

THE PUBLIC INTEREST IN SOUTH AFRICAN COPYRIGHT LAW

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1. INTRODUCTION

- Identify the public interest in copyright law;
- Review the South African Copyright Act (SACA) as to its protection of the public interest;
- Undertake a broad overview of the public interest in the copyright laws of the United Kingdom, United States and Canada as a context;
- Examine the means of implementing the public interest in South African copyright law.

II. THE PUBLIC INTEREST IN COPYRIGHT LAW

II.I *The right to intellectual property*- Art 27 UDHR & Art 15(1) of the ICESCR.

II.II *Equal priority of public and private interests as the essential feature of copyright.*

The importance of the distinction

- + Better understanding of the concept- copyright is set of rules ventilating different human rights.
 - + Determination whether a limitation analysis or balancing exercise is appropriate
 - + Influence on national legal systems.
- The private interest in copyright
 - *Private interest and human rights*
 - + Private interest as constitutional property (s. 25 FC)
 - + Private interest manifesting in the right to privacy (s 14 FC)
 - + Private interest in furtherance of the freedom of expression (S16 FC)
 - The public interest in copyright
 - *The public interest and the public domain*
 - *Mechanisms for implementing the public interest*
 - + Dichotomy between ideas and expressions
 - + Exceptions and limitations
 - *Public interest and human rights*
 - + Public interest and the freedom of expression
 - Freedom of expression and transformative works
 - Freedom of expression and the receipt of ideas and opinions
 - Freedom of expression and access to educational materialS

III AN OVERVIEW OF THE PUBLIC INTEREST IN THE COPYRIGHT LAW UNITED KINGDOM UNITED STATES AND CANADA

III.I Dichotomy between Ideas and Expression

III.II The different legislative techniques of casting exceptions and limitations and the effect of a public interest challenge masquerading as the freedom of expression (First Amendment to the US Constitution)

(A) Closed list of exceptions and limitations- fair dealing and other exceptions and limitations

(i) **United Kingdom**

- * Fair Dealing under s. 29 & 30 of the CDPA and other exceptions and limitations.
- * The challenge of the freedom of expression (public interest) by virtue of the Human Rights Act 1988 - *Ashdown v Telegraph Group Ltd* [2001] 3 WLR 1368 (CA)

(ii) **Canada**

- * Fair Dealing in s 29 of the Canadian Copyright Act and other exceptions and limitations
- * Exceptions and limitations as user rights - *CCH Canadian Limited v Upper Law Society of Canada* 2004 SCC 13
- * The failure of the challenge of the public interest (Freedom of expression) Art 2 of the Charter of Rights and Freedom- *Compagnie Générale des Établissements Michelin- Michelin & Cie v National Automobile, Aerospace, Transportation and General Workers Union of Canada* [1997] 2 F.C. 306

(B) Open ended list of exceptions- fair use and other limitations and exceptions

- * Fair use under s 107 US Copyright Act and other exceptions and limitations
- * The challenge of the First Amendment

* *Eldred v Ashcroft* 537 US 186 (2003)

IV THE PUBLIC INTEREST IN SOUTH AFRICAN COPYRIGHT LAW

IV.I The philosophy of South African copyright law

IV.II Idea/expression dichotomy

IV.III Exceptions and limitations

- Fair dealing under s 12 of SACA
- Other specific exceptions and limitations especially the Reproduction Regulations made pursuant to the right of reproduction under s. 13 of SACA
- Analysis of exceptions and limitations
 - + *Closed list- Not likely to support public interests issues covered by the freedom of expression*
 - + *Lack of judicial review- chilling effect of vague provisions*
 - + *Lack of access to educational materials*

IV.IV The challenge of the digital environment- *Implementing the WIPO digital treaties*

IV.V The challenge of the public interests- Implications of *Laugh It Off v SAB* 2006 (1) SA 144 (CC)

- + The freedom of expression
- + Parody & other transformative works
- + Access to educational works

IV.VI Judicial resolution of the challenge of the public interest- *Difference between a limitation analysis and the balancing of rights*

- + A limitation analysis of the private interest in SACA and the Freedom of expression
Moseneke J in *Laugh It Off*
- + A limitation analysis of the public interest in SACA and constitutional property
- + A balancing exercise of the rights that represent the two interests in copyright
Constitutional property and Freedom of Expression
 - # Sachs J in *Laugh It Off*
 - # *Petro-Props v Barlow* 2006 (5) SA 160(W)
Constitutional Property and Privacy

IV.VI Options in Implementing the Public Interest

- Legislative Amendment of SACA
- Judicial interpretation- ‘Appropriate Relief’(s 38 FC)
- Remedies
 - * Judicial interpretation to accord fair dealing an equal priority with exclusive rights
 - *Legislative amendment of exceptions and limitations (insert the new exceptions like *parody*)
 - * liberalise the Reproduction Regulations
 - * Introduce an open ended fair use doctrine
 - * Compulsory licensing to enable access to educational materials
 - * legalise parallel importation of copyrighted works
 - * Introduce a new public interest defence
 - * Alter the burden of proof
 - * Re interpret the requirements for liability

IV.V Implementing the public interest in the context of Treaty Obligations

- The three step test – Constitutional interpretation and international law.

