

## COPYRIGHT LAW AND FREEDOM OF EXPRESSION IN SOUTH AFRICA\*

### Abstract

*Historically there has been little discussion of the relationship between copyright and freedom of expression in South Africa, particularly when compared with the more robust debate in the US on the relationship between copyright and the First Amendment. The claim, that there is indeed some tension between the imperative of copyright law and the core of the right to freedom of expression, has been ignored for a variety of intuitions and reasons. This article acknowledges the conflict between copyright law and freedom of expression right in South Africa; it recognises the tension and conflict of the fundamental rights that is evident in the two case laws discussed. The author laments the absence of copyright provisions under the Bill of Rights of the Constitution as laid down in the International Covenant on Economic, Social and Cultural Rights (CESCR); a binding treaty that South Africa ratified. It is argued that the courts' reliance on commercial loss leads them to draw quick conclusions which end up resulting in courts failing to take into account the Constitutional dimension of the copyright law/freedom of expression intersection. It is therefore concluded that a proper application of the fair dealing defence can balance the interests of copyright owners and users because it permits the unauthorised appropriation of protected expressions.*

**Key words:** Bill of Rights; CESCR; conflict; copyright; fair dealing; freedom of expression

### 1. Introduction

The adoption of the Universal Declaration of Human Rights (UDHR) by the United Nations General Assembly in 1948 ushered in an international consciousness for the recognition and respect for human rights. Subsequent thereto, a number of treaties and other instruments, such as International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (CESCR) incorporated its provisions, in some cases wholesale.<sup>1</sup> One common feature of almost all human rights treaties or instruments is the inclusion of the freedom of, or the right of expression. Since the establishment of the World Trade Organisation (WTO) and the entering into effect of the Agreement on Trade-Related Aspects of Intellectual Property Rights<sup>2</sup> (TRIPS Agreement), government officials, international bureaucrats, intergovernmental and nongovernmental organisations, courts and scholars have focused more attention on the interplay of human rights and intellectual property rights (IPRs).<sup>3</sup> One notable tension and conflict within the two sets of rights is between copyright law and the freedom of expression right; the main focus of this article. The relationship between copyright law and freedom of expression has always been controversial, but this tension has deepened in recent years with the emergence of the digital environment and expansion of copyright law.<sup>4</sup> This claim, that there is indeed some tension between the imperative of copyright law and the core of the right to freedom of expression has been ignored for a variety of intuitions and reasons.<sup>5</sup> There has historically been little discussion of the relationship between copyright and freedom of expression in South Africa, particularly when compared with the more robust debate in the US on the relationship between copyright and the First Amendment.<sup>6</sup> The two rights inherit a built-in legal conflict and that copyright inevitably imposes a restriction on freedom of expression. The problem is that the natural right of free speech is being depleted by the legislatively granted right of intellectual property, putting both individual liberty and the public good at risk.<sup>7</sup> South African courts deploy various statutory and common law controls when

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<sup>1</sup> B Maripe 'Freezing the press: Freedom of expression and statutory limitations in Botswana' (2001) 2 *African Human Rights Law Journal* 52-75.

<sup>2</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr.15, 1994.

<sup>3</sup> PK Yu 'Reconceptualising Intellectual Property Interests in a Human Rights Framework' (2007) 40 (3) *UC Davis Law Review* 1039.

<sup>4</sup> YH Lee 'Copyright and Freedom of Expression: A Literature Review' CREATE Working Paper (2015) 5.

<sup>5</sup> MD Birnhack 'Acknowledging the conflict between copyright law and freedom of expression under the human rights act' (2003) 2.

<sup>6</sup> Lee (n.4) p8.

<sup>7</sup> AB Cook 'Copyright and freedom of expression: saving free speech from advancing legislation' (2013) 1.

reconciling the rights stemming from copyright ownership with other public interests.<sup>8</sup> Fundamental rights affect every part of South African law, including copyright law. They cannot be dismissed as irrelevant or subordinate to other interests.<sup>9</sup> In South Africa, copyright is regulated primarily by the Copyright Act, 1978 ('the Act') as well as regulations made under the Act. The scope of freedom of expression is grounded on the Constitution<sup>10</sup> of the Republic of South Africa (the Constitution), which makes provision for the right to freedom of expression as a fundamental right. Section 16 of the Bill of Rights delimits freedom of expression as it relates to; (a) freedom of press and other media, (b) freedom to receive or impart information and/ or ideas, (c) freedom of artistic creativity, as well as, (d) academic freedom and freedom of scientific research. Section 2 of the Constitution provides that it is the supreme law of the country and that any law inconsistent with it is invalid. This provision creates the necessity to interpret the Act in a manner consistent with the Constitution at the risk of the Act, or particular provisions of it, being declared to be invalid.<sup>11</sup>

Recent research on the Act finds it to be deficient in enabling access to knowledge, and that the Act itself restricts access to knowledge. Some of the restrictions on access to knowledge infringe fundamental rights, and render the Act putatively unconstitutional.<sup>12</sup> The purposeful disregard of this inherent conflict is beginning to erode the right of public dissemination of information; in favour of private property rights. The danger caused by this erosion is that it creates private monopolies over information and unconstitutionally 'chills' expression. This frustrates the democratic, public benefit purposes of the original constitutional clauses.<sup>13</sup> In contrary some scholars argue that because copyright does not protect the ideas that are embodied in or that may have inspired the work, but protects only the expression of those ideas, it means copyright is not a constraint on freedom of expression, as it does not prevent a person from repeating or making use of the ideas or information contained in a protected work, but merely prevents that person from copying the form of expression used in that work.<sup>14</sup>

This article examines the interaction of freedom of expression and the Act. It begins with a contextual framework for the discussion of the Bill of Rights of the Constitution (freedom of expression) and the Act. It then embarks on presenting and analysing the court decisions on the selected case law and points out the tension between the two rights. The article asks a question; how should the complex relationship between copyright law and freedom of expression be addressed?

