

# THE IMPLEMENTATION OF THE FAIR USE EXCEPTION INTO SOUTH AFRICAN COPYRIGHT LAW IN THE AGE OF ARTIFICIAL INTELLIGENCE: A *FEVER DREAM* OR A JUSTIFIED REFORM?

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## ABSTRACT

The Copyright Amendment Bill ('the Bill') seeks to introduce several changes to the copyright system; starting with the controversial introduction of the fair use exception to the South African landscape. This exception is used by jurisdictions such as the United States of America (US), thoroughly interpreted by courts to determine its parameters and allows for a broader list of uses of works ordinarily protected by copyright. Fair use is largely dependent on an array of open-ended factors, which have up until now been applied by courts on a case-by-case basis.

Critics of fair use cite legal uncertainty as the primary basis for their argument that South Africa should retain its fair dealing exception as it is currently formulated in the Copyright Act 98 of 1978. They further argue that fair dealing provides copyright holders with more control over the use of their works and view the list of acceptable uses of protected works under fair dealing as certain. Additionally, critics are of the view that, should fair use be introduced to the South African copyright system, it will be in direct contravention of the country's obligations under the Berne Convention and the TRIPS Agreement.

There is, however, evidence that the fair use exception has been successfully applied in jurisdictions such as the US and Singapore, and thus judicial guidance and other examples from South Africa's international counterparts could easily remedy these concerns. This article argues that the critics' views on fair use are an exaggeration and a tactic to have South Africa remain complacent in the face of global advancements made in respect of technology.

This article argues that fair use should be introduced to the South African copyright system, and will show that while this exception may be new to this jurisdiction, it will not be difficult to implement and for the courts to navigate. It argues further that fair use will

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serve copyright holders more in a landscape riddled with uncertainty as a result of emerging technology such as artificial intelligence (AI).

KEYWORDS: Fair dealing, fair use, copyright exceptions, artificial intelligence, Copyright Act, Copyright Amendment Bill

## 1. INTRODUCTION

For decades since its promulgation in 1978, the Copyright Act<sup>1</sup> ('the Act') and its accompanying regulations<sup>2</sup> have regulated copyright law in South Africa. The Act has since provided creators with exclusive rights to exploit, sell and modify their work. It has also facilitated access to those works for the public, albeit in limited instances.<sup>3</sup> However, the Act could no longer cater for emerging issues in an evolving legal landscape arising out of the digital era.<sup>4</sup> In response, the Department of Trade, Industry and Competition (DTIC) introduced the Copyright Amendment Bill 2017 ('the Bill') to align the outdated Copyright Act with contemporary technological developments and other areas where it has not been effective.<sup>5</sup> In the broad sense, the Bill seeks to address issues such as access to copyrighted works, transformative use, orphan works and the preservation of traditional knowledge.<sup>6</sup>

The most controversial reform arising out of the Bill is to replace the current fair dealing exception and insert in its place a fair use exception, which aims at covering an open-ended list of permitted uses similar, albeit more defined, to that used in the United States (US).<sup>7</sup> Artificial intelligence (AI) complicates traditional copyright norms. Ncube defines it as a powerful algorithm, machine or computer program that has, as a result of machine learning or neural networks, developed human-like capabilities.<sup>8</sup> These systems can create music, images or text by using material on which it was trained. The training data on which AI systems rely is integral to the article because it is still unclear whether such training amounts to fair dealing or copyright infringement.<sup>9</sup> This

1 Act 98 of 1978; All further references to 'the Act' is a reference to the South African Copyright Act, unless the text expressly provides otherwise.

2 Copyright Regulations 1978 (as amended by GN 1375 in GG 9807 of June 28, 1985), South Africa.

3 Section 6 of the Copyright Act 98 of 1978; See also T Pistorius 'Copyright' in C Visser & A Van der Merwe (eds) in *Law of Intellectual Property in South Africa* (2024) 227.

4 M Riby-Smith 'The good, bad and the Copyright Amendment Bill' (2017) 12 *Journal of World Intellectual Property* 216.

5 See clauses 1.1 and 1.2 of the 'Memorandum on the objectives of the Copyright Amendment Bill,' available at: <https://static.pmg.org.za/B13F-2017.pdf#page=37.09> (accessed on 7 November 2025); See also MA Foree 'Does article 4(1)(a) of the Marrakesh Treaty require limitation to adaptation rights? *Blind SA v Minister of Trade, Industry and Competition* (CCT 320/21) [2022] ZACC 33 (21 September 2022)' (2024) *Potchefstroom Electronic Law Review* 3.

6 See clause 1.1 of the Copyright Amendment Bill; See also Riby-Smith (n4) 216.

7 C Okorie 'Copyright, data mining and developing models for South African natural language processing' (2023) *PLJIP* 20, available at: [https://digitalcommons.wcl.american.edu%2Fresearch%2F117&utm\\_medium=PDF&utm\\_campaign=PDFCoverPages](https://digitalcommons.wcl.american.edu/research/117?utm_source=digitalcommons.wcl.american.edu%2Fresearch%2F117&utm_medium=PDF&utm_campaign=PDFCoverPages) (accessed on 11 March 2025).

8 C Ncube & D Oriakhogba et al *Artificial Intelligence and the Law in Africa* (2023) 1.

9 See the article by J Quang 'Does training AI violate copyright?' (2021) *Berkeley Technology Law Journal* 1407.

uncertainty stems from the limited permissible uses under fair dealing; unless the AI system is built for research, training may not be covered.

A core concern raised by critics is that fair use would result in legal uncertainty and that South Africa may be in contravention of several international agreements to which it is a party, ie, the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) and the Trade-Related Aspects of Intellectual Property (TRIPS) Agreement.<sup>10</sup> However, this article questions whether the ‘uncertainty’ upon which stakeholders rely is more apparent than it is real and whether this is justified or if it is a tactic to stall fair use’s introduction.

Fair dealing and fair use are copyright exceptions that allow for limited use of copyright-protected works without having to obtain permission from the holder of such copyright.<sup>11</sup> Fair dealing provides users with limited permissible uses, while fair use provides for uses that are not restrictively defined in the legislation.<sup>12</sup> There is also a dual approach which usually occurs as a result of legislative reform, such as what the Bill seeks to do in South Africa. This dual approach occurs when an open-ended and restrictive exception is introduced in the same national system with the aim of transitioning from the restrictive approach to a more flexible approach. It is noteworthy that such a dual system can easily become redundant since it more or less caters to the same purpose.<sup>13</sup>

This article presupposes that the law should adapt to any change in technology in a manner that is not superficial but is actually meaningful.<sup>14</sup> It evaluates whether fair use offers South Africa a more agile legal framework in the age of AI than the rigid and restrictive fair dealing.<sup>15</sup> It is against this background that this article considers whether the benefits of legal certainty outweigh the need for adaptability in the digital age. It further considers whether South African courts would struggle to apply fair use to AI-generated works where such a work relies heavily on a protected work to bring about a similar or different work. It is also considered whether the risk of legal uncertainty truly poses challenges to investment and how South Africa can navigate its obligations in terms of TRIPS and Berne Convention. In this regard, the article uses

10 See in this regard S Karjiker ‘Should South Africa adopt fair use? Cutting through the rhetoric’ (2021) 2 *Journal of South African Law* 244, also cited by M Malise ‘From fair dealing to fair use: Striking a balance between competing interests in South African copyright law’ (2023) (unpublished LLM thesis, University of Pretoria) 30.

11 R Shay (2016) ‘Fair deuce: An uneasy fair-dealing duality’ (2016) *De Jure* 106.

12 Ibid.

13 Ibid.

14 T Pistorius ‘The impact of digital copyright law and policy on access to knowledge and learning’ (2019) *Reading & Writing: Journal of the Reading Association of South Africa*, available at: <https://doi.org/10.4102/rw.v10i1.196> (accessed on 15 April 2025).

15 See in this regard B Zungu ‘The Copyright Amendment Bill and the right to property in section 25 of the Constitution: A discussion in support of expansive copyright exceptions and limitations for educational purposes’ (2024) *South African Intellectual Property Journal* 10 where she correctly points out: ‘[...] Educators cannot rely on fair dealing if their needs are not met under s 12(4) and s 13 regulations. While the Copyright Act includes provisions for educational use, its current structure is not fully compatible with the right to education, as it restricts access to essential learning resources and does not sufficiently support educators in their instructional roles.’

comparative insights from the US, Nigeria and Uganda to assess whether fair use can be domestically viable without undermining South Africa's global commitments. The US has adjudicated several cases of this nature, and while Nigeria and Uganda — like South Africa — are developing nations, similar cases in these jurisdictions are likely to be brought before the courts sooner than expected. In the former instance, this provides a real-time view of how courts deal with AI output and the training data on which it relies. In the latter instance, the similarities between the developing nations provide an anchor point for the assertions that fair use may not be problematic.

The case for the introduction of fair use in South Africa, in line with the proposal in the Bill, will commence with a doctrinal and functional comparison to the current fair dealing exception. The article then explores the application of fair use in jurisdictions such as the US, Nigeria and Uganda, before critically evaluating the compatibility of fair use with South Africa's international obligations. The article ultimately weighs the practical, legal and normative arguments for and against reform, in the context of a copyright landscape shaped by AI and global digital transformation.

## 2. OVERVIEW OF THE SOUTH AFRICAN COPYRIGHT EXCEPTIONS

Copyright, at its core, seeks to promote the creative expression of the creator and promote innovation for the public good.<sup>16</sup> It does this by providing creators with exclusive rights to their works for a limited period. Limitations and exceptions in the copyright space provides a necessary balance between the rights awarded to creators and access to the public in respect of such protected works.<sup>17</sup> In this regard, ss 12 to 19B of the Copyright Act contain exceptions that aim to curtail the economic rights awarded to authors under certain specified circumstances.<sup>18</sup> This has the consequence that if the contemplated use by the third-party user does not fall within the specified categories in the Act, it may result in copyright infringement. The Act provides for several exceptions, but this article places its focus on s 12(1), which deals with instances where the use of literary and musical works may be considered fair. The next section of the article explores this provision and contemplates how it may respond to AI training.

