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COPYRIGHT LAW AND THE HUMAN RIGHTS OF PERSONS WITH DISABILITIES: CASELAW FROM AFRICA

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ABSTRACT

Throughout the world, copyright is considered an important tool to encourage and sustain the creation of knowledge and works of art. While it protects the rights of private authors and artists to their creations, copyright also protects the public domain and enhances the ability of individuals to have access to and enjoy cultural goods. However, copyright law must strike a balance between protecting the human rights of those who create and those of people in society who consume what is created. This is especially true in the case of people with visual and print impairments, whose ability to avail themselves of literary works in accessible format copies is compromised by copyright's permission structure. It is important, then, that African countries modify their copyright laws and bring them into conformity with the provisions of international human rights instruments, including especially those of the Marrakesh Treaty. Courts in the African countries can provide an effective interim remedy while they wait for the political branches to bring national copyright laws into conformity with the Marrakesh Treaty and permanently resolve the book famine problem. An examination of the Constitutional Court of South Africa's *Blind SA* provides some evidence of the role that courts can play in helping ensure that national copyright laws conform to international human rights standards and do not violate the human rights of persons with visual and print impairments.

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I. INTRODUCTION

Understanding copyright law and its purposes begins with examining relevant constitutional provisions or clauses and/or legislative enactments. For example, Article 1, §8 cl. 8 of the Constitution of the United States of America grants Congress the power to pass copyright laws and reads as follows: "The Congress shall have Power . . . To promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings."[1] Professor L. Ray Patterson notes that clause 8 "limits the power it grants to the purpose for which the power is granted," and that is "to promote science, which means knowledge or learning in the eighteen-century usage of the word."[2] The law, thus, permits the U.S. Congress to "grant copyright only to authors, only for their writings, and only for limited times."[3]

As evidenced by the expression "for limited Times," if Congress enacted legislation that provided for "a perpetual copyright," that copyright law would be considered unconstitutional.[4] When the U.S. Constitution was ratified in 1789, the expression "exclusive Right" was read as "the right to publish the work" but that today, "there are other ways than publishing to market a work."[5] Hence, the "exclusive Right" is properly read today to mean "the exclusive right of authors to market their works, which retains the original function of the phrase" and also keeps intact the purpose of copyright—"to promote learning."[6]

With respect to the subject matter of copyright, 17 U.S.C. § 102 (a) states that:

> Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived,

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[1] U.S. CONST. art. I, § 8 cl. 8.

[2] L. Ray Patterson, *Regents Guide to Understanding Copyright and Educational Fair Use*, 5 J. INTELL. PROP. L. 243, 270 (1997).

[3] *Id.*

[4] *Id.*; *see also* U.S. CONST. art. I, §8 cl. 8.

[5] Patterson, *supra* note 2, at 270.

[6] *Id.*

> reproduced, or otherwise communicated, either directly or with the aid of a machine or device.[7]

The Statute designates the following as works of authorship:

(1) literary works;
(2) musical works, including any accompanying words;
(3) dramatic works, including any accompanying music;
(4) pantomimes and choreographic works;
(5) pictorial, graphic, and sculptural works;
(6) motion pictures and other audiovisual works;
(7) sound recordings; and
(8) architectural works.[8]

Originality as described in the U.S. Copyright Statute is "an original work of authorship" and is important because it is a constitutional condition for the grant of copyright.[9] As a result of this condition, the law recognizes two categories of writings: those which can be copyrighted and those which cannot be or are not copyrighted.[10] Material that cannot be copyrighted is "called public domain material" and includes "(1) facts and ideas (11 U.S.C. § 102(b)); (2) works of the U.S. Government (11 U.S.C. § 105); (3) all material that is not original with the author claiming copyright (11 U.S.C. § 103); and (4) works upon which the copyright has expired."[11] In *Feist Publ'n., Inc. v. Rural Tel.*, Justice O'Connor clarified the U.S. Supreme Court's position on copyright when she wrote that "originality is a constitutionally mandated prerequisite for copyright protection."[12] The honorable U.S. Supreme Court Justice noted further that "[c]opyright rewards originality, not effort."[13]

Some legal scholars have noted that although the purpose of copyright "is to promote learning, there are two obvious points [that] are sometimes overlooked" and these are that "(1) the amount of public domain material exceeds the amount of copyrighted material by far; and (2) the public domain is as necessary to the promotion of learning as copyright."[14] Thus, "copyright's role in preserving the public domain is as important as protecting the new writings of authors."[15]

The U.S. Constitution's copyright clause reserves copyright only to *new writing* but only for a limited copyright term, meaning that copyright cannot be granted to "old works from the public domain."[16] Hence, "two of the constitutional roles of copyright law are to preserve and to enhance the public domain."[17] However, some scholars have

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[7] 17 U.S.C. § 102(a) (2021).
[8] *Id.*
[9] Patterson, *supra* note 2, at 270.
[10] *Id.*
[11] *Id.*
[12] Feist Publ'n, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 351 (1991).
[13] *Id.* at 364.
[14] Patterson, *supra* note 2, at 270; *see also* L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 3 (1987) (noting promotion of learning as the constitutional purpose of copyright).
[15] Patterson, *supra* note 2, at 270.
[16] *Id.*; *see also* U.S. CONST. art. I, §8 cl. 8.
[17] Patterson, *supra* note 2, at 271.

argued that "copyright has a subjective dimension born in Western ideology and crystallized in American law."[18]

Copyright manifests at least three dimensions. First, is the "moral rights of the individual to his or her intellectual property and to have essential control over that property, be it a work of art, an invention, or a book."[19] This approach to copyright "is reflected in most of the European copyright laws and in the Berne Convention, the oldest and largest of the two major international copyright arrangements," which see copyright as a "natural right."[20]

Second, is the view of copyright that is expressed in Article 1, §8 cl. 8 of the U.S. Constitution and which does not see copyright as a "natural right" but as a "privilege" granted to a creator of knowledge by the State.[21] Thus, the Founders of the American Republic saw copyright as an incentive to encourage intellectual creativity. Of course, copyright, a form of intellectual property law, protects "original works of authorship including literary, dramatic, musical, and artistic works, such as poetry, novels, movies, songs, computer software, and architecture" but not "facts, ideas, systems, or methods of operation."[22] While the American approach commercializes copyright and intellectual creativity, it also ensures that society benefits from the works created.[23] Under the American system, individuals may create knowledge for economic reasons, however, by doing so, they add to the national stock of knowledge, which invariably will benefit society as a whole.

Third, the "societal" theory of copyright, characterized the Soviet copyright system.[24] In that system, "the society has certain basic rights over intellectual work and the copyright laws reflect a compromise between personal rights and interests, which are recognized, and those of the collective enterprise."[25] Copyright as property, which is a foundational and fundamental element of market-based economies and "is basic in both the American and European approaches to copyright," is, however, "absent from the 'societal' theory."[26]

The emergence of copyright in various countries and regions around the world has been influenced by "particular historical and socio-economic circumstances."[27] For example, in Europe, copyright emerged "as printing and distribution grew more sophisticated, industry developed, and a mass market of cultural goods became important."[28] In addition, "[t]he idea of the artist and writer as an individual creator who profits from his or her work and who is engaged in a competitive enterprise with

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[18] Donald L. Diefenbach, *The Constitutional and Moral Justifications for Copyright*, 8 PUB. AFF. Q. 225, 229 (1994).

[19] Philip G. Altbach, *Knowledge Enigma: Copyright in the Third World*, 21 ECON. & POL. WEEKLY 1643, 1643 (1986).

[20] *Id.*

[21] *Id.*

[22] U.S. Copyright Office, *What Does Copyright Protect?*, U.S. COPYRIGHT OFFICE, https://www.copyright.gov/help/faq/faq-protect.html#what_protect (last visited Nov. 1, 2022).

[23] Jon M. Garon, *Media & Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas*, 17 CARDOZO ARTS & ENT. L.J. 491, 545–546 (1999) (noting the role of copyright in knowledge creation and enhancing the ability of citizens to have access to more knowledge).

[24] Altbach, *supra* note 19, at 1643.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

other individual creators is key to the European and American ideologies of copyright."[29]

Most of the countries that emerged from European colonialism inherited their copyright systems from the countries that colonialized them.[30] For example, in Africa, many former British colonies "inherited the English common law system of copyright from the United Kingdom during the colonial era."[31] In the post-independence period, many African countries continued to "model their copyright laws in the copyright law traditions of their erstwhile colonial masters, whether England or France, with their emphasis on the transferability or alienability of copyright."[32]

The Anglo-American model of copyright, where economic and commercial rights are the dominant factor, remains a critical factor in the global protection of intellectual property.[33] For example, when South Africa enacted its Copyright Act, it "was hailed as marking a departure from a dependence on British copyright law."[34] South Africa's effort to remove itself from reliance on the Anglo-American copyright system was, however, short-lived. In *Biotech Lab. (Pty) Ltd v. Beecham Group PLC & Another*, Judge of Appeal Harms, writing for the South African Court of Appeal, referred to an argument that had been advanced in the case in relation to

> a philosophy allegedly underlying the [Copyright] Act, namely that it seeks to create a system whereby the creator of an original work is afforded a qualified exclusive right to compensate him for the effort, creativity and talent expended and to act as an incentive for the creation of further and better works.[35]

Judge of Appeal Harms explained what the Copyright Act as it was at the time, was designed to achieve. He declared as follows:

> The present Act, in its original form, attempted to be kinder to authors. The concept of 'copyright' was replaced with an author's right, the 'ownership' of which vested principally in the author. In this and other regards the object was to move in the direction of Continental law where the emphasis is on the rights (moral and other) of the author and not on the economic rights of employers and entrepreneurs. *The good intentions did not last and hardly a year had passed when the Legislature (by*

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[29] Altbach, *supra* note 19, at 1643.

[30] Samuel Samiai Andrews, *Reforming Copyright Law for a Developing Africa*, 66 J. COPYRIGHT SOC. 1, 30 (2019) (noting that Nigeria "adopted its copyright law from its British colonial heritage").

[31] J. J. Baloyi, *Demystifying the Role of Copyright as a Tool for Economic Development in Africa: Tackling the Harsh Effects of the Transferability Principle in Copyright Law*, 17 POTCHEFSTROOM ELEC. L.J. 87, 114 (2014).

[32] *Id.* at 114.

[33] *See generally* Timothy K. Armstrong, *Two Perspectives on Copyright's Past and Future in the Digital Age*, 15 J. MARSHALL REV. INTELL. PROP. L. 698 (2016) (providing an overview of the evolution of the Anglo-American model of copyright and its impact on global intellectual property).

[34] Baloyi, *supra* note 31, at 117. *See also* Copyright Act 98 of 1978 (S. Afr.).

[35] *Biotech Lab. (Pty) Ltd. v. Beecham Group PLC & Smith-Kline Beecham Pharm. (Pty) Ltd.* 2002 (11) SA 1 (CC) at 11 (S. Afr.).

> *amending s 21) reverted, as far as ownership was concerned, to the Anglo-American model where commercial rights tend to reign supreme*.[36]

Hence, South Africa, like many other developing countries, has copyright law that is based on or reflects the principles entrenched in the Anglo-American model of intellectual property protection. In 2015, South Africa engaged in an ambitious program to fully overhaul its copyright system and did so by incorporating "some of the best elements of both U.S. and European copyright."[37] South Africa imported the concept of "fair use"[38] from U.S. copyright and the "idea of specific, enumerated exemptions for libraries, galleries, archives, museums, and researchers" from the European model.[39]

According to the Electronic Frontier Foundation ("EFF"), "[b]oth systems are important for preserving core human rights, including free expression, privacy, education, and access to knowledge; as well as important cultural and economic priorities such as the ability to build U.S. and European-style industries that rely on flexibilities in copyright."[40] Although the constitutional basis of United States copyright law is utilitarian, it has been argued that "an alternative kind of constitutional norm that might be taken into consideration while shaping copyright law" can be found in Article 27 of the Universal Declaration of Human Rights.[41] In the Section that follows, this Article will examine copyright and its relation to the protection of human rights.

II. COPYRIGHT AND HUMAN RIGHTS

Over the years, emphasis has been placed, not only on the protection of the human rights of knowledge creators (i.e., authors), but also on members of society who consume what is created.[42] This is particularly true for individuals with visual and

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[36] *Id.* at 12.

[37] Cory Doctorow, *An Open Letter to the Government of South Africa on the Need to Protect Human Rights in Copyright,* ELECTRONIC FRONTIER FOUNDATION (EFF) (Aug. 18, 2020), https://www.eff.org/deeplinks/2020/08/open-letter-government-south-africa-need-protect-human-rights-copyright.

[38] *Id.* According to the U.S. Copyright Office, "[f]air use is a legal doctrine that promotes freedom of expression by permitting the unlicensed use of copyright-protected works in certain circumstances." Section 107 of the U.S. Copyright Act "provides the statutory framework for determining whether something is a fair use and identifies certain types of uses—such as criticism, comment, news reporting, teaching, scholarship, and research—as examples of activities that may qualify as fair use."

[39] *Id.*

[40] *Id.*

[41] G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) (hereinafter UDHR).

[42] Jon M. Garon, *Media & Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas*, 17 CARDOZO ARTS & ENT. L.J. 491, 512 (1999) (noting that the ultimate aim of copyright "is to stimulate artistic creativity for the general public good").

print disabilities.[43] Hence, it is important that national copyright laws not "limit the access of [persons with disabilities] to published literary works, and artistic works as may be included in such literary works, in accessible format copies."[44] Thus, copyright law must strike a balance between protecting the human rights of those who create and those of people in society who consume what is created.

Jens Bammel, Secretary General of the International Publishers Association, noted that although copyright protection "is not per se a human right," it is, nevertheless, "a tool which protects the human rights of authors and publishers."[45] He notes further that copyright has "two elements that relate to human rights: it has an element linked to someone's personal creativity and identity and it has an economic aspect." [46] Copyright, however, is not specifically or expressly mentioned in international human rights instruments. Nevertheless, international treaties and conventions, as well as national constitutions, "allude to [copyright] by giving creators and scientists the benefit of 'the moral and material interests resulting from any scientific, literary or artistic production of which he [or she] is the author.'"[47]

Copyright, a form of intellectual property, "enjoys protection as part of the human right to property," which is "enshrined in Article 17 of the Universal Declaration of Human Rights" ("UDHR"). [48] Copyright performs two important functions—to encourage, enhance, and "promote the Progress of Science and useful Arts," as enshrined, for example, in the U.S. Constitution,[49] and to ensure that scientists and authors are fully compensated for their research findings and creative endeavors.[50] In each country, using copyright to ensure that authors and scientists are able to earn a living from their research findings and creative endeavors creates an environment where society can have access to the cultural products that it enjoys.

Article 17 of the Universal Declaration of Human Rights ("UDHR") guarantees the right to property to everyone. According to Article 17:

> 1. Everyone has the right to own property alone as well as in association with others.
> 2. No one shall be arbitrarily deprived of his property.[51]

The UDHR makes the right to property a human right and given that copyright is a form of intellectual property, it can be considered a human right. Article 27 of the UDHR protects the human rights of the consumer of cultural property (27(1)) and those of the producer (27(2)). Article 27 of the UDHR declares as follows:

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[43] *See generally* Patrick Hely, *Note: A Model Copyright Exemption to Serve the Visually Impaired*, 43 VAND. L. REV. 1369 (2010) (noting international efforts to modify copyright law to improve access to copyrighted works for persons with visual and print disabilities).

[44] *Blind SA v. Minister of Trade, Indus. and Competition and Others* 2022 (33) SA 1 (CC), at 2 (S. Afr.).

[45] Jens Bammel, *Introduction: Copyright and Human Rights*, *in* COPYRIGHT AND HUMAN RIGHTS: AN IPA SPECIAL REPORT (2015) 2, https://www.internationalpublishers.org/images/Copyright.pdf.

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] U.S. CONST. art. I, § 8 cl. 8.

[50] Bammel, *supra* note 45.

[51] UDHR, *supra* note 41, at art. 17.

> 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.[52]

As noted by Professor Orit Fischman Afori, "Article 27 embraces a balance of interests between authors' proprietary rights over their works and the rights of other members of society to enjoy these works."[53] Thus, "the introduction of natural law considerations through Article 27 need not necessarily sway the balance in favor of authors; it might even advance the rights of members of society to enjoy works, and hence will contribute to copyright restraint."[54] Introducing natural law considerations into domestic copyright law, through Article 27, "can contribute to the development of copyright law in a balanced way, by enriching the different considerations taken into account."[55]

Professor Paul L. C. Torremans has noted that Article 27's first paragraph "clearly has historical roots."[56] The UDHR "was drafted less than three years after the end of World War II, and those who lost the war had abused science and technology as well as copyright-based propaganda for atrocious purposes." [57] The post-war international community had to prevent such abuses in the future and it appeared that the most effective way to do so was "to recognize that everyone had a share in the benefits and that at the same time those who made valuable contributions were entitled to protection."[58]

While copyright protects the moral and material rights of authors and creators, the second paragraph of Article 27 of the UDHR must therefore "be seen as elevating copyright to the status of a human right, or maybe it is more appropriate to say that the article recognizes the human rights status of copyright."[59] The second paragraph's roots can be found in two important elements. The first one is the "French delegation's original suggestion that had a double focus," which "emphasized the moral rights of the author, which centered on his or her ability to control alterations made to the work and to be able to stop misuses of the work" and recognition of "the right of the author or creator to receive a form of remuneration for his or her creative activity and contribution."[60]

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[52] *Id.* at art. 27.

[53] Ori Fischman Afori, *Human Rights and Copyright: The Introduction of Natural Law Considerations into American Copyright Law*, 14 FORD. INTELL. PROP. MEDIA & ENT. L.J. 497, 500 (2004).

[54] *Id.*

[55] *Id.*

[56] Paul L. C. Torremans, *The International Intellectual Property Regime Complex: Is Copyright a Human Right?*, 2007 MICH. ST. L. REV. 271, 275 (2007).

[57] *Id.*

[58] *Id.*

[59] *Id.* at 276.

