995.²⁶
- 16 There have been three sets of amendments to the Copyright Act since 1995. These extend its provisions to broadcasting, sound recordings, cinematograph works,

²³ Dean’s submissions at para 14

²⁴ The Copyright Act was enacted in 1978, and came into force on 1 January 1979.

²⁵ Dean’s submissions at para 10 and 13.1

²⁶ Dean’s affidavit at para 12

and computer programs,²⁷ deal with collecting societies,²⁸ and add references to the new Companies Act.²⁹ None of these amendments reflect any of TRIPS' substantive provisions; they do not change the structure of the Copyright Act or any of its existing standards.

- 17 The regulations, in which Dean sees a solution, were most recently amended as far back as 1985,³⁰ well before TRIPS was concluded, and even before the Constitution was drafted. No attempt has been made to align them with South Africa's international obligations under TRIPS, the ICESCR, or the CRPD.

COPYRIGHT AND SECTION 25 OF THE CONSTITUTION

- 18 There are three fundamental flaws in Dean's approach to copyright as a form of constitutionally-protected property:³¹

18.1 First, this Court has yet to decide the question in any meaningful way. At most, it has simply assumed this to be the case.

18.2 Second, even on the assumption that copyright is indeed a form of property recognised by section 25, the type of exceptions required to respect, protect, promote and fulfil the rights in the Bill of Rights can in no way be described as arbitrary deprivations.

²⁷ Intellectual Property Laws Amendment Act 38 of 1997

²⁸ Copyright Amendment Act 9 of 2002

²⁹ Companies Act 71 of 2008

³⁰ See Government Notice No. R1211, *Government Gazette* No. 9775 (7 June 1985) and Government Notice No. 1375, *Government Gazette* No. 9807 (28 June 1985).

³¹ See Dean's submissions at paras 17 – 25.

18.3 Third, if copyright is indeed constitutionally-protected property, then Dean’s approach to section 13 of the Copyright Act cannot be sustained.

The property question largely remains open (and should remain so)

19 *National Credit Regulator*,³² on which Dean relies,³³ cites this Court’s judgment in *Laugh it Off* as authority for the proposition that a trademark is constitutionally-protected property.³⁴ It notes that “[w]ithout discussing the specific point, this Court has also accepted a trademark to be property, albeit incorporeal, deserving protection under section 25.”³⁵ Reference was also made to *Phumelela*,³⁶ which says even less.

20 In *Laugh it Off*, this Court noted that “like other property intellectual property does not enjoy special status under the Constitution”, expressly recognising that “[i]t is not immune from challenge and therefore its enforcement must be constitutionally tenable.”³⁷ Importantly, this Court did not conduct the type of analysis contemplated by section 25(1), to assess whether an arbitrary deprivation of property had taken place, nor did it engage in any meaningful way on the nature and extent of constitutional property rights.³⁸

³² *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC);

³³ Dean’s submissions at footnote 26

³⁴ *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC)

³⁵ *National Credit Regulator* at para 61

³⁶ *Phumelela Gaming and Leisure Ltd v Gründlingh and Others* [2006] ZACC 6; 2006 (8) BCLR 883 (CC)

³⁷ *Laugh It Off* at para 17

³⁸ See, for example, paras 34 – 45.

- 21 Dean also cites *Moneyweb* with approval,³⁹ in which Berger AJ simply stated that copyright “*is protected by section 25(1) of the Constitution*”. That statement was made without any supporting authority, and – like *Laugh it Off* – was not followed by any arbitrary deprivation analysis. Instead, it was followed by an interpretation of the Copyright Act that gives effect to rights in the Bill of Rights, treating it like an ordinary statute.⁴⁰
- 22 We submit that this Court should not even consider the question of whether, and if so, to what extent, copyright is protected by section 25 of the Constitution. Instead, without making any final determination in this regard, it should simply assume that copyright falls within the scope of section 25.⁴¹ That said, it should also be mindful of the fact that this case does not require any careful balancing of rights, because rights holders simply have nothing to lose.
- 23 This flows from the fact that this case concerns the failure of the Copyright Act to make any provision for persons with visual and print disabilities to have access to works under copyright. In a context where rights holders ordinarily do not cater for their needs, allowing for the exceptions contemplated by the proposed new section 19D would not give rise to any tension between competing rights; there is no need to consider the right to exclude where no benefit accrues to anyone by such exclusion.