## 2. The Constitutional Framework of the Republic of South Africa

In 1994, after decades of living under an apartheid government, the first democratic election was held in South Africa. For the first time South Africa could call itself a democracy because everyone who was a citizen of South Africa could vote in the elections. The Constitutional Assembly was constituted with the task of drawing up a Constitution to represent the interests and needs of all the people of South Africa. Included in the Constitution was a Bill of Rights which gives people rights and responsibilities.<sup>15</sup> All rights in the Bill of Rights have to be construed *in context*, and especially in line with generally applicable interpretive precepts articulated in, for instance, the founding provisions in chapter 1 of the Constitution (especially in sections 1 and 2), in section 7 with its reading instructions pertaining to the Bill of Rights (chapter 2), and in the Preamble to the Constitution.<sup>16</sup> The Constitution is the supreme

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<sup>8</sup> P Masiyakuruma 'Fair Dealing and Freedom of Expression' (2004) 87.

<sup>9</sup> A Rens 'Realising Human Rights in South African Copyright Legislation: Report on Fundamental Rights, and Global Copyright Legislative Best Practice for Access to Knowledge in South Africa' (2010) 3.

<sup>10</sup> Constitution of the Republic of South Africa, 1996.

<sup>11</sup>CIP 'Intellectual Property and the Constitution' (2015) 1 Available at <http://blogs.sun.ac.za/iplaw/2015/07/14/intellectual-property-and-the-constitution/> (Accessed on 24, November 2016).

<sup>12</sup> Rens (n.9) p3.

<sup>13</sup> CW Dallon 'The Problem with Congress and Copyright law: Forgetting the Past and Ignoring the Public Interest' (2004) 44 SANTA CLARA LAW REVIEW 365.

<sup>14</sup> CJ Adduono 'Rebalancing copyright law' Unpublished PhD thesis, University of Southampton (2015) 5.

<sup>15</sup> Chapter 1: The South African Constitution and Bill of Rights.

<sup>16</sup> L du Plessis 'Affirmation and celebration of the 'religious other' in South Africa's constitutional jurisprudence on religious and related rights: Memorial constitutionalism in action?' (2008) 2 African Human Rights Law Journal 376.

law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.<sup>17</sup>

Despite the fact that the constitution is the supreme law of the land and any law inconsistent with it is invalid, the writers found it relevant and compelling to lay down some limitations specifically for the right of freedom of expression showing what freedom of expression cannot extend to, this was to make sure that freedom of expression is exercised without infringing on other rights. Section 16 (2) states that the right of freedom of expression cannot extend to: Propaganda for war;<sup>18</sup> Incitement of imminent violence;<sup>19</sup> or advocacy of hatred that is based on race, ethnicity gender or religion and that constitutes incitement to cause harm.<sup>20</sup> According to Section 39 the Bill of Rights should be interpreted as follows: When interpreting the Bill of Rights, a court, tribunal or forum<sup>21</sup>— must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;<sup>22</sup> must consider international law;<sup>23</sup> and may consider foreign law.<sup>24</sup> When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.<sup>25</sup> The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.<sup>26</sup>

The Constitution sets out in its Bill of rights and entrenches the right to freedom of expression as a primary right.<sup>27</sup> This right is found in Section 16 of the Constitution and states that everyone has the right to freedom of expression, which includes,<sup>28</sup> freedom of press and other media;<sup>29</sup> freedom to receive or impart information or ideas;<sup>30</sup> freedom of artistic creativity;<sup>31</sup> and academic freedom and freedom of scientific research.<sup>32</sup> Freedom of expression safeguards a person's right to impart and receive information and it has three interdependent rationales. Firstly, it allows individuals to gather information necessary for making various choices as part of the democratic process.<sup>33</sup> Secondly, the analysis generated by readily available information may foster the discovery of truth.<sup>34</sup> Lastly, freedom of expression may be an end in itself because it promotes self actualisation.<sup>35</sup>

### Treaty Obligations

Significantly absent from section 16(1) and other provisions of the Constitution dealing with the entrenchment of freedom of expression<sup>36</sup> is recognition of Intellectual Property (IP) particularly copyright as a human right. The Constitutional Court has explicitly rejected the claim that there is a constitutional right to IP. In Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996) the Constitutional Court responded to the claim that Constitution could not be adopted because it does

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<sup>17</sup> Sec 2.

<sup>18</sup> Sec 16 (2) (a).

<sup>19</sup> Sec 16 (2) (b).

<sup>20</sup> Sec 16 (2) (c).