[60] *Id.* This was the French delegation to the UN Commission on Human Rights that drafted the UDHR between early 1947 and late 1948. *See, e.g.,* United Nations, *Universal Declaration of Human*

Article 27 was also influenced by the contributions of the Mexican and Cuban members of the committee that drafted the UDHR "who argued that it made sense to establish a parallelism between the provisions of [UDHR] and the American Declaration on the Rights and Duties of Man that had at that stage been adopted very recently."[61] However, the initial criticism that "intellectual property was not, properly speaking, a human right or that it already attracted sufficient protection under the regime of protection afforded to property rights in general[,] was eventually defeated by a coalition of those who primarily voted in favor."[62]

Of course, some critics of the UDHR have argued that it is "hortatory and aspirational, recommendatory rather than, in a formal case, binding."[63] However, since its adoption by the United Nations General Assembly (UNGA) in 1948, "the years have further blurred the threshold contrast between 'binding' and 'hortatory' instruments."[64] Although the UDHR does not have the legal status of a treaty, "its position in international law has changed significantly, and it has received favorable treatment in many domestic legal systems since it was adopted by the [UNGA] on December 10, 1948."[65] Most importantly is the fact that "over the years arguments have developed which favor viewing 'all or parts of [the UDHR] as legally binding, either as a matter of customary international law or as an authoritative interpretation of the UN Charter.'"[66]

International human rights scholars have noted that "copyright as a human right requires a balance between the concepts expressed in article 27(1) and those expressed in article 27(2)" and that "[d]espite the uncertainty surrounding Article 27, national courts have used it to protect the interests of authors on a couple of occasions."[67] For example, in 1959, a Paris Court of Appeal granted Charlie Chaplin, a British national, "protection of cinematographic works in France although he was not entitled to the benefit of the Berne Convention."[68] The decision of the French court to grant Chaplin French rights regarding his moral rights in his cinematic creations was based "on an assimilation of Article 27(2) when he wished to object to the unauthorized addition of a sound track to one of his movies."[69]

Rights (1948), Drafting History, DAG HAMMARSKJÖLD LIBRARY, https://research.un.org/en/undhr/draftingcommittee (last visited Nov. 2, 2022).

[61] Torremans, *supra* note 56, at 276. Article 13 of the American Declaration deals with intellectual property rights. *See* American Declaration of the Rights and Duties of Man, OEA/ser.L./V/II.23, doc. 21 rev. 6 (1948), available at https://www.oas.org/dil/access_to_information_human_right_American_Declaration_of_the_Rights_and_Duties_of_Man.pdf.

[62] Torremans, *supra* note 56, at 277.

[63] HENRY J. STEINER ET AL., INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 152 (2008).

[64] John Mukum Mbaku, *Protecting Human Rights in African Countries: International Law, Domestic Constitutional Interpretation, the Responsibility to Protect, and Presidential Immunities*, 16 S.C. J. INT'L L. & BUS. 1, 21 (2019).

[65] *Id.*

[66] *Id.*

[67] Torremans, *supra* note 56, at 277.

[68] François Dessemontet, *Conflicts of Laws for Intellectual Property in Cyberspace*, WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO) (Nov. 6 - 7, 2000), https://www.wipo.int/amc/en/events/conferences/2000/presentations/dessemontet.html.

[69] Torremans, *supra* note 56, at 277.

The UDHR was adopted in 1948 and in 1966, the UNGA adopted the International Covenant on Economic, Social and Cultural Rights ("ICESCR").[70] However, unlike the UDHR, the ICESCR is a binding international human rights treaty and hence, it can impose binding obligations on States Parties.[71] For example, Article 15 of the ICESCR imposes several obligations and responsibilities on States Parties and instructs them to act in specific ways:

> 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.
>
> 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
>
> 3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
>
> 4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.[72]

The obligations imposed on States Parties by the ICESCR "apply to the substantive rights granted in paragraph one of article 15, which are based on article 27 of the [UDHR]" and "which comprise the rights of everyone to take part in cultural life, to enjoy the benefits of scientific progress and its applications, and—most importantly for current purposes—to benefit from the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which he [or she] is the author."[73]

Article 15.1(c) of the ICESCR imposes an obligation on States Parties to protect the "moral and material interests of authors," which result from their "scientific, literary or artistic production."[74] All States Parties have an obligation to "implement copyright as a human right and to put in place an appropriate regime of protection for

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[70] G.A. Res. 2200A (XXI) (Dec. 16, 1966) (hereinafter ICESCR).

[71] Bruno Simma and Gleider I. Hernández, *Legal Consequences of an Impermissible Reservation to a Human Rights Treaty: Where Do We Stand?*, *in* THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION 67 (Enzo Cannizzaro et al. eds., 2011) (noting that "[h]uman rights treaties . . . create rights and obligations between their parties").

[72] ICESCR, *supra* note 70, at art. 15.

[73] Torremans, *supra* note 56, at 278.

[74] ICESCR, *supra* note 70, at art. 15(1)(c).

the interests of authors and creators."[75] Although States Parties to the ICESCR are granted significant discretion as to "the exact legal format" for protecting the interests of authors and creators, "[t]he human rights framework in which copyright is placed does however put in place a number of imperative guidelines" and these are:[76]

- Intellectual property rights must be consistent with the understanding of human dignity in the various international human rights instruments and the norms defined therein;
- Intellectual property rights related to science must promote scientific progress and access to its benefits;
- Intellectual property regimes must respect the freedom indispensable for scientific research and creative activity;
- Intellectual property regimes must encourage the development of international contacts and cooperation in the scientific and cultural fields.[77]

Article 15(1)(b) of the ICESCR grants everyone the right to enjoy the "benefits of scientific progress and its applications."[78] The right of everyone to enjoy the benefits of scientific progress and its applications has been conceptualized as having three key components: (1) "[a] right of access to beneficial scientific and technological developments"; (2) "[a] right of choice in determining priorities and making decisions about major scientific and technological developments"; and (3) "[a] right to be protected from possible harmful effects of scientific and technological development, on both individual and collective levels."[79]

From a human rights perspective, each State Party must ensure that, at the minimum, the right to access and benefit from scientific and technological developments will be exercised by all citizens "without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[80] In addition, each State Party must "ensure the equal right of men and women to the enjoyment of" the benefits of scientific and technological developments.[81]

The human rights approach to interpreting the right to benefit from scientific and technological developments "establishes a requirement for the state to undertake a very rigorous and desegregated analysis of the likely impact of specific innovations, as well as an evaluation of proposed changes in intellectual property paradigms, and to utilize these data to assure nondiscrimination in the end result."[82] Specifically, each State Party must ensure that "the poor, the disadvantaged, racial, ethnic and linguistic

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[75] Torremans, *supra* note 56, at 279.

[76] *Id.* at 279.

[77] Audrey R. Chapman, *A Human Rights Perspective on Intellectual Property, Scientific Progress, and Access to the Benefit of Science, Science and Human Rights Program*, WIPO 1, 13 (1999), https://www.wipo.int/edocs/mdocs/tk/en/wipo_unhchr_ip_pnl_98/wipo_unhchr_ip_pnl_98_5.pdf.

[78] ICESCR, *supra* note 70, at art. 15(1)(b).

[79] Chapman, *supra* note 77.

[80] ICESCR, *supra* note 70, at art. 2(2).

[81] *Id.* at art. 3.

[82] Chapman, *supra* note 77.

minorities, women [and girls], rural residents" are provided with the wherewithal to enjoy the benefits of scientific and technological developments.[83]

The main interest of this Article is to examine how copyright law in particular and intellectual property law in general have subordinated "the interests of people with disabilities in accessing copyrighted works to those of rightsholders in maintaining copyright's permission structure as a barrier to the accessibility of their works."[84] First, the Article will provide an overview of examples of how copyright's ableism has produced the subordination of the interests of persons with disabilities to access copyrighted works to those of copyright holders, with particular emphasis on Africa. Second, the Article will use a case from the Constitutional Court of South Africa to show how civil society groups and courts in the continent are fighting to strike a balance between the rights of copyright holders to enjoy the benefits of their creations and developments and those of persons with disabilities to have access to these cultural goods.

III. COPYRIGHT AND PERSONS WITH DISABILITIES

A. Introduction

Some scholars have argued that intellectual property law in the United States has, "as a general matter, proceeded in ignorance of disabilities."[85] The failure of intellectual property law, including copyright, to consider the interests of persons with disabilities "can cause extrinsic harms to the goals of disability law and policy."[86] Specifically, "copyright's ableist tradition of subordinating the interests of people with disabilities in accessing copyrighted works to those of rightsholders in maintaining copyright's permission structure" is a major "barrier to the accessibility of their works."[87]

Making creative works accessible to persons with disabilities is guaranteed by international human rights instruments and the laws of many countries, including those in Africa.[88] The UN Convention on the Rights of People with Disabilities ("CRPD") directs States Parties to "recognize the right of persons with disabilities to take part on an equal basis with others in cultural life."[89] The CRPD also imposes an obligation on these States to:

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[83] *Id.*

[84] Blake E. Reid, *Copyright and Disability*, 109 CAL. L. REV. 2174, 2176 (2021).

[85] Eric E. Johnson, *Intellectual Property's Need for a Disability Perspective*, 20 GEO. MASON U. CIV. RTS. L.J. 181, 186 (2010).

[86] Reid, *supra* note 84, at 2175.

[87] *Id.* at 2175–2176.

[88] *See, e.g.*, WIPO, *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled*, WIPO Doc. VIP/DC/8 Rev. (Sept. 30, 2016) (creating "a set of mandatory limitations and exceptions for the benefit of the blind, visually impaired, and otherwise print disabled (VIPs)").

[89] Convention on the Rights of Persons with Disabilities, G.A. Res, 61/106, U.N. Doc. A/RES/61/106, art. 1 (Dec. 6, 2006), available at http://www.un.org/esa/socdev/enable/documents/tccconve.pdf (hereinafter CRPD).

take all appropriate measures to ensure that persons with disabilities:

> (a) Enjoy access to cultural materials in accessible formats;
> (b) Enjoy access to television programs, films, theater and other cultural activities, in accessible formats;
> (c) Enjoy access to places for cultural performances or services, such as theaters, museums, cinemas, libraries and tourism services, and, as far as possible, enjoy access to monuments and sites of national cultural importance.[90]

In addition, States Parties are required to ensure that people with disabilities "can exercise the right to freedom of expression and opinion, including the freedom to seek, *receive and impart information* and ideas on an equal basis with others and through all forms of communication of their choice."[91] States Parties are expected to do so by:

> (a) Providing information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost;
> (b) Accepting and facilitating the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions;
> (c) Urging private entities that provide services to the general public, including through the Internet, to provide information and services in accessible and usable formats for persons with disabilities;
> (d) Encouraging the mass media, including providers of information through the Internet, to make their services accessible to persons with disabilities;
> (e) Recognizing and promoting the use of sign languages.[92]

States Parties are also instructed by the CRPD "[t]o enable persons with disabilities to live independently and participate fully in all aspects of life."[93] More specifically, States Parties are "(g) [t]o promote access for persons with disabilities to new information and communications technologies and systems, including the Internet" and "(h) [t]o promote the design, development, production and distribution of accessible information and communications technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost."[94]

In its *2021 Report on Public Access to Information*, the United Nations Educational, Scientific, and Cultural Organization ("UNESCO"), noted that civil and political rights, including the right to information, "are a vital prerequisite for persons

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[90] *Id.* at art. 30(1).
[91] *Id.* at art. 21 (emphasis added).
[92] *Id.* at art. 21(a)–(e).
[93] *Id.* at art. 9(1).
[94] CRPD, *supra* note 89, at art. 9(2)((g)–(h)).

with disabilities to overcome histories of exclusion."[95] UNESCO also acknowledges that in addition to discussing equality for persons with disabilities in accessing information, the CRPD also "places the right to information in the context of disability accessibility."[96] Finally, the CRPD also imposes obligations on States Parties to take necessary measures to ensure that persons with disabilities can fully access information and fully participate in the cultural life of their communities.[97]

On January 29, 2018, the African Union adopted the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa ("African Disabilities Protocol").[98] However, as of 2023, only five of Africa's 55 Member States of the African Union ("AU") have ratified the African Disabilities Protocol.[99] The Protocol directs States Parties to ensure that "[e]very person with a disability has the right to barrier free access to the physical environment, transportation, *information, including communications technologies and systems*, and other facilities open or provided to the public."[100] States Parties are also required to facilitate "respect, recognition, promotion, preservation and development of sign languages."[101]

Additionally, States Parties to the African Disabilities Protocol must ensure that "[e]very person with a disability has the right to freedom of expression and opinion including the freedom to seek, receive and impart information and ideas through all forms of communication of their choice."[102] With respect to the right to access information, the African Disabilities Protocol states that "[e]very person with a disability has the right to access information" and that States Parties "shall take policy, legislative, administrative and other measures to ensure that persons with disabilities can exercise these rights, on the basis of equality."[103] States Parties are expected to do so by:

> a) Providing information intended for the general public as well as information required for official interactions to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner, and without additional cost to persons with disabilities;

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[95] UNESCO, *To Recovery and Beyond 2021 UNESCO Report on Public Access to Information (SDG 16.10.2)*, UNESCO (2022), https://unesdoc.unesco.org/ark:/48223/pf0000380520 (hereinafter UNESCO).

[96] *Id.*

[97] *See generally* CRPD, *supra* note 89, at art. 25.

[98] African Union, *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa*, AFRICAN UNION (Jan. 29, 2018) (hereinafter African Disabilities Protocol).

[99] *See* African Union, *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa: Status List*, AFRICAN UNION, https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-persons-disabilities-africa (last visited Nov. 9, 2022). The Protocol has been ratified by Kenya, Mali, and Rwanda. The Protocol will enter into force "thirty (30) days after the deposit of the fifteenth (15th) instrument of ratification by a Member State." *Id.*

[100] African Disabilities Protocol, *supra* note 98, at art. 15(1) (emphasis added).

[101] *Id.* at art. 16(3)(j).

[102] *Id.* at art. 23(1).

[103] *Id.*at arts. 24(1) & 24(2).

> b) Requiring private entities that provide services to the general public, including through print and electronic media, to provide information and services in accessible and usable formats for persons with disabilities;
> c) Recognizing and promoting the use of sign languages and deaf culture; and
> d) Ensuring that persons with visual impairments or with other print disabilities have effective access to published works including by using information and communication technologies.[104]

The African Disabilities Protocol also guarantees the right of every person with a disability to participate in cultural activities and imposes an obligation on States Parties to take "effective and appropriate policy, legislative, budgetary, administrative and other measures to ensure this right, on the basis of equality."[105] States Parties are expected to do so by:

> a) Ensuring that persons with disabilities have access to . . . cultural services and facilities, including access to . . . theaters, . . . entertainment establishments, . . . [and] libraries;
> f) Facilitating access to audio, video, print and media technologies and services including theater, television, film and other cultural performances and activities;
> g) Discouraging negative representations and stereotyping of persons with disabilities in both traditional and modern cultural activities and through the media;
> h) Encouraging and supporting creativity and talent among persons with disabilities for their own and the society's benefit;
> i) Putting in place measures to mitigate barriers that hinder access to cultural materials in accessible formats; and
> j) Recognizing and supporting the cultural and linguistic identities of persons with disabilities, including deaf-blind and deaf culture, and sign languages.[106]

UNESCO has noted that "[t]he importance of access to information (ATI)" is a human right that has internationally been recognized but that the realization of this right by persons with disabilities "remains a challenge."[107] The UN's 2030 Agenda for Sustainable Development has called upon UN Member States to ensure the full and equal participation of persons with disabilities in all spheres of society.[108]

When the African Disabilities Protocol was adopted in 2018, the UN High Commissioner for Human Rights ("HCHR") issued a Press Release in which it was noted that the Protocol has "great potential to strengthen the implementation of

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[104] *Id.* at art. 24(2)(a)–(d).
[105] African Disabilities Protocol, *supra* note 98, at art. 25(1) and (2).
[106] *Id.* at art. 25(2).
[107] UNESCO, *supra* note 95.
[108] UN General Assembly, *Transforming our World: The 2030 Agenda for Sustainable Development*, UN Doc. A/RES/70/1 (Oct. 21, 2015), at para. 25 (hereinafter The 2030 Agenda).

universal human rights for 84 million Africans with disabilities."[109] The Protocol, noted the Special Rapporteur on the Rights of Persons with Disabilities, "is expected to trigger a much greater inclusion of the concerns of people with disabilities in laws, policies and budgets, because it ensures increased accountability and closer oversight of how States implement their human rights obligations."[110]

B. Copyright and Rights of Persons with Disabilities in Africa

In the Preamble to its *2030 Agenda for Sustainable Development*, the UN noted that the global community had embarked on a "collective journey" and had pledged that "no one will be left behind."[111] The 2030 Agenda also includes persons with disabilities as a "priority group" to be considered in efforts to (i) promote "sustained, inclusive and sustainable growth, full and productive employment and decent work for all" and (ii) "[m]ake cities and human settlements inclusive, safe, resilient and sustainable."[112] However, this effort to include persons with disabilities in various interventions designed to achieve the goals of the 2030 Agenda remains a work-in-progress.

For example, it has been estimated that in 2018, as many as "one billion people live with some form of disability, and that 80% of these individuals live in low- or middle-income countries, where they face more severe hardship than any other group of individuals."[113] Researchers have noted that "[f]ive years into the [Sustainable Development Goals] SDGs, little has been achieved in terms of inclusion of persons with disabilities" and that "[s]uch individuals still face particularly high rates of poverty (SDG1) and hunger (SDG2)."[114]

Throughout Africa, persons with disabilities continue to face "public stigma in various spheres of life," effectively reducing their ability to participate in welfare-enhancing activities (e.g., education and training; work; and travel).[115] During February 16–17, 2022, the governments of Ghana and Norway co-hosted the second Global Disability Summit ("GDS"), held virtually because of COVID-19.[116] The GDS' objectives were to (i) "[r]aise global attention and focus on neglected areas and inclusive sustainable development"; (ii) "[s]trengthen the capacity of organizations of persons with disabilities in the Global South and their engagement with governments"; (iii) "[m]obilize targeted and concrete commitments on disability inclusion and inclusive development"; and "[s]howcase best practice and evidence from across the

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[109] United Nations Human Rights Office of the High Commissioner, *African States Affirm the Rights of Persons with Disabilities in a New Landmark Protocol: Africans With Disabilities*, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (Feb. 15, 2018), https://www.ohchr.org/en/press-releases/2018/02/african-states-affirm-rights-persons-disabilities-new-landmark-protocol.

[110] *Id.*

[111] The 2030 Agenda, *supra* note 108, at pmbl.

[112] The 2030 Agenda, *supra* note 108, at paras. 8 & 11.

[113] Jean-François Trani et al., *Stigma of Persons with Disabilities in South Africa: Uncovering Pathways from Discrimination to Depression and Low Self-Esteem*, 265 SOC. SC. & MED. 113449, 113450 (2020).

