The public interest in Namibian copyright law

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Introduction

Since information is the building block of knowledge, it is of such crucial importance that its availability or restriction should be of concern to all societies. This is more so for developing countries where, for a number of reasons, information is often restricted. One of the reasons why information may not be free-flowing in society is due to the nature of its intellectual property protection system.

Embodying all creative manifestation is information – which is often represented by products, such as books, music, machinery, and drugs. The information that leads to the production of these goods is important for the survival of society because it is employed by other creators to produce other goods. Yet it is equally important that those who have created goods receive a recompense for their work: both to stimulate them, and to encourage others. Every system which seeks to protect creativity, including the intellectual property system we know today, must grapple with these fundamental tensions to bring about a meaningful state of equilibrium between or among them for the greater good of societal development.

All intellectual property rights – patents, designs, and trademarks – are intricately interwoven with the availability of information. This is even more so in the case of copyright, because it protects expressions of ideas, and these expressions – be they books, music, artworks, photographs, or computer software – affect the information people receive and their ability to engage in creative activity. Since copyright instrumentally affects how information is made available, every society and its legal system needs to address how proprietary systems such as copyright are conceived, sustained and elaborated.

The ability of copyright to affect access to information is multi-dimensional and can be understood in two principal ways. On the one hand, copyright protection is an incentive for creative minds to continue in their work, ensuring that they can, in turn, generate new works in the market, based on the information that their novelty has brought. This is an issue of crucial public interest.

It is also in the public interest that, in certain defined conditions, the public should have free access to copyrighted works because this sustains the innovation cycle that feeds societal development and renewal.

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On the other hand, the economic rights of copyright owners can inhibit access to information because such economic rights restrict access to the copyright work except with the consent of the copyright owner. These barriers to access, which include the price of the work and other permissions, constitute the private interests of the author. It is obvious, therefore, that most legal systems should engage in a balancing exercise that ensures that the public and private interests in copyright ownership are given equal play. It should be self-evident that all legal systems should strive for such a carefully calibrated copyright system.

For developing African countries (including Namibia), where there is not much creativity, a serious question is whether copyright is a hegemonic strategy of foreign authorship. In these countries, the enforcement of copyright serves principally to protect foreign works and leads to capital flight. In a sense, these countries are confronted by a 'double' public interest, where copyright should – ideally – ensure access to works and, at the same time, reward and encourage creativity.

For developing African countries, the march of globalisation – especially as manifested with the advent of the World Trade Organisation's Uruguay Round of Talks and the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) – ensures that the homogenising effect of the TRIPS Agreement in ensuring a level playing field in market access for intellectual property goods severely affects the ability of developing countries to construct a responsive copyright regime. If they were free to do so, many developing countries would construct a copyright regime that privileges the public interest. The model of copyright protection cast by TRIPS and its variants privilege the private interest in copyright to such an extent that, at first blush, most people believe that copyright is only about the interests of the copyright owner. Firstly, TRIPS and the like speak to the exclusive interests of the copyright owner while the public interest is represented principally as exceptions and limitations on such exclusive rights. Furthermore, the exceptions and limitations need to pass the three-step test, which essentially requires that the economic interests of a copyright owner should be the determinant of how national legal systems allow free access to copyrighted works. There are perhaps no exceptions or limitations that do not strike at the economic interest of the copyright owner.

However, as the architecture of the international intellectual property system and national legal systems elaborated the author-centric system, little attention was paid to the public interest represented by fundamental human rights in national constitutions. What duty did they place on countries with respect to access to information and knowledge, and how these countries sought to fulfil their constitutional obligations to their people?

Thus, this paper elaborates on the mechanisms that are designed to enhance the public interest in matters of copyright. In the following section, the paper presents an overview of the public interest in copyright law. This is followed by an overview of Namibian copyright law in particular, and focuses on the public

Interest in such law by examining the application of the three-step test in some detail. The fourth section continues the elaboration of the public interest by examining how the latter is represented by fundamental rights and freedoms in the Namibian Constitution. The section also contains an analysis of a possible conflict between the Namibian Copyright Act and the Namibian Constitution, and it examines the implication of regarding copyright as a human right under the Constitution. The recognition of exceptions as a user right rather than a privilege is explored in the fifth section, while the sixth speaks to the role of Namibian collecting societies in enhancing the public interest because they represent Namibian and foreign right holders in negotiating with the public as regards access to their works. Section seven brings up the rear with some concluding remarks.

The public interest in copyright law: An overview

Copyright, which can simply be defined as the ability of a copyright owner to control how the public has access to his/her work, has both a private nd a public interest aspect.[1] A copyright owner has exclusive rights representing his/her private interest, which enables him/her to determine how third parties have access to the work. These exclusive rights include the right of reproduction, translation, public performance, distribution. The public interest represents the mechanisms by which the general public is allowed to have access to copyrighted works. The *public interest* is different from the *public domain* – which includes the public interest as well as works that are not subject to copyright. The principal mechanisms for the public interest in a copyright regime are exceptions and limitations. Every copyright regime is, therefore, a balance between the public and the private interest. How this balance is struck varies from country to country. As perceptively recognised by the South African publishing industry, the question that occupies the attention of developing countries' policymakers – and which applies to Namibian copyright policymakers – is put thus:[2]

What kind of copyright regime would contribute most effectively to the availability of relevant and affordable information in developing countries? And how can developing countries most effectively address the needs of poorer readers and learners, while still fostering the growth of local knowledge and local publications.

In my opinion, a copyright regime primed for development is one that accords equal priority to private and public interests in copyright.[3]

The dichotomy between ideas and their expression is often advanced as beneficial to the public interest. This is true to the extent that copyright protects

1 Davies (2002:7) holds that "Copyright systems are recognised as having two-fold purpose: to accord exploitation rights to those engaged in literary and artistic production and to answer to the general public interest in the widest possible availability of copyright material".
2 See PICC (2004).
3 For more, see Nwauche (2007).

only expressions and not ideas. The said dichotomy ensures that the public have access to ideas that can sustain different expressions. However, in many cases, an expression completely embodies an idea – such that, unless the expression is accessed, the idea cannot be grasped. In other cases, the expression contains such vital information that it becomes critical for further creativity. Since knowledge creation is often a cooperative and cumulative enterprise, today's copyright work becomes the shoulders on which future creative minds stand to create new works.