<sup>21</sup> Sec 39 (1).

<sup>22</sup> Sec 39 (1) (a).

<sup>23</sup> Sec 39 (1) (b).

<sup>24</sup> Sec 39 (1) (c).

<sup>25</sup> Sec 39 (2).

<sup>26</sup> Sec 39 (3).

<sup>27</sup> FXI (n.3) p14.

<sup>28</sup> Sec 16 (1).

<sup>29</sup> Sec 16 (1) (a).

<sup>30</sup> Sec 16 (1) (b).

<sup>31</sup> Sec 16 (1) (c).

<sup>32</sup> Sec 16 (1) (d).

<sup>33</sup> A Meiklejohn 'The First Amendment is an Absolute' in Supreme Court Review (1961) 245.

<sup>34</sup> E Barendt, *Freedom of Speech*, Oxford University Press (1985).

<sup>35</sup> F Schauer, *Free Speech: A Philosophical Enquiry*, Cambridge University Press (1982) 274.

<sup>36</sup> Plessis (n.21) p380.

not guarantee the right to IP.<sup>37</sup> This claim of the constitutional court is in contrary to the provisions of the international treaties.

The first key in an international instrument that identifies copyright as a human right is found in Article 27 of the UDHR.<sup>38</sup> According to Article 27 everyone has first of all ‘the right to the protection of the moral and material interests resulting from and scientific, literary or artistic production of which he is the author’.<sup>39</sup> Most importantly it should be noted that the human rights that were articulated in the instrument are held to exist independently of implementation or even recognition in different legal systems of different countries. The Universal Declaration was a resolution of the General Assembly of the United Nations passed in 1948 and had no binding force on member countries in the sense that it did not create enforceable obligations on adherence to the declaration.<sup>40</sup> Torremans continues to report that the protection of moral and material rights of authors and creators is clearly exactly what is covered by the area of law known as copyright and the second paragraph of Article 27 of the same instrument must therefore be seen as elevating copyright to the status of human right, or maybe it is more appropriate to say that the article recognises the human rights status of copyright. Even though the UDHR was not a binding instrument a follow-up was made by the CESCR which took the form of a treaty and became a legally binding instrument to contracting states which South Africa has ratified. If we look in a bit more detail at the substantive provision contained in Article 15.1 (c) of the Covenant the clear starting point is that an obligation is imposed upon the contracting parties to protect the material and moral interests of authors and creators.<sup>41</sup> In essence there is therefore an obligation to implement copyright as a human right and to put in place an appropriate regime of protection for the interests of authors and creators.<sup>42</sup> The human rights framework in which copyright is placed does however put in place a number of imperative guidelines (a) copyright must be consistent with the understanding of human dignity in the various human rights instruments and the norms defined therein, (b) copyright related to science must promote scientific progress and access to its benefits, (c) copyright regimes must respect the freedom indispensable for scientific research and creative activity, (d) copyright regimes must encourage the development of international contacts and cooperation in the scientific and cultural fields.<sup>43</sup> In light of these human rights instruments, it is difficult to argue that intellectual property laws and policies should always be subordinated to human rights obligations in the event of a conflict between the two.<sup>44</sup>

Comparable language intimating that copyright must exist as a human right does not, in other words, appear anywhere in the written text of the Constitution as observed from the binding instrument which South Africa has ratified. When called upon to adjudicate upon the validity of the South African Constitution as part of the process of its adoption, and in particular upon the question of whether it provided for all universally acceptable fundamental rights, freedoms and civil liberties in the Bill of Rights (as it was mandated to do), the Constitutional Court – in the *Certification* case as mentioned above – held that the right to hold IP was not universally accepted as a fundamental right and therefore did not require to be recognised in the Bill of Rights.<sup>45</sup> The court sought to justify its decision by explaining that IP is a form of ‘property’ which is covered by section 25 of the Constitution and it was therefore not necessary for it to be dealt with separately in the Bill of Rights.

It is argued that copyright according to the Covenant is universally acceptable as a fundamental right and should be included in the Bill of Rights which is sadly missing. It is apparent from a reading of

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<sup>37</sup> Rens (n.6) p28.

<sup>38</sup> JAL Sterling *World Copyright Law* (2<sup>nd</sup> ed, Sweet & Maxwell, 2003) 43.

<sup>39</sup> PLC Torremans *Copyright and Human Rights; Freedom of Expression-Intellectual Property-Privacy* (The Hague, Kluwer Law International, 2004) 4.

<sup>40</sup> CIP (n.10) p1.

<sup>41</sup> AR Chapman ‘A Human Rights Perspective on Intellectual Property, Scientific Progress, and Access to the Benefits of Science’, WIPO Panel Discussion on Intellectual Property and Human Rights (1998) 15.

<sup>42</sup> Torremans (n.30) p8.

<sup>43</sup> Chapman (n.31) p13.

<sup>44</sup> Yu (n.2) p1042.