### 2.2 Fair dealing in South Africa

The term 'fair dealing' is not defined in the Copyright Act. Broadly, however, Okorie defines it as a statutory limitation or exception to the exclusive rights awarded to copyright owners.<sup>19</sup> There is a common misconception that fair

<sup>16</sup> T Pistorius 'Copyright' in C Visser & A Van der Merwe (eds) in *Law of Intellectual Property in South Africa* (2024) 188.

<sup>17</sup> Ibid.

<sup>18</sup> According to Visser et al *Law of Intellectual Property in South Africa* (2024) 257, the fair dealing exception becomes relevant once a litigant has established infringement.

<sup>19</sup> CI Okorie 'The fair dealing/fair use landscape for artificial intelligence innovation and computational research in Africa' (2025) *International Review of Law, Computers & Technology* 10.

dealing is a concept not many jurisdictions adhere to.<sup>20</sup> This is not the case; in fact, other than South Africa, several jurisdictions apply the fair dealing exception, including the UK, Singapore,<sup>21</sup> India, Australia,<sup>22</sup> New Zealand<sup>23</sup> and Canada.<sup>24</sup> The exceptions or limitations allow for an interruption in delineated instances of the exclusive rights awarded to creators to exploit their works in terms of the Act without having to obtain the permission of the copyright owner or holder.<sup>25</sup> The rationale behind fair dealing is to establish a balance between the economic and personal interests of copyright holders while facilitating access, freedom of expression, education and the culture of the public.

It is therefore important for users to ascertain *first* whether a contemplated use is allowed *or* not. In other words, if the use is *not* listed, fair dealing cannot be used as a defence against what would normally constitute copyright infringement.<sup>26</sup> It appears that it is irrelevant for a person committing the infringement to be aware of such an act.<sup>27</sup> Fair dealing finds its origin in the Imperial Copyright Act of 1911, where specific provision was made for summaries contained in newspapers; the exception has since expanded a bit.<sup>28</sup> Its evolution is the result of the 1992 amendment to the Act<sup>29</sup> into which is now contained in s 12 of the current Copyright Act:<sup>30</sup>

Copyright shall not be infringed by any *fair dealing* if a literary or musical work is used solely, and then only to the extent reasonably necessary –

- a) for the purposes of research or private study by, or the personal or private use of, the person, using the work; or
- b) for the purposes of criticism or review of that work or of another work; or

20 RM Shay 'Exclusive rights in news and the application of fair dealing' (2014) *South African Mercantile Law Journal* 592.

21 See Chapter 63 of the Singapore Statutes which regulates Copyright in Singapore.

22 See ss 41, 41A, 42, 43 of the Australian Copyright Act of 1968 which covers various aspects of copyright exceptions including research, study, parody and satire, reviews, and criticism; See also the Australian Law Reform Commission [on] Copyright and the Digital Economy: Final Report (2013) (ALRC Report) 95.

23 Sections 42 and 43 of the Copyright Act 143 of 1994 outlines several fair dealing exceptions, which includes news reporting and private study. Several factors are considered to determine if the fair dealing standards are met in New Zealand, including the purpose of the use, the effect on the market or the value of the work copied.

24 See s 29 of the Canadian Copyright Act of 1985 which allows for copyrighted material to be used in respect of research, private study, education, satire and parody, amongst other aspects.

25 S Karijker 'Should South Africa adopt fair use? Cutting through the rhetoric' (2021) *Journal of South African Law* 242; see s 12(1) of the Copyright Act 1978; see C Okorie 'Copyright, data mining and developing models for South African Natural Language Processing' (2023) *JSJIP* 20: 'Section 12(1) [of the Copyright Act] refers to an exhaustive list of activities ('dealing'), which are to be considered within the parameters of fairness.'

26 S Karijker 'Should South Africa adopt fair use? Cutting through the rhetoric' (2021) *Journal of South African Law* 242; See also *Moneyweb (Py) Ltd v Media 24 Ltd* 2016 4 SA 591 (GJ) at para 111.

27 IE Okonkwo 'NFT, copyright and intellectual property commercialisation' (2021) 29 *International Journal of Law and Information Technology* 299–300.

28 See s 2(1)(i) of the Imperial Copyright Act 1911; See also R Shay 'Fair deuce: An uneasy fair-dealing duality' (2016) *De Jure* 105–117.

29 See s 12 of Act 125 of 1992, which replaced, at the time s 14 of the 1978 Act; see also R Shay 'Fair deuce: An uneasy fair-dealing duality' (2016) *De Jure* 106.

30 Section 12(1) of the Copyright Act 1978.

- c) for the purpose of reporting current events – in a newspaper, magazine or similar periodical; or by means of broadcasting or in a cinematograph film.<sup>31</sup>

In South Africa, the presence of fair dealing in a given dispute may be resolved by employing a two-stage test: (a) purpose of the use and (b) fairness. The purpose, on the one hand, must align itself with the permissible uses in the Act that do not constitute infringement, such as personal or private use of a musical work.<sup>32</sup> Fairness, on the other hand, is not explicitly defined in the Act.<sup>33</sup> The court in *Moneyweb v Media24* correctly points out that:

Fairness is an elastic concept. A determination of “fair dealing” involves a value judgment and will depend on the particular facts or circumstances at the time of the dealing.<sup>34</sup>

The judgment illustrates how inexperienced the courts are in determining what constitutes fair dealing. Despite developing its own factors based on s 107 of the US Copyright Act 1976 in *Moneyweb*, the court held that such determinations hinge on the actual matter before the court.<sup>35</sup> This is problematic for several reasons; for one, the critique levelled against the proposed fair use exception is based on the notion that it would bring about uncertainty. It appears from *Moneyweb* that uncertainty was, in any event, present.<sup>36</sup>

This analysis thus far suggests that fair dealing’s function as a mechanism to balance the right of the creator, ie, to exploit the work, while facilitating access to copyrighted material to the public has run its course. The article’s argument here is based on the fact that the exception presents courts with a closed list of permissible uses. In the age of AI, this could translate into any use of copyrighted works will constitute copyright infringement. This is so since the use of those works for AI training falls outside the scope of allowed uses. The exception here could be that the AI system caters specifically for education or news reporting. However, this cannot be enough given South Africa’s commitment to updating its copyright legislation. If copyright aims to address access to copyrighted works by the public and to advance innovation, is that the appropriate line to draw when it comes to training AI systems? In other words, where appropriate guardrails are established, and remuneration

31 The specific reference in s 12(1) of the Copyright Act to literary and musical works should not be taken that the provision is limited to those works only; but must be understood to also apply *mutatis mutandis* to all nine categories of works listed in the Act. In this respect it is also appropriate to mention the limitations in respect of the application of fair dealing in terms cinematograph films, sound recordings and computer programs. These works are not eligible to be used for private study, personal or private use. It further does not apply to programs-carrying signal.

32 IE Okonkwo ‘NFT, copyright and intellectual property commercialisation’ (2021) 29 *International Journal of Law and Information Technology* 299–300.

33 Zungu (n15) 9.

34 *Moneyweb v Media24* para 114; Zungu (n15) 9.

35 See *Moneyweb* at paras 103, 113–115; See also T Awad ‘Toward a South African fair use standard’ (2024) 57 *Vanderbilt Journal of Transnational Law* 561.

36 *Moneyweb v Media24* para 103.

systems for works used are accounted for, there should be an encouragement of this type of training.<sup>37</sup>

Fair use and fair dealing should not be seen as substitutes for each other.<sup>38</sup> In fact, they differ exponentially in scope and application. As discussed, fair dealing allows for a departure from ordinary copyright rules under circumstances outlined by law.<sup>39</sup> In this way, a benefit of the fair dealing exception is its transparency and extra-judicial clarity, which means the circumstances under which copyrighted works may be used are clear by delineating specific categories of use.<sup>40</sup> Its predictability provides any creator with a sense of security since the boundaries of acceptable use are easily ascertainable. The problem with this line of thinking is clear from the amount of case law that has practically tested the apparent clarity upon which critics rely.

To date, the only case that has given the court an opportunity to evaluate the effectiveness of the fair dealing under s 12(1) was the court in the *Moneyweb (Pty) Ltd v Media24 Ltd & another*,<sup>41</sup> which dealt with an issue between *Moneyweb*, an online media platform with a focus on reporting on investments, finance and media-related news, and Media24, South Africa's largest print and digital media group.<sup>42</sup> Media24's print and online publications publish articles on an array of diverse topics, which could be considered direct competition for *Moneyweb* since it, too, is an online media outlet.<sup>43</sup> *Moneyweb* sought an order to have Media24 remove articles which they allege Media24 published unlawfully.<sup>44</sup> The *crux* of this case, for purposes of this article,<sup>45</sup> is around whether the parts of the published works, owned by *Moneyweb*, and used by Media24, were substantially reproduced to the point that they can no longer be viewed as fair dealing. For clarity, the defence raised by Media24 was that its use of the copyrighted works constituted 'fair dealing', in terms of the

37 The purpose of this article is *not* to simultaneously argue for the protection of AI-generated output.

38 See Karijker 'Should South Africa adopt fair use? Cutting through the rhetoric' (2021) *Journal of South African Law* at 241 where he states that '[i]t should immediately be noted that the overwhelming majority of jurisdictions employ a system of fair dealing, so it would hardly be appropriate to create the impression that fair use is a readily accepted alternative to fair dealing'.

39 Y Mupangavanh 'Copyright law and human rights: *Blind SA v Minister of Trade, Industry and Competition* and its potentially far-reaching implications' (2024) *South African Journal on Human Rights* 2; Dean & Deyer *Introduction to Intellectual Property in South Africa* (2024) 48–9.

40 RM Shay 'Fair deuce: An uneasy fair dealing-fair use duality' (2016) *De Jure* 106.

41 [2016] 3 ALL SA 193 (GJ) and even this case was decided before the emergence of AI and thus the manner in which this provision was evaluated is not useful for *transformative works*, or those works that are created through AI output (unsettled debate).

42 *Moneyweb (Pty) Ltd v Media24 Ltd & another* [2016] 3 ALL SA 193 (GJ) 2.