In its simplest form, the public interest enables free and unrestricted access to specified works. It is also possible that the public interest could involve a fee that may be more reasonable than the market value. Charging a reasonable fee as a condition for gaining access to a work is a possible compromise to enhance the public interest. The compromise is reached between the private and public interests, i.e. the private interest gains by being paid and the public interest gains by having access to the information. In the next section, the paper contextualises the public interest by setting out an overview of the Namibian copyright law.

An overview of the Namibian copyright law

Copyright is protected in Namibia by the Copyright and Neighbouring Rights Protection Act, 1994 (No. 6 of 1994, as amended). Section 2 of the Act protects –

- literary works
- musical works
- artistic works
- cinematograph films
- sound recordings
- broadcasts
- programme-carrying signals
- published editions, and
- computer programs.

The exclusive rights of a copyright owner are set out in sections 7 to 14 of the Act, which list the rights accorded to each copyright work. Generally, they are *exclusive* rights, which enable a copyright owner to –

- authorise the reproduction of the work in any manner or form
- publish the work, if unpublished

- perform the work in public
- broadcast the work
- cause the work to be included in a diffusion service
- make an adaptation of the work, and
- include the work in a cinematograph film or television work.

Sections 15 to 24 contain detailed provisions of the exceptions regarding each of the works recognised by the Act. For literary and musical works, section 15(1) of the Act provides that copyright –

… shall not be infringed by a fair dealing in the use of a literary or musical work

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

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

(c) for the purpose of reporting on a current event –

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

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

provided in the case of paragraphs (b) and (c)(i), the source and the name of the author if that name appears on the work, are mentioned.

Other exceptions in the Act include –

use of the work for purposes of judicial proceedings[4]

use by way of quotation, provided that the quotation is compatible with fair practice, the extent of the use does not exceed that justified by the purpose, and the source and name of the author is acknowledged, and[5]

use by way of illustration in a publication, broadcast or sound or visual recording for teaching purposes, provided such use is compatible with fair practice, and the extent of the use does not exceed that justified by the purpose.[6]

Exceptions for literary and musical works include using the work for the lawful broadcasts of broadcasting organisations,[7] and reporting in the press any public

4 Section 15(2).
5 Section 15(3).
6 Section 15(4).
7 Section 15(5).

lecture address or other work of a similar nature.[8] This may include articles published in a newspaper, magazine or similar periodical on a current economic, political or religious topic.[9]

Section 15(8) of the Act provides that –

… no copyright shall subsist in –

(a) the official text of any work of a legislative, administrative or legal nature, or an official translation thereof;

(b) a speech of a political nature or a speech delivered in the course of judicial proceedings; or

(c) publications or broadcasts of news of the day.

These exceptions often apply in different terms to the other works recognised for copyright. What applies to all the reproduction exceptions under the Act are the provisions of section 16, which require that the reproduction –

… is not in conflict with a normal exploitation of the work and is not unreasonably prejudicial to the legitimate interests of the owner of the copyright.

It is only the reproduction exception that is so circumscribed: other exceptions are left without such restriction.

Indeed, the Act follows a unique pattern. Firstly, there is no general fair dealing exception. Secondly, even though the exceptions are similar, they are tailored to each work. For example, while there is an exclusive right of reproduction for each of the works, it is only with respect to literary and musical broadcasts, and works and published editions, that there are reproduction exceptions. Therefore, the Act can be said to describe the exceptions and limitations in great detail. This legislative style is capable of ensuring that the judiciary has little room for manoeuvring in determining permitted uses. It may be interpreted that the statutory cast of the exceptions and limitations reflects an agreeable and satisfactory compromise between the private interest of a copyright owner and the public interest.

If one compares the Namibian Act with other African copyright legislation, the nature and extent of their respective exceptions are brought into sharp relief. The first basis of comparison is the teaching exception. With regard to the use of works for teaching, section 15 of the Botswana Copyright and Neighbouring Rights Act, No. 8 of 2000 provides thus:

(1) The following acts effected for the purposes of teaching shall be permitted without authorisation of the author, or other owner of copyright –

8 Section 15(6).
9 Section 15(7).

(a) the reproduction of a short part of a published work for teaching purposes by way of illustration, in writings or sound or visual recordings, provided that reproduction is compatible with fair practice and does not exceed the extent justified;

(b) the repro-graphic reproduction, for face-to-face teaching in education institutions the activities of which do not serve direct or indirect commercial gain, of published articles, other short works or short extracts of works, to the extent justified by the purpose, provided that –

(i) the act of reproduction is an isolated one occurring, if repeated, on separate and unrelated occasions, and

(ii) there is no collective licence available, offered by a collective administration organisation of which the educational institution is or should be aware, under which such reproduction can be made.

While the teaching exception in the Botswana Act seems broad, it is nonetheless important to note that section 15 is carefully calibrated; for this reason, it is likely that course packs may be difficult to assemble for teaching purposes. The requirement that the act of reproduction is isolated can limit the possibility of a regular annual production of course packs.

Furthermore, the reference to a collective licence points to the fact that collective administration[10] will surely defeat the exceptions. If collective administration for reprography exists,[11] it will be an uphill battle to prove that a collective licence does not exist. Assuming that the parties are not able to reach a licensing agreement, the exception cannot be used. It is only where there is no collective administration that the exception is relevant.[12]

Compared with Botswana's provisions regarding the teaching exception, the Namibian Act is grossly inadequate. Furthermore, it appears that teachers in Namibia cannot employ copyright works for teaching in a classroom. Again, the exceptions do not support the production of course packs for students.