[114] *Id.*

[115] *Id.*

[116] Global Disability Summit, *Welcome to the Global Disability Summit*, GLOBAL DISABILITY SUMMIT (Feb. 16-17, 2022), https://www.globaldisabilitysummit.org/ (hereinafter GDS).

world on disability inclusive development, and progress made from the GDS in 2018."[117]

Reporting on the GDS for *African Arguments*, Gertrude Oforima Fefoame, who grew up in Ghana with "a severe visual impairment" and "experienced stigma and discrimination," noted that "[b]efore the [COVID-19] pandemic," there had been significant progress in "disability rights activism, advocacy and legislation." [118] However, after COVID-19 struck the continent, most people with disabilities "were left behind."[119] She notes that in Ghana during the pandemic, the needs of people with disabilities "were constantly neglected, from information not being accessible, to personal protection equipment ("PPE") not being available, to people with disabilities not being prioritized to receive vaccines." [120] This was taking place "against a background in which millions of people with disabilities already face daily denial of their human rights to education, health care, employment, and political participation."[121]

This is what a blind woman from Senegal said about the way she was treated during the pandemic: "[a]part from the radio news, I was unable to access other types of information on the vaccine. As a blind person, I have no other sources of information."[122] A hearing impaired woman from Uganda had a similar experience: "[m]y greatest pain is when even some organization brought some relief food here, nobody was bothered that I could get food, [because] I had no sign language interpreter near me."[123]

The first GDS was held in London in 2018 ("GDS18").[124] However, at the time when GDS22 was held virtually, many of the commitments that had been made at GDS18 had not yet been implemented[125] as many of them "were vague, were not properly financed, or did not take neglected areas into account" and that "there wasn't a meaningful mechanism in place to hold bodies to account for their commitments."[126] As a consequence, millions of people with disabilities around the world and in Africa continue to face enormous challenges as they struggle to have access to life-saving and welfare-enhancing services. In many rural areas in Africa, it is often the case that persons with disabilities are not provided with the facilities (e.g., braille lessons for the

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[117] *Id.*

[118] Gertrude Oforiwa Fefoame, *People with Disabilities have been Forgotten. Not any More*, AFRICAN ARGUMENTS (Feb. 15, 2022), https://africanarguments.org/2022/02/people-with-disabilities-have-been-forgotten-not-any-more/.

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] Fefoame, *supra* note 118.

[124] International Disability Alliance, *Global Disability Summit (GDS18*), INTERNATIONAL DISABILITY ALLIANCE (IDA), https://www.internationaldisabilityalliance.org/content/global-disability-summit (last visited Feb. 8, 2023) (noting that the first Global Disability Summit, GDS18, was held in London).

[125] Fefoame, *supra* note 118. However, a report released in 2021 by the International Disability Alliance, in collaboration with the UK Foreign, Commonwealth and Development Office and the Norwegian Agency for Development (Norad), notes that "despite the unprecedented challenges posed by the Covid 19 pandemic, it is encouraging to see that many exceptional commitments made in London in 2018 were successfully accomplished"); *see also* INTERNATIONAL DISABILITY ALLIANCE, GLOBAL DISABILITY SUMMIT + 2 YEARS: PROGRESS ON IMPLEMENTATION OF COMMITMENTS 4 (2021).

[126] Fefoame, *supra* note 118.

blind; wheelchairs for those with mobility problems; augmentative communications devices for persons with speech disabilities) to live independently.[127]

Although the challenges that persons with disabilities face daily are universal, Africans with disabilities live in communities whose customary and traditional practices create additional problems for them.[128] It has been estimated that as of 2020, they are at least 25 million Nigerians with one form of disability or another.[129] In Nigeria, as is the case in many African countries, customary and cultural beliefs significantly influence the way people relate to or treat those with disabilities.[130] Beliefs about disabilities in Nigeria often inform traditional practices, such as witchcraft—it is not unusual for persons with disabilities to be labeled as witches.[131]

Throughout many communities in Nigeria, "these beliefs are generally taken to be the various causes of disabilities."[132] It is also believed that people living with disabilities have been cursed, perhaps, by their ancestors or God.[133] In both Nigeria and many other African countries, various communities view people with disabilities as cursed or as punished for some crime that they have committed.[134] In some cultures, people with disabilities are considered "social outcasts serving retribution for offenses of their forefathers."[135] In many parts of Nigeria, people with disabilities "are not only [considered] inferior to those without disabilities" but are believed to "lack characteristics that make them full humans."[136] In many of these communities, people

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[127] Jose Montes & Rachel Swindle, *Poverty & Equity Notes: Who is disabled in Sub-Saharan Africa?*, WORLD BANK GROUP 1, 1 (Apr. 2021), https://openknowledge.worldbank.org/server/api/core/bitstreams/43c0c781-d348-5b2c-b365-7eb241daf77e/content (noting that "disability rates are higher for those in rural areas, among those with less education, and increase sharply with age").

[128] *See, e.g.*, Edwin Etieyibo & Odirin Omiegbe, *Religion, Culture, and Discrimination Against Persons with Disabilities in Nigeria*, 5 AFR. J. DISABILITY 192, 193 (2016) (identifying religious and cultural practices that discriminate against persons with disabilities in Nigeria).

[129] International Disability Alliance, *25 Million Lives at Stake: Nigerians with Disabilities During the Pandemic*, INTERNATIONAL DISABILITY ALLIANCE (Dec. 4, 2020), https://www.internationaldisabilityalliance.org/blog/25-million-lives-stake-nigerians-disabilities-during-pandemic.

[130] Etieyibo and Omiegbe, *supra* note 128, at 195. For example, "[p]eople with mental illness are killed as part of rituals, practices that flow from various beliefs that people [in Nigeria] hold about disability.".

[131] *Id.* at 193; *see also* Ibo Cbanga, *Juju*, BRITANNICA, https://www.britannica.com/topic/juju-magic (last visited Nov. 9, 2022). Juju is "an object that has been deliberately infused with magical power or the magical power itself; it also can refer to the belief system involving the use of juju."

[132] Etieyibo & Omiegbe, *supra* note 128, at 193.

[133] Davinder Kumar, *Africa's disabled cursed by apathy and abuse*, ALJAZEERA (Sept. 23, 2013), https://www.aljazeera.com/features/2013/9/23/africas-disabled-cursed-by-apathy-and-abuse (noting that children with disabilities in many countries in West Africa are often branded as devils or a "curse of God"); *see also* Ingrid Gercama and Nathalie Bertams, '*They Believe I was cursed with blindness because God was angry': Girls with disabilities in Ethiopia have been sexually assaulted and are feared for being under the spell of witchcraft*, ALJAZEERA (Sept. 24, 2018), https://www.aljazeera.com/gallery/2018/9/24/they-believe-i-was-cursed-with-blindness-because-god-was-angry (quoting a blind Ethiopian girl who said men think that blind girls like her "are cursed by the ancestors").

[134] Kumar, *supra* note 133. This is so, even with newborns who are too young to have been able to commit any crimes.

[135] Etieyibo & Omiegbe, *supra* note 128, at 193.

[136] *Id.*

with disabilities are quite often "used in sacrifices in order to bring wealth or good luck."[137]

For both religious and cultural reasons, people with disabilities are often killed or trafficked.[138] These include "people with mental illness, [and] people with oculocutaneous albinism and angular kyphosis."[139] In addition, children with disabilities are also forced to roam the streets "alms-begging" for adults who are either family members or strangers who have purchased the children from their parents.[140] In Nigeria's Benin City, for example, a middle-aged woman with mental illness was burned to death "by a crowd because of the belief that she was responsible for the various problems facing the community."[141]

South African families often view their children with disabilities as a curse.[142] According to the Afrika Tikkun, an international NGO that advocates on behalf of children, many South African families "hide away [children with disabilities]. They don't want their communities to know, because they believe their communities are going to judge them."[143] According to Human Rights Watch ("HRW"), there is an estimated "600,000 children with disabilities" in South Africa who are not able to attend school.[144] Although lack of resources and access are important obstacles, "pervasive stigma" is another critical factor.[145]

In South Africa, people with print disabilities, including those with visual disabilities, "often cannot obtain reading materials in accessible formats."[146] The International Commission of Jurists ("ICJ") has noted that "South Africa's Copyright Act serves to restrict access to reading materials for persons with disabilities unless individual copyright holders elect to make such materials accessible or available for

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[137] *Id.*

[138] *See* Samhar Almomani, *Tanzanian Children with Disabilities Trafficked and Enslaved in Kenya: A Heartbreaking Investigation*, WORLD FORGOTTEN CHILDREN FOUNDATION (Jul. 11, 2022), https://www.worldforgottenchildren.org/blog/tanzanian-children-with-disabilities-trafficked-and-enslaved-in-kenya-a-heartbreaking-investigation/146 (reporting on an investigation by the British Broadcasting Corporation (BBC) Africa Eye program, which uncovered a "hidden trafficking network that brings in children with disabilities from poor rural regions of Tanzania and forces them into what is nothing short of modern-day slavery, begging on the streets of Nairobi, Kenya"); *see also* Eudias Kigai, *Kenya-Tanzania: Trafficking handicapped children and the economy of misery*, THE AFRICA REPORT (Jul. 29, 2013), https://www.theafricareport.com/5476/kenya-tanzania-trafficking-handicapped-children-and-the-economy-of-misery/ (reporting the trafficking of children with disabilities from Tanzania into Nairobi, Kenya).

[139] Etieyibo & Omiegbe, *supra* note 128, at 193–94.

[140] *Id.*

[141] *Id.* at 194.

[142] Natasha Ghoneim, *Breaking 'the curse' of disabled children in South Africa*, ALJAZEERA (Apr. 21, 2017), https://www.aljazeera.com/features/2017/4/21/breaking-the-curse-of-disabled-children-in-south-africa.

[143] *Id.*

[144] Human Rights Watch (HRW), *South Africa: Children with Disabilities Shortchanged*, HRW (May 24, 2019), https://www.hrw.org/news/2019/05/24/south-africa-children-disabilities-shortchanged.

[145] Ghoneim, *supra* note 142.

[146] International Commission of Jurists (ICJ), *South Africa: ICJ Argues that Copyright Act must be Struck Down Because it Fails to Protect the Rights of Persons with Print Disabilities*, ICJ (May 12, 2022), https://www.icj.org/south-africa-icj-argues-that-copyright-act-must-be-struck-down-because-it-fails-to-protect-the-rights-of-persons-with-print-disabilities/.

appropriate adaptation."[147] In the next section, this Article examines how courts in Africa are intervening to invalidate copyright statutes that fail to uphold the rights of persons with disabilities. It will do so by examining *Blind SA v. Minister of Trade, Industry and Competition & Others*, a case of the Constitutional Court of South Africa.[148]

IV. COPYRIGHT AND PEOPLE WITH PRINT AND VISUAL DISABILITIES: CASELAW FROM SOUTH AFRICA

A. Introduction

In celebration of human rights day, the Special Rapporteur on Freedom of Expression and Access to Information in Africa noted that "while it does not make specific mention of disability as a protected group, the UDHR has, over time, anchored the development of very concrete instruments to ensure equal rights for persons with disabilities."[149] The Special Rapporteur then acknowledged the adoption, in January 2018, of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa ("African Disabilities Protocol") by the Assembly of Heads of State and Government of the African Union ("AU Assembly").[150] In addition, the Special Rapporteur made mention of the adoption of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired, Or Otherwise Print Disabled ("Marrakesh Treaty").[151]

The Special Rapporteur noted that despite the fact that many international and regional human rights instruments, including the Banjul Charter, guarantee the right to information, an estimated one billion people with disabilities continue to face various barriers in "their day-to-day lives," including access to information.[152] The right to access information, noted the Special Rapporteur, remains unrealized by many people with disabilities, particularly those with visual impairments—the latter face "distinct barriers due to the unavailability of reading material in accessible formats."[153]

According to the World Blind Union ("WBU"), "[o]ver 90% of all published materials cannot be read by blind or print-disabled people, leading to a 'book famine.'"[154] The WBU has argued that published materials need to be reproduced "into

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[147] *Id.*

[148] *Blind SA v. Minister of Trade, Indus. and Competition* 2021 ZAGPPHC 871 (GP) (S. Afr).

[149] Special Rapporteur on Freedom of Expression and Access to Information in Africa, *Statement of Special Rapporteur on Freedom of Expression and Access to Information in Africa on Access to Information for Persons Who are Blind or Otherwise Print Disabled*, AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS (Dec. 10, 2018), https://web.archive.org/web/20220406111858/https://www.achpr.org/pressrelease/detail?id=14.

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] World Blind Union, *Human Rights*, WORLD BLIND UNION, https://worldblindunion.org/programs/human-

accessible formats, such as braille, large print, and audio editions," in order to fully address the book famine.[155] However, existing copyright rules within many countries around the world continue to obstruct and prevent this reproduction.[156]

The Special Rapporteur also stated that the "Marrakesh Treaty was adopted in a bid to establish normative standards for ensuring access to information by persons with print disabilities" and that it "recognises the continuing shortage of available works in accessible format copies for persons with visual impairments or other print disabilities and sees the need to expand the number of works in accessible formats, and improve their circulation." [157] The Marrakesh Treaty "acknowledges the importance of the international copyright system and aims to ensure that the limitations and exceptions in national copyright laws grant persons with visual impairments or with other print disabilities access to works."[158]

The Special Rapporteur then asked African States "to eradicate the book famine for visually impaired and other print disabled persons, including by becoming party to the Disabilities Rights Protocol as well as the Marrakesh Treaty, and implementing the letter and spirit of those instruments."[159] African States were expected to do so by ensuring that their copyright statutes guarantee and protect the interests of persons with disabilities.

In August 2020, Cory Doctorow, writing for the Electronic Frontier Foundation ("EFF"), noted that five years earlier, South Africa had "embarked upon a long-overdue overhaul of its copyright system" and that, as part of that process, legislators had "incorporated some of the best elements of both U.S. and European copyright" into South Africa's post-apartheid copyright laws.[160] Doctorow argued that South Africa borrowed "the flexible idea of fair use" from the United States and "the idea of specific, enumerated exemptions for libraries, galleries, archives, museums, and researchers" from the European Union.[161] While both the U.S. and E.U. systems "are important for preserving core human rights, including free expression, privacy, education, and access to knowledge; as well as important cultural and economic priorities such as the ability to build U.S.- and European-style industries that rely on flexibilities in copyright," the two systems taken together

> are even better: the European system of enumerated exemptions gives a bedrock of certainty on which South Africans can stand, knowing for sure that they are legally permitted to make those uses. The U.S. system, meanwhile, future-proofs these exemptions by giving courts a framework with which to evaluate new uses involving technologies and practices that do not yet exist.[162]

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rights/#:~:text=Over%2090%25%20of%20all%20published,current%20copyright%20rules%20within%20most (last visited Nov. 10, 2022).

[155] *Id.*

[156] *Id.*

[157] Special Rapporteur on Freedom of Expression and Access to Information in Africa, *supra* note 149.

[158] *Id.*

[159] *Id.*

[160] Doctorow, *supra* note 37.

[161] *Id.*

[162] *Id.*

However, the EFF reported in late 2020, that South African President, Cyril Ramaphosa, had returned the draft copyright law to Parliament after striking out "both the E.U.- and U.S.-style limitations and exceptions."[163] He argued "that they violated South Africa's international obligations under the Berne Convention, which is incorporated into other agreements such as the WTO's TRIPS Agreement and the WIPO Copyright Treaty."[164] The EFF subsequently sent an open letter to South Africa's executive and legislative branches setting out the legal basis for "the U.S. fair use system's compliance with international law, and the urgency of balancing South African copyright with limitations and exceptions that preserve the public interest."[165]

When *Blind SA v. Minister of Trade, Industry and Competition & Others* was decided by the Constitutional Court ("CC") on September 21, 2022, the relevant copyright law in South Africa was the Copyright Act 98 of 1978.[166] Many human rights advocates, particularly those working with people with visual impairments or other print disabilities, argued that progress to update South African copyright law has been slow.[167] In 2015, the Copyright Amendment Bill was expected to bring up to date the Copyright Act 98 of 1978 and deal with "the rights of blind people to access literary works in the new section 19D."[168] However, since progress in enacting the amendment bill has been slow, Blind SA, an NGO that advocates for the rights of the blind, "felt that the issue of access to literary works for the blind could be delayed no longer, and approached the High Court for an order declaring the Copyright Act to be unconstitutional to the extent that it unjustifiably fails to make proper provision for blind people to access books."[169]

The High Court

> declared that sections 6 and 7, read with section 23 of the Copyright Act 98 of 1978, are unconstitutional, invalid and inconsistent with the rights of persons with visual and print disabilities, as set out in sections 9(3), 10, 16(1)(b), 29(1) and 30 of the Constitution, to the extent that these provisions of the Copyright Act limit the access of such persons to published literary works, and artistic works as may be included in such literary works, in accessible format copies.[170]

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[163] *Id.*

[164] *Id.*

[165] Doctorow, *supra* note 37.

[166] Copyright Act 98 of 1978 (S. Afr.).

[167] Jeremy de Beer, *South Africa: Copyright and the Rights of Blind People*, ENSIGHT (Nov. 1, 2022), https://www.ensafrica.com/news/detail/6365/south-africa-copyright-and-the-rights-of-blin.

[168] *Id.*

[169] *Id.*

[170] Constitutional Court of South Africa, *Blind SA v. Minister of Trade, Indus. and Competition and Others: Post Judgment Media Summary*, CONSTITUTIONAL COURT OF SOUTH AFRICA (Sept. 21, 2022), https://www.concourt.org.za/index.php/judgement/485-blind-sa-v-minister-of-trade-industry-and-competition-and-others-cct320-21#:~:text=Aggrieved%20by%20this%20lengthy%20legislative,with%20visual%20and%20print%20disabilities.