³⁹ *Moneyweb (Pty) Ltd v Media 24 Limited and Another* 2016 (4) SA 591 (GJ)

⁴⁰ *Moneyweb* at paras 109 and 110

⁴¹ This approach has been adopted by this Court in applying section 25 to mining rights (*Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC)); the loss of earning capacity (*Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC)); and the loss of goodwill (*Phumelela*)

- 24 In short, this case concerns the rights of persons with visual and print disabilities to gain access to a market that those without disabilities already have access to. Allowing for such access does not impinge on authors' rights, or circumscribe the reach of publishers' markets. On the contrary, it seeks a remedy that would expand the market to a particular group, that has, until now, been excluded from the market for no good reason.

Arbitrary deprivations of property

- 25 Section 25(1) of the Constitution provides: "*No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.*" Thus non-arbitrary deprivations may be permitted by a law of general application, such as the Copyright Act. And, at least in theory, a law that allows for the arbitrary deprivation of property may be saved by section 36(1) of the Constitution.
- 26 The type of exceptions required to respect, protect, promote and fulfil rights, and to give effect to our international human rights obligations, cannot be described as arbitrary. As Dean notes, any deprivation of rights in copyright "*must be for good cause, or constitute a justifiable limitation in terms of section 36*".⁴² Even he agrees that persons with visual and print disabilities should be able to access copyrighted works in the manner contemplated by the Marrakesh VIP Treaty.

⁴² Deans submissions at para 20

27 Dean’s reliance on section 25 of the Constitution is unhelpful. It does not assist in determining whether, and to what extent, the Copyright Act is unconstitutional; nor does it help in finding an appropriate remedy; all that it does is make it clear that any protection that section 25(1) may afford copyright holders is a protection that is not at risk. Given the existing book famine and the historical neglect of people with disabilities, there is no danger of rights being deprived arbitrarily.

Dean’s approach to section 13 of the Copyright Act cannot be sustained

28 Dean’s understanding of section 13 of the Copyright Act, which recognises that the Minister has broad discretion to make law, sits particularly uncomfortably with an approach that sees copyright as constitutionally-protected property. One would expect a provision that contemplates the creation of further exceptions to exclusionary rights ordinarily to be interpreted somewhat narrowly. That would apply both to the scope and applicability of the exceptions.

29 Recently, in *Minister of Finance v Afribusines NPC*,⁴³ this Court considered the purpose served by regulations, and what this may mean for their interpretation. Writing for the majority, Madlanga J explained:⁴⁴

“Ordinarily, the purpose served by regulations is to make an Act of Parliament work. The Act itself sets the norm or provides the framework on the subject matter legislated upon. Regulations provide the sort of detail that is best left by Parliament to a functionary, usually the Minister responsible for the administration of the Act, to look beyond the framework and – in minute detail

⁴³ [2022] ZACC 4

⁴⁴ *Afribusines NPC* at para 103

– to ascertain what is necessary to achieve the object of the Act or to make the Act work.”

30 Thus where an Act is said to give effect to constitutionally-recognised rights, and sets out – in some detail – carefully considered exceptions to those rights, any discretionary power that has further implications for the rights must be interpreted narrowly. Put differently, it is for the Copyright Act itself to provide exceptions that facilitate access to copyrighted works for persons with visual and print disabilities. The Minister may then provide further detail in regulations.

DEAN’S RELIANCE ON SECTION 13 REGULATIONS

31 Dean states that “*a constitutionally-informed approach must equally apply to the Copyright Act.*”⁴⁵ We agree. That said, his interpretation stretches the bounds of the text of the Copyright Act to arrive at an unreasonable interpretation. As this Court held in *Hyundai*,⁴⁶ “*where a legislative provision is reasonably capable of a meaning that places it within constitutional bounds, it should be preserved.*”⁴⁷

32 We submit that Dean’s interpretation is unreasonable in three ways: it is not fit for purpose; it distorts the meaning of particular provisions of the Copyright Act; and it continues to have the effect of limiting the rights to equality and dignity of

⁴⁵ Dean’s submissions at para 29

⁴⁶ *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others* 2001 (1) SA 545 (CC) at para 26 (our emphasis), cited in Dean’s submissions at footnote 32

⁴⁷ See also, *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC) at para 85; *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC) at para 59; and *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) at paras 23 – 24.

people with visual and print disabilities. And as *Hyundai* notes, “*all statutes must be interpreted through the prism of the Bill of Rights.*”⁴⁸

- 33 In what follows in this section, we deal with the following five issues in turn:
- 33.1 First, why Dean’s approach discriminates against people with visual and print disabilities;
- 33.2 Second, why the obligation that Dean seeks to impose on the Minister is itself problematic;
- 33.3 Third, why accessible format shifting often requires more than mere reproduction;
- 33.4 Fourth, why cross-border exchange requires more than what future regulations made in terms of section 13 may offer; and
- 33.5 Finally, why Dean’s approach to the issue is more restrictive than what the Marrakesh VIP Treaty contemplates.