Apart from the teaching exception, there are no other exceptions that support

10 See later herein.

11 Section 7 of the Botswana Copyright and Neighbouring Rights (Amendment) Act, 2005 introduces a collective administrative body to be known as the Copyright Society of Botswana. The Society is to be a non-profit-making company limited by guarantee, and will be responsible for the following:

(i) The negotiation and granting of licences in written agreement with the owners of copyright for the adaptation of works, performances and sound recordings, the insertion of works, performances or sound recordings in other scopes; and the use of works for publicity purposes

(ii) The setting of rates for royalties in accordance with acceptable international standards, and

(iii) The collection and distribution of royalties to appropriate copyright owners.

12 See Rens et al. (2005).

educational establishments in their quest for access to information. For example, students and other learners may need to make copies of articles and other materials from their school library. These photocopies are often the only way that students can access some of the materials. In this regard, section 16 of the Botswana Act provides as follows:

Any library or archive whose activities do not serve direct or indirect gain may, without the authorisation of the author or other owner of copyright, make a single copy of the work by repro-graphic reproduction –

(a) where the work reproduced is a published article, other short work or a short extract of a work, and where the purpose of the reproduction is to satisfy the request of a person, provided that –

(i) the library is satisfied that the copy will be used solely for the purposes of study, scholarship or private research;

(ii) the act of reproduction is an isolated case occurring, if repeated, on separate and unrelated occasions; and

(iii) there is no collective licence available, offered by a collective administration organisation of which the library or archive is or should be aware, under which such copies can be made; …

Moreover, there are no library exceptions allowing the libraries to make copies of works in the Namibian Act. For example, the Nigerian Copyright Act 2004 (c.C38) allows libraries to make three copies of works that are not locally available.[13] This exception is also found in section 16(b) of the Botswana Act, which provides as follows:

(b) where the copy is made in order to preserve and, if necessary replace a copy, or to replace a copy which has been lost, destroyed or rendered unusable in the permanent collection of another similar library or archive, provided that it is impossible to obtain such a copy under reasonable conditions, and provided further that the act of reprographic reproduction is an isolated case occurring, if repeated, on separate and unrelated occasions.

One of the factors affecting the public interest in Namibia is the protection of copyright in a digital environment. In this regard, Namibia is a signatory to the World Intellectual Property Organisation (WIPO) digital treaties, namely the WIPO Copyright Treaty and the WIPO Performances and Phonogram Treaty (WPPT).[14] These treaties are designed to protect copyright in a digital

13 See para. Q of the second schedule to the Nigerian Copyright Act: "The making of not more than three copies of a book (including a pamphlet, sheet music, map, chart or plan) by or under the direction of the person in charge of a public library for the use of the library if such a book is not available for sale in Nigeria".

14 Namibia signed the treaties on 20 December 1996.

environment. In this regard, a Copyright Amendment Bill is currently before Parliament. The Bill is designed to incorporate the obligations arising from these treaties.

In the digital environment, the small window which exceptions and limitations present to the public is even more threatened. The widespread copying enabled by the digital environment has led to the development of technological tools that deny access to copyrighted works held by the Internet. In addition, all those who use technological devices to circumvent these access-restricting technologies are liable to be convicted for criminal offences. Consequently, if care is not taken by copyright administrators, these technological measures in a digital environment suffice to completely restrict the access granted by exceptions and limitations in a non-digital environment. This is possible because the technology is blind and needs to be configured to recognise legitimate access. In this regard, African countries are increasingly amending their legislation to conform to the WIPO digital treaties. However, it is important that, in their domestication of these treaties, the continent takes care to ensure that existing exceptions can be enjoyed within the digital environment as well.[15]

The Namibian Act and the Three-step Test

The Three-step Test is found in international intellectual property treaties such as the Berne Convention for the Protection of Literary Works;[16] the World Trade Organisation (WTO) Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS);[17] the WCT; and the WPPT – to mention but a few. An example of the Test is found in Article 13 of TRIPS, which requires that limitations of or exceptions to rights granted to copyright owners are only permitted in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author. An equivalent of the Three-step Test in the Namibian Act is found in section 16.

The cumulative nature of the Test ensures that exceptions and limitations – and, therefore, the public interest – are severely threatened. It is difficult to imagine an exception or limitation that does not, for example, impact on a right holder's income. If the Three-step Test is pursued to its logical conclusion, copyright will become an exclusive protection for authors. A survey of recent decisions on the Test will clearly illustrate this point. In a 2000 decision,[18] a WTO panel stated the following:[19]

We believe that an exception and limitation to an exclusive right in domestic legislation rises to the level of a conflict with a normal exploitation of the work …

15 See the WCT and the WPPT.
16 See Nwauche (2005:361).
17 See Article 13 of the TRIPS Agreement.
18 Panel Report of 15 June 2000, United States, Article 110(5) of the US Copyright Act, WT/DS160R/R. Available at www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm; last accessed 6 January 2009.
19 Para. 6.183–6.184.

if uses that are in principle covered by that right but exempted under the exception and limitation, enter into economic competition with the ways in which the right holders normally extract economic value from that right to the work (i.e. the copyright) and thereby deprive them of significant or tangible commercial gains. In developing a benchmark for defining normative connotation of normal exploitation, we recall the European Communities['] emphasis on the potential impact of an exception rather than on its actual effect on the market at a given point of time, given that, in its view, it is the potential effect that determines the market conditions.

More recently, in a judgment dated 28 February 2006, the French *Cour de Cassation*[20] interpreted the Three-step Test to set aside an exception that allowed the private copying of a DVD holding that was incompatible with the normal exploitation of a work.

It is important, therefore, that national courts are flexible in the manner in which the manifestation of the Test is interpreted. Thus, a Namibian court ought to be careful of the interpretation of section 16 and the like. An interpretation of the Test that is favourably disposed to the public interest[21] can be based on the recognition that such interest may in certain circumstances approximate to constitutionally guaranteed rights. The paper now turns to this consideration.