Following the High Court's declaration, Blind SA petitioned the Constitutional Court to confirm the order of constitutional invalidity made by the High Court of South Africa, Gauteng Division, Pretoria.[171]

B. Blind SA v. Minister of Trade, Industry and Competition and Others (S. Afr. CC)

The case before the Constitutional Court ("CC") concerned an application for the CC to confirm an order that had been granted by the High Court of South Africa, Gauteng Division.[172] In its order, the High Court had declared South Africa's Copyright Act (98 of 1978) unconstitutional to the extent that it "limits and/or prevents persons with visual and print disabilities from accessing works under copyright that persons without such disabilities are able to access."[173] The High Court had also declared the Copyright Act unconstitutional to the extent that it "does not include provisions designed to ensure that persons with visual and print disabilities are able to access works under copyright in the same manner contemplated by the Marrakesh Treaty."[174]

The application was brought by the NGO Blind SA in terms of "section 172(2)(d) of the Constitution, read with section 15(1)(b) of the Superior Courts Act and rule 16(4) of [the Constitutional Court's] Rules."[175] Section 172(2)(d) of the Constitution of South Africa states that "[a]ny person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection."[176] Section 15(1)(b) of the Superior Courts Act states that

> [w]henever any person or organ of state with a sufficient interest appeals or applies directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court, as contemplated in section 172(2)(d) of the Constitution, the Court must deal with the matter in accordance with the rules.[177]

Finally, according to Rule 16(4) of the Rules of the Constitutional Court of South Africa,

> A person or organ of state entitled to do so and desirous of applying for the confirmation of an order in terms of section 172(2)(d) of the Constitution shall, within 15 days of the making of such order, lodge an application for such confirmation with the Registrar and a copy thereof with the Registrar of the court which made the order,

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[171] *Id*.

[172] *Blind SA v. Minister of Trade, Indus. and Competition* 2021 ZAGPPHC 871 (GP) at 871 para. 1 (S. Afr.).

[173] *Id.*

[174] *Id.*

[175] *Id.*

[176] S. AFR. CONST., 1996 § 172(2)(d).

[177] Superior Courts Act 10 of 2013 § 15(1)(b) (S. Afr.)

> whereupon the matter shall be disposed of in accordance with directions given by the Chief Justice.[178]

In this case, the parties were Blind SA and five respondents.[179] The first respondent was the Minister of Trade, Industry and Competition, who is responsible for administering the Copyright Act and is granted power under the Act to make regulations.[180] Although the Minister did not oppose the application before the CC, he filed written submissions.[181] The rest of the respondents were the Minister of International Relations and Cooperation, the Speaker of the National Assembly, the Chairperson of the National Council of Provinces, and the President of the Republic of South Africa.[182] Writing for the Court, Unterhalter AJ noted that "[t]he second to fifth respondents were joined as respondents in the High Court proceedings but did not file any papers before the High Court, nor in [the CC]."[183]

There were three amicus curiae filed in this case. First, "[t]he ICJ supported Blind SA's submission that the Copyright Act ought to be aligned with the Marrakesh Treaty to cure the inconsistency of the Copyright Act with the Constitution and acceptable international standards."[184] Second, "[t]he MMA argued that the Copyright Act was inconsistent with domestic, regional and international obligations."[185] Finally, the High Court "did not find arguments made by Recreate Africa to have been of assistance."[186]

Unterhalter AJ then proceeded to examine in detail the submissions made to the CC and noted that "[t]he submissions made by Blind SA, the Minister and amici covered a wide range of issues" and that "[t]hese included the need to align the Copyright Act with the Marrakesh Treaty, as well as other International Agreements such as the Berne Convention, TRIPS Agreement, the Convention on the Rights of Persons with Disabilities (CRPD) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)."[187] In addition, noted Unterhalter AJ, "[s]ubmissions were also made regarding the possible importation and export of copyright works for

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[178] S. AFR. CONST., 1996: RULES OF THE CONSTITUTIONAL COURT, GoN R1675, G. 25726.

[179] *Blind SA v. Minister of Trade, Indus. and Competition* 2021 ZAGPPHC 871 (GP) at para. 2 (S. Afr.).

[180] *Id.*

[181] *Id.*

[182] *Id.*

[183] *Id.* There were three amicus curiae filed. Professor Owen Dean, an expert on copyright law and the author of the *Handbook of South African Copyright Law*, an important text on copyright law in South Africa, was one of the filers. *See Blind SA v. Minister of Trade, Indus. and Competition* 2021 ZAGPPHC 871 (GP) at para. 3. In his amicus, Professor Dean raised questions "as to whether Blind SA's application [was] sound." Media Monitoring Africa Trust ("MMA"), "a non-profit organization that operates in the public interest to promote the development of a free, fair, ethical and critical media in South Africa," was the second amicus curiae. *Id.* The third amicus curiae was the International Commission of Jurists ("ICJ"), an NGO that is dedicated to defending human rights and promoting the rule of law throughout the world. *Id.*

[184] *Id.* at para. 12.

[185] *Id.*

[186] *Blind SA v. Minister of Trade, Indus. and Competition* 2021 ZAGPPHC 871 (GP) at para. 12.

[187] *Id.*

purposes of making accessible format copies available to visually and print disabled persons."[188]

Unterhalter AJ began his analysis of the case by noting that "[t]he crux of [the] matter concerns Blind SA's contention that the Copyright Act limits the availability of works under copyright in formats accessible to persons with print and visual disabilities."[189] The heart of Blind SA's submission was that since the Copyright Act "requires consent of the copyright owner to convert works into formats suitable for the use of persons with print and visual disabilities, . . . such persons suffer limitations, often of a severe kind, in assessing works under copyright that persons without these disabilities do not encounter."[190]

At the time the CC was deliberating on Blind SA's application, there was "a legislative process under way to amend the Copyright Act."[191] However, noted Unterhalter AJ, despite the fact that the Minister of Trade, Industry and Competition had "published a draft Copyright Amendment Bill (CAB) for public comment on 27 July 2015," the Bill had not yet been enacted into law.[192] The CAB, noted Justice Unterhalter, had proposed a new section 19D, "under the heading '[g]eneral exceptions regarding protection of copyright work for persons with disability'" and on May 16, 2017, "the CAB was introduced into the National Assembly as a section 75 Bill (ordinary bills not affecting provinces)."[193]

CAB was subsequently passed by Parliament on March 28, 2019.[194] However, on June 16, 2020, the CAB "was referred back to the National Assembly by the President [of the Republic of South Africa] in terms of section 79(1) of the Constitution."[195] The National Assembly's decision to pass the CAB was eventually rescinded and the bill has been reclassified as "a section 76 Bill (ordinary bills affecting provinces)."[196] Thus, at the time the CC decided Blind SA's application, section 19D had not yet been enacted into law due to the lengthy process.[197] When, and if, section 19D is finally passed into law, it would "allow for the conversion of copyright works into an accessible format copy, 'but which does not introduce changes other than those needed to make the work accessible to a person with a disability.'"[198]

Blind SA was aggrieved and frustrated by the "inordinate delay of the legislative process" and subsequently "approached the High Court for an order declaring the Copyright Act unconstitutional to the extent that it unjustifiably limits the rights of persons with visual and print disabilities."[199] On December 7, 2021, the High Court

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[188] *Id.* at para. 14.

[189] *Id.* at para. 4. The Court defined "persons with print and visual disabilities" to include "blind persons."

[190] *Id.*

[191] *Blind SA v. Minister of Trade, Indus. and Competition* 2021 ZAGPPHC 871 (GP) at para. 4.

[192] *Id.* at para. 5.

[193] *Id.* at para. 5.

[194] *Id.* at para. 6.

[195] *Id.* at para. 6, fn. 7.; *see also* S. AFR. CONST., 1996 § 79(1). Section 79(1) of the Constitution states that "[t]he President must either assent to and sign a Bill passed in terms of this Chapter or, if the President has reservations about the constitutionality of the Bill, refer it back to the National Assembly for reconsideration."

[196] *Blind SA v. Minister of Trade, Indus. and Competition* 2021 ZAGPPHC 871 (GP) at para. 6.

[197] *Id.*

[198] *Id.* at para. 7.

[199] *Id.* at para. 8.

"declared the Copyright Act to be unconstitutional to the extent that it fails to make provision for exceptions that would enable, through the conversion of works, access to such works by persons with visual and print disabilities."[200] Unterhalter JA noted that the application was unopposed.[201]

In its judgment, the High Court held that "despite the alternative formats available for blind persons and those with visual and print disabilities, the Copyright Act was restrictive of the free conversion of works under copyright into alternative formats."[202] This, argued the High Court, "meant that the consent of copyright owners was required to convert works under copyright into formats that enabled persons with print and visual disabilities to have equal access to information."[203] The High Court then held "the statutory prohibition of the free conversion of works to be discriminatory and inconsistent with section 9 of the Constitution."[204] Additionally, the High Court held "that acting in accord with South Africa's intent to ratify the Marrakesh Treaty, Parliament adopted the CAB which proposes the insertion of section 19D to create exceptions to the Copyright Act."[205]

With respect to the delay in adopting the CAB, the High Court noted that "section 19D was not the subject of controversy in Parliament" and found the delay to be "unreasonable and contrary to section 36(1) of the Constitution as it unjustifiably perpetuates the violation of the rights of visually and print disabled persons."[206]

With respect to the pleaded case, Justice Unterhalter noted that although it "submitted that section 2 of the Copyright Act lists types of original works eligible for copyright in South Africa" and that these include "literary works, artistic works, cinematographic films and a range of other works under copyright," Blind SA only explained "how the Copyright Act impedes access to published literary works."[207] In addition, noted Unterhalter AJ, "[t]he founding affidavit is also confined to securing the rights of persons with print and visual disabilities."[208]

In its submissions, Blind SA stated that "copyright owners have near exclusive control over the reproduction, publication, performance, broadcast, transmission and adaptation of works under copyright" and that "[u]nless it falls within a legislated exception, or is authorized by the copyright owner, any use of such work is an infringement of copyright and gives rise to civil and, potentially, criminal sanction."[209] Thus, argued Blind SA, "the legislative framework must provide an express exception to permit the production of accessible format copies" with the alternative being that every single person with visual and print disabilities "must contact every copyright owner to secure authorization to produce accessible format copies."[210] As a

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[200] *Id.* at para. 8.

[201] *Blind SA v. Minister of Trade, Indus. and Competition* 2021 ZAGPPHC 871 (GP) at para. 8.

[202] *Id.* at para. 9.

[203] *Id.*

[204] *Id.*

[205] *Id.* at para. 10.

[206] *Blind SA v. Minister of Trade, Indus. and Competition* 2021 ZAGPPHC 871 (GP) at para. 11; *see* S. AFR. CONST., 1996 § 36(1) (dealing with limitation of rights).

[207] *Blind SA v. Minister of Trade, Indus. and Competition* 2021 ZAGPPHC 871 (GP) at para. 16.

[208] *Id.* at para. 16.

[209] *Id.* at para. 17.

[210] *Id.*

consequence, submitted Blind SA, South Africa's Copyright Act "unfairly discriminates against persons with visual and print disabilities."[211]

Read together with section 39(a), argued Blind SA, section 13 of the Copyright Act grants authority to the Minister of Trade, Industry and Competition "to make regulations that contemplate further types of reproduction in respect of works under copyright."[212] Blind SA also submits, however, that the Minister's power "to prescribe general exceptions only applies to reproducing works" and that "Section 13 may not be used to authorize acts beyond this."[213] Noting that the CC had drawn "a clear distinction between the lawful delegation of authority to make subordinate legislation and the assignment of plenary legislative power to the Executive," Blind SA cautioned that section 13 "should be interpreted narrowly to avoid the unlawful assignment of plenary legislative power."[214]

Blind SA also submitted that "leaving the realization of the rights of a marginalized 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."[215] Therefore, submitted Blind SA, "sections 13 and 39(a) of the Copyright Act do not provide a statutory basis to afford access by print-disabled persons to accessible format copies."[216] Blind SA stated that "an exception granted solely in respect of reproduction would be inadequate" and would fail to comply with Article 4(1)(a) of the Marrakesh Treaty which states that:

> [c]ontracting parties shall provide in their national copyright laws for a limitation or exception to the right of reproduction, *the right of distribution, and the right of making available to the public* as provided by the WIPO Copyright Treaty (WCT), to facilitate the availability of works in accessible format copies for beneficiary persons.[217]

By "impeding access to works," the Copyright Act effectively "limits a range of constitutionally-entrenched rights that persons with visual and print disabilities enjoy" and these rights include "the rights to equality, human dignity, basic and further education, freedom of expression, and participation in the cultural life of one's choice."[218] Finally, argued Blind SA, "the Copyright Act, as a law of general application, is not justifiable in terms of section 36(1) of the Constitution" and that "the

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[211] *Id.*

[212] *Blind SA v. Minister of Trade, Indus. and Competition* 2021 ZAGPPHC 871 (GP) at para. 18; *see also* Copyright Act 98 of 1978, § 13 (S. Afr.) (dealing with general exceptions in respect of reproduction of works *Id.* at § 39(a) (stating that "[t]he Minister may make regulations—(a) as to any matter required by this Act to be prescribed by regulation.").

[213] *Blind SA v. Minister of Trade, Indus. and Competition* 2021 ZAGPPHC (GP) at 871 para. 19.

[214] *Id.*

[215] *Id.* at para. 20.

[216] *Id.*

[217] *Id.*; *see also* MARRAKESH TREATY TO FACILITATE ACCESS TO PUBLISHED WORKS FOR PERSONS WHO ARE BLIND, VISUALLY IMPAIRED, OR OTHERWISE PRINT DISABLED art. 4(1)(a) (June 27, 2013). Adopted by the Diplomatic Conference to Conclude a Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities. Emphasis added as part of submission to the CC.

[218] *Blind SA v. Minister of Trade, Indus. and Competition* 2021 ZAGPPHC (GP) at 871 para. 24 (S. Afr.).

violation of so many intersecting rights is ordinarily very difficult to justify and that their limitation does not serve any legitimate purpose, as copyright owners do not stand to lose anything from the relief sought."[219]

Blind SA then prayed the Court "to exercise its broad remedial powers in terms of section 172(1)(b) of the Constitution, and read-in, with immediate effect, section 19D." [220] Unterhalter AJ provided an overview of Blind SA's response to the submissions made by the first amicus, Professor Dean. [221] After that, the Court proceeded to examine the submissions made by the first respondent (the Minister of Trade, Industry and Competition).[222] Unterhalter JA noted that although the Minister did not "oppose the confirmation of the declaration of invalidity," he nevertheless, made a submission in favor of "the suspension of the declaration of invalidity to assist [the] Court to determine the appropriate remedy."[223] Blind SA argued, however, that "a suspension of the order of invalidity [would be] incompetent because it purports to suspend the operation of an order that is not in operation in any event."[224]

With respect to the relief sought by Blind SA, which was "a final reading-in without suspension of the finding of unconstitutionality," the Minister argued that this "is inappropriate."[225] The Minister argued that "a suspension coupled with an interim reading-in is a remedy that does not intrude unduly into the domain of Parliament."[226] Unterhalter AJ then proceeded to examine the submissions of the three amicus curiae and after doing so, he noted that "[t]he application before [the] Court takes the form of confirmation proceedings" and cited to § 167(5) of the Constitution which stipulates that the Constitutional Court "makes the final decision as to whether an Act of Parliament . . . is constitutional, and, must confirm any order of invalidity made by the Supreme Court of Appeal [or] High Court . . . before that order has any force."[227] Justice Unterhalter concluded that the Constitutional Court's "jurisdiction is necessarily engaged" and that "[a]ccordingly, [the CC] must conduct its own evaluation and satisfy itself as to the constitutional validity of the provisions of the Copyright Act that have been challenged."[228]

Unterhalter AJ then began the analysis of the case by re-examining the pleaded case and noted that "the application is brought in the public interest and on behalf of persons with visual and print disabilities" and that "[t]his class of persons is taken to

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[219] *Id.* at para. 24; S. AFR. CONST., 1996 § 36(1) (dealing with the limitation of the rights in the Bill of Rights).

[220] *Blind SA v. Minister of Trade, Indus. and Competition* 2021 ZAGPPHC (GP) at 871 para. 25 (S. Afr.); S. AFR. CONST., 1996 § 172(1)(b) (stating that "[a] court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.").

[221] *Blind SA v. Minister of Trade, Indus. and Competition* 2021 ZAGPPHC (GP) at 871 paras. 26-27 (S. Afr.).

[222] *Id.* at para. 29–32.

[223] *Id.* at para. 29.

[224] *Id.* at para. 25.

[225] *Id.* at para. 30.

[226] *Blind SA v. Minister of Trade, Indus. and Competition* 2021 ZAGPPHC (GP) at 871 para. 30 (S. Afr.).

[227] *Id.* at para. 43; S. AFR. CONST., 1996 § 167(5).

[228] *Blind SA v. Minister of Trade, Indus. and Competition* 2021 ZAGPPHC (GP) at 871 paras. 44, 46 (S. Afr.).

fall within the definition of 'a beneficiary person' in Article 3 of the Marrakesh Treaty."[229] In Article 3 of the Marrakesh Treaty, a beneficiary person is defined as follows:

> A beneficiary person is a person who:
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> (a) is blind;
>
> (b) has a visual impairment or a perceptual or reading disability which cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability; or
>
> (c) is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading;
>
> regardless of any other disabilities.[230]

Although Blind SA's submission made reference to the works that are eligible for copyright listed in section 2 of the Copyright Act, the NGO's interest was in "literary works"—those works, which are "published in print, include books, magazines, periodicals, articles, textbooks and other educational materials."[231] As submitted to the Court by Blind SA, "copyright in a literary work vests the exclusive right to do or to authorize the doing of acts set out in section 6 of the Copyright Act" and that "[s]ave for certain legislated exceptions, the use of literary works by recourse to acts which the copyright owner has the exclusive right to do or to authorize requires the consent of the copyright owner."[232]

Since the majority of "published books are not published in accessible format copies, that is, formats accessible to persons with visual and print disabilities," noted Blind SA, "such persons must secure authorization to convert books into accessible format copies."[233] Without authorization from the copyright owner, noted Blind SA, "the rendering of a literary work in which copyright subsists into accessible format copies would constitute an infringement of copyright under section 23, and an offense under section 27 of the Copyright Act."[234] The result, argued Blind SA, "is that persons with visual and print disabilities are denied access to the vast majority of published literary works on the basis of their disability" and that "[t]he Copyright Act is an

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[229] *Id.* at para. 47.

[230] *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled*, *supra* note 88, at art. 3.

[231] *Blind SA v. Minister of Trade, Indus. and Competition* 2021 ZAGPPHC (GP) at 871 para. 48 (S. Afr.).

[232] *Id.*

[233] *Id.* at para. 50.