43 *Moneyweb* (2016) 2.

44 *Moneyweb* (2016) 3.

45 The *Moneyweb* (2016) case dealt with other important issues such as authorship and originality in terms of the Copyright Act, 1978.

several provisions of the Copyright Act of 1978, including ss 12(1)(c)(i)<sup>46</sup> and 12(8)(a)<sup>47</sup> and thus no copyright was violated.

In weighing up the factors to determine if the fair dealing defence can be upheld, the court acknowledged the lack of authority on the parameters of the application of fair dealing in South Africa. The court indicated that there is a need to rely on foreign law, specifically the case of *Ashdown v Telegraph Group*, to make its findings.<sup>48</sup> This comparison did not result in the adoption of the test, as the court acknowledged the incompatibility of the fair dealing test with the specificity of South African law.<sup>49</sup> The court emphasised the need to interpret provisions of the Copyright Act through a constitutional prism, which requires any provision to be consistent with the Constitution, failing which, it will be rendered inconsistent and invalid.<sup>50</sup> The court held that the factors to be considered for a finding based on s 12 in this case were the following:

- a) the nature of the medium in which the works have been published;
- b) if the original work has been published;
- c) the time that has lapsed between the publication of the original work and the subsequent work;
- d) the amount both qualitatively and quantitatively of the original work taken by the subsequent work;
- e) and the extent of the acknowledgement given by the authors of the subsequent work to the original.<sup>51</sup>

Admirably, the court acknowledged that it struggles with defining fair dealing precisely.<sup>52</sup> This supports the argument in this article that fair dealing is both restrictive and vague in its phrasing and application. This may be problematic in the digital space, and a failure to define its parameters appropriately may render its application obsolete. AI systems have predominantly been trained on works from the Global North.<sup>53</sup> This means foreign perspectives and technical biases are more evident, ensuring that Africa remains underrepresented in

46 This part of the paper specifically looks at subsection (c) of the Act as the rest of the fair dealing provision already appears elsewhere in this article. This subsection holds that: 'for purposes of reporting current events – (i) in a newspaper, magazine or other periodical; or (ii) for purposes of broadcasting or in a cinematograph film; provided that, in the case of paragraphs (b) and (c) [mentioned elsewhere in the manuscript], the source shall be mentioned as well as the author if it appears on the work', see *Moneyweb v Media24* para 101 (or pg 51).

47 This section of the Copyright Act 1978 reads as follow: 'No copyright shall subsist in official text of a legislative, administrative or legal nature, or in official translations of such texts, or in speeches of a political nature or in speeches delivered in the course of legal proceedings, or in the news of the day that are mere items of press information', also see *Moneyweb v Media24* para 56.

48 *Ashdown v Telegraph Group* 2001 EWCA Civ 1142, at para 638b–c; see also Awad (n35) 541.

49 *Moneyweb* (2016) at para 106.

50 See s 172(1)(a) of the Constitution of the Republic of South Africa, 1996.

51 *Moneyweb* (2016) para 113.

52 The court in *Moneyweb* agreed with the authors Laddie, Prescott & Vitoria of *The Modern Law of Copyright and Designs* (2000) 611–627 in this respect.

53 A Rens et al 'Clarifying copyright to enable AI research in Africa' Research ICT Africa, available at: <https://researchictafrica.net/research/ai-and-intellectual-property-brief-1/> (accessed on 6 November 2025).

both input and output data.<sup>54</sup> A further implication of a failure to include text-and-data-mining (TDM) exceptions to allow for AI training is that system developers will invest in AI systems in jurisdictions with more progressive laws.<sup>55</sup> Awad proposes that the lack of cases dealing with fair dealing in South Africa is a result of the culture and that it appears, in his view, that there is a certain respect by South Africans for the moral rights and attribution of the author.<sup>56</sup> It is unclear how this view was formulated because research shows South Africa has some of the highest piracy figures in Africa.<sup>57</sup> Thus, the question arises whether fair dealing is as certain as critics argue when it has been tested only once, leaving a *lacuna* in the law.

The lack of cases before the court may also reflect the financial barriers faced by many creators<sup>58</sup> who face significant financial constraints and often do not have the means to afford the costs associated with commercial litigation.<sup>59</sup> This is another indication that alleged certainty could also be a result of financial disparities, forcing creators to relinquish rights in terms of a protected work. Be that as it may, while fair dealing exceptions are perceived to be more certain and prominent, the courts are not able to illustrate with necessary certainty their application. The question arises whether this exception remains useful and inclusive in a world where technology is making inroads and challenging traditional notions of creation. The article questions whether, given the absence of case law, apart from *Moneyweb*,<sup>60</sup> which did not deal with fair dealing in a meaningful way, the argument can be sustained that this exception operates as originally intended.

Fairly recently, the Copyright Act was scrutinised for its inadequate exceptions insofar as access to works for visually impaired and blind persons was concerned.<sup>61</sup> The Constitutional Court in *Blind SA v Minister of Trade, Industry and Competition* held that the current provisions of the Copyright Act remain prohibitive of a free conversion of works under alternative formats and

54 Ibid.

55 Ibid.

56 Awad (n35) 541.

57 Staff writer 'South Africa ranked in top 50 pirating countries in the world' *Mybroadband*, available at: <https://mybroadband.co.za/news/internet/174412-south-africa-ranked-in-top-50-pirating-countries-in-the-world.html> (accessed on 10 November 2025); See also S Karjiker 'Copyright infringement and game theory: The law and its limits' (2017) 28 *Stellenbosch Law Review* 152; See also J Vermeulen 'Warnings about piracy' *MyBroadband*, 12 August 2025, available at: <https://mybroadband.co.za/news/broadcasting/606351-warning-about-piracy-in-south-africa.html> (accessed on 10 November 2025); Staff writer 'Why MultiChoice is fighting the war on content piracy' Multichoice, available at: <https://www.multichoice.com/news/why-multichoice-is-fighting-the-war-on-content-piracy> (accessed on 10 November 2025).

58 The article uses creators generally to refer to authors, musicians, or poets and actors.

59 De Castro et al 'What does it cost to defend your IP rights?' (2013) *WIPO Magazine*, available at: <https://www.wipo.int/en/web/wipo-magazine/articles/what-does-it-cost-to-defend-your-ip-rights-38493#:~:text=Mechanisms%20used%20to%20resolve%20disputes&text=The%20estimated%20duration%20of%20court,productivity%20and%20missed%20business%20opportunities> (accessed on 8 November 2025).

60 See the discussion of *Moneyweb* above (n33).

61 *Blind SA v Minister of Trade, Industry and Competition* (14996/21) [2021] ZAGPPHC 871; 2021 BIP 14 (GP) (7 December 2021) para 2; See also Mupangavanh (n39) 3.

cites a WIPO report that indicates that less than 7% of books are available in accessible formats for persons with visual and print disabilities.<sup>62</sup> The court held that the Copyright Act's provisions were discriminatory against persons with disabilities because of their failure to expressly provide for accessible format shifting provisions.<sup>63</sup> This resulted in certain sections of the Copyright Act being declared inconsistent with the Constitution and invalid to the extent that they do not make provision for works to the aforementioned class of persons.<sup>64</sup> Furthermore, the court also held that South Africa failed in aligning its copyright laws through establishing provisions designed to guarantee visual and print disabled persons access to copyrighted works as intended in the Marrakesh Treaty.<sup>65</sup> Despite not being a party to the Marrakesh Treaty, Ncube and Samtani maintain that the treaty is relevant because it seeks to promote international best practices, and could propel South African law to be more inclusive by providing access to works for the abovementioned categories of persons.<sup>66</sup> They further importantly point out that due to the Constitutional Court's decision, South Africa is better positioned to accede to the Marrakesh Treaty since no legal barriers to such accession exist following *Blind SA*.<sup>67</sup>

Ncube and Reid<sup>68</sup> correctly point out that when applying fair dealing and fair use clauses to provide accessible works to persons with disabilities, the limits are clear.<sup>69</sup> The former clauses are exhaustive and may limit the range of uses that can be justified for accessibility, while the latter clauses are non-exhaustive and can provide for accessible works despite the clauses not listing disability explicitly.<sup>70</sup> The authors acknowledge that fair use clauses are often worded broadly to include 'the making and dissemination of accessible format copies for the benefit of persons with disabilities,' where fair dealing often lacks such an accommodation.<sup>71</sup> It is thus clear that fair dealing is more restrictive and allows for specific uses, and fair use is more flexible and allows for more opportunity for both organisations and users to create works that are accessible.

62 *Blind SA* para 5.

63 *Blind SA* paras 70–74; See also C Ncube & S Samtani 'Copyright, disability rights, and the Constitution: *Blind SA v Minister for Trade, Industry and Competition*' (2023) 13 *Constitutional Court Review* 471; See also Zungu (n15) 6.

64 *Blind SA* para 31; See also D Nicholson 'Submission on Copyright Amendment Bill [B13d-2017] – 17 January 2023' Parliament Monitoring Group, available at: [https://static.pmg.org.za/Annex\\_B\\_Scholarly\\_Horizons\\_Denise\\_Nicholson\\_Submission\\_CAB.pdf](https://static.pmg.org.za/Annex_B_Scholarly_Horizons_Denise_Nicholson_Submission_CAB.pdf) (accessed on 14 November 2025); D Nicholson 'Unpacking the positive sides of fair use for society and creatives at large' *Daily Maverick* (21 December 2023), available at: <https://www.dailymaverick.co.za/article/2023-12-21-unpacking-the-positive-sides-of-fair-use-for-society-and-creatives-at-large/> (accessed on 19 July 2025).

65 *Blind SA* paras 4–5; See also Mupangavanhu (n39) 3.

66 Ncube & Samtani (n63) 474.

67 Ncube & Samtani (n63) 493.

68 C Ncube & B Reid 'Scoping study on access to copyright protected works by persons with disabilities' (2019) *World Intellectual Property Organization*, available at: <https://ssrn.com/abstract=3371039> (accessed on 13 November 2025).