Dean’s approach discriminates against people with visual and print disabilities

- 34 Dean asserts that “*the fact that the Act does not enact an outright prohibition and wholly impede access to copyrighted works by print-disabled people is ...*

⁴⁸ *Hyundai* at para 21

sufficient to save it from constitutional invalidity".⁴⁹ This is clearly wrong; an outright prohibition is unnecessary for any particular measure to be considered as unfair discrimination.⁵⁰

- 35 Blind SA's uncontested evidence clearly demonstrates the adverse impact that the Copyright Act has had, and continues to have, on people with visual and print disabilities.⁵¹ Although facially neutral, the Act has a disproportionate impact on persons with visual and print disabilities by making it difficult, if not impossible, for them to access works under copyright. As this Court recently affirmed,⁵² "*a seemingly benign or neutral distinction that nevertheless has a disproportionate impact on certain groups amounts to indirect discrimination*".

The obligation that Dean seeks to impose on the Minister is problematic

- 36 Dean asserts that when read with section 39(a) of the Act, section 13 "*oblige[s] the Minister to promulgate regulations to provide access to print-disabled people*".⁵³ He makes this assertion in a context characterised by 25 years of the current Bill of Rights being in operation, 15 years of the CRPD placing binding obligations on South Africa, and nine years having passed since the Marrakesh VIP Treaty was concluded.

⁴⁹ Dean's submissions at para 34

⁵⁰ See, for example, *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC) at para 43.

⁵¹ See founding affidavit at paras 62, and 72 – 117; Low supporting affidavit, paras 24 – 34; Yacoob supporting affidavit, paras 3 – 12; and Gama supporting affidavit, paras 6 – 14.

⁵² *Mahlangu and Another v Minister of Labour and Others* 2021 (2) SA 54 (CC) at para 92

⁵³ Dean's submissions at para 35

37 The regulations are archaic and appear largely obsolete, having been promulgated well before the advent of the internet, and indeed the Constitution, and having been last amended in 1985. Yet in all this time, no Minister has taken any steps towards amending the regulations to deal with accessible format shifting. Nor does Dean appear to have taken any steps over the years to use his laudable position of influence to secure what is now his desired outcome.

38 It is in this context that we submit that leaving the realisation of the rights of a marginalised group of people to the whims of the Minister, in circumstances where he and his predecessors have failed to act for over two decades, is an affront to the dignity of persons with visual and print disabilities. They are entitled to have their inherent worth recognised; they should not be required to have the realisation of their rights deferred, as they wait patiently for Godot to arrive.

Accessible format shifting requires more than reproduction

39 Dean asserts that “*format shifting only entails reproduction*”.⁵⁴ In making this claim, he relies on Article 4(1)(a) of the Marrakesh VIP Treaty, which does not mention adaptation. It does, however, go beyond reproduction, also mentioning “*the right of distribution, and the right of making available to the public*”, and stating that “[t]he limitation or exception provided in national law should permit changes needed to make the work accessible in the alternative format.”⁵⁵

⁵⁴ Dean’s submissions at para 50

⁵⁵ Our emphasis

40 In *World Blind Union Guide to Implementing the Marrakesh VIP Treaty*, Helfer et al explain that “*the last sentence of Article 4(1)(a) does not limit the nature or scope of permitted changes; rather, it authorizes any changes necessary to make covered works accessible to beneficiaries.*”⁵⁶ The authors explain:⁵⁷

*“Given the wide array of print disabilities and the differing technological needs of individuals who experience those disabilities, states should fully implement this provision of the Treaty to permit beneficiaries and authorized entities **to make whatever modifications are necessary** to make a work accessible to all print-disabled persons.”*

41 We submit there are various types of modifications that may be needed for a work to be transformed from its original form into an accessible format copy. A shift in format, such as “*preparing written descriptions of photographs or other art in a book; converting written text into audio, Braille, or other accessible formats; making tactile graphics based on images in a book; or adapting font style or size*”,⁵⁸ may well require adaptation. As Reid explains:⁵⁹

“[R]emediating inaccessible copyright works into accessible forms, such as by creating a Braille version of a book or adding captions to a video, might implicate a copyright holder’s exclusive rights to reproduction, adaptation, and distribution if the remediation is performed by a third party other than the copyright holder.”