The public interest as a fundamental human right under the Namibian Constitution

Our consideration of the exceptions in the Namibian Act in the previous section indicates clearly that a number of the rights and freedoms are protected by the Namibian Constitution. In this regard, two rights -- freedom of speech and expression, and the right to education – are germane.

Firstly, Article 21 of the Namibian Constitution grants all persons freedom of speech and expression. The right to freedom of expression is not only about being able to communicate: it is also about receiving ideas.[22] As the Constitutional Court of South Africa put it in *South African Broadcasting Corporation v The National Director of Public Prosecutions*, –[23]

[a]ccess to information and the facilitation of learning and understanding are essential for meaningful involvement of ordinary citizens in public life. This corresponds to the vision in the Preamble to the Constitution of laying the foundations for a democratic and open society in which government is based on the will of the people. It also reflects the foundational principle of democratic government which ensures accountability, responsiveness and openness.

20 Cass. 1re civ., 28 February 2006; an English translation of the case can be found in International Review of Intellectual Property and Competition Law, 2006, 36:760.
21 Generally, see Geiger (2007) and Senftleben (2004).
22 See Tushnet (2004:101).
23 2007 (1) SA 523 (CC) (hereafter SABC), para. 28.

Freedom of expression is also critical in the enjoyment of other rights. Thus, the South African Constitutional Court stated that freedom of expression is –[24]

… part of a web of mutually supporting rights enumerated in the Constitution, including the right to "freedom of conscience, religion, thought, belief and opinion", the right to privacy and the right to dignity. Ultimately, all of these rights together may be conceived as underpinning an entitlement to participate in an ongoing process of communicative interaction that is of both instrumental and intrinsic value.

Namibian courts have been emphatic about the importance of freedom of expression. In *Kauesa v Minister of Home Affairs and Others*,[25] the Supreme Court adopted what it describes as the "moving speech" of Justice Barndeis in *Whitney v California*[26] to illustrate and buttress its stance that freedom of expression is important in any democracy. In *Fantasy Enterprises v Nasilworski*,[27] the Namibian High Court adopted Prof. T Emerson's[28] exposition which examined the rationale of the freedom of expression, to strengthen the need to jealously protect the right to freedom of speech and expression.

Secondly, Article 20, which deals with the right to education,[29] states the following:

(1) All persons shall have the right to education.

(2) Primary education shall be compulsory and the State shall provide reasonable facilities to render effective this right for every resident within Namibia, by establishing and maintaining State schools at which primary education will be provided free of charge.

A combination of the right to education and freedom of expression supports the assertion that some learning materials – including copyrighted works – are required to be made available to Namibians if such rights are to be meaningfully enjoyed. It is noteworthy that Article 20(2) makes this obvious with respect to primary education. It is also clear that reference to "learning materials" certainly contemplates books, articles, etc. protected by copyright. Since public primary education institutions are required to provide free education, it behoves the State to ensure that access barriers like copyright do not put a price tag on information. The principles of equality and non-discrimination recognised by the Namibian Constitution in Article 10 further require that all public schools

24 See Mokgoro J in Case v Minister of Safety and Security 1996 (3) SA 617 (CC); hereafter Case.
25 1996 (4) SA 965 (NmSC); hereafter Kauesa.
26 274 US 375.
27 1998 NHC 1; hereafter Fantasy Enterprises.
28 The Court quotes from pp 6–7 of Emerson (1970).
29 Namibia´s constitutional provision is in line with the provisions of international instruments on education, such as Article 26 of the Universal Declaration on Human Rights; Articles 13 and 14 of the International Covenant on Economic, Social and Cultural Rights; and Articles 28 to 30 of the Convention on the Rights of the Child.

offer the same "reasonable learning facilities" to learners. Allowing copyright protection to introduce a demarcation between those who are able to afford the books and those who are not will be a breach of this right. Accordingly, the State is obliged to provide learning materials to pupils or, at the very least, ensure that they are available at school libraries and the like. Similar considerations apply to post-primary and tertiary education.

The importance of education cannot be overestimated, and there needs to be a conscious effort to ensure meaningful access to learning materials that make a difference in the quality of education. Clearly, however, free access to copyrighted works will affect the private interests of copyright owners, leading to a loss of their income. What is needed, therefore, is a carefully constructed public interest to ensure that, within the regime of such interest, there is enough incentive to encourage creativity – especially in developing countries like Namibia.

The importance of constitutional norms lies in the fact that the provisions of legislation such as a copyright Act are subordinate to the supreme law of the land – a constitution. It is likely that constitutional rights will ground efforts to introduce new exceptions or even to interpret existing exceptions in a flexible manner. Given the manner in which the Three-step Test is currently interpreted, it is important that constitutional obligations on national governments should weigh on national courts as they interpret the exceptions to copyright control. Clearly, the "fair dealing" requirements in the Namibian Act are subject to varying interpretations. Indeed, any human rights framework should ensure that *fair dealing* is interpreted in an expansive way. A few examples will illustrate the point being made here.

If a work can be accessed for the purpose of research, it is possible that the right of fair dealing can be enjoyed by an individual and also by an institution such as a library or archive. For an individual, the amount of the work to which s/he is entitled to access is important. In this regard, can a person copy a whole work, or only half or a quarter of it? Can s/he copy a journal or only a percentage of it, i.e. one or two articles only? Can all the students in a class turn up to copy a work and claim the research exception? Can a non-profit library utilise the research exception and provide a copy of the work for the use by any number of researchers? What quantity of copying will amount to "a conflict with a normal exploitation of a work and prejudicial to the legitimate interests of a right owner", as stipulated in the Namibian Act, for example? Looking at the cast of section 16 in the latter Act closely, can it be said that the educational interests of Namibian students are a legitimate pursuit and, therefore, outside the legitimate interests of a right owner? As Geiger points out, –[30]

… the right holder cannot have the power to control all uses of his work, as some prejudices may be justified in light of values deemed superior to the interests of the right holder.