69 Ncube & Reid (n68) 20.

70 Ncube & Reid (n68).

71 Ncube & Reid (n68) 21.

The limitations under fair dealing may also limit the extent to which copyright law will allow AI training to occur, since the South African law does not explicitly allow for it, except in the instances mentioned above such as where an AI system is developed for research purposes. This shows that fair dealing may not be equipped for contemporary challenges, which include the ability to respond proactively to further innovation in South Africa. There are constant advancements made in respect of technology, which requires copyright law to adapt and reassess how the exceptions apply in the broader context of creativity, social media platforms, but also emerging technology such as AI. In this context, it has also been considered whether it is sensible to continuously re-evaluate copyright exceptions or laws in the face of the digital revolution or whether it is time to adopt a proactive approach and incorporate a doctrine into South African law, which caters for future innovation due to its open-ended nature.

The next section of the paper evaluates the proposed fair use model briefly. It seeks to establish how this model seeks to update copyright law in the digital age.

## 2.2 Copyright Amendment Bill's fair use model

The Bill seeks to introduce fair use to the Copyright Act under s 12A of the Bill.<sup>72</sup> The legislators drafted this contemplated provision to include permissible uses such as research, teaching, criticism and review.<sup>73</sup> This encapsulates the original fair dealing provision. However, in addition to those mentioned permitted uses, the Bill also includes several other categories of instances where protected works may be used, including comment, satire, caricature, homage and pastiche.<sup>74</sup>

The Bill also includes a test to determine whether use of a protected work amounts to fair use or not. The test is laid out as follow:

72 'In addition to uses specifically authorised, fair use in respect of a work or the performance of that work, for purposes such as the following, does not infringe copyright in that work: (i) Research, private study or personal use, including the use of a lawful copy of the work at a different time or with a different device; (ii) criticism or review of that work or of another work; (iii) reporting current events; (iv) scholarship, teaching and education; (v) comment, illustration, parody, satire, caricature, cartoon, tribute, homage or pastiche; (vi) preservation of and access to the collections of libraries, archives and museums; and (vii) ensuring proper performance of public administration.'

73 See s 12A(a)(i) of the Copyright Amendment Bill.

74 Ibid at (v); See also the work of P Mezei et al 'Opinion of the European Copyright Society on the scope of the pastiche exception in EU Copyright Law (*CG and YN v Pelham GmbH and Others, Case C-590/23*)' (2025) *International Review of Intellectual Property and Competition* 382 defines pastiche as '[a term that] cannot be understood as a mere imitation of an artistic style and it need not entail an explicit interaction with the original work. The presence of humour or mockery is not a necessary requirement for the application of the pastiche exception. Also, the expression resulting from the exercise of the pastiche exception need not itself be an original work.'

(b) In determining whether an act done in relation to a work constitutes fair use, all relevant factors shall be taken into account, including but not limited to— (i) the nature of the work in question; (ii) the amount and substantiality of the part of the work affected by the act in relation to the whole of the work; (iii) the purpose and character of the use.<sup>75</sup>

The proposed expanded exception retained most of the allowed categories in which copyrighted works may be used, including a number of new categories. It is hardly inconceivable that in a modern society where new works are created frequently that an exception should cover those works. It is clear that the legislature aims to promote innovation and growth in this creative economy. However, authors are of the view that a great deal of uncertainty could be created by the potential 'dual' applicability of fair use.<sup>76</sup> This denotes the dual function of providing creators with incentives to fuel further innovation while advancing public welfare through allowing the public access to protected works in defined instances without having to obtain permission from the rights holder.<sup>77</sup> Further concerns for this introduction are raised in respect of the economic harm copyright holders may face if it is introduced. This concern is based on the perceived wide scope of fair use, arguing that copyright holders may have less rights in their works and this could lead to a loss in income. This narrative is then also used to insinuate that holders of copyright may lose royalty payments due to the potential exploitation of fair use.<sup>78</sup> In this instance, the so-called value gap is used, whereby musicians are undercompensated for their contribution to the platform, YouTube, while its owners reap the benefits from the uploaded content on its platform.<sup>79</sup>

South Africa is a founding member of the Agreement Establishing the World Trade Organization (WTO) and, through this membership, is a party to both the TRIPS Agreement and the Berne Convention. On this basis, the proposed fair use provision in the Bill is rejected due to concerns regarding a breach of international obligations under the aforementioned agreements.<sup>80</sup> In terms of the Berne Convention, the three-step test formulated in art 9(2), which previously *only* granted holders of copyright a right for their work not to be reproduced, has been extended to include all exclusive rights by a copyright holder. This was done by art 13 of the TRIPS Agreement, accompanied by a reiteration of art 9(2), which broadened the limitation and is now considered an international standard for limitation. These rights afforded to copyright holders

75 'Including whether— (aa) such use serves a purpose different from that of the work affected; and (bb) it is of a commercial nature or for non-profit research, library or educational purposes; and (iv) the substitution effect of the act upon the potential market for the work in question; (c) For the purposes of paragraphs (a) and (b) the source and the name of the author shall be mentioned.'

76 R Shay 'Fair deuce: An uneasy fair dealing-fair use duality' (2016) *De Jure* 105.

77 D Nicholson 'Why 'fair use' is so important for South African copyright law' (2018) *Wits Library*, available at: <https://www.wits.ac.za/news/latest-news/in-their-own-words/2018/11/why-fair-use-is-so-important-for-south-african-copyright-law.html#:~:text=This%20framework%20allows%20copyright%20users,the%20monopoly%20must%20have%20limits> (accessed on 24 July 2025).

78 Karjiker (n10) 240.

79 Lawrence 'Addressing the value gap in the age of digital music streaming' (2019) *Vanderbilt Journal of Transnational Law* 511–12; See also Karjiker (n10) 248.

80 See full list of signatories of the Convention here: [https://www.wipo.int/wipolex/en/treaties>ShowResults?search\\_what=C&treaty\\_id=15](https://www.wipo.int/wipolex/en/treaties>ShowResults?search_what=C&treaty_id=15) (accessed on 12 March 2025).

may be limited but only in instances where certain requirements are met, ie, it must be confined to special cases, it must not be in conflict with ordinary exploitation of the interest of holders and must not unduly prejudice holders of copyright.

### 3. SOUTH AFRICA'S INTERNATIONAL OBLIGATIONS

This section of the article explores South Africa's international obligations in terms of both the TRIPS Agreement to which it is bound, due to it being a party to the agreement that established the WTO.<sup>81</sup> This section also evaluates the same, in respect of, the Berne Convention. The aim here is to determine whether AI training is possible with the introduction of fair use and how the three-step test's interpretation by the WTO panel<sup>82</sup> and academic commentators may assist in justifying this proposed introduction in South Africa.

#### 3.1 General overview

The Berne Convention was concluded to establish a minimum standard framework for the copyright protection of literary, musical and artistic works across its member states.<sup>83</sup> The convention promotes authors' rights and their recognition internationally. The primary intent is to provide a uniform framework for the protection of the rights of copyright holders and to determine control and use, irrespective of nationality and where the publication of the work first occurred.<sup>84</sup> In addition, the Berne Convention contains a standard test against which member states are expected to measure their exceptions to copyright.

The TRIPS Agreement is a legal agreement between members of the WTO aimed at establishing minimum standards for the regulation by national governments of different IP forms.<sup>85</sup> The rationale behind the TRIPS Agreement is to integrate intellectual property into the multilateral trading system to minimise trade distortions and impediments. TRIPS includes a similar test aimed at supposedly augmenting the exception from the Convention.<sup>86</sup> Nicholson points out that these instruments provide users access to copyright works to unlock global knowledge that users 'can use, re-use, remix, adapt, translate, and create new transformative works' thereby

81 O Dean *Gift of Multiplication – Essays on the Copyright Amendment Bill* (2023) 36.

82 WTO Panel on United States – Section 110(5) of the US Copyright Act, available at: [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds160\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm) (accessed on 11 November 2025).

83 See *Moneyweb v Media24* para 69; see also OH Dean *Handbook of South African Copyright Law* (updated 2015) as held in *Moneyweb* paras 1-98B, 198-C.

84 See Preamble of Berne Convention, available at: [https://www.wipo.int/wipolex/en/text/283698#P82\\_10336](https://www.wipo.int/wipolex/en/text/283698#P82_10336) (accessed on 14 April 2025).

85 See art 1(3) of the TRIPS Agreement, available at: [https://wto.org/english/tratop\\_e/intel2\\_e.htm#copyright](https://wto.org/english/tratop_e/intel2_e.htm#copyright) (accessed on 21 April 2025).

86 See the TRIPS Agreement, comprehensively contained on the WTO website, available at: [https://wto.org/english/tratop\\_e/intel2\\_e.htm#copyright](https://wto.org/english/tratop_e/intel2_e.htm#copyright) (accessed on 21 April 2025).

continuously contributing to ‘the ever-changing kaleidoscopic world we live in’.<sup>87</sup>

This article specifically aims to highlight the flexibility Berne and TRIPS provide in respect of developing nations such as Nigeria, Uganda and South Africa. However, whether such flexibility is evident from the national laws will only briefly be considered in this article. Berne and TRIPS specifically provide that these nations need not apply their provisions rigidly but may adapt rules to fit the domestic needs of the developing nations’ copyright systems.<sup>88</sup> However, several academic voices<sup>89</sup> are of the view that including a less restrictive copyright exception may directly violate the international obligations of these jurisdictions. This part of the article will evaluate the three-step test contained in Berne and TRIPS to ascertain if there is cause for concern should South Africa adopt the fair use doctrine.<sup>90</sup>

### 3.2 Three-step test under the Berne Convention and TRIPS Agreement

The three-step test is integral to international copyright law. It originated in art 9(2) of the Berne Convention and was later adopted with modification in art 13 of the TRIPS agreement.<sup>91</sup> The test establishes a mandatory copyright exception to which all members of the convention must adhere. This test broadly sets out specific instances of when a protected work may be used. The three-step test in Berne is set out in the following broad terms:

It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain *special* cases, provided that such reproduction does not conflict with a *normal exploitation* of the work and does not *unreasonably prejudice* the legitimate interests of the author.<sup>92</sup>

<sup>87</sup> See D Nicholson ‘Submission on Copyright Amendment Bill [B13d-2017] –17 January 2023’ Parliament Monitoring Group, available at: [https://static.png.org.za/Annex\\_B\\_Scholarly\\_Horizons\\_Denise\\_Nicholson\\_Submission\\_CAB.pdf](https://static.png.org.za/Annex_B_Scholarly_Horizons_Denise_Nicholson_Submission_CAB.pdf) (accessed on 14 November 2025); D Nicholson ‘Unpacking the positive sides of fair use for society and creatives at large’ *Daily Maverick* (21 December 2023), available at: <https://www.dailymaverick.co.za/article/2023-12-21-unpacking-the-positive-sides-of-fair-use-for-society-and-creatives-at-large/> (accessed on 19 July 2025).