<sup>45</sup> *Certification of the Constitution of the RSA 1996* (4) SA 744 (CC) at p 799.

section 25 that its primary focus is on immovable property (land) and more particularly the deprivation or expropriation of such property. The inclusion of sub-section (4) (b) appears to have been something of an afterthought as a catchall to include property in general within its ambit. No doubt the Constitutional Court had this provision in mind when it said that section 25 covered IP. On this premise, the protection granted to IP by the section is of a very limited ambit and is confined essentially to preventing the taking away of existing property. It places no obligation on the state to continue facilitating the creation of IP in the future. The scope of the protection, such as it is, is rather unsatisfactory. Be that as it may, a basis was created for the argument to be advanced that IP enjoys (a measure) of protection in the Bill of Rights and is constitutionally enshrined.<sup>46</sup> One consequence of South Africa's constitutional system for South African lawmakers working with copyright reform is that the role of lawmakers in copyright reform is not to play referee between competing interest groups, but instead to reform copyright law in order to respect, protect, promote and fulfil the rights in the Bill of Rights, even if that does not serve the interests of a particular interest group. Another consequence is that the Bill of Rights is fully justifiable. All legislation, including copyright legislation is subject to constitutional challenge in the courts, so that those provisions in copyright legislation which unjustifiably infringe a fundamental human right can be struck down by the Constitutional Court.<sup>47</sup> With the constitutional context in mind, we move on to the South African copyright law and relate its provisions to the constitutional right of freedom of expression.

### **3. The Copyright Law of the Republic of South Africa**

Copyright provides the author of a work with a monopoly of limited duration, for the exploitation of that work, to compensate and reward him for the effort, time and creativity employed to create the work. Copyright acts as an incentive for the creation of works and an incentive for the distribution of such works. Although copyright is sometimes congruent with the aims of freedom of expression, it is principally concerned with protecting the expression of ideas in various cultural media.<sup>48</sup> Sometimes copyright's incentives promote freedom of expression by stimulating the creation of new expressions.<sup>49</sup> Scholars argue that because copyright does not protect the ideas that are embodied in or that may have inspired the work, but protects only the expression of those ideas, it means copyright is not a constraint on freedom of expression, as it does not prevent a person from repeating or making use of the ideas or information contained in a protected work, but merely prevents that person from copying the form of expression used in that work.

In South Africa, copyright is regulated primarily by the Act as well as regulations made under the Act.<sup>50</sup> South Africa became a signatory to the Berne Convention for the Protection of Literary and Artistic Work (Berne Convention) in 1928, and signed the TRIPS Agreement in 1995. It has signed the WIPO Internet Treaties, i.e. the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), but has not yet ratified them. In 2013, South Africa strongly supported the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled ('The Marrakesh Treaty'), adopted in Morocco in June 2013, but has yet to ratify it.<sup>51</sup> There is no system in South Africa for the registration of copyright, apart from the registration of copyright in cinematograph films, which is provided for in the Registration of Copyright in Cinematograph Films Act, 1977. There are two general requirements that must be met in order for copyright to subsist in a work. These are: *Originality*; and *Existence* in a material form.<sup>52</sup> The standard of originality required by the Act for copyright to subsist in a work is not very high.<sup>53</sup> All that is required is that the work must be the product of a person's labours, skills and endeavours.

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<sup>46</sup> CIP (n.11) p2.

<sup>47</sup> Rens (n.9) p7.

<sup>48</sup> Masiyakuruma (n.8) p88.

<sup>49</sup> VM Landes & RA Posner 'An Economic Analysis of Copyright law' *Journal of Legal Studies* 18 (1989) 325.

<sup>50</sup> L Thornton 'Copyright in state documents in South Africa' (2003) 2.

<sup>51</sup> Dr Nicholson 'The South African Copyright Law: a historical overview and challenges to address access to knowledge issues in a country in transformation' (2015) 3.

<sup>52</sup> Thornton (n.40) p3.

<sup>53</sup> OH Dean *Handbook of South African Copyright Law* 1-15 – 1-17 (South Africa, Juta & Co Ltd, 1987).

Fair dealing was first developed by courts in England in the eighteenth century, and was codified in 1911.<sup>54</sup> In the United Kingdom (UK) legislation, an exception to infringement was provided for fair dealing with a work for the purposes of private study, research, criticism, review, or newspaper summary. Fair dealing also became incorporated into the copyright laws of the former British Imperial territories, now referred to as the Commonwealth countries.<sup>55</sup> Fair dealing provides that in some circumstances, the unauthorised exploitation of an author's expression will not constitute copyright infringement. This defence is aimed at advancing several public interests including aiding transformative uses of copyright works<sup>56</sup> curing market failure<sup>57</sup> and promoting freedom of expression.<sup>58</sup> Defendants may use copyright works for the purpose of criticising or reviewing the specific works, their primary ideas or their social and moral implications. Criticising copyright works aids the democratic process and the discovery of truth by facilitating the ventilation of divergent political or cultural ideas. These benefits are extended to users of varying abilities and persuasions because courts disregard the quality or appropriateness of the user's criticism.<sup>59</sup>

South Africa is mandated to facilitate access to information and knowledge in all national legislation and policies to advance its national, regional and international development and transformation strategies. However, copyright has become a barrier to accessing information and knowledge. Copyright exceptions and limitations are the main mechanism for ensuring a fair balance between the competing interests of copyright owners on the one hand and user interests on the other.<sup>60</sup> 'Without copyright exceptions and limitations, copyright owners would have an almost complete monopoly regarding access to their copyright protected materials. As a result, every use of such material would be subject to permission (a licence), regardless of the societal value of the use; and access to knowledge material would be severely hampered.' Fair dealing allows the use of copyrighted expression in some cases but the court pointed to the limited power of the defence. In some instances, it concluded, the defence will not suffice.<sup>61</sup> Accordingly, it declared that in rare circumstances courts should apply the Act in a manner that will take freedom of expression considerations into account.<sup>62</sup>