V CONCLUSION

SOME USEFUL PROVISIONS

1. INTERNATIONAL PROTECTION OF THE RIGHT TO INTELLECTUAL PROPERTY

Article 27 of the Universal Declaration of Human Rights

(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 15 of the International Covenant for Economic Social and Cultural Rights

1. The States Parties to the present Covenant recognize the right of everyone:

(a) To take part in cultural life;

(b) To enjoy the benefits of scientific progress and its applications;

(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

FAIR DEALING UNDER THE UK COPYRIGHT DESIGNS AND PATENT ACT

29.—(1) Fair dealing with a literary, dramatic, musical or artistic work for the purposes of research or private study does not infringe any copyright in the work or, in the case of a published edition, in the typographical arrangement.

(2) Fair dealing with the typographical arrangement of a published edition for the purposes mentioned in subsection (1) does not infringe any copyright in the arrangement.

(3) Copying by a person other than the researcher or student himself is not fair dealing if—
(a) in the case of a librarian, or a person acting on behalf of a librarian, he does anything which regulations under section 40 would not permit to be done under section 38 or 39 (articles or parts of published works: restriction on multiple copies of same material), or
(b) in any other case, the person doing the copying knows or has reason to believe that it will result in copies of substantially the same material being provided to more than one person at substantially the same time and for substantially the same purpose.

30.—(1) Fair dealing with a work for the purpose of criticism or review, of that or another work or of a performance of a work, does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement.

(2) Fair dealing with a work (other than a photograph) for the purpose of reporting current events does not infringe any copyright in the work provided that (subject to subsection (3)) it is accompanied by a sufficient acknowledgement.

(3) No acknowledgement is required in connection with the reporting of current events by means of a sound recording, film, broadcast or cable programme.

FAIR DEALING UNDER THE COPYRIGHT ACT OF CANADA

Fair Dealing

29 Fair dealing for the purpose of research or private study does not infringe copyright.

29.1 Fair dealing for the purpose of criticism or review does not infringe copyright if the following are mentioned:

- (a) the source; and
- (b) if given in the source, the name of the
 - (i) author, in the case of a work,
 - (ii) performer, in the case of a performer's performance,
 - (iii) maker, in the case of a sound recording, or
 - (iv) broadcaster, in the case of a communication signal.

29.2 Fair dealing for the purpose of news reporting does not infringe copyright if the following are mentioned:

- (a) the source; and
- (b) if given in the source, the name of the
 - (i) author, in the case of a work,
 - (ii) performer, in the case of a performer's performance,
 - (iii) maker, in the case of a sound recording, or
 - (iv) broadcaster, in the case of a communication signal.

FAIR DEALING UNDER THE SOUTH AFRICAN COPYRIGHT ACT

12 General exceptions from protection of literary and musical works

(1) Copyright shall not be infringed by any fair dealing with a literary or musical work-

(a) for the purposes of research or private study by, or the personal or private use of, the person using the work;

(b) for the purposes of criticism or review of that work or of another work; or

(c) for the purpose of reporting current events-

(i) in a newspaper, magazine or similar periodical; or

(ii) by means of broadcasting or in a cinematograph film;

Provided that, in the case of paragraphs (b) and (c) (i), the source shall be mentioned, as well as the name of the author if it appears on the work.

[Sub-s. (1) amended by s. 11 (a) and (b) of Act 125 of 1992.]

FAIR USE UNDER THE US COPYRIGHT ACT

S. 107

[t]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include--

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

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

(4) the effect of the use upon the potential market for or value of the copyrighted work.

RELEVANT SECTIONS OF THE BILL OF RIGHTS OF THE FINAL CONSTITUTION 1996

14. Privacy

Everyone has the right to privacy, which includes the right not to have

- a. their person or home searched;
- b. their property searched;
- c. their possessions seized; or
- d. the privacy of their communications infringed.

16. Freedom of expression

1. Everyone has the right to freedom of expression, which includes

- a. freedom of the press and other media;
- b. freedom to receive or impart information or ideas;
- c. freedom of artistic creativity; and
- d. academic freedom and freedom of scientific research.

2. The right in subsection (1) does not extend to

- a. propaganda for war;
- b. incitement of imminent violence; or
- c. advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

25. Property

1. No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

2. Property may be expropriated only in terms of law of general application

- a. for a public purpose or in the public interest; and
- b. subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

3. The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including

- a. a. the current use of the property;
- b. b. the history of the acquisition and use of the property;
- c. c. the market value of the property;
- d. d. the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
- e. the purpose of the expropriation.

2. For the purposes of this section

- a. the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
- b. property is not limited to land.