<sup>88</sup> See art 32(2)(ii) of the Berne Convention where the provision states: ‘... Countries outside the Union which become party to this Act shall, subject to paragraph (3), apply it with respect to any country of the Union not bound by this Act or which, although bound by this Act, has made a declaration pursuant to Article 28(1)(b). Such countries recognize that the said country of the Union, in its relations with them: (ii) subject to Article I (6) of the Appendix, has the *right to adapt* the protection to the level provided for by this Act.’ [emphasis added]

<sup>89</sup> See in this regard T Schonwetter ‘The “fair use” doctrine and the implications of digitizing for the doctrine from a South African perspective’ (2006) *The Southern African Journal of Information and Technology*; Karjiker (n10).

<sup>90</sup> It must also be noted that cognisance is taken in this article of the jurisdictional differences that exist between SA and the US, and thus several revisions may be necessary to bring this exception in line with the needs of a ‘developing’ nation.

<sup>91</sup> C Geiger, DJ Gervais & M Sentfleben ‘The three-step test revisited: How to use the test’s flexibility in national copyright law’ (2013) *American University International Law Review* 601.

<sup>92</sup> See art 9(2) of the Berne Convention, available at: <https://www.wipo.int/wipolex/en/text/283693> (accessed on 9 April 2025); This article focuses on subsection 2 of this Berne test [emphasis added].

Article 13 of the TRIPS Agreement sets out the three-step test in the following manner:

Members shall confine limitations or exceptions to exclusive rights to certain *special cases* which do not conflict with a *normal exploitation* of the work and do not unreasonably prejudice the legitimate interests of the right holder.<sup>93</sup>

The wording of this exception contained in TRIPS is almost identical to that contained in the Berne Convention and therefore unsurprisingly, the criticism that follows the phrasing and restrictiveness of Berne follows that of TRIPS. Additionally, although the content of the TRIPS Agreement is described as the ‘highest common denominator amongst industrialised countries as of 1991’, it has resulted in falling short of addressing contemporary challenges that emerged as a result of technology.<sup>94</sup> Ginsburg notes that the WTO’s response to the dispute arising out of s 110(5) of the US Copyright Act was the first time an international adjudicative body provided a detailed interpretation of this test.<sup>95</sup> Schönwetter notes,<sup>96</sup> however, that the decision binds only the parties to the dispute, but value can be derived from the interpretation of the steps.<sup>97</sup>

The *first* step requires copyright to be confined to ‘certain special cases’.<sup>98</sup> This merely requires a well-defined and narrow scope and application of the work. The panel also indicated that not every possible use must be listed, but the reach must be determinable.<sup>99</sup> The *second* step requires that exceptions must not ‘conflict with normal exploitation’ of such work.<sup>100</sup> This step requires that the right holder and other users not directly compete commercially, which means that the manner in which the rights holder normally derives value for the work cannot be the same as other users. The *third* step mandates that there is no ‘unreasonable prejudice to legitimate interests’ of the rights holder.<sup>101</sup> This step appears stricter comparatively and refers to significant or unreasonable economic harm or loss of income for the copyright holder and the denial of justifiable non-monetary interests.<sup>102</sup> This test is cumulative in nature, which

93 See art 13 of the TRIPS Agreement, available at: [https://wto.org/english/tratop\\_e/intel2\\_e.htm#copyright](https://wto.org/english/tratop_e/intel2_e.htm#copyright) (accessed on 21 April 2025).

94 J Gervais ‘The TRIPS Agreement and the Doha Round: History and impact on economic development’ in P Yu (ed) *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age* (2007) 24–50.

95 J Ginsburg ‘Toward a supranational copyright law? The WTO Panel decision and the “three-step test” for Copyright Exceptions’ (2001) 19 *Columbia Public Law Research Paper* 2.

96 T Schönwetter ‘The three-step test within the copyright system’ available at: <http://pcf4.dec.uwi.edu/viewpaper.php?id=58&print=1> (accessed on 14 November 2025).

97 Geiger, Gervais & Senglleben (n91) 4.

98 WTO Panel (n82) 32; The first step as contained in art 9(2) of Berne and art 13 of TRIPS simply means exceptions must be defined properly and narrow enough in scope and application, per T Schönwetter ‘The three-step test within the copyright system’, available at: <http://pcf4.dec.uwi.edu/viewpaper.php?id=58&print=1> (accessed on 14 November 2025).

99 WTO Panel (n82) 32; T Schönwetter ‘The three-step test within the copyright system’ available at: <http://pcf4.dec.uwi.edu/viewpaper.php?id=58&print=1> (accessed on 14 November 2025) 3.

100 WTO Panel (n82) 44.

101 WTO Panel (n82) 57.

102 Ibid.

means if an exception fails to meet all three steps, it is considered non-compliant and will not be permitted.<sup>103</sup>

The convoluted or vague nature of this exception and whether its existence is necessary in the grand scheme of how individual members have regulated copyright law will not be thoroughly detailed in this article.<sup>104</sup> However, it is important to ascertain how this test has been interpreted to determine if fair use and AI training are possible. The test requires a value judgement to be made to assess the limitations and exceptions applicable to the exclusive rights of copyright holders' works while ensuring those exclusive rights are not unduly restrictive to the public's use of those works.<sup>105</sup>

The Max Planck declaration urged for the restoration of the three-step test to its original role as a flexible standard and not the rigid and restrictive tool that it currently appears to be.<sup>106</sup> Geiger and Gervais et al argue that the three-step test was always intended to be flexible and balanced.<sup>107</sup> This view is echoed by other authors such as Samuelson<sup>108</sup> and Kur.<sup>109</sup> In other words, to deviate from the international standard, the exceptions must be restricted to special cases. Geiger and Gervais et al caution against a strict reading of the first step that demands rigid and narrow categories, because they view the third step as an avenue for a proportionality analysis.<sup>110</sup> This is to provide copyright holders with certainty.<sup>111</sup> If a deviation occurs, in other words — where the exclusive rights are circumvented, copyright holders must be compensated appropriately.<sup>112</sup> Certainty can easily be secured by outlining specific ways in which the exception will be applied. The US has been a party to the Berne Convention for a number of years and has been able to apply the fair use

103 N Koutras & H Rigby 'A scientific analysis of the three-step test: Through the lenses of international and Australian laws' (2022) *Publishing Research Quarterly* 506.

104 See Hugenholtz et al 'Conceiving an international instrument on limitations and exceptions to copyright' (2008) *Amsterdam Law School Research* 18 where the authors explicitly hold that the three-step test is 'vague or imprecise', a view this article strongly supports.

105 See art 9(2) of the Berne Convention, available at: <https://www.wipo.int/wipolex/en/text/283693> (accessed on 09 April 2025), which requires these steps to be interpreted in a way that those special limitations may apply in certain circumstances only, while being cognisant of the ordinary rights of creators to exploit benefits of the works they created. This must be done by weighing the legitimate interest of copyright holders and/or authors against the interest of society.

106 C Geiger et al 'Declaration: A balanced interpretation of the three-step test in copyright law' (2010) *Journal of Intellectual Property Information Technology and e-Commerce*; Geiger, Gervais & Sennfleben (n91) 608.

107 Geiger et al (n106) 582.

108 P Samuelson & K Hashimoto 'Is the US fair use doctrine compatible with Berne and TRIPS obligations?' (2018) *Berkeley Centre for Law & Technology* 9.

109 M Kur 'Of oceans, islands and inland water – how much room for exceptions and limitations under the three-step test?' (2009) *Richmond Journal of Global Law and Business* 350.

110 Kur (n109) 626.

111 Jehoram 'Restrictions on copyright and their abuse' (2005) *European Intellectual Property Review* 360.

112 Karjiker (n10) 250.

exception with relative ease.<sup>113</sup> Gervais et al argue that these tests have been developed with the understanding that they would be applied in multiple jurisdictions (with various differences), and it would be inappropriate to make an assumption that flexible or open-ended national provisions, such as [...] fair use, are *per se* impermissible under the test.<sup>114</sup>

There is a predominant view that an overwhelming dissent exists in respect of the introduction of fair use, but there are several academic commentators in favour of such an introduction, and this article relies a great deal on those arguments.<sup>115</sup> For example, one of the arguments in favour of this introduction refers South African critics to the fact that the US have, for decades, used this exception without formally being charged before the WTO with violating their international duties in terms of either the Berne Convention or the TRIPS Agreement, to which the US is also a signatory.<sup>116</sup> In terms of becoming a signatory to the TRIPS Agreement, the US altered the language of the fair use exception to align it with the three-step test. This means that if the exception in its format contained in the US Copyright Act goes against the international copyright exceptions, as critics would have the world believe, this would have been addressed. However, this has not yet occurred. US negotiators worded fair use in a way that did not contravene the US's international obligations.