⁵⁶ Our emphasis

⁵⁷ L. Helfer, MK Land, RL Okediji, JH Reichman, *World Blind Union Guide to Implementing the Marrakesh VIP Treaty* (Oxford University Press, 2017) at 110 (emphasis in original)

⁵⁸ Helfer et al at 110

⁵⁹ Blake E. Reid, “Copyright and Disability”, (2021) 109 *California Law Review* 2173 at 2177. See also, founding affidavit, para 78.

- 42 Such an interpretation aligns with Dean’s *Handbook of South African Copyright Law*, which draws a clear distinction between reproduction and adaptation.⁶⁰

“The new Shorter Oxford Dictionary gives as a meaning of the word ‘reproduction’ the action or process of bringing an idea etc to mind again in the same form; a copy, especially of a work of art. On the other hand it defines ‘adaptation’ as meaning, inter alia, ‘the action or process of fitting or suiting one thing to another; modification to fit a new use, a new condition etc’. The word ‘adapt’ has the meaning ‘alter or modify (especially a text)’. Thus, in broad terms, ‘reproduce’ means to make a copy, while ‘adapting’ means to alter, to modify or to transform.”

Cross-border exchange requires more than what regulations may offer

- 43 Relying on the qualification to section 23(2) of the Copyright Act, Dean submits that cross-border exchange could be permitted by regulations made in terms of section 13. According to him, it would not constitute an act of infringement if an accessible format copy were to be imported and distributed if, to the knowledge of the importer/distributor, the making of that copy was permitted where it was made, or would have been permitted in South Africa.⁶¹ Importantly, section 23(2) makes no mention of exports, which are an integral part of “exchange”.
- 44 Another problem with this approach, which relies solely on section 13 regulations exempting reproductions for the purposes of accessible format shifting, is that it falls foul of Dean’s own position: that the legislative framework must be aligned

⁶⁰ Owen Dean, *Handbook of South African Copyright Law*, Revision Service 15 ((Juta & Co., 30 September 2015) at para 8.5.2 (our emphasis)

⁶¹ Dean’s submissions at para 51

squarely with the Marrakesh VIP Treaty. We submit that Dean’s proposal would not achieve this purpose, as it does not address the following aspects of the treaty:

44.1 Article 5(1) provides that in order to facilitate cross-border exchanges, a contracting party’s national copyright law must make provision for an accessible format copy to *“be distributed or made available by an authorized entity to a beneficiary person or an authorized entity in another Contracting Party.”*⁶² Put simply, cross-border exchange is a two-way street. (Further detail in this regard is provided in Article 5(2).)

44.2 Article 6, dealing with the importation of accessible format copies, states that if the national law of a contracting party *“would permit a beneficiary person, someone acting on his or her behalf, or an authorized entity, to make an accessible format copy of a work”*, then it *“shall also permit them to import an accessible format copy for the benefit of beneficiary persons, without the authorization of the rightholder.”*⁶³

44.3 The footnote to Article 6 provides:⁶⁴

“Agreed statement concerning Article 6: It is understood that the Contracting Parties have the same flexibilities set out in Article 4 when implementing their obligations under Article 6.”

⁶² Footnote omitted

⁶³ Footnote omitted

⁶⁴ Emphasis in original

45 A further problem with Dean’s approach is that it fails to consider the potential chilling effect of section 28 of the Copyright Act, which makes provision for restricting the importation of copies. Even if section 23(2) operates in the manner set out by Dean, section 28 of the Act may be triggered if a person in South Africa were to import accessible format copies without the consent of the copyright owner, particularly if processes other than reproduction were used to create such copies in the country of origin.