30 Note 22.

I would submit that an expansive research exception should enable individuals to copy substantial portions of copyrighted works – if not the whole work. Accordingly, libraries of educational institutions at least should be allowed to keep copies of books that are used by students and are not readily available, even in terms of the price.

The analysis above assumes that the combined right to education and freedom of expression range against the provisions of the Namibian Act. A different scenario would apply if copyright and other intellectual property rights were human rights, however. In my opinion, they are – and juridical support for this contention can be found in Article 15(1) of the International Covenant for Social Economic and Cultural Rights:

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

(a) To take part in cultural life;

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

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

In addition, Article 27 of the Universal Declaration of Human Rights provides as follows:

(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.

In many African constitutions, however, there is no fundamental right to intellectual property.[31] Nonetheless, a number of other rights capture the essence of intellectual property rights. These rights include freedom of expression, the right to privacy, and the right to property.

Since the Namibian Constitution is an example of a national constitution that in

31 In the certification process leading up to the adoption of the Final Constitution (FC) there was a proposal to include in it the right to intellectual property. When the Constitution of the Republic of South Africa came before that country's Constitutional Court, the Court was urged to recognise the right to hold Intellectual property because it is a universally accepted human right. The Court held that the right to hold intellectual property was not a universally accepted fundamental human right, however, and that the FC was not thereby defective. See In re: Certification of the Constitution of the Republic of South Africa, 1996 10 BCLR 1253 (CC), para. 75).

fact does recognise these three rights, it is important to illustrate how the right to intellectual property can find meaning in these other rights. Let us first address freedom of expression. If, as was pointed out above, one of the meanings of the public interest of copyright is the possibility that, by incentivising creativity, copyright serves to make copyright goods available to the public, then insofar as copyright is an engine of free expression,[32] freedom of expression contemplates copyright. However, if the private interest of copyright conceived as the economic interests of a right owner constrains access to copyrighted works, then copyright becomes an external value competing against freedom of expression.

Secondly, in the right to privacy,[33] it is essentially the private interests of an author that are implicated when copyright is said to interact with privacy. An individual asserting a right to privacy wishes to *seclude information from the public*, while copyright may be deployed to *secure access to information by the public*.

Thirdly, with respect to the right to property, it is still a matter of some controversy as regards whether or not intellectual property is part of the constitutional protection of property. In the European Union[34] and United States,[35] there is no such doubt. If copyright is regarded as constitutional property, it is obliged to receive the same nature of constitutional protection offered to other property forms.[36]

32 For example, in Harper & Row Publishers Inc. v Nation Enterprises, 471 US 539 at p 558, the United States Supreme Court observed as follows: "[T]he Framers intended copyright itself to be the engine of free expression. By establishing the marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas".

33 Article 13 of the Namibian Constitution provides that "(1) No persons shall be subject to interference with the privacy of their homes, correspondence or communications save as in accordance with law and as is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others. (2) Searches of the person or the homes of individuals shall only be justified: (a) where these are authorised by a competent judicial officer; (b) in cases where delay in obtaining such judicial authority carries with it the danger of prejudicing the objects of the search or the public interest, and such procedures as are prescribed by Act of Parliament to preclude abuse are properly satisfied".

34 See Anheuser-Busch, Inc. v Portugal, Application No. 73049/01 (Grand Chamber, 2007); decision available at the European Court of Human Rights, http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=anheuser-busch%2C%20%7C%20Inc%20%7C%20portugal&sessionid; last accessed 5 January 2009.

35 See e.g. Chavez v Arte Publico Press, 204 F.3d 601, 605 n.6 (5th Cir. 2000): "Since patent and copyright are of a similar nature, and patent is a form of property [within the meaning of the Due Process Clause] … copyright would seem to be so too".

36 See Article 16 of the Namibian Constitution, which states the following: "(1) All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees: provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens. (2) The State or a competent body or organ authorised by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with requirements and procedures to be determined by Act of Parliament".

In this regard, it should be remembered that –[37]

[t]he overriding purpose of the constitutional property clause is to strike a balance between the protection of existing property rights and the promotion of the public interest.

Resolving a conflict between the Namibian Act and fundamental rights

Assuming it is true that copyright, like other intellectual property rights, is not a fundamental human right, then a conflict can be said to exist between the Namibian Act and the fundamental rights and freedoms enshrined in the Namibian Constitution. On the basis of freedom of expression, it may be asserted that a specific use that is not reflected in the existing exceptions in the Namibian Act is constitutional and, therefore, not contrary to the Act. Accordingly, a challenge to the constitutionality of the Act will invite a Namibian Court to consider the limitation clause as contained and defined in Articles 21(2) and 22 of the Constitution. Indeed, Article 21(2) provides as follows:

(2) The fundamental freedoms referred to in Sub-Article (1) hereof shall be exercised subject to the law of Namibia, in so far as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by the said Sub-Article, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

Article 22 defines the process of the limitation by providing that –

Whenever or wherever in terms of this Constitution the limitation of any fundamental rights or freedoms contemplated by this Chapter is authorised, any law providing for such limitation shall:

(a) be of general application, shall not negate the essential content thereof, and shall not be aimed at a particular individual;

(b) specify the ascertainable extent of such limitation and identify the Article or Articles hereof on which authority to enact such limitation is claimed to rest.

The question, therefore, will be whether the Copyright Act can be said to limit freedom of expression, the right to privacy, or the right to property.

An example of a broadly similar challenge can be found in *Fantasy Enterprises* where the applicants challenged the constitutionality of the Indecent and Obscene Photographic Matter Act, 1967 (No. 37 of 1967) on the ground that it imposes an unreasonable and unjustifiable restriction on the right to freedom

37 See the South African Constitutional Court in First National Bank of SA Ltd t/a Wesbank v Commissioner South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance, 2002 (4) SA 768 (CC), para. 50.

of speech and expression. In *Kauesa*, the Court held that limitations to the right to speech are required to be both reasonable and necessary. Furthermore, it was pointed out that the courts should be strict in interpreting limitations to rights so that individuals are not unnecessarily deprived of the enjoyment of their rights.