This article also proposes a different view regarding the obligation South Africa has *in re* the above treaties. South Africa became a party to the TRIPS Agreement in 1994 as it emerged as a democracy following a lengthy stint as an Apartheid state.<sup>117</sup> It further acceded to the Berne Convention in 1928 when it was still clouded by its pre-democratic history. South Africa was a completely different country then and the *boni mores*<sup>118</sup> at the time dictated its relationship with the international community, perhaps out of fear of potential economic sanctions. The interpretation of both TRIPS and Berne evolved over time and

<sup>113</sup> See the US cases of *Hustler Magazine, Inc v Moral Majority, Inc.*, 106 F Supp1562 (C.D Cal., 1985) where it was held that copying [of portions] of a book did not diminish any sales potential and would neither hinder the marketability of back issues, thus fair was established; See also more recently *Author's Guild v Google, Inc* No13-4829 in this case Google made digital copies of millions of books submitted to it by various libraries, where it was scanned and made available to users through its Google Books service. Users could identify and access (free-of-charge) portions of those books, ie, words and relevant terms from the scanned text. The court held that this was fair use in the form of 'transformative use' because the information provided was limited without the user being given complete access to the full work.

<sup>114</sup> Geiger & Gervais et al 'The three-step test revisited: How to use the test's flexibility in national copyright law' (2013) *PIJIP* Research Paper no. 2013-04 3.

<sup>115</sup> Awad (n35) 529; Krauss (a letter submitted to Currie and Webber et al) (2025) Constitutional Court Collections (2025) para 47, available at: <https://collections.concourt.org.za/bitstream/handle/20.500.12144/38600/7.%20ReCreate's%20Submissions.pdf?sequence=14&isAllowed=y> (accessed on 28 July 2025); M Sag 'Predicting fair use' (2012) *Ohio State Law Review* 49; S Flynn 'Dispelling Myths About Fair Use' (2019) *InfoJustice*, available at: <https://infojustice.org/archives/40889> (accessed on 19 July 2024).

<sup>116</sup> Awad (n35) 564.

<sup>117</sup> See the overview of TRIPS on WTO website, available at: [https://www.wto.org/english/tratop\\_e/trips\\_e/intel2\\_e.htm#:~:text=Overview%20the%20TRIPS%20Agreement,features%20of%20the%20Agreement%20are](https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm#:~:text=Overview%20the%20TRIPS%20Agreement,features%20of%20the%20Agreement%20are) (accessed on 15 July 2025).

<sup>118</sup> The article refers to *boni mores* to mean the social morality or the ideological (attitudes) assumptions that prevailed during that time.

this must be reflected in the manner in which copyright responsibilities are assigned to member countries. This is particularly relevant in relation to open-ended exceptions such as fair use, especially for developing nations. In other words, this article argues that these responsibilities are outdated and do not reflect the growth of these developing nations and certainly do not reflect the prevailing ideologies under which these nations currently harbour.

This article is essentially arguing that developing nations should adopt a purposive interpretation<sup>119</sup> of the provisions of these international treaties as opposed to being bound by a literal interpretation. In other words, developing nations must not be bound by dated views regarding the applicability of these provisions in the modern age. The South African Constitution, in any event, mandates a re-interpretation of these treaties that reflects domestic values and socio-economic realities, a reflection of a country in 2025, not the 1900s.<sup>120</sup> An illustration of the importance of Constitutional interpretation of international law is seen from the case of *Glenister v President of the Republic of South Africa*, where the court held that:

The approval of an international agreement, under section 231(2) of the Constitution, conveys South Africa's intention, in its capacity as a sovereign state, to be bound at the international level by the provisions of the agreement.<sup>121</sup>

Currie and Webber et al have made further arguments regarding a constitutional approach in interpreting South Africa's copyright laws with the view that there can be no arbitrary deprivation of property when new provisions are introduced with the aim of benefiting South Africans in line with a law of general application.<sup>122</sup> The next part of the article comparatively draws on the operation of fair use in the African context and the US.

#### 4. COMPARATIVE APPLICATION OF THE FAIR USE EXCEPTION IN THE US, NIGERIA AND UGANDA

This section of the article compares the various iterations of the copyright exceptions that exist across multiple jurisdictions. The idea here is to ascertain whether the concerns that a more expanded exception is inappropriate in the African region are valid. This section will first explore the exception in the US, and how the courts have interpreted fair use in the context of the training of AI systems and whether there is any difficulty in curbing use where it exceeds the allowed use categories within these frameworks. This section will also examine the dual exception in jurisdictions such as Nigeria and Uganda, where Nigeria, in terms of the latest Copyright Act, retains its fair dealing exception

<sup>119</sup> Per De Gruyter in C Barak (ed) *Purposive Interpretation of Law* (2005) 207–209 holds the following view: 'a purposive interpretation involves interpretation based on language, purpose and discretion. Language sets limits of interpretation. Purpose determines the choice of legal meanings, within the boundaries of language. Discretion operates when the [letter of the text does not single out a meaning but allows for varying interpretations].'

<sup>120</sup> See s 38 of the Constitution of the Republic of South Africa, 1996.

<sup>121</sup> *Glenister v President of the Republic of South Africa* [2011] ZACC 6 at 91.

<sup>122</sup> I Currie, E Webber & D Linde et al 'ReCreate's amicus submission to the Constitutional Court in South Africa, May 2025' (2025) *Program on Information Justice and Intellectual Property*.

in wording, but it appears wider than how the same exception is applied in South Africa. This will allow for the various positions to be juxtaposed with access, and whether it makes a difference to have a wider exception as opposed to applying the restrictive fair dealing.

#### 4.1 US fair use provision

The article views the US fair use provision from the perspective that it promotes the rights of creators and encourages innovation, while being flexible enough to keep up with technological trends. In this regard, the exact parameters of this exception can be ascertained from s 107 of the US Copyright Act of 1976 and is phrased in the following manner:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.<sup>123</sup>

The US has employed this exception for decades, but it was first codified in its law in the 1976 Copyright Act.<sup>124</sup> This means that the US has assembled several judgments to test its fair use provision. This has not been the case for South Africa, as illustrated above, for example. It is therefore not inconceivable that, should this fair use doctrine be adopted, South Africa would have ample legal precedent on which to draw in tailoring fair use to its domestic market, informed by both the successes and the failures of the doctrine's application abroad. In determining whether the use made of a work in any particular case is a *fair use*, the US Copyright Act outlines several factors that ought to be considered by a court in making such a determination and it includes:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes, is it transformative; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>125</sup>

In the US, exception is argued to be more inclusive and less restrictive than their counterparts from the African region. Fair use is a legal doctrine used where users make use of the work by another, a copyrighted work, without expressly obtaining permission from the owner of the work.<sup>126</sup> In this respect, the exception is similar since it aims at protecting the right of the author to exploit the work. It appears from the reading of the US Act that [even where]

123 See s 107 of Title 17 of the US Copyright Act 1976.

124 See the U.S. Copyright Office Fair Use Index, available at: <https://www.copyright.gov/fair-use/> (accessed on 15 July 2025).

125 See s 107 of the US Copyright Act, 1976.

126 S Mwakaje 'Access to educational publications and the copyright law in Tanzania: Revisiting the underlying opposing interests' (2020) *Journal of Humanities and Social Sciences* 79.

a work is unpublished; a finding of fair use may be made where the unpublished work falls within the parameters of the above provision.<sup>127</sup>

From an earlier reading of this article, it may appear that fair use is used *only* in the US. However, this is not the case, while not a legal transplant, countries such as Canada, South Korea and Singapore use fair use as it was introduced as a contextual legislative intervention to ensure flexibility.<sup>128</sup> However, there are several countries that have adopted a variation of the fair use doctrine with some mild success. Jurisdictions such as Israel,<sup>129</sup> Singapore,<sup>130</sup> Nigeria<sup>131</sup> and Uganda<sup>132</sup> all adopted a version of this doctrine. South Africa could easily interpret fair use in line with its international obligations and take guidance from jurisdictions such as Israel. In other words, the idea is that fair use and South Africa's international copyright obligations can co-exist.

A further argument in favour of the proposed introduction of fair use in South Africa is that the US uses this exception and seemingly benefits from it a great deal. An example can be found in a 2017 report by the Computers and Communications Industry Association (CCIA), which examined how fair use has contributed to economic growth in the US.<sup>133</sup> The study found that:

value added by fair use industries was 16 percent of the U.S. economy [...] and contributing \$2.8 trillion to U.S. GDP. Meanwhile, the combined value added by industries that are the most reliant on fair use and other limitations and exceptions to copyright protections has more than tripled in size over 2002. From 2012 to 2014, the real output of these primary core industries accounted for 6.7 percent of real GDP growth, six times their current weight in the U.S. economy.<sup>134</sup>

These numbers do not compare to those that maintain fair use causes loss of revenue. In doing these comparisons, one must not forget to include the industrious entertainment industry that the US has built over the years.<sup>135</sup> The creative output from the US is known worldwide, and yet it lobbies against other jurisdictions adopting an exception which has thus far only served them well. This raises an important question whether the US's disdain

127 See s 107 of the US Copyright Act, 1976.

128 Parliamentary Monitoring Group 'Copyright Amendment Bill: DTI & CIPC response on flagged clauses' (2018), available at: <https://pmg.org.za/committee-meeting/26598/> (accessed on 28 February 2024).

129 See J Band & J Gerafi 'The fair use/fair dealing handbook' (2015) *InfoJustice* 30, available at: <https://infojustice.org/wp-content/uploads/2015/03/fair-use-handbook-march-2015.pdf#page=32.09> (accessed on 11 November 2025).

130 Band & Gerafi (n129) at 55–57; See also Singapore Copyright Act, s 35.

131 Band & Gerafi (n129) 44.

132 Band & Gerafi (n129) 66–67.

133 A Szamoszegi & M McCleary 'Fair use in the US economy: Economic contributions of industries relying on fair use', available at: <https://ccianet.org/wp-content/uploads/2017/06/Fair-Use-in-the-U.S.-Economy-2017.pdf#page=5.10> (12 November 2025).

134 Ibid.

135 N Gombalova 'Breaking into America's \$649B entertainment market: Your complete guide' *Foothold*, available at: <https://www.footholdamerica.com/blog/breaking-into-americas-649b-entertainment-market-your-complete-guide/> (accessed on 10 November 2025); See also the report by Price Waterhouse Coopers 'US Edition: Global entertainment & media outlook 2025–2029' (2025), available at: <https://www.pwc.com/us/en/industries/tmt/library/global-entertainment-media-outlook.html> (accessed on 13 November 2025).

in respect of other countries adopting this exception is as a result of it knowing the competitive edge it provides to that jurisdiction. The fear is that should other countries adopt this doctrine, the US may lose that edge and may need to compete with other jurisdictions more directly.