45.1 Acting in terms of section 28, a copyright owner may give notice to the Commissioner for Customs and Excise to treat any imported copies of works under copyright as “prohibited goods”. Once notice is given, the Commissioner may detain the copies until the notice has been withdrawn or the time specified in the notice has expired.⁶⁵

45.2 While the notice is in operation, the importer would presumably have the opportunity to establish that the copies, had they been made in South Africa, would not be *infringing* copies. Of course, that would take time and money, which many may not have in abundance. And while various processes unfold, the imported copies would remain in detention.

46 With all of these shortcomings in mind, which make it clear that cross-border exchange requires more than what section 13 regulations may offer, we submit that the only appropriate way to domesticate the Marrakesh VIP Treaty’s provisions on cross-border exchange is by the amendment of the Copyright Act

⁶⁵ Section 28(1)

to include a provision such as proposed new section 19D, as contemplated by clause 20 of the CAB.

Dean's approach is more restrictive than the Marrakesh VIP Treaty

47 Dean appears to suggest that Article 5 of the Marrakesh VIP Treaty only permits “authorized entities” to import and/or obtain accessible format copies.⁶⁶ But Article 5(1) only deals with exports. And Article 6 is clear that “*a beneficiary person, someone acting on his or her behalf, or an authorized entity ... [may] also ... import an accessible format copy for the benefit of beneficiary persons*”.

AN APPROPRIATE REMEDY

48 Dean provides the following three reasons for his submission that the proposed reading-in would be an inappropriate remedy:⁶⁷

48.1 First, section 19D is “*not uncontroversial*”;

48.2 Second, the proposed reading-in remedy “*is not effective and operable*”;
and

48.3 Third, “*it is at odds with the Marrakesh Treaty and other international instruments.*”

⁶⁶ See Dean's submissions at para 51.5

⁶⁷ Dean's submissions at paras 56-76

Section 19D is not controversial

49 In support of the first reason, Dean relies on the three annexures to his affidavit that this Court has admitted as evidence. At most, the annexures provide evidence that section 19D will eventually be promulgated with minor amendments; the annexures go no further. At this stage, it would be premature for this Court to preempt the outcome of the current parliamentary process.

The proposed reading-in remedy would be effective and operable

50 In our main heads of argument, we addressed the enforceability of section 19D, if it were to be read in as it currently reads. While we stand by those submissions, we make the following three additional points:

50.1 First, 70 states parties to the Marrakesh VIP Treaty do not define the scope of works to which accessible format shifting applies within their individual domestic copyright laws.⁶⁸ The proposed new section 19D of the CAB, as it reads in clause 20 of the CAB, is clearly not an outlier.

50.2 Second, the absence from the proposed reading-in remedy of definitions of “*accessible format copy*”, “*persons with disabilities*” and “*a person who serves persons with disabilities*” does not render the remedy vague.

⁶⁸ A list of the 70 countries is attached as Annexure A.

As we have already noted, and as Dean notes,⁶⁹ section 233 of the Constitution requires that where reasonably possible, legislation must be interpreted in a manner consistent with binding international law.⁷⁰ Our main heads of argument address this issue in some detail.

50.3 Third, a court's "*power to grant a just and equitable order in terms of section 172(1)(b) of the Constitution 'is so wide and flexible' that Courts are empowered to grant relief that has not been pleaded.*"⁷¹ As Moseneke DCJ held in *Hoërskool Ermelo*,⁷² this "*ample and flexible remedial jurisdiction in constitutional disputes permits a court to forge an order that would place substance above mere form*".

50.4 If this Court were to come to the conclusion that an appropriate reading-in remedy requires the inclusion of definitions from the Marrakesh VIP Treaty, and/or the CAB, this Court would therefore be entitled to include such definitions. The fact that Blind SA's notice of motion does not mention the definitions is not a barrier to such relief being granted, should it be just and equitable in the circumstances to grant such relief.

⁶⁹ Dean's submissions at para 13.1.

⁷⁰ Dean himself states this in his Heads at para 13.1.

⁷¹ See *Public Protector v South African Reserve Bank*, above n 4 at para 243, citing *Economic Freedom Fighters v Speaker of the National Assembly* 2018 (2) SA 571 (CC) at para 211 with approval.

⁷² *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (2) SA 415 (CC) at para 96

Section 19D and alignment with the Marrakesh VIP Treaty

51 Dean submits that section 19D is not aligned squarely with the Marrakesh VIP Treaty.⁷³ What appears to be required, in his view, is identical language, and the most restrictive interpretation. He makes his submissions without reference to how other states have domesticated the treaty in their national copyright laws.