The South African Constitutional Court has demonstrated the manner in which a court could assess a challenge to the constitutionality of an intellectual property right in *Laugh It Off Promotions v South African Breweries*.[38] In the latter case, the Constitutional Court demonstrated that the use of freedom of expression could be a good way to constrain intellectually property rights that centred excessively on private interest; the case in point entailed the reach of the anti-dilution provisions of the South African Trade Marks Act, 1993 (No.194 of 1993). The respondent in the case, a trader of alcoholic and non-alcoholic beverages, had acquired trademarks relating to the brand of Carling Black Label from a South African firm. At the end of November 2001, the respondent came to know that the applicant had produced and was offering for sale to the public T-shirts that bore a print that was markedly similar in lettering, colour scheme and background to that of the respondent's trademarks. The only difference was in the wording: the words *Black Label* were replaced on on the T-shirt with *Black Labour*; the respondent's wording *Carling Beer* was substituted with *White Guilt*; and for *American Lusty Lively Beer* that was *Enjoyed by men around the world*, the applicant had printed *Africa's lusty lively exploitation since 1652* and *No regard given worldwide*. The calls by the respondent to the applicant to desist from using the trademarks elicited no response. Consequently, the respondent sought an interdict at the High Court, which was granted. The applicant appealed to the Supreme Court of Appeal and lost, hence the appeal to the Constitutional Court, where it was successful. The Constitutional Court held that the proper approach when freedom of expression, a constitutionally guaranteed human right, interfaced with legislative anti-dilution provisions – which, in this case, was section.32(4) of the Trade Marks Act – is to balance the interests of the owner of the trademarks against the claim of free expression, for the very purpose of determining what is unfair and materially harmful to the trademarks in these circumstances. Since the relevant South African anti-dilution provisions seek to oust certain expressive conduct, the Constitutional Court assumed that this could be a limitation of the freedom of expression reasonably and justifiably expected in an open and democratic society. Therefore, the Court required an interpretation of the anti-dilution provision that was most compatible with, and least destructive to, the right to free expression. Accordingly, the Court determined the appropriate interpretation to be that the owner of a trademark seeking the protection of anti-dilution provisions to oust an expressive conduct protected under the Constitution had to demonstrate likelihood of substantial economic harm or detriment to the trademark.

Because of *Laugh It Off*, it is certainly permissible to speculate as to whether freedom of expression and other human rights can be employed to constrain the private-interest-centred copyright protection. Clearly, our comparative survey of

38 2006 (1) SA 144 (CC).

some African copyright legislation in relation to the Namibian Act shows that there are many public interest concerns that may not be permissible under the Act, and that, if Namibian courts were to follow the prevalent interpretation of the Three-step Test then these public interests will not be promoted. Since the Three-step Test certainly restricts access to information and knowledge, there is a strong possibility that a claim for some of the exceptions discussed above would be successful. Of more importance, perhaps, is the attitude to an interpretation of exceptions to a right owner's exclusive rights. The values represented by fundamental rights ought to loom large in the background, instructing the judge to strictly interpret statutory provisions which seek to nullify constitutionally guaranteed rights. Accordingly, this attitude will surely broaden the exceptions in the Namibian Act – and, therefore, the public interest.

Another example of how freedom of expression can mediate the exercise of intellectual property rights is found in the decision of the English Court of Appeal in *Ashdown v Telegraph Newspapers*.[39] The Court of Appeal stated that the case raised the important question of whether the Human Rights Act, 1998 had impacted on the protection offered to owners of copyright by the Copyright Design Patent Act, 1988.[40] The facts of this case reveal that, in the course of a meeting between Prime Minister Tony Blair and the then leader of the Liberal Democrats, Lord Ashdown, the latter kept a confidential minute of their meeting. The minute reached the hands of the political editor of the *Sunday Telegraph*, which subsequently published it. Lord Ashdown commenced proceedings against the Telegraph Group claiming breach of confidence and copyright infringement. He sought an injunction and damages or, alternatively, an account of profits. In considering the merits of the defence of public interest, the Ashdown Court stated that there would be occasions when –[41]

… it is in the public interest not merely that information should be published, but that the public should be told the very words used by a person, notwithstanding that the author enjoys copyright in them.

In the Court's opinion, one way of accommodating the public interest was to indemnify the author for any loss caused to him, or alternatively account to him for any profit made as a result of copying his work. Apart from the fact that the Human Rights Act justified the defence of *public interest*, the Court also held that it had an impact in the *manner* in which the fair dealing provision was to be interpreted. *Ashdown* illustrates the principle that paying a fee or a price is consistent with the public interest.

Copyright as a fundamental human right

As hinted above, there is still considerable controversy as to whether copyright and other intellectual property rights are human rights or whether they are

39 2001 EWCA Civ 1142. Hereafter Ashdown.
40 Ibid.:para. 1.
41 Ibid.:para. 44.

different values.[42] Assuming that copyright is part of the right to intellectual property, or its constituent parts find expression in other human rights, it is important to consider how to resolve the clash between copyright as a human right, and other human rights. Constitutional theory usually requires the balancing of the human rights that are involved. An example of the balancing of human rights is found in the minority judgment of O'Regan J in *NM v Charlene Smith*,[43] in which the relationship between privacy and freedom of expression was explored. O'Regan recognised that the two rights might, at some point, pull in opposite directions.[44] In her opinion, –[45]

… [t]he appropriate balance between privacy and expression requires the legal rules which provide for redress for breaches of privacy to be developed in a manner that recognises both the importance of privacy and the importance of freedom of expression.