An additional argument is that other jurisdictions may adopt fair use and leverage it as a competitive advantage, benefiting from decades of judicial precedent developed in the US — precedent that the US itself had to build from scratch. There is even a plethora of precedent on fair use cases dealing with the training of AI on copyrighted data, including *Getty Images v Stability AI*,<sup>136</sup> *Thomson Reuters v Ross Intelligence*<sup>137</sup> and *Dow Jones & Company Inc v Perplexity AI Inc*, for courts to use to navigate this complex terrain.

Recently, the US district court had to determine whether the training of an AI system on copyrighted data amounted to fair use in the cases *Bartz v. Anthropic PBC*<sup>139</sup> and *Kadrey v. Meta Platforms, Inc.*,<sup>140</sup> which revolved around allegations that copyrighted works had been used to train AI systems without the permission of the authors of said works. Per Chhabria J, training of AI systems using copyrighted data presents both challenges and opportunities depending on the context in which the works are used. For example, training could result in either transformative works or infringement. This does not resolve the blanket claim of infringement some critics claim will arise, but it does present a unique opportunity for further research.<sup>141</sup>

#### 4.2 Fair use in the African context: Nigeria and Uganda

In 2023, Nigeria promulgated a new Copyright Act, which included revisions and a more expanded version of its copyright exception fair dealing.<sup>142</sup> In terms of the old Nigerian Copyright Act, the language used in the then-fair dealing provision stated that: ‘by way of fair dealing for purposes of research, private

136 This case dealt with allegation by Getty Images that Stability AI violated their exclusive rights in terms of copyright law by building and offering Stable Diffusion and DreamStudio using material obtained from the Getty’s database. This case also includes trademark infringement allegations arising from the accused technology’s ability to replicate Getty Images’ watermarks in the AI outputs. Stability AI has sought to have the case dismissed or transferred to the Northern District of California.

137 Thomson Reuters sued ROSS Intelligence and alleged that the AI and legal research company unlawfully copied content from Westlaw, a research platform owned by Thomson Reuter to train its AI-based platform. This case is important for copyright since it will determine if training data used to train machines amounts to fair use.

138 Perplexity AI used the plaintiffs’ copyrighted news content in training its own RAG (retrieval-augmented generation) solution, which resulted in Rupert Murdoch’s Dow Jones and New York Post suing the platform, No. 1:24-cv-07984 (S.D.N.Y.).

139 *Bartz v. Anthropic PBC*, 3:24-cv-05417.

140 *Kadrey v. Meta Platforms Inc.*, No. 3:23-cv-03417.

141 A Buick ‘Copyright and AI training data—transparency to the rescue’ (2023) 3 *Journal of Intellectual Property Law & Practice* 190–91.

142 See J Band ‘New Nigerian Copyright Act creates open fair dealing exception’ (2023) *Info Justice*, available at: [\(accessed on 18 July 2025\).](https://infojustice.org/archives/45182#:~:text=An%20expanded%20exception%20for%20people,(Section%2031%2D35))

use, criticism or review or the reporting of current events'.<sup>143</sup> Band notes that while Nigeria predominantly retained the fair dealing name in the Act, there was a notable expansion of the categories of permissible uses of copyrighted works.<sup>144</sup> Oriakhogba and Nicholson point out that the expanded fair dealing exception, as set out in terms of s 20 the Copyright Act, appears to mimic that of the US.<sup>145</sup> The Nigerian Copyright Act also sets out clear factors to be used in determining whether a contemplated use of a work is considered 'fair'.<sup>146</sup> These factors are staples in most copyright regimes, and the legislature ensures that fairness in use is at the core of these provisions, whether they are restrictive or even expanded such as is the case in Nigeria.

Copyright laws in Uganda are regulated by the Copyright and Neighbouring Rights Act.<sup>147</sup> Uganda, like the US and arguably Nigeria, makes use of the open-ended exception of fair use.<sup>148</sup> In terms of s 15 of the Ugandan Copyright

143 See the old Nigerian Copyright Act (Laws of the Federation of Nigeria, 1990 as amended by the Copyright Amendment Decree No. 98 of 1992 and the Copyright (Amendment) Decree 1999).

144 Band (n142).

145 '1) The rights conferred in respect of a work by sections 9, 10, 11, 12 and 13 of this Act, do not include the right to control— (a) any of the acts specified in those sections by way of fair dealing for purposes such as— (i) private use; (ii) parody, satire, pastiche, or caricature; (iii) non-commercial research and private study; (iv) criticism, review or the reporting of current events, subject to the condition that, if the use is public, it shall be accompanied by an acknowledgement of the title of the work and its authorship except where the work is incidentally included in a broadcast.'; See also D Oriakhogba 'Nigeria quietly, but surely, embracing balance, openness and flexibility in her copyright regime?' (2021) *Info Justice* (originally appearing on the IPKat), available at: <https://infojustice.org/archives/43721> (accessed on 15 July 2025); See also Nicholson (n87).

146 'Provided that in determining whether the use of a work in a particular case is fair dealing, the factors to be considered shall include the— (i) purpose and character of its usage; (ii) nature of the work; (iii) amount and substantiality of the portion used in relation to the work as a whole; and (iv) effect of the use upon the potential market of value of the work.'

147 Copyright and Neighbouring Rights Act 19 of 2006.

148 See s 15 of the Copyright and Neighbouring Rights Act 19 of 2006 which outlines the provision in the following manner: 'The fair use of a protected work in its original language or in a translation shall not be an infringement of the right of the author and shall not require the consent of the owner of the copyright where— (a) the production, translation, adaptation, arrangement or other transformation of the work is for private personal use only; (b) a quotation from a published work is used in another work, including a quotation from a newspaper or periodical in the form of press summary, where— (i) the quotation is compatible with fair practice; and (ii) the extent of the quotation does not exceed what is justified for the purpose of the work in which the quotation is used, and (iii) acknowledgement is given to the work from which the quotation is made; (c) a published work is used for teaching purpose to the extent justified for the purpose by way of illustration in a publication, broadcast or sound or visual recording in so far as the use is compatible with fair practice and acknowledgement is given to the work and the author; (d) the work is communicated to the public for teaching purposes for schools, colleges, universities or other educational institution or for professional training or public education in so far as the use is compatible with fair practice and acknowledgement is given to the work and the author; (e) the work is reproduced, broadcast or communicated to the public with acknowledgement of the work, in any article printed in a newspaper, periodical or work broadcast on current economic, social, political or religious topic unless the article or work expressly prohibits its reproduction, broadcast or communication to the public; (f) any work that can be seen or heard is reproduced or communicated to the public by means of photograph, audio-visual work or broadcast to the extent justified for the purpose when reporting on current events; (g) any work of art or architecture in a photograph or an audio-visual or television broadcast is reproduced and communicated to the public where the work is permanently located in a public place or is included by way of background or is otherwise incidental to the main object represented in the photograph or audio-visual work or television broadcast; (h) for the purposes of current information, a reproduction in the press, broadcast or communication to the public is made

Act, provision is made<sup>149</sup> for an extensive list of instances where a copyrighted work may be used by a third party without having to obtain the permission of the holder of the copyright. Uganda is a developing nation like South Africa, and like South Africa, it does not appear to have much case law illustrating its ability to apply its fair use principles to case law. However, it does appear that the Ugandan Supreme Court was able to apply these principles, at least once, in the case of *Angela Katatumba v Anti-Corruption Coalition of Uganda*<sup>150</sup> where an artist, composer and singer's song was, without permission, incorporated into and released in an advertisement by an environmental conservation agenda to save a forest reserve. The plaintiff instituted a proceeding for copyright infringement. The defendant raised fair use as a defence, citing public interest for the use of the work.

The plaintiff argued that the use by the defendant of her work does not fall within the eleven permissible uses stipulated under s 15(1) of the Copyright and Neighbouring Rights Act.<sup>151</sup> The court agreed with the defendant in that it was public interest since the use was to save a forest reserve, which involved the public, but cautioned against using someone's work without their consent. The court resultantly found that the defendant's use was not fair as contemplated in the Act. It was held to be infringing because of the absence of a licensing agreement.<sup>152</sup> This case illustrates an important point regarding the court's ability to decide on fair use in the context of a developing nation and how important a court considers the consent of a copyright holder in being able to protect their work from use that is not fair.<sup>153</sup>

Oriakhogba notes the expansion in terms of the Nigerian Copyright Act and states: 'The Nigerian Copyright Act [...] is a great step forward for Nigeria, and [for] the development of copyright laws on the continent.'<sup>154</sup> It will serve as a model for other countries in Africa that are updating and modernising their laws for the digital environment.<sup>155</sup> It is therefore clear that a more expanded use can work in the African context if worded appropriately.

to— (i) a political speech or a speech delivered during any judicial proceeding; or (ii) an address, lecture, sermon or other work of a similar nature delivered in public; (i) for the purpose of a judicial proceeding, work is reproduced; (j) subject to conditions prescribed by the Minister, a reproduction of a literary, artistic or scientific work by a public library, a non-commercial documentation centre, a scientific institution or an educational institute if the reproduction and the copies made— (i) do not conflict with the normal exploitation of the work reproduced; (ii) do not unreasonably affect the right of the author in the work; and (k) any work is transcribed into braille or sign language for educational purpose of persons with disabilities.'

149 See the Ugandan fair use provision *supra*.

150 HCCS no.307 of 2011.

151 See *Angela Katatumba v Anti-Corruption Coalition of Uganda* HCCS no. 307 of 2011 at 26.

152 *Angela Karatumba* (n151) 35.

153 K Aziz 'The doctrine of fair use under Ugandan copyright law' (2020) 7.

154 D Oriakhogba 'Nigerian's new Copyright Act 2022: How libraries can benefit' *IP Kitten* (3 April 2023), available at: <https://ipkitten.blogspot.com/2023/04/guest-post-nigerians-new-copyright-act.html> (accessed on 15 July 2025).