[234] *Id.*

unsurmountable barrier that prevents works being locally available in various accessible format copies."[235]

Blind SA submitted to the Court that the Copyright Act, in its current iteration, "limits the entrenched rights of persons with visual and print disabilities" and that the rights that are being limited are "the rights to equality, human dignity, basic and further education, freedom of expression, and participation in the cultural life of one's choice."[236] In addition, argued Blind SA, "the limitation of rights that the Copyright Act brings about cannot be justified in terms of section 36 of the Constitution."[237] Unterhalter AJ then reviewed the relief sought by Blind SA and concluded that Blind SA justifies this relief "on the basis that those whose rights are infringed by the Copyright Act require an immediate remedy."[238] These aggrieved individuals, noted Blind SA, "should not be required to wait for Parliament to pass into law the remedial provisions that would cure the constitutional inconsistency of the Copyright Act as identified by Blind SA."[239]

In addition, noted Blind SA, that remedial intervention should not have "to wait the broader reformation of the Copyright Act, so long delayed in Parliament."[240] Instead, "the reading-in of section 19D would serve the remedial purpose of giving immediate relief to persons with visual and print disabilities."[241] Section 19D, noted Blind SA, was "not identified by the President [of South Africa], when he referred the CAB back to Parliament, as giving rise to constitutional concerns" and that "[t]his remedial regime would then permit Parliament to do its work to pass into law the CAB, and provide the basis for South Africa's accession to the Marrakesh Treaty, but with immediate relief to those with visual and print disabilities."[242]

Unterhalter AJ then proceeded to draw the Court's attention to the issues raised by the case and those that "it [did] not."[243] First, Justice Unterhalter noted that the case before the CC concerned literary works and that it did not "traverse access to other works eligible for copyright."[244] Within South Africa, Unterhalter AJ noted, there is a scarcity of published literary works in "accessible format copies" that can be used by persons with visual and print disabilities.[245] That scarcity is due to the fact that it is very difficult for advocates for the poor to secure authorization from the owners of copyright in literary works so that these works can be legally rendered into accessible format copies.[246]

Second, noted Justice Unterhalter, "no case is made out as to the need for the access of unpublished literary works" and that although mention was made of the

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[235] *Id.* at para. 51.

[236] *Blind SA v. Minister of Trade, Indus. and Competition* 2021 ZAGPPHC (GP) at 871 para. 52 (S. Afr.).

[237] *Id.* at para. 56.

[238] *Id.* at para. 57.

[239] *Id.* at para. 57.

[240] *Id.* at para. 57.

[241] *Blind SA v. Minister of Trade, Indus. and Competition* 2021 ZAGPPHC (GP) at 871 para. 57 (S. Afr.).

[242] *Id.*

[243] *Id.* at para. 60.

[244] *Id.*

[245] *Id.*

[246] *Blind SA v. Minister of Trade, Indus. and Competition* 2021 ZAGPPHC (GP) at 871 para. 60 (S. Afr.).

"need to comply with the Copyright Act" so that "books in accessible format copies" could be imported from abroad, including from "Bookshare in the United States," there was no case made as to precisely "how the Copyright Act prevents or hampers the importation of books in accessible format copies into the country, nor, more generally, how distribution within the country is affected." [247] In addition, noted Justice Unterhalter, "[h]ow the Copyright Act restricts imports and distribution and how such restrictions infringe upon the rights of persons with visual and print disabilities is so undeveloped in the founding affidavit that no case can be said to have been made out on this score."[248]

The third issue raised by the case at bar, stated Unterhalter AJ, is that Blind SA used the failure of South Africa's Parliament to enact necessary legislation to provide a remedy for the scarcity of literary works in accessible format to seek relief from the courts instead of waiting for the "long delayed parliamentary process."[249] However, the relief sought by Blind SA before the courts did not include constitutional review of delay in the legislative process and, in addition, noted Unhertalter AJ, Blind SA did not "question the legality of the Government's approach to amend the Copyright Act to give effect to the Marrakesh Treaty, as a precursor to its ratification."[250]

Justice Unterhalter summarized the case before the CC. The case before the Court is "a challenge to the Copyright Act on the basis that exclusive rights of copyright owners *require the authorization of these owners before original published literary works may be made into accessible format copies for the use of print and visually impaired persons*."[251] The requirement that such authorization must be granted by copyright owners before literary works are made into accessible format copies so that they can be used by print and visually impaired persons, argued Blind SA before the Court, infringes the "identified rights" of this category of persons. [252] If, noted Unterhalter AJ, the Court were to confirm that this requirement infringes the identified rights of print and visually impaired persons, then the Court is bound to decide on an appropriate remedy, one that is just and equitable, and is capable of curing "this infringement of rights."[253] The Court's "remedial remit," noted Justice Unterhalter, "does not," however, "go beyond the challenge that has been made."[254]

Unterhalter AJ then proceeded to examine the issues contributing to a scarcity of published literary works in accessible format copies.[255] This could come about because copyright owners decline to grant permission for such copies to be made or "on account of the difficulty and delay in identifying those from whom authorization is required."[256] Justice Unterhalter explained that it is possible that in some cases, "particular literary works" may not be available and in other cases, the format may not be optimal.[257]

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[247] *Id.* at para. 61.

[248] *Id.*

[249] *Id.* at para. 62.

[250] *Id.*

[251] *Blind SA v. Minister of Trade, Indus. and Competition* 2021 ZAGPPHC (GP) at 871 para. 63 (S. Afr.) (emphasis added).

[252] *Id.*

[253] *Id.*

[254] *Id.*

[255] *Id.* at paras. 64–66.

[256] *Blind SA v. Minister of Trade, Indus. and Competition* 2021 ZAGPPHC (GP) at 871 para. 64 (S. Afr.).

[257] *Id.*

While print and visually impaired persons suffer from this scarcity, this situation is especially dire for "poor persons in this category"—for them, "the scarcity is absolute, and few works are available at all."[258]

This scarcity of published literary works in accessible format copies, noted Justice Unterhalter, "goes to the heart of the constitutional challenge that Blind SA brings before [the] Court."[259] South Africa's Copyright Act, noted Justice Unterhalter, affords "owners of copyright in literary works" protection, which "gives rise to a sharp disparity between those with print and visual disabilities, and those who do not suffer such impairments."[260] Any limitations suffered by persons without print and visual disabilities pale in comparison with those faced by people with print and visual disabilities.[261] The requirement of the Copyright Act that authorization must be secured from copyright owners before original published literary works may be made into accessible format copies for the use of print and visually impaired persons leads to or causes the scarcity of literary works in accessible format copies. This, noted Justice Unterhalter, "is unfair discrimination on the grounds of disability that section 9(3) of the Constitution prohibits."[262]

From a legislative perspective, argued Justice Unterhalter, any statutes designed to protect the rights of copyright owners "must take account of the differential impacts of such protection upon different classes of persons."[263] Regarding the case before the Court, it is necessary to consider how the requirement that prior authorization be obtained from copyright owners before original published literary works can be made into accessible format copies for the use of print and visually impaired persons affects the access that "persons with print and visual disabilities have to literary works in comparison to the access enjoyed by persons without these disabilities."[264] In the case where persons with print and visual disabilities "suffer great and particular hardship by reason of the requirement of authorization," noted Justice Unterhalter, that requirement "cannot be applied as if all persons who need access to literary works are similarly situated, when they are not."[265]

For the state to avoid unfair discrimination, it is necessary that it treat people in the same way or make available to them the same entitlements. However, noted Justice Unterhalter, in some cases, it may be necessary for the state to "recognize the differences between persons and to provide different or more favorable treatment to some, so as to secure non-discriminatory outcomes for all."[266] While this may appear "paradoxical," noted Unterhalter, AJ, such differential treatment has been carried out in cases of persons with disabilities.[267] For example, stated Justice Unterhalter, "a person in a wheelchair needs a ramp to access a public health clinic and a blind person

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[258] *Id.*

[259] *Id.* at para. 66.

[260] *Id.*

[261] *Blind SA v. Minister of Trade, Indus. and Competition* 2021 ZAGPPHC (GP) at 871 para. 66 (S. Afr.).

[262] *Id.*

[263] *Id.* at para. 67.

[264] *Id.*

[265] *Id.*

[266] *Blind SA v. Minister of Trade, Indus. and Competition* 2021 ZAGPPHC (GP) at 871 para. 67 (S. Afr.).

[267] *Id.* at para. 68.

needs a means by which they might know when it is safe to cross the road at a traffic light."[268]

With respect to the case at bar, Justice Unterhalter noted that the South African Parliament had recognized the need to protect the rights of owners of copyright in literary works.[269] However, the "requirement of authorization," which protects copyright owners, must not be applied without taking notice of the impact that this requirement imposes on the different classes of persons in South Africa. Thus, argued Unterhalter AJ, applying this requirement to all citizens without exception effectively exposes persons with print and visual disabilities "to damaging scarcity of literary works."[270] That approach "constitutes unfair discrimination and hence the Copyright Act, to avoid this discrimination, must apply the requirement of authorization with due regard to the different effect of the requirement upon those with print and visual disabilities."[271] Unterhalter AJ then held that "the requirement of authorization in the Copyright Act would constitute unfair discrimination on the grounds of disability, and thus infringes section 9(3) of the Constitution [of the Republic of South Africa]."[272] Specifically, the Statute fails to take into consideration the effect or impact of "the requirement of authorization" on persons with print and visual disabilities.[273]

Literary works, noted Justice Unterhalter, have a vast "universe of knowledge and imagination" and access to these works significantly enhances every person's engagement with the "world of ideas" and this is an "important attribute of the well-being of persons."[274] Unfortunately, continued Unterhalter AJ, the existing Copyright Act has radically compromised the ability of persons with print and visual disabilities to access literary works through the requirement of authorization and in doing so, the Act has heaped indignities upon the existing adversities that this group of citizens already faces. The Copyright Act's requirement of authorization, Justice Unterhalter ruled, infringes the right to dignity in § 10 of the Constitution of South Africa.[275]

Section 16(1)(b) of the Constitution of the Republic of South Africa guarantees the freedom of everyone to "receive or impart information or ideas."[276] That provision is infringed by the Copyright Act's requirement of authorization.[277] Justice Unterhalter held that the evidence adduced before the Court "shows that the requirement of authorization drastically limits access to literary works, impairs the freedom to receive information, and thus, in turn, to impart information."[278] Additionally, Unterhalter AJ held that the requirement of authorization impairs the ability of persons with print

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[268] *Id.*

[269] *Id.* at para. 69.

[270] *Id.* at para. 69.

[271] *Blind SA v. Minister of Trade, Indus. and Competition* 2021 ZAGPPHC (GP) at 871 para. 69 (S. Afr.).

[272] *Id.* at para. 70.

[273] *Id.*

[274] *Id.* at para. 71.

[275] *Id.*

[276] *Blind SA v. Minister of Trade, Indus. and Competition* 2021 ZAGPPHC (GP) at 871 para. 72 (S. Afr.).

[277] *Id.*

[278] *Id.*

and visual disabilities to participate in the cultural life of their choice and hence, infringes § 30 of the Constitution.[279]

Since the evidence adduced by Blind SA establishes that persons with print and visual disabilities continue to "struggle to secure books in accessible format copies that they require for their education" and "[c]hildren, and especially poor children, cannot secure the textbooks they require," the right of persons with print and visual disabilities to a basic education, including basic adult education, as guaranteed by § 29(1)(a) of the Constitution, is infringed.[280] Additionally, Justice Unterhalter held that the right to further education, which is protected in terms of § 29(1)(b) of the Constitution of South Africa, was also infringed.[281] Although the right to higher or further education is to be made progressively available and accessible through reasonable measures, according to § 29(1)(b), Unterhalter AJ held that "the relaxation of the requirement of authorization in favor of persons with print and visual disabilities is a reasonable measure that the state can and must take."[282]

In summary, Justice Unterhalter held that taking into consideration the powers of the Minister of Trade, Industry and Competition to grant permission for the reproduction of literary works in terms of § 13 of the Copyright Act, "the constitutional rights of persons with print and visual impairments in terms of sections 9(2), 10, 16(1)(b), 29(1)(a) and (b) and 30 have been infringed by the requirement of authorization in the Copyright Act as it applies to make published literary works available to persons with print and visual disabilities in accessible format copies."[283]

This, however, was not the end of the Court's decision in *Blind SA*. Unterhalter AJ next examined the intervention of Professor Dean and noted that Blind SA had taken issue with Professor Dean's submissions to the Court on two grounds. First, noted Blind SA, "to render literary works into accessible format copies requires more than reproduction, it also requires adaptation."[284] Second, if section 13 of the Copyright Act is interpreted as urged by Professor Dean, submitted Blind SA, that would amount to "an impermissible delegation of an original legislative power." [285] Justice Unterhalter then proceeded to analyze the scope of the power conferred by section 13 of the Copyright Act, which deals with general exceptions in respect of reproduction of works.[286]

Unterhalter AJ then concluded that "[i]t is common ground that the right of a copyright owner under the Copyright Act to authorize the reproduction or adaptation of a literary work should not prevent the access of literary works in accessible format copies to print and visually disabled persons."[287] This, noted Justice Unterhalter, is the

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[279] *Id.*; *see also* S. AFR. CONST., 1996 § 30 (stating that "[e]veryone has the right to use the language and to *participate in the cultural life of their choice*") (emphasis added).

[280] *Blind SA v. Minister of Trade, Indus. and Competition* 2021 ZAGPPHC (GP) at 871 para. 72 (S. Afr.).; *see also* S. AFR. CONST., 1996 § 29(1)(a).

[281] *Blind SA v. Minister of Trade, Indus. and Competition* 2021 ZAGPPHC (GP) at 871 para. 73 (S. Afr.)*; see also* S. AFR. CONST., 1996 § 29(1)(b).

[282] *Id.* at para. 73.

[283] *Id.* at para. 74.

[284] *Id.* at para. 77.

[285] *Id.*

[286] *Blind SA v. Minister of Trade, Indus. and Competition* 2021 ZAGPPHC (GP) at 871 para. 78 (S. Afr.); *see also* COPYRIGHT ACT 98 OF 1978, § 13 (S. Afr.).

[287] *Blind SA v. Minister of Trade, Indus. and Competition* 2021 ZAGPPHC (GP) at 871 para. 88 (S. Afr.)

"constitutional infirmity that must be cured."[288] On the contrary, stated Unterhalter AJ,

> [t]hose who serve the interests of persons with print and visual disabilities should be given the greatest latitude to produce literary works in accessible format copies and to develop technologies to do so that are ever better at rendering the original work in the best possible way, tailored to the varied incidents of the impairments such persons suffer. That requires, as a matter of probability, the freedom to make adaptations and not merely reproductions.[289]

Thus, noted Justice Unterhalter, "the power conferred upon the Minister in section 13 cannot adequately serve to cure the constitutional invalidity of the Copyright Act" as identified by the learned justice.[290] It follows that the arguments presented in defense of the constitutional validity of the Copyright Act "cannot prevail" and that "[t]he statutory right conferred upon copyright owners to authorize the reproduction and adaptation of original literary works (and their inclusion of artistic works) gives rise to the scarcity of literary works in accessible format copies for those with print and visual disabilities, thereby infringing their constitutional rights."[291]

Justice Unterhalter moved on to explain the Court's remedy and began the discussion by noting that § 172(1)(a) of the Constitution requires the Court to "declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency."[292] Having found provisions of the Copyright Act to be inconsistent with the Constitution, Justice Unterhalter then next elaborated on the remedy.[293] First, he made reference to the order of the High Court of South Africa, Gauteng Division, Pretoria. The High Court had ordered as follows: "The Copyright Act 98 of 1978 is declared unconstitutional in terms of *section 174(1)* of the Constitution, 1996."[294]

Justice Unterhalter noted that Blind SA had observed that the High Court's order did not reference "the correct provision of the Constitution in terms of which an order of this kind is made" and that in addition, the order had not specified "the extent of the inconsistency with the Constitution."[295] Blind SA had then prayed the Constitutional Court ("CC") to cure these defects. Blind SA's prayer was for the CC to cure these defects in the following terms:

> The Copyright Act is inconsistent with the Constitution of the Republic of South Africa, 1996 to the extent that it—

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[288] *Id.*

[289] *Id.* at para. 89.

[290] *Id.* at para. 90.

[291] *Id.* at 871 para. 90.

[292] *Blind SA v. Minister of Trade, Indus. and Competition* 2021 ZAGPPHC (GP) at 871 para. 91 (S. Afr.)

[293] *Id.*

[294] *Id.* at para. 92.

[295] *Id.*

> 2.1 limits and/or prevents persons with visual and print disabilities accessing works under copyright that persons without such disabilities are able to access; and
> 2.2 does not include provisions designed to ensure that persons with visual and print disabilities are able to access works under copyright in the manner contemplated by the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled;
>
> and in so doing, unreasonably and unjustifiably limits the rights of persons with visual and print disabilities to equality, dignity, freedom of expression, and basic and further education, and to participate in the cultural life of their choice.[296]

In his analysis of Blind SA's prayer, Justice Unterhalter noted that the "proposed order is too wide and, in some respects, imprecise."[297] Unterhalter AJ then advanced four reasons why he believed that the order demanded by Blind SA was imprecise and these include the following: (1) "it references all works under copyright"; (2) "it would declare that the omissions of the Copyright Act fail to measure up to what the Marrakesh Treaty requires to enable persons with visual and print disabilities to have access to published works" even though the Marrakesh Treaty is not the standard "against which inconsistency for the purposes of section 172(1)(a) is measured"; (3) "the proposed order stipulates for the declaration of invalidity of the Copyright Act, without identifying the provisions of the Copyright Act that are inconsistent with the Constitution"; and (4) "it fails to specify that the order applies to published works" since no case was presented before the Court for infringements in respect of unpublished works.[298]

To formulate and issue an order that is responsive to the case established by Blind SA before the CC it was necessary to include certain elements in the order. After discussing the said elements, Unterhalter AJ then issued the following order:

> (2) It is declared that sections 6 and 7, read with section 23 of the Copyright Act 98 of 1978, are unconstitutional, invalid and inconsistent with the rights of persons with visual and print disabilities, as set out in sections 9(3), 10, 16(1)(b), 29(1) and 30 of the Constitution, to the extent that these provisions of the Copyright Act limit the access of such persons to published literary works, and artistic works as may be included in such literary works, in accessible format copies.
> (3) A person with a visual and print disability described in paragraph 2 means a person who—
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> (a) is blind;

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[296] *Id.* at 871 para. 93.

[297] *Blind SA v. Minister of Trade, Indus. and Competition* 2021 ZAGPPHC (GP) at 871 para. 94 (S. Afr.).