As correctly identified by O'Regan, it is correct to proceed in balancing rights by treating all rights as equal and deserving of protection.[46] If this is in the foreground, the way to proceed is to identify the different interests that are ventilated by each right, and find a balance by an interpretation which preserves the essential interests in each right. This is often not an easy exercise because, at the end of the day, neither of the rights remains what it was at the beginning of the balancing exercise. Some of the features of a right may be removed or altered, depending on the prevalent interest. What is important is that the rights do not come to the table with an implicit understanding that one right will trump the other. In a sense, this is what may happen in a limitation exercise. However, when rights are balanced, this need not and should not happen.

When a court employs a wrong methodology and engages in a limitation exercise when it should be balancing the rights in question, it arrives at a result that seems to privilege one of the rights at play. This is what seems to have happened in the South African case of *Petro Props (Pty) Ltd v Barlow and Another*,[47] which involved freedom of expression and 'property rights'. In this case, the applicant, who was building a fuel service station and a convenience store that would operate under the South African fuel giant's brand name, *Sasol*, applied and obtained all the necessary consents for that activity, pursuant to section 22 of the Environmental Conservation Act, 1989 (No. 73 of 1989) (ECA). The respondent and her association opposed the development because it was taking place in an

42 Helfer (2003:47); Chapman (2001).
43 Case CCT 69/05; judgment delivered on 4 April 2007.
44 See para. 144:"In understanding the scope of privacy, it is important to recognise that, at times, the right to privacy might suggest that certain facts should not be published while at the same time the right to freedom of expression might suggest those same facts should be able to be published".
45 Ibid.:para. 147.
46 Generally, see Alexy & Rivers (2002:Ch. 3).
47 2006 (5) SA 160(W).

ecologically sensitive area. Her opposition took the form of an ongoing public campaign against the development. The campaign was successful in that it brought Sasol to the point of withdrawing from the project. The applicant sought an interdict, basing its claim on the right to property under section 25 of the ECA. The applicant contended that it had been persistently and unlawfully harassed in seeking to construct a petrol station on its property, and that its right to property had to prevail over the respondent's freedom of expression under section 16 of the South African Constitution. Inter alia, the respondents contended that, since sections 35 and 36 of the ECA provided for administrative appeals and court reviews of administrative decisions, as the only avenues of remedy against those aggrieved by such decisions, the respondent was entitled to fall back on the Constitution to claim a right to freedom of expression outside those avenues.

The Court refused to grant the interdict. After stating that neither freedom of expression nor 'property rights' were absolute, the Court recognised that its task in the matter was to "determine the point of balance appropriate to the pertinent facts".[48] It then went on rely on the methodology of Moseneke J in *Laugh It Off*. In doing so, it characterised the interests in *Petro Props* as being the same as those in *Laugh It Off* in relation to "the interface between freedom of expression and commercial and proprietary interests".[49] What had earlier been referred to as "property rights" was now downscaled to "commercial and proprietary interests". There was no mention of constitutional property. Perhaps this was why the Court proceeded to what is really a limitation analysis:[50]

Applying the two-stage analysis … to the present case, it is necessary first to assess the degree to which the constitutional protection of expression extends to the protection of the respondent's campaign, and thereafter to evaluate the degree to which that protection falls [sic] to be diluted in the light of [the] applicant's rights and interests.

In this way, the Court's analysis at the beginning of the case had already privileged freedom of expression over property rights. If the Court was involved in a balancing exercise, it would proceed by discussing freedom of expression and then the right to property. It would then identify how the issues in this case implicated the two rights, and would then seek to strike a balance. Be that as it may, it is not surprising that the Court found that the interdict would reverse the outcome of debate in the public domain and that this would have a chilling effect on the readiness of groups like the respondents to engage in free speech and free expression. It also found that the manner of the respondent's campaign was designed to promote public participation, the gathering and exchange of information, discussion, and production of community-based mandates.

There was clearly a public interest in protecting the manner in which the respondents carried out their campaign, as they were engaged in constitutionally protected expression.

48 Ibid.:para. 51.
49 Ibid.:para. 51.
50 Ibid.:para. 52.

The Court thereafter evaluated the applicant's "commercial interest in the undisturbed completion of the project".[51] It recognised the substantial investment in excess of R8.5 million, and stated that this was a point of distinction from *Laugh It Off* since the loss of this sum represented a "substantial economic detriment" fact which, in the *Laugh It Off* paradigm, may have justified ousting protected constitutional expression. Of importance to the Court was that there was no direct relationship between the act of expression and the allegation of prospective harm, and that it was public opinion that might influence Sasol's opinion – and only if that was successful would it have financial consequences for the applicant. For this reason, the Court found that a successful campaign was not vexatious, *contra bonos mores* or actionable, and that the applicant had not proved that its rights outweighed that of the respondent.

The claim that there was no direct relationship between the campaign and the building of the property is somewhat surprising, given that the Court was provided with cogent evidence that the campaign had led to Sasol beginning to review its sponsorship of the programme.[52] Furthermore, the Court declared the campaign "successful",[53] and stated that public opinion opposed the building of the petrol station. These facts prove that there is a *direct* relationship between the campaign and the fear of prospective harm, and that, even if it were *indirect*, the right to property is implicated.

It is important to note that the Court did not refer to constitutional property as the applicant's interests. All it alluded to was the "commercial interest"[54] of the applicant. The result may have been different if the Court had found that the applicant's interest was not just a "commercial interest" but a constitutionally protected one.

Having evaluated the two rights, the court should have proceeded to strike a balance – given the key dispute which was to stop further campaigns, as damages were not sought. Refusing the interdict would allow the campaign to continue and, ultimately, lead to Sasol's withdrawal and consequent loss to the applicants. Perhaps the Court could have dwelt on the provisions of sections 35 and 36 of the ECA, which provided an avenue for appeals against approvals such as the one applicant had been granted. The Court could have struck a balance by ordering the respondents to cease their campaigns and seek a judicial review of the approval, pursuant to sections 35 and 36 of the ECA. In this way, the public interest issues that the respondent's had promoted would continue to be ventilated.