52 As we have shown in relation to definitions of applicable works, implementation may vary.⁷⁴ The same goes for definitions of beneficiary persons:⁷⁵

52.1 25 countries include people with aural disabilities;

52.2 22 countries include people with cognitive/mental disabilities;

52.3 19 countries include people with physical disabilities; and

52.4 28 countries have not identified which types of disabilities are covered, using the general language of “*persons with disabilities*”, as the CAB does, in their implementing legislation.

53 Dean asserts that section 19D(3) “*lacks the Treaty’s limiting requirement that the exporter must have reasonable grounds for believing that the exempted copies will only be used by beneficiary persons in the importing country*”.⁷⁶ But the

⁷³ Dean’s submissions at para 71

⁷⁴ See above para 50.1.

⁷⁵ A list of these countries is attached as Annexure B.

⁷⁶ Dean’s submissions at para 72.3.3

Marrakesh VIP Treaty cannot be read in isolation. With this in mind, section 19D seeks to reconcile our international copyright and human rights obligations, in a manner that has already been adopted by others.

54 The final points we wish to make concern the so-called “three-step test” on which Dean seeks to rely. There is, in fact, more than a single version of this test, with the language of Article 9(2) of Berne differing somewhat from what is contained in Article 13 of TRIPS.⁷⁷

55 And while there is no definitive case law interpreting the Berne test, there is only one decision of a WTO panel concerning Article 13 of TRIPS,⁷⁸ which has been widely criticised in the academic literature.⁷⁹ (Two other WTO panel decisions consider different versions of the three-step test in different contexts: one in relation to patents;⁸⁰ and another in relation to geographical indications.⁸¹

56 In any event, Dean has provided no explanation as to why section 19D does not comply with the three-step test. For current purposes, let us consider Article 9(2) of Berne, which provides:

“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

⁷⁷ See AF Christie and R Wright, “A Comparative Analysis of the Three-Step Tests in International Treaties” (2014) 45 *IIC – International Review of Intellectual Property and Competition Law* 409.

⁷⁸ WTO Panel Report, *EC – Section 110(5) of the US Copyright Act* WT/DS160/R (15 June 2000)

⁷⁹ See, for example, S Ricketson and JC Ginsburg, *International Copyright and Neighboring Rights: The Berne Convention and Beyond* (Oxford University Press, 2006) at 771–772; and JC Ginsburg, “Toward Supranational Copyright Law? The WTO Panel Decision and the ‘Three-Step Test’ for Copyright Exceptions” (2001) 187 *Revue Internationale du Droit d’Auteur* 3

⁸⁰ WTO Panel Report, *Canada – Patent Protection of Pharmaceutical Products*, WT/DS114/R (17 March 2000)

⁸¹ WTO Panel Report, *EC – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* WT/DS174/R (15 March 2005)

reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

57 According to this version of the three-step test, reproduction of a work under copyright may be permitted “*in certain special cases*”, provided that it –

57.1 “*does not conflict with a normal exploitation of the work*”; and

57.2 “*does not unreasonably prejudice the legitimate interests of the author.*”

58 Expanding access to persons with visual and print disabilities, who would otherwise have limited to no access, must surely qualify as a special case.⁸² And it is because of the way works are normally exploited that accessible format copies are ordinarily not available. That leaves just step three.

59 By expanding access to persons with visual and print disabilities, section 19D would not interfere with any legitimate interests of authors. (There can be no legitimate interest in denying access for no other reason than copyright grants such a right to exclude.) On the contrary, this would expand authors’ readership.

60 While strict alignment with the Marrakesh VIP Treaty would ensure that the three-step test, in whatever form, is satisfied, the converse does not apply. Put differently, the test may be satisfied by adopting wording that, for good reason,

⁸² See P Harpur, *Discrimination, Copyright and Equality: Opening the e-Book for the Print-Disabled* (Cambridge University Press, 2017).

departs from the Marrakesh VIP Treaty. One such reason may be the need to tailor the law to suit a country's domestic legal system.⁸³

CONCLUSION

61 Accordingly, we persist in submitting that this Court ought to grant the order as set out in paragraph 124 of our heads of argument.

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31 March 2022

⁸³ See Christophe Geiger, Daniel Gervais, and Martin Senftleben, "The Three-Step Test Revisited: How to Use the Test's Flexibility in National Law" (2014) 29 *American University International Law Review* 581.