Section 12 of the Act lays out the general exceptions from protection of literary and musical works. (1) Copyright shall not be infringed by any fair dealing with a literary or musical work (a) For the purposes of research or private study by, or the personal or private use of, the person using the work; (b) For the purposes of criticism or review of that work or of another work; or (c) For the purpose of reporting current events; (i) In a newspaper, magazine or similar periodical; or (ii) By means of broadcasting or in a cinematograph film; provided that, in the case of paragraphs (b) and (c) (i), the source shall be mentioned, as well as the name of the author if it appears on the work.

## Case Law

### **National Soccer League t/a Premier Soccer League v Gidani (PTY) LTD<sup>63</sup>**

In this case the plaintiff (National Soccer League t/a The Premier Soccer League) instituted action proceedings against the defendant (Gidani (Pty) Ltd) for infringing, since December 2007, and continuing to infringe, its copyright in the annual and/or weekly soccer fixtures or lists, which infringement is as contemplated by section 23 read with section 6 of the Act by using, without a license or permission or authority from the plaintiff, its weekly and/or annual fixture lists in its Sport Stake betting game or business. The specific allegations in the plaintiff's particulars of claim are that – Since

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<sup>54</sup> Copyright Act 1911.

<sup>55</sup> J Band & J Gerafi 'The Fair Use/Fair Dealing Handbook' (2013) 1.

<sup>56</sup> PN Leval 'Toward a Fair Use Standard' *Harvard Law Review* 103 (1990) 1105.

<sup>57</sup> W Gordon 'Fair Use as Market Failure: a Structural and Economic Analysis of the Betamax Case and its Predecessors' *Columbia Law Review* 82 (1982) 1600.

<sup>58</sup> *Newspaper Licensing Authority v. Marks & Spencer* (1999) RPC 536 (HC) 546.

<sup>59</sup> *Pro Sieben Media AG v. Carlton UK Television LTD* (1999) 1 WLR 605 (CA).

<sup>60</sup> Nicholson (n.40) p4.

<sup>61</sup> Birnhack (n.5) p31.

<sup>62</sup> Birnhack (n.5) p31.

<sup>63</sup> National Soccer League t/a Premier Soccer League v Gidani (PTY) LTD (2014) Case No: 10/48519.

the creation of the annual list in respect of the season commencing August 2007 and the weekly list since December 2007, the defendant has infringed, and continues to infringe, the plaintiff's copyright in the annual list and/or the weekly list as contemplated by section 23, read with section 6 of the Act, by virtue of the following:<sup>64</sup>

- 1) The defendant is not the owner or the licensee of the copyright in any of the lists.<sup>65</sup>
- 2) The defendant has unlawfully reproduced – and continues to unlawfully reproduce – a substantial part of or make adaptations of the annual list and/or the weekly list and causes them to be published on the defendant's internet website as part of its 'Sport Stake' gambling game offering. The Sport Stake gambling game involves the correct prediction of the outcomes of several football matches. In particular, gamblers are required to predict the outcome of 12 pre-determined matches drawn from *inter alia*, South African professional soccer fixtures.<sup>66</sup>
3. The defendant has caused to be published, its aforesaid unlawful reproductions and/or adaptations on a weekly basis during the soccer season at various petrol stations and retail outlets in connection with its 'Sport Stake' gambling game offering.<sup>67</sup>

The plaintiff relied on some relevant provisions of the Act which includes section 2 for works eligible for copyright; Section 23 of the Act that deals with the infringement of copyright as well as the remedies there; action likely to be taken by the owner of a copyright for infringement as governed by section 24 of the Act. Section 25 of the Act that deals with those rights that exclusive licensees and/or exclusive sub-licensees have, which is not material here as the defendant is neither licensee nor sub-licensee. And also section 9A which deals with copyright relative to sound recordings *vis-à-vis* artists performing the works covered by copyright. The general principles therein set out are of equal application to other copyrights. The defendant submitted that the Act is on all constructions meant to bear a meaning which is the least destructive of free expression rights. That in this case, protection is sought for a literary work consisting on a compilation, i.e. database from which an annual fixture list is printed out, which has nothing meritorious about it. It's very purpose, according to the defendant further, is to inform a wide public interested in South African football of the games to be played, that at the end of the day, the fixtures are – 'The results of the efforts of the plaintiff is in organising the league fixtures to be played. And it is for this very purpose of organising the league fixtures to be played for the foremost league in South Africa that the plaintiff exists. It's very purpose is to arrange the matches to be played by the leading football teams in South Africa and to inform the public of the details of when and where each match is to be played.'