[298] *Id.*

> (b) has a visual impairment or a perceptual or reading disability which cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability; or
> (c) is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would normally be acceptable for reading; regardless of any other disabilities.[299]

Blind SA, noted Justice Unterhalter, prays the CC to rule similarly as it had done in *AmaBhungane* and read-in section 19D as Parliament's effort to bring the Copyright Act in line with the Marrakesh Treaty.[300] Noting that the parliamentary process had already taken too long, Unterhalter AJ held that there was a pressing need to address the infringement of rights.[301] The honorable justice then cited to section 237 of the Constitution which places an obligation on state organs that "constitutional obligations must be performed diligently and without delay." [302] Nevertheless, noted Justice Unterhalter, Parliament must be "afforded an opportunity to cure the constitutional defect" that the CC had found.[303]

The remedy in question, noted Justice Unterhalter, "fits into a larger legislative design as to how to domesticate the Marrakesh Treaty and harmonize the exceptions that are required with the project under consideration to revise the Copyright Act."[304] However, this is a matter that must be handled by Parliament and not the courts and that a read-in by the CC should not interfere with or deter "Parliament from its ultimate task to cure the constitutional defect" that the Court has found so that the remedy can be integrated into "the wider reformation of the Copyright Act."[305] The declaration of invalidity, Unterhalter AJ held, must be suspended for a period of 24 months to provide Parliament with the time to complete its work. However, during this interim period, persons with print and visual disabilities must be provided with relief.[306]

In providing a read-in remedy, noted Justice Unterhalter, courts must not trespass upon the constitutional powers of Parliament. The courts' constitutional mandate is to provide "an effective remedy that cures a specific defect."[307] After further analysis, Justice Unterhalter then declared that:

The interim relief *must contain* the following:

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[299] *Id.* at para. 97.
[300] *Id.* para. 100.
[301] *Id.*
[302] *Blind SA v. Minister of Trade, Indus. and Competition* 2021 ZAGPPHC (GP) at 871 para. 100 (S. Afr.); *see also* S. AFR. CONST., 1996 § 237.
[303] *Blind SA v. Minister of Trade, Indus. and Competition* 2021 ZAGPPHC (GP) at 871 para. 102 (S. Afr.).
[304] *Id.*
[305] *Id.*
[306] *Id.*
[307] *Id.* at para. 103.

> (a) First, the subject of the exception is published literary works, and artistic works forming part of these works, that are the subject of copyright under the Copyright Act.
> (b) Second, those who are to benefit from the exception must be defined. There is good reason to adopt the definition of beneficiary persons in the Marrakesh Treaty, as Blind SA has done.
> (c) Third, it is necessary to define the scope of the exception, and, in particular, what it means to permit the making of an accessible format copy. The CAB's definition is somewhat truncated. Professor Dean's proposed regulation offers a definition that is limited to reproduction, which I have found to be too restrictive. Again, the Marrakesh Treaty provides a definition of "accessible format copy" that is sufficiently broad to take account of the variety of content and technologies that may be used to give beneficiary persons access that is feasible and comfortable. The definition also recognizes the rights of the copyright owner to have the integrity of the original work respected.
> (d) Fourth, and further as to scope, the exception must be clear as to the right of the copyright owner from which a derogation is permitted. It is the right of the copyright owner to authorize the reproduction or adaptation of the relevant works.[308]

Justice Unterhalter then discussed requirements designed to protect the rights of copyright owners while the targeted relief to persons with visual and print disabilities is being provided. These include the following: (1) only persons who have lawful access to the literary work or a copy of it must be allowed to make an accessible copy of the work; (2) while the conversion of the work into an accessible format copy may be undertaken by any means "needed to navigate information in the accessible format," this process must not "introduce changes other than those needed to make the work accessible to the beneficiary person";[309] and (3) accessible format copies must be supplied exclusively only for the use of the beneficiary persons and such supply must be undertaken only on a non-profit basis.[310]

Finally, noted Justice Unterhalter, "persons with print and visual disabilities must be assisted by others to have accessible format copies of the relevant works made for them."[311] These others include persons who are acting as agents of beneficiary persons, and "entities and institutions that provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis to make accessible format copies."[312] Taking all these considerations in mind, Justice Unterhalter framed the interim order as follows:

> In the result, the following order is made:

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[308] *Blind SA v. Minister of Trade, Indus. and Competition* 2021 ZAGPPHC (GP) at 871 para. 106 (S. Afr.).

[309] *Id.* at para. 107

[310] *Id.* (emphasis added).

[311] *Id.* at para. 108.

[312] *Id.* at para. 109.

> 1. The order of the High Court of South Africa, Gauteng Division, Pretoria declaring the Copyright Act 98 of 1978 inconsistent with the Constitution is confirmed to the extent provided in paragraph 2.
> 2. It is declared that sections 6 and 7, read with section 23 of the Copyright Act 98 of 1978, are unconstitutional, invalid and inconsistent with the rights of persons with visual and print disabilities, as set out in sections 9(3), 10, 16(1)(b), 29(1) and 30 of the Constitution, to the extent that these provisions of the Copyright Act limit the access of such persons to published literary works, and artistic works as may be included in such literary works, in accessible format copies.
> 3. A person with a visual and print disability described in paragraph 2 means a person who—
>
> (a) is blind;
>
> (b) has a visual impairment or a perceptual or reading disability which cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability; or
>
> (c) is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would normally be acceptable for reading regardless of any other disabilities.
>
> 4. The order of the High Court is otherwise set aside, save for its order as to costs.
> 5. The declaration of unconstitutionality in paragraphs 1 and 2 takes effect from the date of this judgment and is suspended for a period of 24 months to enable Parliament to cure the defect in the Copyright Act giving rise to its invalidity.[313]

Paragraph 6 of the interim order was devoted to definitions of (i) accessible format copy; (ii) beneficiary person; (iii) literary works; and (iv) a permitted entity. The Court then ordered the Minister of Trade, Industry and Competition to pay the applicant's costs in the case before the CC, including the costs of the applicant's two counsels.[314]

V. LESSONS FROM *BLIND SA V. MINISTER OF TRADE, INDUSTRY AND COMPETITION*

A. Introduction

Throughout Africa, many people are unable to read classic novels, such as Chinua Achebe's *Things Fall Apart* and Alan Paton's *Cry, the Beloved Country* because of a disability. The category of Africans who suffer the most from this inability to access

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[313] *Blind SA v. Minister of Trade, Indus. and Competition* 2021 ZAGPPHC (GP) at 871 para. 112 (S. Afr.).

[314] *Id.* at para. 112.

these classic literary works are those with visual and print impairments.[315] This is because the majority of published books and other literary works are not presented in formats that are accessible to persons with visual and print impairments.[316]

Cognizant of the scarcity of published literary works in accessible format copies that can be used by persons with visual and print disabilities, Member States of the World Intellectual Property Organization ("WIPO"), a specialized agency of the United Nations, adopted *The Marrakesh Treaty* on June 27, 2013 in Marrakesh, Morocco.[317] The Marrakesh Treaty, which was designed "to remove copyright barriers that prevented access to print works for print-disabled people, . . . is the first copyright treaty with human rights principles at its core" and makes "specific references to the Universal Declaration of Human Rights and the UN Convention on the Rights of Persons with Disabilities."[318] According to the U.S. Copyright Office, the adoption of the Marrakesh Treaty was prompted by the "widespread recognition of the problem known as a 'book famine,' the situation where very few books are published in formats that are accessible to those who are blind and visually impaired."[319]

According to the WIPO, the Marrakesh Treaty "demonstrates that copyright systems are an important part of the solution to the challenge of improving access to books and other printed works for persons with print disabilities."[320] Hence, an important goal of the Marrakesh Treaty is to significantly enhance the ability of persons with visual and print disabilities to have access to printed materials.[321] Specifically, the Marrakesh Treaty imposes an obligation on all Contracting Parties to include provisions in their national copyright laws that provide for "a limitation or exception" to the right of reproduction and the right of distribution in order to make available works in accessible format copies to persons with visual and print impairments.[322] According to Article 4(1)(b), a Contracting Party may, but is not

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[315] *See, e.g.*, Ope Adetayo, '*A book famine': In Nigeria, copyright laws mean visually impaired people can't access many books*, MINORITYAFRICA (Aug. 29, 2020), https://minorityafrica.org/nigeria-copyright-laws-visually-impaired-people-access-books/ (noting that converting books into accessible digital formats for blind and visually impaired persons is illegal in Nigeria); *see also* Omolola Afolabi, *Nigeria: Book Famine—How Policies in Nigeria Limit Visually Impaired Persons' Access to Books*, PREMIUM TIMES (NIGERIA) (Jan. 17, 2023), https://allafrica.com/stories/202301180012.html.

[316] Julia Chaskalson, *Copyright laws shut out blind and visually impaired South Africans from the world of books*, DAILY MAVERICK (SOUTH AFRICA) (Apr. 28, 2022), https://www.dailymaverick.co.za/opinionista/2022-04-28-copyright-laws-shut-out-blind-and-visually-impaired-south-africans-from-the-world-of-books/ (noting that only "0.5% of published works in South Africa are available in accessible formats").

[317] *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled*, World Intellectual Property Organization, *supra* note 88.

[318] Jessica Coates et al., *Getting Started: Implementing the Marrakesh Treaty for Persons with Print Disabilities: A Practical Guide for Librarians*, UNIV. OF TORONTO SCARBOROUGH 10 (Mar. 2018), https://www.ifla.org/files/assets/hq/topics/exceptions-limitations/getting_started_faq_marrakesh_treaty_a_practical_guide_for_librarians_2018_en.pdf.

[319] U.S. Copyright Office, *Understanding the Marrakesh Treaty Implementation Act*, U.S. COPYRIGHT OFFICE 1 (Aug. 2020), https://www.copyright.gov/legislation/2018_marrakesh_faqs.pdf.

[320] WIPO, *Main Provisions and Benefits of the Marrakesh Treaty (2013)*, WIPO 2 (2016), https://www.wipo.int/publications/en/details.jsp?id=4047.

[321] *Understanding the Marrakesh Treaty Implementation Act*, *supra* note 319.

[322] *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled*, *supra* note 88, at art. 4(1)(a).

obligated to, "also provide a limitation or exception to the right of public performance to facilitate access to works for beneficiary persons."[323]

Article 4(2) provides examples of an exemption or limitation that a Contracting Party may implement to fulfill Article 4(1). First, the authorized entity must have lawful access to the work in question and must be acting on a non-profit basis—that is, the entity must not be operating for the purpose of earning a profit.[324] Second, the conversion of the literary work to an accessible format copy does not introduce changes that "go beyond what is necessary to make the work accessible to a beneficiary person."[325] If an entity meets these two conditions, a Contracting Party may, without prior authorization by the copyright holder, permit such an entity to make or reproduce an accessible format copy of the work or secure such a copy from "another authorized entity" and make this available to "beneficiary persons by any means, including by non-commercial lending or by electronic communication by wire or wireless means, and undertake any intermediate steps to achieve those objectives."[326]

Article 4(3) of the Marrakesh Treaty provides an alternative way to fulfill Article 4(1)—it can do so by "providing other limitations or exceptions in its national copyright law" that are consistent with the "General Principles on Implementation under Article 10 and with any existing rights and obligations that the Contracting Party has under the following international copyright agreements—the Berne Convention; the Agreement on Trade-Related Aspects of Intellectual Property Rights; and the WIPO Copyright Treaty."[327]

Articles 4(4) and 4(5) permit, but may not require, Contracting Parties, "to confine limitations or exceptions to works that, in the particular accessible format, 'cannot be obtained commercially under reasonable terms for beneficiary persons in that market,' and to make the relevant limitations or exceptions subject to remuneration."[328]

Essentially, the Marrakesh Treaty allows what are referred to as "authorized entities" to perform "certain acts, otherwise prohibited under copyright law, in order to assist the 'beneficiaries.'"[329] While the Marrakesh Treaty does not require an organization "to fulfill any formalities or undertake specific procedures to obtain recognition as an 'authorized entity,'" it also does not prohibit "such measures and thus gives Member States the leeway to create such procedures at the national level."[330]

In general, the Marrakesh Treaty requires that Contracting Parties provide for a limitation or an exception to copyright in order to allow "beneficiaries" and "authorized entities" to effect the "changes needed to make a copy of a work in an accessible format for persons with a print disability" and to "allow the exchange across borders of those

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[323] *Id.* at art. 4(1)(b).

[324] *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled*, *supra* note 88, at art. 4(2)(a).

[325] U.S. Government Publishing Office, *Message from the President of the United States Transmitting [The Marrakesh Treaty], Done at Marrakesh on June 27, 2013*, U.S. GOVERNMENT PUBLISHING OFFICE 13 (Feb. 10, 2016), https://www.congress.gov/114/cdoc/tdoc6/CDOC-114tdoc6.pdf.

[326] Marrakesh Treaty, *supra* note 217, at art. 4(2)(a). *See also* U.S. Government Publishing Office, *supra* note 325, at 13.

[327] *Id.* at arts. 4(3), 10 & 11. *See also* U.S. Government Publishing Office, *supra* note 325, at 14.

[328] U.S. Government Publishing Office, *supra* note 325, at 14.

[329] *Main Provisions and Benefits of the Marrakesh Treaty (2013)*, *supra* note 320, at 3.

[330] *Id.*

accessible copies produced according to the limitations and exceptions provided in the Marrakesh Treaty, or in accordance with the operation of law."[331]

Although the Marrakesh Treaty does not have any formal relationship with other treaties and "does not affect the obligations Member States have assumed under other international agreements," it reinforces "the need for Contracting Parties to comply with their international obligations regarding the creation of limitations and exceptions at the national level."[332] The WIPO notes that that obligation usually relates to "the so-called three-step test," which is found in the Berne Convention, the WIPO Copyright Treaty and the TRIPS Agreement.[333] The three-step test provides that an exception in national legislation should be confined to "(i) certain special cases (ii) that do not conflict with the normal exploitation of the work; and (iii) that do not unreasonably prejudice the legitimate interests of the right holder."[334]

The Marrakesh Treaty has "one shared goal and benefit: To increase access to books, magazines and other printed materials for the world's population of persons with print disabilities."[335] The anticipated benefits of the Marrakesh Treaty include (i) improved awareness of the challenges faced by the print-disabled community and persons with disabilities; (ii) greater access to education; (iii) enhanced social integration and cultural participation; and (iv) poverty alleviation and increased contributions to the national economy.[336]

Before *Blind SA*, less than 0.5% of published works in South Africa were available in formats that are accessible to persons with visual and print disabilities.[337] In order for South Africans with print and visual disabilities to access "99.5% of the market of published works," they must convert these literary works from the format in which they currently exist—that is, the format in which these works are published—to a format that these persons with disabilities can access. Until *Blind SA* was decided, persons with print and visual disabilities who undertook such conversion of literary works were considered to have infringed South Africa's copyright law and hence, were subject to various legal sanctions.[338]

B. Lessons from Blind SA

The Convention on the Rights of Persons with Disabilities ("CRPD") imposes an obligation on States Parties to take appropriate steps "to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials."[339] This provision

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[331] *Id.* at 4.

[332] *Id.*

[333] *Id.*

[334] *Main Provisions and Benefits of the Marrakesh Treaty (2013)*, *supra* note 320, at 4.

[335] *Id.* at 5.

[336] *Id. at* 5–6.

[337] Sanya Samtani, *South African Constitutional Court Rectifies Copyright Discrimination for People With Disabilities*, OXFORD HUMAN RIGHTS HUB (Sept. 26, 2022), https://ohrh.law.ox.ac.uk/south-african-constitutional-court-rectifies-copyright-discrimination-for-people-with-disabilities/.

[338] *Id.*

[339] Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3 art. 30(3).

has direct relevance to the challenges that persons with disabilities, including those with print and visual disabilities in Africa, face when they want to access books and other reading materials. As unanimously held by the Court in *Blind SA*, the failure of persons with print and visual disabilities to have equal access to books and other reading materials deprives them of the ability to fully enjoy "a range of rights on an equal basis with others, including the right to education, participation in cultural life and freedom of expression."[340]

Throughout many countries in Africa, there is a *book famine*, "a term that is used even by the World Intellectual Property Organization itself, to describe the devastating dearth of reading materials available to persons with disabilities throughout the world."[341] The situation is especially dire in Africa, as copyright law protections constrain the ability of persons with print and visual disabilities to have access to books and other literary materials in a format that is accessible to them.[342]

International and domestic copyright laws protect the IP of an author of a literary work and effectively prohibit "the copying, alteration or transformation of the work without the author's permission" and in doing so, copyright laws safeguard "the legitimate interests and livelihoods of authors."[343] However, without exceptions, particularly with respect to accessible formats, persons with disabilities are faced with only three options: (1) "go without reading materials"; (2) "individually approach authors one by one for permission to modify books and modify at their own personal cost"; (3) "break the law."[344]

South Africa took an active part in the design and adoption of the Marrakesh Treaty. However, the country has not yet acceded to the Treaty, "puzzling saying it will only do so once it has finished the drawn out process of amending [its] Copyright Act."[345] It was because of the failure of South Africa's Parliament to act expeditiously that forced Blind SA, an NGO that advocates for the rights of the visually impaired persons in South Africa, to approach the High Court of South Africa, Gauteng Division, Pretoria, praying for an order declaring the Copyright Act unconstitutional and "a 'reading in' of the provisions of the draft Copyright Amendment Bill."[346]

In post-apartheid South Africa, courts have "frequently undertaken to interpret the State's constitutional and statutory law with reference to international law and standards."[347] It was on this basis that the International Commission of Jurists ("ICJ") approached the High Court of South Africa, Gauteng Division, Pretoria, seeking to be admitted as amicus curiae in order to "assist the court by making arguments relating to the inconsistency of the Copyright Act with international law and standards, in particular those stemming from the CRPD Convention and the International Covenant

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[340] Onen Cylus & Timothy Fish Hodgson, *Ending Book Famine and Vaccine Inequality: What a South African Court's Decision on Copyright Law has to do with COVID-19 Vaccine Access*, OPINIO JURIS & INTERNATIONAL COMMISSION OF JURISTS (Oct. 20, 2021), http://opiniojuris.org/2021/10/20/ending-book-famine-and-vaccine-inequality-what-a-south-african-courts-decision-on-copyright-law-has-to-do-with-covid-19-vaccine-access/.

[341] *Id.*

[342] *Id.*

[343] *Id.*

[344] *Id.*

[345] Cylus & Hodgson, *supra* note 340.