In fact, it can be asserted that sections 35 and 36 were the statutory proxies of the freedom of expression in the way that the Act is cast. It would have been a different thing if there had been no such avenues, or if those that existed

51 Ibid.:para. 62.
52 Ibid.:para. 39.
53 Ibid.:para. 59.
54 Ibid.:para. 62.

had been permanently foreclosed. There is no doubt that the *Petro Props* Court unduly trumped constitutional property by the use of the freedom of expression because it did not correctly characterise the applicant's right as a constitutional right.

Judicial innovation: Recognising exceptions as user rights

This section of the paper addresses a judicial innovation by the Canadian Supreme Court in *CCH v Law Society of Upper Canada* in the recognition of exceptions as user rights.[55] In *CCH*, the Appellant Law Society maintained and operated the Great Library at Osgoode Hall in Toronto – a reference and research library with one of the largest collections of legal materials in Canada. The Great Library also provides a request-based photocopy service for Law Society members, the judiciary and other authorised researchers. Under this 'custom photocopy service' legal materials are reproduced by Great Library staff and delivered in person, by mail or by facsimile transmission, to requesters. The Law Society also maintains self-service photocopiers in the Great Library for use by its patrons.

In 1993, the respondent publishers commenced copyright infringement actions against the Law Society, seeking a declaration of subsistence and ownership of copyright in specific works, and a declaration that the Law Society had infringed copyright when the Great Library had reproduced a copy of each of the works in question. The publishers also sought a permanent injunction prohibiting the Law Society from reproducing these works, as well as any other works that they published. The Law Society denied liability and counterclaimed that copyright was not infringed when a single copy of a reported decision, case summary, statute, regulation or a limited selection of text from a treatise was made by the Great Library staff, or one of its patrons on a self-service copier, for the purpose of research. Inter alia, the Supreme Court held that, under section 29 of the Canadian Copyright Act, fair dealing for the purpose of research or private study did not infringe copyright. As stated above, the CCH Court confirmed what, in their opinion, the fundamental attribute of *copyright* was. The Court approved its opinion in *Théberge v Galerie d'Art du Petit Champlain Inc*,[56] where this attribute is set out thus:[57]

The Copyright Act is usually presented as a balance between promoting the public interests in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator … The proper balance among these and other public policy objectives lies not only in recognizing the creator's rights[,] but [also] in giving due weight to their limited nature ... Excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization.

55 [2004] 1 SCR 339. Hereafter *CCH*.

56 2002 SCC 34, [2002] 2 SCR 467.

57 Ibid.:para. 30–32. See also *Society of Composers, Authors and Music Publishers of Canada v Canadian Association of Internet Providers*, 2004 SCC 45.

The CCH Court formulated the concept that exceptions and limitations were user rights. According to the Court, –[58]

[b]efore reviewing the scope of the fair dealing exception under the Copyright Act, it is important to clarify some general considerations about exceptions to copyright infringement. Procedurally, a defendant is required to prove that his or her dealing with a work has been fair; however[,] the fair dealing exception is perhaps more properly understood as an integral part of the Copyright Act than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception[,] like other exceptions in the Copyright Act, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and user's interests, it must not be interpreted restrictively.

Options in constructing the public interest: The role of Namibian collecting societies in achieving a balance between public and private interests in the Namibian Copyright Act

There are many options in constructing the public interest in the Namibian Act. They range from a reform of the Act to a liberal interpretation of the exceptions in it. One type of reform that deserves special consideration involves the enhancement of the operations of collecting societies in Namibia. *Collecting societies* are organisations of right owners acting to promote and protect right owners' interests. Typically, these societies licence the work of their members to the public, lifting the administrative load from individual owners who may otherwise be burdened with tasks such as negotiating with each member of the public wishing to use their work.[59]

Section 56(3)(b) of the Namibian Act authorises the Minister of Information and Broadcasting to authorise collecting societies that meet certain requirements that include their constitution adequately providing for –

… the collection on behalf of, and accounting and distribution to, its members of royalties or other remuneration accruing by reason of the use of works or performances affecting rights pertaining thereto ...

Presently there are two such societies: the Namibian Society of Composers and Authors of Music (NASCAM), and the Namibian Reproductive Rights Organisation (NAMRO). Because reprography is concerned with photocopying, NAMRO is likely to play a significant role in the Namibian educational sector, since the right to reproduction is the exclusive right of the author most implicated. Section 56(6) and (7) of the Act restrict negotiations to licence works to collecting societies and to individual right owners who have joined a

58 Note 56, para. 48. The significance of the user right has been recognised and celebrated in a surfeit of academic commentary. Here is a sample: Gervais (2004:131); Ong (2004:150); Scassa (2004:89); Tawfik (2005:6).
59 See Ficsor (2002).

collecting society. Typically, collecting societies negotiate an individual licence on the basis of individual work, or a collective licence to cover all the works in a repertoire. It is important to note, therefore, that the price of licences that collecting societies negotiate with users of the work is relatively high because of the weak bargaining position of the latter. It is important to add that, very often, users of copyrighted works are unable to factor in the exceptions to copyright as a basis for negotiating a lesser licence value. Accordingly, it is useful for users of copyrighted works to note the existence of Copyright Tribunals established by section 35 of the Act, because arguments about the public interest in Namibian copyright law will be entertained by these Tribunals.

Concluding remarks

The framing of the public interest in copyright issues as fundamental human rights and freedoms has brought new dimensions to the quest for the public interest in copyright – akin to the realisation that intellectual property rights are human rights. There is no doubt that the nature and extent of interaction between the various human rights will continue to unravel for a while. Part of this process is the awareness that the Three-step Test is fatal to the public interest. To overcome this obstacle, national legislatures and judiciaries need to be conscious of the constitutional obligations imposed on the state for her citizens.

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