The defendant continued to state that once the interested public has been informed of the fixture lists to be played, the fixture list has served its purpose. It is untenable that thereafter copyright should be abused so as to prevent the use of the disseminated information by the public.<sup>68</sup> The defendant relied on Section 16 (1) (b) of the Bill of Rights. The defendant further dismissed the plaintiff's copyright infringement allegations by stating among others that the plaintiff's claim of right is not as protected as was the case in *Bosal Afrika (Pty) Ltd v Grapnel; Payen Components SA Ltd v Bovick CC59* and/or *Board of Healthcare Funders v Discovery Health*. The defendant argued and submitted that in the present case, the fixtures or lists or the databases concerned and the information contained in those databases do not constitute valuable property in themselves on an ongoing basis, where the appropriation of the information in those databases would cause substantial harm. The defendant reiterates several times that the use of the information contained in the databases and the reproduction thereof in the 'Sport Stake' game do not cause the plaintiff, in this case harm and that neither does it do harm to the works in question which are of short-lived duration. In short, the defendant was saying

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<sup>64</sup> National Soccer League (n.61) para 3.1.

<sup>65</sup> National Soccer League (n 61 above) para 3.1.1.

<sup>66</sup> National Soccer League (n 61 above) para 3.1.2.

<sup>67</sup> National Soccer League (n 61 above) para 3.1.3.

<sup>68</sup> National Soccer League (n.61) para 101

that the plaintiff had imparted information and the public at large, including itself in that definition of ‘public’, are within their rights to use it including commercial use of it.<sup>69</sup>

The judge dismissed the defendant’s justification to equate itself with members of the public in this sense. He mentioned that in his view the injunction to construe statutes consistent with the Constitution means that where reasonably possible the court is obliged to promote the rights entrenched by the Constitution. The court is obliged to balance out the interests of the plaintiff as owner of the copyright against the claim of free expression for purposes of determining the scope of the plaintiff’s right to prevent the reproduction, adaptation of information contained in the plaintiff’s fixture lists, among others.<sup>70</sup> In balancing the rights afforded by the Copyright Act as against the imperatives of the Constitution in order to determine the scope of rights of copyright one must have regard to the purpose underlying copyright in compilations.

The judge continued to relate that the defendant as a National Lottery Operator cannot be considered to be ‘*the press*’ or ‘*other media*’. It is also not an information provider. It is a company which runs a commercial gambling business. Furthermore, the defendant’s business is not ‘*to receive or impart information or ideas*’. It is run as a business. What it is doing is not receiving or imparting information or ideas, but rather publicising its gambling game in the form of ‘Sport Stake’. Publishing one’s business for commercial gain is not the receipt or imparting of information or ideas. He further mentioned that the defendant consciously, knowingly and deliberately copied and is still copying selections from the plaintiff’s fixture lists specifically for purposes of operating its Sport Stake gambling game. This ‘*selection*’ cannot be considered on any basis to be to inform the public of the fixtures.<sup>71</sup> It is not gainsaid that the fixture lists are the plaintiff’s property. The plaintiff’s property rights are also entrenched and protected in the Constitution. Section 25(1) (c) of the Constitution reads as follows: ‘No one may be deprived of property except in terms of law of general application and no law may permit arbitrary deprivation of property.’

The following order was made: (1) It was ordered and declared that the plaintiff’s annual fixture lists and weekly fixture lists are each subject to copyright protection as afforded by section 6 of the Copyright Act in favour of the plaintiff; (2) The defendant was ordered to deliver-up all infringing copies, reproductions and/or adaptations of all the plaintiff’s annual and/or weekly lists in its possession or under its control; (3) The following declaratory was issued:<sup>72</sup> ‘The plaintiff’s copyright in its annual and/or weekly soccer fixture lists from the 2008/2009 South African soccer season to date has been infringed by the defendant to the extent to which any soccer fixture in the aforesaid or relevant season to date appears in the defendant’s ‘Sport Stake’ product offering.’ The defendant was ordered to pay the costs of the action, which costs shall include the costs consequent upon the appointment or use of two counsels.

#### ***Moneyweb (PTY) Limited v Media24 Limited and Another*<sup>73</sup>**

In this case the applicant (Moneyweb (PTY) Limited) seeks declaratory orders against the first (Media24 Limited) and second respondent (Fadia Salie) for alleged copyright infringement and/or unlawful competition in respect of seven increased to eight,<sup>74</sup> news articles published by the first respondent’s online financial website (Fin24) of which the second respondent is the editor. There were, thus, in effect seven separate claims for copyright infringement of literary works. Accordingly, the court had to determine the following: whether Moneyweb’s previously-published articles were protected by copyright (i.e., were original); whether Media24’s articles reproduced a substantial part of the corresponding Moneyweb article (in light of the statutory exclusion in section 12(8)(a) of the Act), and, therefore, *prima facie* infringed Moneyweb’s copyright in its previously-published articles; and, if

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<sup>69</sup> National Soccer League (n.61) para 103

<sup>70</sup> National Soccer League (n.61) para 102.

<sup>71</sup> National Soccer League (n.61) para 104.

<sup>72</sup> National Soccer League (n.61) para 118.3.

<sup>73</sup> Moneyweb (PTY) Limited v Media24 Limited Case No: 13/31575.