[346] *Id.*

[347] *Id.*

on Economic, Social and Cultural Rights ("ICESCR") which both protect the rights to education and participation in cultural life."[348] The ICJ also argued that although South Africa had not yet acceded to the Marrakesh Treaty, the country's constitutional law should, however, be interpreted "in light of its provisions because the Constitutional Court has held that even 'non-binding' sources of international law can and should be considered in giving meaning to the State's obligation to take reasonable and effective measures to realize human rights." [349] This, argued the ICJ, is particularly important and relevant in the context in which *Blind SA* was being considered "given that the Marrakesh Treaty largely reinforces existing obligations of South Africa in terms of the CRPD and ICESCR, and because of South Africa's public support for the Treaty."[350]

Writing for the High Court, Judge Mbongwe had declared the Copyright Act unconstitutional on the basis that it infringes on a variety of rights of South Africans with disabilities.[351] In addition, declared Judge Mbongwe, "[t]he absurdity of having to weigh the protected rights, which are invariably pecuniary in nature, against the infringement of human rights is unfathomable in a constitutional democracy with a Bill of Rights."[352]

Courts and the political branches in other African countries will do well to heed to Justice Mbongwe's admonition and make sure that the rights of persons with print and visual disabilities are not subordinated to the pecuniary interests of copyright holders. The marginalization of persons with print and visual disabilities by denying them access to information "that is available in works under copyright, by far the largest and primary sources of information, should have no place in any society," including those in Africa.[353]

The WIPO has stated that "no more than seven percent of published books are in formats that the blind or visually impaired, estimated at 285 million people worldwide, can read." [354] In Africa, nearly 26.3 million people have some form of vision impairment.[355] Justice Mbongwe noted that the consent of copyright holders, "which is rarely readily granted," must be sought before works can be converted into formats that are "suitable for the visually and print disabled to have equal access to information." [356] Many African countries have constitutions that prohibit discrimination and espouse "the eradication of all forms of discrimination in favor of the prevalence of equality, irrespective of race, gender, religion, *disabilities* and cultures."[357]

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[348] *Id.*

[349] *Id.*; *see also S v. Makwanyane & Another* 1995 (3) SA 391 (CC) at paras. 34–35 (S. Afr.). (The Constitutional Court is making it plain that it is entitled to consider both binding and non-binding instruments of international law).

[350] Cylus & Hodgson, *supra* note 340.

[351] *Blind SA v. Minister of Trade, Indus. and Competition* 2021 ZAGPPHC (GP) 871 (S. Afr).

[352] *Id.* at para. 2

[353] *Id.*

[354] *Id.* at para. 5.

[355] World Telehealth Initiative, *Restoring vision in Western Africa,* WORLD TELEHEALTH INITIATIVE (Aug. 16, 2021), https://www.worldtelehealthinitiative.org/blog/togo-program.

[356] *Blind SA v. Minister of Trade, Indus. and Competition* 2021 ZAGPPHC (GP) 871 at para. 8 (S. Afr).

[357] *Id.* at para. 6.

For example, §9 of the Constitution of the Republic of South Africa guarantees equality and states that "[e]veryone is equal before the law and has the right to equal protection and benefit of the law."[358] In addition, the constitution provides that "[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, *disability*, religion, conscience, belief, culture, language and birth." [359] The Constitution of Kenya, 2010 also has a provision guaranteeing equality and freedom from discrimination.[360] According to § 27(4), "[t]he State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, color, age, *disability*, religion, conscience, belief, culture, dress, language or birth."[361]

Another lesson for African countries from *Blind SA* is that courts have an obligation "to be alive to the spirit, purport and objectives of the Constitution and the Bill of Rights" when interpreting legislative provisions.[362] In addition, as noted by Mbongwe J in *Blind SA* (H. Ct.), courts in other African countries may consider various international human rights instruments as tools to interpret the constitution and national legislative provisions. In doing so, courts in these countries can bring legislative provisions, including copyright laws, into conformity with international human rights law. This can happen even if, as was the case in South Africa with *Blind SA*, the country has not yet acceded to the treaty.[363] The key is for the courts in each African country to make sure that legislative provisions, including copyright laws, conform to international human rights instruments (e.g., CRPD, ICESCR, Marrakesh Treaty). In the case of copyright laws, using international human rights law as an interpretive tool can help African courts cure, if only in the short term, the "book famine" problem. This is especially true in countries like South Africa, where there is an "endless delay" in the legislative process.[364]

Justice Mbongwe also stated that "a developing country . . . can ill-afford to not keep abreast with international standards more so on matters commonly affecting human rights and humanity worldwide."[365] In addition, declared Mbongwe J, "[a] coherent international approach that manifests in the laws of the individual States is the most practical mechanism to employ in such instances" and that "[t]he protection of intellectual property at the expense of human rights of access to information requires a coherent international approach to dislodge the beneficiaries of the protection of their controlling powers."[366] An important lesson from Justice Mbongwe's

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[358] S. AFR. CONST., 1996 § 9(1). This provision is part of Charter 2—The Bill of Rights.

[359] *Id.* at § 9(3) (emphasis added).

[360] CONSTITUTION § 27 (2010) (Kenya). Section 27 is part of Kenya's Bill of Rights (Rights and Fundamental Freedoms).

[361] *Id.* at § 27(4) (emphasis added).

[362] *Blind SA v. Minister of Trade, Indus. and Competition* 2021 ZAGPPHC (GP) 871 at para. 7 (S. Afr).

[363] *See also S v. Makwanyane & Another* 1995 (3) SA 391 (CC) at para. 35 (S. Afr.).

[364] *See Blind SA v. Minister of Trade, Indus. and Competition* 2021 ZAGPPHC (GP) 871 at paras. 11-12 (S. Afr). The ultimate goal is for the legislative branch to take the appropriate measures to bring national copyright laws in conformity with international human rights instruments. Until such legislation is enacted, courts can use their interpretive powers to issue interim orders that cure the book famine problem.

[365] *Id.* at para. 20.

[366] *Id.* at para. 20.

analysis in the High Court's decision in *Blind SA* is that African countries must make sure that their national laws, including their copyright laws, are fully in conformity with provisions of international human rights instruments.

South Africa, of course, is not the only African country that has struggled in its efforts to domesticate the Marrakesh Treaty. Malawi acceded to the Marrakesh Treaty in 2017 and subsequently enacted legislation to implement the Treaty. That legislation, the Copyright Act (Chapter 49: 03), commenced on March 13, 2017. And § 49 states as follows:

> The reproduction of a published literary, artistic, or musical work in a form specifically intended for visually impaired persons or persons with print disabilities people with disabilities who, due to the nature of their disability, are not able to access or enjoy the work in any of the forms in which it is *commercially available*, shall be permitted:
>
> Provided that the reproduction and the making available of the copies is not made on a commercial basis and that the copies shall be made available only to such disabled people for which they are intended, and that—
>
> (a) the reproduction is not made from copies which are made for the same purpose;
> (b) where it is a reproduction of a musical work, it is not made in the form of a sound or audio-visual recording; and
> (c) where the reproduction is made in the form of a sound or audio-visual recording, the copies shall be made available only by way of lending to people who, due to their disability, may access and enjoy the work only in this form.[367]

Commenting on Malawi's new copyright law, leading library organizations, including the Electronic Information for Libraries ("EIFL"), African Library and Information Associations and Institutions ("AfLIA"), and the International Federation of Library Associations and Institutions ("IFLA"), stated that the inclusion of a "commercial availability test on the making of accessible format copies in [the laws of] Malawi" effectively "undermines the objective of the Marrakesh Treaty which is to end the global 'book famine' for persons with print disabilities." [368] These library organizations noted that although Malawi's new copyright law "permits a range of library activities and services, complex conditions limit in practice what libraries in Malawi are permitted to do."[369]

The requirement that in order for authorized entities or beneficiary persons and persons acting on their behalf to make an accessible format copy they must check to see if the work is commercially available before they can do so "is deeply

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[367] COPYRIGHT ACT §49 (Malawi) (emphasis added).

[368] International Federation of Library Association and Institutions (EIFL), *EIFL calls on Malawi: embrace the spirit of the Marrakesh Treaty—no commercial availability test*, EIFL (Aug. 4, 2017), https://www.eifl.net/news/eifl-calls-malawi-embrace-spirit-marrakesh.

[369] *Id.*

disappointing."[370] The African Regional Intellectual Property Organization ("ARIPO") has addressed the issue of *commercial availability* in its Guidelines for the Domestication of the Marrakesh Treaty as follows:[371]

> In view of diverse socio-economic and cultural situations prevailing in developing countries, and in most ARIPO Member States, *it may be difficult for authorized entities or beneficiary persons and persons acting on their behalf to ascertain whether accessible format copies are obtainable commercially and reasonably in the market*.[372]

In fact, for a work published outside an African country (for example, outside Malawi), it would be very difficult, if not, impossible, for authorized entities "to ascertain with certainty whether [the work in question] is available in the format needed."[373] Thus, for the thousands of Malawians with print and visual disabilities, it is likely the case that their information requests would most probably be delayed or denied. Perhaps, more importantly, the commercial availability test would put Malawi's law "out of step with other countries ratifying the Marrakesh Treaty in Africa and around the world."[374]

Although the Marrakesh Treaty is an important international initiative to effectively address the "book famine" problem and significantly enhance the ability of persons with print and visual disabilities to avail themselves of accessible format copies, it is important that legislation domesticating the Treaty must not introduce additional constraints, such as the commercial availability test, that must be overcome by authorized entities or those acting on behalf of persons with print and visual disabilities. Several international library organizations have argued that "[t]he diversion of limited resources available for accessibility work to commercial availability research is . . . an unacceptable waste of philanthropic and public resources."[375]

In fact, the founder of Bookshare, the online library of accessible ebooks for people with print disabilities (including those with visual impairment, severe dyslexia, and cerebral palsy), has indicated that his organization *will not* provide Bookshare content under the Marrakesh Treaty "to countries with a commercial availability test" and that it will not offer "the Bookshare technology platform for domestic accessible library services in such countries."[376]

Various international library associations have argued that Malawi, which acceded to the Marrakesh Treaty on July 14, 2017, is in "a strong position to provide leadership in Africa on domestic implementation that respects both the spirit and the

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[370] *Id*.

[371] *ARIPO Guidelines for the Domestication of the Marrakesh Treaty*, AFRICAN REGIONAL INTELLECTUAL PROPERTY ORGANIZATION (ARIPO) (Dec. 7, 2018), https://www.aripo.org/publications/aripo-guidelines-for-the-domestication-of-the-marrakesh-treaty/.

[372] *Id.* at para. 1.5.3 (emphasis added).

[373] *Id.* at para. 1.5.3.

[374] *EIFL calls on Malawi: embrace the spirit of the Marrakesh Treaty—no commercial availability test*, *supra* note 368.

[375] *Id.*

[376] *Id.*

letter of the Treaty."[377] However, in order for Malawi to successfully provide such leadership, it must rid its enabling law of such constraints as a commercial availability test.[378] Other African countries that have not yet domesticated the Marrakesh Treaty should take a lesson from Malawi's experience and make sure that their enabling legislation does not create barriers that will further exacerbate the book famine problem for their citizens.[379]

On April 6, 2022, Nigeria's Senate passed the Copyright Bill 2022, which is designed to amend the Copyright Act Cap C28 LFN, 2004, and domesticate the Marrakesh Treaty. The new bill, which is titled *A Bill for an Act to Repeal The Copyright Act Cap C28 LFN 2004 and to Re-enact the Copyright Act 2021 and for Matters Connected Therewith, 2021 (SB. 688)*, provides exceptions from copyright control in order to allow for literary works to be converted to an accessible format copy for the benefit of persons with print and visual disabilities.[380] Unlike Malawi's, Nigeria's law to domesticate the Marrakesh Treaty does not have a commercial availability test.[381]

However, Nigeria is having similar problems like those encountered by South Africa in its efforts to domesticate the Marrakesh Treaty: a delay by the political branches to complete the domestication process.[382] Nigeria deposited its instrument of ratification with the WIPO on October 4, 2017, and it was not until July 2022 (nearly five years), that both chambers of the country's National Assembly finally passed the enabling legislation—the Copyright Bill 2022. Although the Nigeria Association for the Blind (NAB) has been lobbying President Buhari to assent to the bill and effectively transform the provisions of the Marrakesh Treaty into justiciable rights in Nigeria, as of this writing, he has not yet done so. Consequently, the book famine remains a reality for Nigerians living with print and visual disabilities. Perhaps, the NAB could learn from South Africa's experience and petition the Federal High Court for an appropriate interim remedy. That may encourage the political branches to expeditiously complete the process of domesticating the Marrakesh Treaty.

Millions of Africans with print and visual disabilities continue to suffer from the book famine problem. To deal effectively and fully with this problem, each African country that has not yet done so should (1) sign and ratify the Marrakesh Treaty; (2) pass enabling legislation to domesticate the Marrakesh Treaty and create rights that are justiciable in domestic courts; (3) ensure that the enabling legislation does not, like Malawi's, introduce constraints that further exacerbate the problem of converting literary works into an accessible format copy for the benefit of persons with print and visual disabilities; and (4) make certain that the judiciary is independent enough and has the capacity and wherewithal to enforce the rights guaranteed by the Marrakesh Treaty and other international human rights instruments.

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[377] *Id.*

[378] *Id.*

[379] *See* Copyright Amendment Bill 2017 § 19D (S. Afr.). South Africa's Copyright Amendment Bill, 2017 does not include a commercial availability test.

[380] A BILL FOR AN ACT TO REPEAL THE COPYRIGHT ACT CAP C28 LFN 2004 AND TO RE-ENACT THE COPYRIGHT ACT 2021 AND FOR MATTERS CONNECTED THEREWITH, 2021 (SB. 688) (Nigeria).

[381] *Id.*; *see also* COPYRIGHT ACT §49 (Malawi).

[382] Afolabi, *supra note* 315 (urging Nigeria to ameliorate the book famine situation by domesticating the Marrakesh Treaty).

In the case where the political branches are either reluctant or unwilling to ratify and domesticate the Marrakesh Treaty, the courts should, as they did in South Africa through *Blind SA*, provide an interim remedy. In doing so, the courts should encourage the political branches to expeditiously reform national laws, including copyright laws, to bring them in conformity with provisions of international human rights instruments.

VI. SUMMARY AND CONCLUSION

Throughout the world, copyright laws are generally designed to promote the creation of knowledge by granting special protection to authors. However, some legal scholars have argued that copyright also helps to delineate and preserve public domain material and that the public domain is just as important to learning as copyright. Copyright and free speech experts have argued that copyright is very important in preserving and enhancing the public domain.[383]

While some scholars have argued that the modern approach to copyright traces its origins to European copyright laws and the Berne Convention, which see copyright as a natural right, it is important to recognize that the U.S. Constitution does not see copyright as a natural right but as a privilege, which is granted the creator of knowledge by the State.[384] The Founders of the American Republic, which came into being through the Constitution of 1789, considered copyright an incentive to encourage and enhance the creation of "original works of authorship including literary, dramatic, musical, and artistic works."[385]

The American approach, it is argued, commercializes copyright and intellectual effort and creativity. However, it also ensures that society at large benefits from the knowledge created. While, under the American system, individuals may create knowledge exclusively for economic reasons, what they create adds to the national stock of knowledge, which will invariably benefit society. In some societies (e.g., the Soviet Union), legislative enactments create copyright laws that "reflect a compromise between personal rights and interests" (i.e., the rights of the creators, such as authors) and those of society at large or the public.[386]

The emergence of copyright in Africa has been influenced by several historical and socio-economic circumstances, including colonialism, through which Europeans brought to the continent the idea of the "artist and writer as an individual creator who profits from his or her work."[387] The African countries that emerged from colonialism inherited the copyright systems of the countries that colonized them. For example, former British colonies, such as Nigeria and Ghana, inherited "the English common law system of copyright from the United Kingdom" and after independence, these countries continued to "model their copyright laws in the copyright law traditions of

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[383] Patterson, *supra* note 2, at 271.
[384] *See, e.g.*, U.S. CONST. art. I, § 8, cl. 8.
[385] U.S. Copyright Office, *supra* note 22.
[386] Altbach, *supra* note 19, at 1643.
[387] *Id.*

their erstwhile colonial masters, whether England or France, with their emphasis on the transferability or alienability of copyright."[388]

Throughout the world today, the Anglo-American copyright model, in which economic and commercial rights dominate, remains an important factor in the protection of intellectual property. Some developing countries, including some in Africa (e.g., South Africa), have attempted to minimize their reliance on the Anglo-American approach to copyright. In 2015, the South African Parliament decided to fully overhaul the country's copyright system and incorporate "some of the best elements of both U.S. and European copyright."[389] From U.S. copyright, South Africa imported the concept of "fair use" and from the European model, it borrowed the "idea of specific, enumerated exemptions for libraries, galleries, archives, museums, and researchers."[390]

The Electronic Frontier Foundation has argued that both the American and European approaches to copyright are important for the preservation of human rights, particularly, free expression, privacy, education, and access to knowledge, as well as the ability to enhance entrepreneurship and the building of industries that rely on flexibilities in copyright.[391] Although the majority of copyright laws around the world are based on utilitarian objectives or foundations, over the years, many people have come to see copyright as protecting not only the rights of the creators of knowledge, but also those of members of society who consume what is created. In fact, many international human rights instruments (e.g., the UDHR, the ICESCR, and the CRPD) have provisions that protect the rights of individuals, including those with disabilities, to access published literary works, as well as artistic works. International human rights law now expects national copyright laws to strike a balance between protecting the human rights of knowledge creators and those of persons within society who consume what is created.

It has been argued that copyright is not a human right, but rather a form of property that "enjoys protection as part of the human right to property, which is enshrined in Article 17 of the [UDHR]." [392] Copyright performs two important functions: it encourages and enhances creativity in the sciences and arts; and ensures that scientists and authors are fully compensated for their research findings and creative endeavors. While making certain that authors and knowledge creators are fully compensated for their efforts, copyright also creates an environment within which members of society at large can have access to necessary cultural products.

While copyright protects the moral and material rights of authors and creators, it is necessary to note that Article 27 of the UDHR elevates "copyright to the status of a human right, or maybe it is more appropriate to say that the article recognizes the human rights status of copyright."[393] The key to modern copyright is that society through its laws protects the rights of creators and authors in their works and allows them to earn a living from their creations. Through this process, members of society are provided with the cultural goods that enrich their lives.

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[388] Baloyi, *supra* note 31, at 114.
[389] Doctorow, *supra* note 37.
[390] *Id.*
[391] *Id.*
[392] Bammel, *supra* note 45.
[393] Torremans, *supra* note 56, at 276.