<sup>74</sup> An amendment to the notice of motion, to add an additional news article, was effected after the replying papers were delivered.

there was *prima facie* infringement, whether Media24 had any statutory defences pursuant to sections 12(1)(c)(i). For convenience the applicant is referred to as Moneyweb and to the first and second respondents as Fin24.<sup>75</sup> The applicant seeks the removal of the articles in question from Fin24's website as well as a damages inquiry at proceedings it intends instituting in due course should its declaratory orders succeed.<sup>76</sup>

Fin24 made no collateral challenge to the validity of any provision of the Act on constitutional ground instead they contended that the relevant provisions of the Act should be interpreted (and given effect to) in light of the provisions of section 16 of the Constitution.<sup>77</sup> They clarified that they do not contend that section 16 permits copyright infringement, they contended that when determining difficult cases of alleged copyright infringement regard should be given to section 16.<sup>78</sup> They continued in their defence to say the role of the media has been in particular been recognised as (among the other things) facilitating and driving freedom of speech. Especially the duty of responsibility of the media to disseminate information to the citizenry has been recognised.<sup>79</sup> They pleaded that the requirements of section 12 (1) (c) (i) of the Act must be understood through the prism of the Constitution and, specifically, the right to freedom of expression. The inquiry must proceed by balancing the interests of the copyright owner against the claim of the free expression for the very purpose of determining what is unfair and materially harmful to the copyright owner's interests. This means construing section 12(1) (c) (i) in a manner 'most compatible with the right to free expression'.<sup>80</sup>

When concluding the case for the totality of the above submissions, the court ruled that Moneyweb has failed: (1) To show that the articles in issue are original, (2) To identify those parts sourced by Fin24 infringed from Moneyweb and to demonstrate that those parts are original to Moneyweb and; (3) Accordingly to prove that Fin24 infringed Moneyweb's copyright by making a qualitatively substantial reproduction

The three side by side comparisons presented above show that the reason Moneyweb has not done this is because it cannot. The comparisons illustrate to, the applicability of section 12(8) of the Act. In respect of all the articles in issue, Fin24 has dealt fairly with Moneyweb's corresponding article, as contemplated by section 12 (1) (c) (i) of the Act in that: Its dealing with Moneyweb's article was fair in all circumstances, including the fact that as a member of the press, Fin24 has a constitutional duty to inform public opinion by disseminating news and complied substantially with its attribution provisions by providing an instant, clickable link back to Moneyweb's article. The court ruled that there is no basis on the fact before court to extent the common law of unlawful competition in Moneyweb's favour: It is nowhere alleged (nor can it be) that Fin24 has appropriated any property on Moneyweb prior to the latter's use and publication of it, let alone by dishonest or unlawful means, still less on any commercially-consequential scale. In the circumstances, it was concluded that Moneyweb's application be dismissed with costs, including those of two counsel.

### **Revisiting the Two Cases**

Where copyright conflicts with the public interest, courts attempt to strike a delicate balance between maintaining public access to protected expressions and securing the economic benefits of copyright ownership. This balancing exercise reflects the general qualification of fundamental rights by other competing interests. South African courts rely on several statutory and common law measures when reconciling copyright with the public interest.<sup>81</sup> Apart from proving that the claimant's work was used for the recognised purposes, defendants must also prove that the work was dealt with fairly. Although the liberal construction of the statutory purposes of fair dealing enhances freedom of expression, the real battles between authors and users are fought over fairness issues. Birnhack is of the opinion that:

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<sup>75</sup> Moneyweb (n.17) para 1.

<sup>76</sup> Moneyweb (n.17) para 2.

<sup>77</sup> Record pp.292-293 answering affidavit Para 41.

<sup>78</sup> Moneyweb (n.17) para 67.

<sup>79</sup> National Media Ltd and Others v Bogoshi 1998 (4) SA 1196 (SCA).

<sup>80</sup> Moneyweb (n.17) para 70.

<sup>81</sup> Masiyakuruma (n.8) 91.

One familiar line is the tension between the rival interests of the public and those of the individual author. The public is interested in widening dissemination of works of authorship, enabling easier access and lowering barriers on using of the works, so they can be used as building blocks for further works. The author wishes to control his work – both in the financial and the cultural sense. Another parallel line is the tension between the present cost to the public and its future gain. As long as a work is protected the public must receive the owner's authorisation to use it.

It is clear in National Soccer League case that the court dismissed the defendant's claim of fair dealing which relied on the constitutional provision of freedom of expression. The reason being that the court showed the fact that the defendant was engaged in a commercial mission than just imparting information to the public. The court seemed to find that an infringement with no purpose other than to generate commercial gain cannot be shielded by the right to freedom of expression.<sup>82</sup> Even though this is true it is argued that courts should clarify their approaches to fair dealing<sup>83</sup>, it has been noted that even if economic loss constitute part of unfair dealing, for the mere fact that the copyright owner suffers economic loss should not be relied upon and concluded that the whole dealing is unfair, another thing to note is that in this case the court ruled that the defendant's infringement was motivated by profit and therefore the constitutional defence is not applicable, this should also not be the case of assessing fairness, different factors needs to be considered as a whole. The author acknowledges and agrees with the decision of the court that the defendant as a National Lottery Operator cannot be considered to be '*the press*' or '*other media*' and that it is also not an information provider. One interesting statement is from a separate case of Laugh it off v SAB where Judge Sachs in para 85 mentioned that:

Of more significance is whether the activity is primarily communicative in character or primarily commercial. Thus, some degree of commerce should not in itself exclude the activity from free speech protection. Nor, however, should an element of social criticism on its own save an inherently commercial activity from a charge of unfairly causing detriment.

The author believes this too much reliance on the degree of commerce brings forth a conflict between the two fundamental rights. In particular it is proposed on eliminating the focus on the commercial nature of the use, as speech does not lose the constitutional protection solely on the basis of the existence of a profit motive or other commercial advantage to the speaker.<sup>84</sup> This reliance on the degree of commerce is also evident in the Ashdown v. Telegraph Group Ltd case where the court held that *The Telegraph* destroyed part of the commercial value of Ashdown's forthcoming memoirs; that the fact that the minute was obtained by a breach of confidence was a material consideration, and that a substantial portion of the minute had been copied. The conclusion was that the defendant could not rely on the defence of fair dealing. The court closely examined *The Telegraph*'s reproduction of Ashdown's minute and found that it was beyond the necessary requirement for reporting the information authoritatively but was motivated by profit.<sup>85</sup> It is argued that this commercial value dependency leads the courts to draw quick conclusions which end up resulting in courts failing to take into account the constitutional dimension of the copyright law/freedom of expression intersection.

On the other note upon passing the judgment the court addressed the issue of originality of the fixtures qualifying them to be protected under copyright. It is argued that careful consideration needs to be given to the content of the allegedly infringing speech and the content of the protected work. The question is how far has the court gone to test the originality of the fixtures? Not all copyright interests have equal value: entrepreneurial works such as sound recordings, for instance, are not as well protected as works of authorship, and works invested with a higher degree of skill and labour are granted greater

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<sup>82</sup> J Speres 'South Africa: PSL v Gidani - copyright in fixture lists' (2014) 1.

<sup>83</sup> Kelly, 'Current Events and Fair Dealing with Photographs', 259.

<sup>84</sup> Lockridge, 'The Myth of Copyright's Fair Use Doctrine', 34, 99 - 102.

<sup>85</sup> Birnhack (n.5) 11.

protection compared to simpler works which receive ‘thinner’ protection.<sup>86</sup> In the National Soccer League’s case the court held that a work is considered original if its creation involved the expenditure of time and intellectual effort on the part of its author, and the result was not the production of a slavish copy of another’s work. The author believes that the fixtures do not represent a culmination of extensive labour, skill and creativity, but was merely a compilation of information; therefore the author does not see how originality totally subsists in such a work. On a separate case of Moneyweb the court made the right decision in dismissing the originality in the reports as it was just a mere recording of a press statement.

Commenting on the *Moneyweb v Fin 24 case*, Karjiker commented that the case that the determination of whether a work is original, or whether a substantial part of a copyright work has been reproduced, involves value judgments, by the court. However, the fact that the court considered four of the seven Moneyweb articles as lacking originality (and, therefore, ineligible for copyright protection) does come as a surprise, particularly given the length of each article. It is not clear whether the court has established a higher test for originality than the traditional ‘sweat of the brow’ approach. ‘The manner in which section 12(8) is meant to operate is not clear. First, the judgment suggests that a news report is not protected by copyright to the extent that it contains ‘items of press information’ but that the remaining portion could still be eligible for copyright protection i.e., could still be original. In other words, there is no indication that the mere presence of ‘items of press information’ will exclude the work from copyright protection. Second, the court does not expressly state whether ‘items of press information’ should already be discounted when determining whether a work is original, or only when determining whether a substantial portion has been copied. Given the order in which the court proceeded with its analysis, it appears that ‘items of press information’ were in fact discounted in its determination of whether the news articles were original.’

In summary of the cases discussed above it is upon the courts to adopt strategies of striking a balance between the rights, Kelly suggests that it is necessary for the courts to clarify their approach to fair dealing by sweeping away the artificial limitations, practices and assumptions that have accreted over time, and to take a broad and all-encompassing approach to assessing ‘fairness’ which would give courts the relative freedom to make fact-based determinations of whether a particular dealing is fair in any given case, rather than following precedents which state that entire classes of use (e.g. non-public use or use that does not refer to an ‘event’) automatically fall outside the ambit of the defence.

#### **4. Conclusion**

The author laments the absence of copyright provisions under the Bill of Rights of the Constitution. It has been observed that the relationship between copyright and freedom of expression is not as easy as one may think, up until there is an infringement case, it becomes evident that indeed there is a conflict and thus the author concludes that; of all the dimensions of the relationship, the constitutional dimension should take precedence. The purposeful disregard of this inherent conflict is beginning to erode the right of public dissemination of information; in favour of private property rights. The danger caused by this erosion is that it creates private monopolies over information and unconstitutionally ‘chills’ expression. This frustrates the democratic, public benefit purposes of the original constitutional clauses (Section 16). We have learnt from the two cases discussed that whenever there is a conflict the courts face a challenge of striking a balance between the two fundamental rights. It is therefore concluded that a proper application of the fair dealing defence can balance the interests of copyright owners and users because it permits the unauthorised appropriation of protected expressions.<sup>87</sup>

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<sup>86</sup> Griffiths, ‘Copyright Law after Ashdown’, 259.

<sup>87</sup> Masiyakuruma (n.8) 87.