Article 15.1(c) of the ICESCR imposes an obligation on States Parties to "recognize the right of everyone: (c) [t]o benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."[394] All States Parties are obligated to "implement copyright as a human right and to put in place an appropriate regime of protection for the interests of authors and creators."[395] States Parties to the ICESCR are granted significant discretion as to the nature of the legal framework within which the interests of authors and creators are protected. However, international human rights law imposes an obligation on States Parties to ensure that "[i]ntellectual property rights must be consistent with the understanding of human dignity in the various international human rights instruments and the norms defined therein."[396] In addition, "[i]ntellectual property rights related to science must promote scientific progress and *access to its benefits*."[397] States Parties, of course, must ensure that their citizens living with disabilities (e.g., print and visual disabilities) are provided access to these intellectual and cultural goods in accessible formats.

Thus, from a human rights perspective, every State must ensure that the right to access and benefit from scientific and technological developments or discoveries can be exercised by all citizens. In fact, each State must ensure that "the poor, the disadvantaged, racial, ethnic and linguistic minorities, women [and girls], [and] rural residents" are provided with the wherewithal to enjoy the benefits of scientific and technological developments.[398]

A group, which throughout the world, has been especially vulnerable to discriminatory practices in accessing the benefits of scientific and technological developments are persons with disabilities. Quite often, national copyright laws subordinate the rights of persons with disabilities in accessing copyrighted works to those of copyright holders. These copyright laws have permission structures that serve as a major barrier to the accessibility of cultural works and goods.[399] Hence, copyright's ableism has forced the subordination of the interests and rights of persons with disabilities to access copyrighted works to those of copyright holders.

Making sure that persons with disabilities have access to creative works is guaranteed by international human rights instruments and the laws of many countries, including those in Africa. For example, the CRPD instructs States Parties to "recognize the right of persons with disabilities to take part on an equal basis with others in cultural life."[400] In addition, the CRPD also imposes an obligation on States Parties to take all appropriate steps and measures to ensure that persons with disabilities (a) "[e]njoy access to cultural materials in accessible formats"; (b) "[e]njoy access to television programs, films, theater and other cultural activities, in accessible formats"; and (c "[e]njoy access to places for cultural performances or services, such as theaters, museums, cinemas, libraries and tourism services, and, as far as possible, enjoy access to monuments and sites of national cultural importance."[401]

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[394] ICESCR, *supra* note 70, at art. 15(1)(c).
[395] Torremans, *supra* note 56, at 276.
[396] Chapman, *supra* note 77.
[397] *Id.* (emphasis added).
[398] *Id.*
[399] Reid, *supra* note 84, at 2176.
[400] CRPD, *supra* note 89, at art. 30(1).
[401] *Id.*

In addition, States Parties are required to make sure that persons with disabilities "can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice."[402] States Parties are expected to enhance the ability of persons with disabilities to realize these rights by "[p]roviding information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost."[403] States Parties must also provide persons with disabilities with the wherewithal to live independently and participate in all aspects of life.[404]

On January 9, 2018, the AU adopted the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa ("African Disabilities Protocol"), which directed all States Parties to ensure that "[e]very person with a disability has the right to barrier free access to the physical environment, transportation, information, including communications technologies and systems, and other facilities open or provided to the public."[405] In addition, the African Disabilities Protocol also requires States Parties to facilitate "respect, recognition, promotion, preservation and development of sign languages."[406] Unfortunately, as of this writing, the African Disabilities Protocol has been ratified by only five AU Member States.[407]

Although the challenges that persons with disabilities face on a daily basis are universal, Africans with disabilities live in societies or communities whose customary and traditional practices create additional problems for these persons.[408] For example, in Nigeria, persons with disabilities are often viewed by many communities as individuals who have been cursed or punished, most likely by their ancestors, for some crime that they or their families have committed.[409] Quite often, persons with disabilities are sacrificed to "the gods" in order to seek wealth and/or good luck.[410]

On December 10, 2018, the Special Rapporteur on Freedom of Expression and Access to Information in Africa, declared that although the UDHR "does not make specific mention of disability as a protected group, the UDHR has over time anchored the development of very concrete instruments to ensure equal rights for persons with

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[402] *Id.* at art. 21.

[403] *Id.* at art. 21(1)(a).

[404] *Id.* at art. 9(1).

[405] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, *supra* note 98, at art. 15(1).

[406] *Id.* at art. 16(3)(j).

[407] *See id.* According to Article 38(1), the Protocol "shall enter into force thirty (30) days after the deposit of the fifteenth (15th) instrument of ratification by a Member State." *See* African Disabilities Protocol, *supra* note 98, at art. 38(1).

[408] *See, e.g.*, Charlotte Baker & Elvis Imafidon, *Traditional beliefs inform attitudes to disability in Africa: Why it matters*, THE CONVERSATION (June 15, 2020), https://theconversation.com/traditional-beliefs-inform-attitudes-to-disability-in-africa-why-it-matters-138558 (noting that in Africa, a "range of beliefs and attitudes underpin . . . alternative explanations" for disability).

[409] Etieyibo & Omiegbe, *supra* note 128, at 193–94.

[410] *Id.* at 193.

disabilities."[411] The Special Rapporteur then noted the adoption by the AU Assembly of Heads of State and Government of the African Disabilities Protocol and the Marrakesh Treaty. The Special Rapporteur then noted that although many international and regional human rights instruments guarantee the right to information, an estimated one billion people with disabilities continue to face various barriers in their daily lives. One of these barriers is access to information. The right to information, noted the Special Rapporteur, remains unrealized by many people with disabilities, particularly those with visual and print disabilities. The latter, the Special Rapporteur argued, face distinct barriers because of the unavailability of reading material in accessible formats.[412]

With respect to the Marrakesh Treaty, the Special Rapporteur noted that this international human rights treaty was adopted in an effort to "establish normative standards for ensuring access to information by persons with print disabilities" and that the treaty "recognizes the continuing shortage of available works in accessible format copies for persons with visual impairments or other print disabilities and sees the need to expand the number of works in accessible formats, and improve their circulation."[413] The Marrakesh Treaty, the Special Rapporteur noted, "acknowledges the importance of the international copyright system and aims to ensure that the limitations and exceptions in national copyright laws grant persons with visual impairments or with other print disabilities access to works."[414]

The Special Rapporteur then asked AU Member States "to eradicate the book famine for visually impaired and other print disabled persons, including by becoming party to the Disabilities Rights Protocol as well as the Marrakesh Treaty, and implementing the letter and spirit of those instruments."[415] Unfortunately, many African countries have copyright laws that discriminate against persons with print and visual disabilities. This is the case with South Africa's Copyright Act 98 of 1978, which has a *permission structure* that acts as a barrier to the accessibility of copyrighted works. In addition, some African countries, which have passed legislation to domesticate the Marrakesh Treaty, have a *commercial availability test* that has become a major constraint to the ability of persons with print and visual disabilities to avail themselves of accessible format copies.

In August 2020, Cory Doctorow noted that five years earlier, the government of the Republic of South Africa had engaged in "a long over-due overhaul of its copyright system" and that as part of the process, Parliament had "incorporated some of the best elements of both U.S. and European copyright."[416] Doctorow noted that South Africa had borrowed "the flexible idea of fair use" from the United States and "the idea of specific, enumerated exemptions for libraries, galleries, archives, museums, and researchers" from the EU.[417] Doctorow argued further that the two systems taken together "are even better: the European system of enumerated exemptions gives a bedrock of certainty on which South Africans can stand, knowing for sure that they are

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[411] Special Rapporteur on Freedom of Expression and Access to Information in Africa, *supra* note 149.

[412] *Id.*

[413] *Id.*

[414] *Id.*

[415] *Id.*

[416] Doctorow, *supra* note 37.

[417] *Id.*

legally permitted to make those uses" and that the U.S. system "future-proofs these exemptions by giving courts a framework with which to evaluate new uses involving technologies and practices that do not yet exist."[418]

In late 2020, the Electronic Frontier Foundation ("EFF") reported that, South Africa's President Cyril Ramaphosa had returned the draft copyright law to Parliament after he had stricken out "both the E.U.- and U.S.-style limitations and exceptions, arguing that they violated South Africa's international obligations under the Berne Convention."[419] The EFF then sent an open letter to South Africa's political branches in which it set out the legal basis for "the U.S. fair use system's compliance with international law, and the urgency of balancing South African copyright with limitations and exceptions that preserve the public interest."[420]

In its submissions to the High Court, Blind SA had noted that South Africa was "among the countries represented at the *Diplomatic Conference to Conclude a treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities ('the Marrakesh Treaty')*."[421] Blind SA argued before the High Court that in a closing statement, South Africa expressed appreciation of the purpose and value of the "efforts and remedial actions proposed in the treaty"[422] and that "[a] very poignant part in the speech was the acknowledgement of the purpose and values espoused by the [Marrakesh] Treaty and the positive impact the implementation of the remedial actions contained therein would have on the livelihood of the blind and visually impaired members of society."[423]

Following its intent to ratify the Marrakesh Treaty, the Parliament of South Africa adopted the "Copyright Amendment Bill . . . on 19 March 2018 which proposes the insertion in the provisions of the Act of section 19D to create exceptions to the Copyright Act for the benefit of the blind and people with visual and print disabilities." [424] However, noted Blind SA, despite the positive step taken by Parliament to domesticate the Marrakesh Treaty and hence, create rights that are justiciable in South African courts, there emerged an inordinate delay in the "actual amendment of the Copyright Act" and that the delay pertained to "an inchoate legislative process and engagements between the Presidency and the National Assembly."[425]

Blind SA argued further that since "the provisions of the proposed Section 19D are neither a subject of contestation or controversy among stakeholders nor any reservation by the Presidency in the engagements concerned," the delay in implementation of the amendments to the Copyright Act, was, "consequently, unreasonable and contrary to the provisions of section 36(1) of the Constitution as it unjustifiably perpetuates the violation of the rights of the blind, visually and print

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[418] *Id.*

[419] *Id.*

[420] *Id.*

[421] *Blind SA v. Minister of Trade, Indus. and Competition* 2021 ZAGPPHC (GP) 871 at para. 8 (S. Afr).

[422] *Id.*

[423] *Id.*

[424] *Id.* at para. 10.

[425] *Id.* at para. 11.

disabled persons."[426] It was the endless delays in implementing the amendments imbodied in Section 19D that forced Blind SA to institute proceedings before the High Court and prayed the Court to declare the Copyright Act 98 of 1978 "inconsistent with the Constitution of the Republic of South Africa, 1996."[427]

Before the High Court, Blind SA specifically challenged "the inordinate delay by the government to bring into operation the provisions of the Copyright Amendment Bill by amending the offending statutory provisions with the haste deserved. Courageously and, in view, appropriately so, [Blind SA] approached the Court seeking orders that are intended to expedite the process of bringing an immediate end to the violation of the rights of a section of persons in society; the blind, visually and print disabled persons."[428] Mbongwe J, writing for the High Court, found, subject to confirmation by the Constitutional Court, that the Copyright Act 98 of 1978, as it stood,

> ought to be declared unconstitutional in terms of section 174(1) of the Constitutional Act, 1996 to the extent that it fails to make provision for exceptions that would enable, through the conversion of works under copyright to suitable formats that enable access to such works by persons with visual and print disabilities, and,
>
> In terms of the provisions of section 174(2) of the Constitution Act, 1996, the provisions of the Copyright Amendment Bill [B 13B—2017], ought to be read forthwith as if specifically incorporated in the provisions of the Copyright Act of 1978 in order to remove unconstitutionality in the current provisions of the Act.[429]

The High Court declared the Copyright Act to be unconstitutional to the extent that it fails to make provision for necessary exceptions that would "enable, through the conversion of works, access to such works by persons with visual and print disabilities."[430] The Court also found the inordinate delay by the Parliament of South Africa to implement the necessary amendment to the Copyright Act "to be unreasonable and contrary to section 36(1) of the Constitution as it unjustifiably perpetuates the violation of the rights of the blind, and visually and print disabled persons."[431]

Blind SA then sought confirmation of the High Court's order that the Copyright Act is unconstitutional, in the Constitutional Court ("CC"). In doing so, Blind SA argued that "the key provision that was required to give effect to the Marrakesh Treaty was the [Copyright Amendment Bill's] proposed new section 19D."[432] The Minister of Trade had submitted to the CC that the relief sought by Blind SA, "namely a final reading-in without suspension of the finding of unconstitutionality, was inappropriate"

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[426] *Blind SA v. Minister of Trade, Indus. and Competition* 2021 ZAGPPHC (GP) 871 at para. 11 (S. Afr).

[427] *Id.* at para. 12.

[428] *Id.* at para. 13.

[429] *Id.* at para. 28.

[430] Const. Court of South Africa, *supra* note 170.

[431] *Id.*

[432] *Id.*

but that "a suspension of the order of unconstitutionality for a 24-month period was a remedy that did not intrude unduly into the domain of Parliament."[433]

In a unanimous judgment written by Unterhalter AJ, the CC confirmed the order of constitutional invalidity made by the High Court and held that any law that is designed to protect the rights of copyright owners "must take account of the differential impacts of such protection upon different classes of persons."[434] Having ruled to uphold the High Court's order of unconstitutionality, the CC then proceeded to assess remedies to cure the constitutional invalidity. The CC found a reading-in of section 19D of the Copyright Amendment Bill to be too wide and imprecise and subsequently formulated an order that was responsive to the case that Blind SA had established before the courts. Thus, the CC confirmed the order of the High Court declaring the Copyright Act unconstitutional and ordered a "reading-in of section 13 of the [Copyright Act] under the heading 'section 13A Exceptions applicable to beneficiary persons.'"[435] That reading-in, ruled the CC, was "to endure for 24 months to enable Parliament to cure the defect in the Copyright Act giving rise to its invalidity."[436]

The decision of South African courts in *Blind SA* is important in protecting the rights of persons with visual and print disabilities, not just in South Africa, but also in other countries on the continent. Although many African countries have ratified the Marrakesh Treaty, they have not yet enacted the enabling legislation to create rights that are justiciable in domestic courts. The decision in *Blind SA* provides a teaching moment for persons with visual and print disabilities and their supporters (e.g., NGOs that advocate on behalf of persons with print and visual impairments). Through the courts, the political branches can be encouraged to expeditiously amend their national laws, including their copyright laws, to conform to the provisions of international human rights instruments, including particularly, the Marrakesh Treaty.

Some African countries, such as Malawi, have passed legislation to domesticate the Marrakesh Treaty, but in doing so, they have introduced provisions (e.g., commercial availability test) that represent further impediments to the ability of persons with visual and print impairments to avail themselves of books and other intellectual properties in accessible formats. Citizens in these countries can use the courts to force the political branches, like in South Africa, to act expeditiously to cure any existing constitutional inconsistency. Of course, where countries have not yet passed legislation to domesticate the Marrakesh Treaty, the courts can also be called upon to ensure that the political branches enact the necessary enabling legislation to bring national laws in line with the provisions of the Marrakesh Treaty and other international human rights instruments.

On October 4, 2017, Nigeria deposited its instrument of ratification of the Marrakesh Treaty with the Director General of the WIPO. The Marrakesh Treaty was expected to enter into force in the Federal Republic of Nigeria on January 4, 2018. When it is finally domesticated through the appropriate enabling legislation, the Marrakesh Treaty will form part of Nigeria's copyright legal architecture. However, Nigeria's political branches have not been responsive to efforts made by the Nigeria Association of the Blind ("NAB") and the World Blind Union to domesticate the

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[433] *Id.*
[434] *Id.*
[435] Const. Court of South Africa, *supra* note 170.
[436] *Id.*

Marrakesh Treaty. By July 2022, both chambers of Nigeria's National Assembly had enacted the Copyright Bill 2022 to repeal the Copyright Act, CAP C28 LFN (2004). The new bill was expected to, inter alia, "facilitate Nigeria's compliance with obligations arising from relevant international copyright treaties," including the Marrakesh Treaty.[437] While the NAB has been campaigning for Nigeria's President Muhammadu Buhari to sign the bill and "remove legal barriers for persons with print disabilities,"[438] as of this writing, the president has not yet assented to the law and hence, the rights of Nigerians with visual and print disabilities remain unprotected.

The way forward for African countries is to, first, sign and ratify the Marrakesh Treaty. Second, pass legislation to domesticate the Marrakesh Treaty. Third, ensure that national courts have the independence and institutional wherewithal to enforce the laws. What these countries can learn from *Blind SA* is that, in addition to enforcing the laws, the courts can, through their decisions, help the political branches amend the laws, including copyright laws, and bring them into conformity with the provisions of international human rights instruments. By doing so, both the judiciary and political branches can help solve the book famine problem and ensure that the rights of persons with visual and print impairments are fully protected.

As described by Langa CJ in *MEC for Education: KwaZulu-Natal & Others v. Navaneethum Pillay*,[439] "[d]isabled people are often unable to access or participate in public or private life because the means to do so are designed for able-bodied people. The result is that disabled people can, without any positive action, easily be pushed to the margins of society."[440] In addition, argued Langa CJ:

> Exclusion from the mainstream of society results from the construction of a society based solely on 'mainstream' attributes to which disabled persons will never be able to gain access. Whether it is the impossibility of success at a written test for a blind person, or the need for ramp access to a library, the discrimination does not lie in the attribution of untrue characteristics to the disabled individual. The blind person cannot see and the person in a wheelchair needs a ramp. *Rather, it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them*.[441]

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[437] Precious Ogwa, *National Assembly passes copyright bill*, THE GUARDIAN (NIGERIA) (Aug. 2, 2022), https://guardian.ng/features/national-assembly-passes-copyright-bill/; *see also* Samson Atekojo Usman, *Reps Deputy Minority Leader, Okechukwu urges President Buhari to assent Copyright bill*, DAILY POST (Nov. 27, 2022), https://dailypost.ng/2022/11/27/reps-deputy-minority-leader-okechukwu-urges-president-buhari-to-assent-copyright-bill/.

[438] Institute for Media and Society (IMESO) (Nigeria), *Sign revised copyright bill, blind association tells president*, IMESO (Sept. 7, 2022), https://imesoimeso.org/sign-revised-copyright-bill-blind-association-tells-president/. The bill is officially referred to as *A Bill for an Act to Repeal the Copyright Act CAP C28 LFN 2004 and to Re-enact the Copyright Act 2021 and for Matters Connected Therewith, 2021* (SB. 688).

[439] *MEC for Education: KwaZulu-Natal & Others v. Navaneethum Pillay* 2008 (1) SA 474 (CC).

[440] *Id.* at para. 74.

[441] *Id.* (emphasis added).

It is the duty of African countries, including especially their governments, "to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation" in the cultural life of their communities.[442] An important place to start is to sign the Marrakesh Treaty, ratify it, and pass the necessary legislation to domesticate it, and then ensure that the country's courts are provided with the necessary independence and tools to enforce the laws.

[442] *Id.*