155 Ibid.

## 5. ANALYSIS AND RECOMMENDATIONS FOR THE WAY AHEAD

It is clear from the discussion that some divergent opinion still exists regarding the suitability of an expansive fair use exception in South African copyright law. It is also clear that the South African Copyright Act of 1978 is outdated and stems from a pre-democratic dispensation, and this article highlights that these pre-democratic notions are perpetuated by those still relying on old rules for new problems. In fact, South African copyright law, in its current form, poses significant hurdles in respect of access to information, and fails to provide newer works the platform to be integrated into society as a result of a closed-ended exception such as fair dealing. This article contends that, if properly contextualised, fair use could represent a beneficial, and even necessary, reform for South Africa that advances innovation while safeguarding creators' intellectual efforts. This argument rests on several factors and is not oblivious to the criticisms levelled against the potential introduction of fair use.

There are some academic authors who are vehemently against the introduction of fair use into the South African system. The reasons furthered for this rejection range from legal uncertainty and vagueness, potential judicial overreach, threats to the economic benefits of creators, and compatibility with international obligations. Karjiker is of the view that introducing fair use in South Africa would introduce an inappropriate amount of legal uncertainty. He further maintains that, given the fact that South Africa is a developing nation, it does not have the required jurisprudence to interpret an open-ended exception such as what fair use would require.<sup>156</sup> This article argues that this position exaggerates the risks associated with judicial interpretation and underestimates the capacity of fair use to be adapted to the South African context, as evidenced by Nigeria's adoption of an expanded exception and South Africa's constitutional interpretive tradition. While Schonwetter does not reject the introduction of this exception outright, he raises concerns regarding the compatibility of such an introduction *vis-à-vis* South Africa's international obligations.<sup>157</sup> This article responded to this claim above and showed that there is some flexibility woven into the three-step test and that the US has used the provision for decades without any visible issues. In this case, South Africa ought to consider its obligations under Berne and TRIPS, and ensure that the provision is drafted to avoid any breach.

Karjiker notes that fair use offers no 'bright-line test' and makes predicting the outcome of a case on this basis strenuous, a view shared by other critics, adding that fair use presents too many ambiguous outcomes which could limit its application in South Africa.<sup>158</sup> However, this view is formulated based on a romanticised view regarding the benefits of copyright, one that assumes it consistently generates an income, recognition and agency for creators. It further presupposes that any legal disputes have a certain outcome. In the context of

<sup>156</sup> Karjiker (n10) 240.

<sup>157</sup> Schonwetter 'The "fair use" doctrine and implications of digitizing for the doctrine from the South African perspective' (2006) *The Southern Journal of Information and Communications* 32.

<sup>158</sup> Karjiker (n10) 240; See also Schonwetter (n157) 32.

South Africa, it does not align with the empirical realities. Many local content creators and artists report minimal benefits from current copyright protections, especially when navigating digital platforms such as TikTok and YouTube.<sup>159</sup> Those who are against introducing fair use also fail to consider the perspective of the artist who seeks to expose their work to a larger audience than what copyright law currently provides for. In essence, the debates and disagreements from the literature are telling of how there should be more of a connection with the plight of the artist.

Furthermore, given the array of instances where fair use may find application, critics worry that this will place creators in a difficult position since their works may now be used in more instances than previously contemplated under the fair dealing exception. Additionally, concerns regarding the training data used for machines such as generative AI make this exception too wide, which may cause creators a loss in revenue.<sup>160</sup> Flynn aptly points out that 'Fair use is not *carte blanche* to use other people's work without paying.'<sup>161</sup> He continues to state, as illustrated in the article, that a core component of testing whether a use is fair is whether the use would deprive the creator of revenue by substituting for the need to buy the work. Piracy of copyrighted work is not fair use.<sup>162</sup>

This is not the first time dated copyright principles have been challenged by the emergence of new technology.<sup>163</sup> It is important for any given country's copyright system to be able to adapt to change.<sup>164</sup> As the world evolves, often new discoveries are made, and new technology emerges, which may require the rules of copyright to be applicable to it. Resultantly, a stagnant copyright system poses hurdles for innovative thinking or creativity and other methods.

The South African copyright system, however, appears to have had no difficulty in adapting to technological change.<sup>165</sup> An example of this adaptability is the technological advancements in respect of computers made in the late 1970s and early 1980s.<sup>166</sup> During this era, the use of computer programs became prominent, but remained unregulated, and copyright emerged as the area best suited for regulation.<sup>167</sup> However, to uphold its international obligations arising out of the TRIPS Agreement<sup>168</sup> and the WIPO Copyright treaty,<sup>169</sup> South Africa

159 S Samtani 'The domestic effect of South Africa's treaty obligations' (2020) *Program on Information Justice and Intellectual Property Research Paper* (PIJIP) 3.

160 See the Publishers SA Report on 'The expected impact of the "fair use" provisions and exceptions for education in the Copyright Amendment Bill on the South African Publishing industry' 16, available at: <https://publishsa.co.za/wp-content/uploads/2021/07/Pwc-Report-On-Copyright-Amendment-Bill-31-July-2017-1.pdf#page=25.10> (accessed on 14 April 2025).

161 Flynn (n115).

162 Flynn (n115).

163 Pistorius (n14) 3–4.

164 Pistorius (n14) 2.

165 Ali 'The evolution of writing: From typewriters to AI-powered emails' *Medium* (17 August 2023), available at: <https://www.aifocussed.medium.com/the-evolution-of-writing-from-typewriters-to-ai-powered-emails-a66d0e47a51d/> (accessed on 7 March 2025).

166 O Dean 'Protection of computer programs by copyright in South Africa' (1995) 6 *Stellenbosch Law Review* 86.

167 *Ibid.*

168 See art 9(2) of TRIPS and the discussion under 3.2. above.

169 See art 4 of the WIPO Copyright treaty and the discussion under 3.2 above.

remedied this. This was done through the 1992 Amendment to the Copyright Act, computer programs were explicitly recognised as a distinct work eligible for protection.<sup>170</sup> The continued treatment of training AI models as fair use is ‘essential to protecting research’, including non-generative, non-profit educational research methodologies like those applied in the context of text-and-data-mining (TDM). If an override of fair use and licensing rights restricts researchers in training AI on public domain works, it would undermine scholars, who are now limited in the scope of explorations that can be made using AI tools.<sup>171</sup>

There are several cases in which the courts navigated the exception, and accusations of breach of their international obligations have not deterred them from the continued use of the exception. It is unclear why South Africa cannot incorporate similar methods with regard to the use of this exception and clarify unclear issues while maintaining its international obligations. Most of the concerns raised by academic research can be remedied by having a more robust discussion regarding the manner in which this exception can propel innovation in this country. This article also finally acknowledges that, from all the discourse in South Africa regarding AI, it is clear that copyright law and its anthropocentric notion of creativity and authorship are, in any event, not suitable for the complexity of AI-generated works. A brand-new framework may very well be necessary to deal with these forms of works. The exact detail of how a new framework will have to grapple with some of the challenges copyright has been unable to remedy is beyond the scope of this article.

Despite the criticism regarding fair use’s introduction, a nuanced analysis reveals that not only is this exception compatible with the South African landscape, but it has the potential to promote access to knowledge and further innovation. This article uses a quote from a study done to explain why many pilot programmes launch in jurisdictions such as the US, and *not* the UK or South Africa, titled ‘The economic contribution of copyright-based industries in South Africa’.<sup>172</sup> The study aptly references a statement made by the team at Google: ‘The existence of a general *fair use* exception that can adapt to new technical environments may explain [the rationale behind why] the search engines first developed in the USA, where users were able to rely on flexible copyright exceptions, and not in the UK, where such uses would have been considered infringement.’<sup>173</sup> It is against this quote that the article also suggests that critics are arguing for the continued use of fair dealing because of its inherent outdated view regarding South Africa’s economic and innovative

<sup>170</sup> See s 1 of the Copyright Amendment Act, 1992.

<sup>171</sup> RG Samberg, T Vollmer & S Teremi ‘Training generative AI models on copyrighted works is fair use’ Association of Research Libraries, available at: <https://www.arl.org/blog/training-generative-ai-models-on-copyrighted-works-is-fair-use/> (accessed on 18 July 2025).

<sup>172</sup> A Pouris & R Inglesi-Lotz ‘The contribution of copyright-based industries to the South African economy’ (2011) WIPO Report 12, available at: [https://www.wipo.int/export/sites/www/copyright/en/docs/performance/econ\\_contribution\\_cr\\_za.pdf](https://www.wipo.int/export/sites/www/copyright/en/docs/performance/econ_contribution_cr_za.pdf) (accessed on 24 July 2025).

<sup>173</sup> See D Nicholson ‘Copyright reform in South Africa from a Librarian’s perspective: A case study approach’ (2022) *De Gruyter* 333; see also Gowers *Review of Intellectual Property* (2006) 62.

ability. The view that the current climate cannot handle such a forward-looking exception is based on archaic views about African creative industries. Band correctly points out that the adoption of an expanded ‘fair dealing’ provision by Nigeria, one of Africa’s largest producers of films and music, should encourage other African countries to follow suit and adopt open copyright exceptions.<sup>174</sup>

In respect of judicial overreach, it is argued that the fair use exception would improperly delegate legislative policymaking to the courts.<sup>175</sup> It is held that courts will have broad discretion to develop new exceptions on a case-by-case basis, which critics consider inconsistent with the separation of powers in South African law and will undermine the oversight granted to Parliament. This view fails to account for the fact that courts are mandated to interpret the law and that, where an interpretation based on the plain wording of a legislative provision would produce an arbitrary result, courts are empowered to adopt an interpretation that yields an equitable outcome.

This article finally argues that South Africa must dispense with reactive policy decisions. In other words, where emerging issues are concerned, copyright law must adapt before it is too late. It is thus time to introduce proactive measures to prevent the incessant need for updates to the system, the moment a rule or norm becomes outdated. This article calls for reform in this regard to foster a copyright system that benefits the public while maintaining its notion of protecting the interests of creators.

## 6. CONCLUSION

The primary purpose of this article is to demonstrate that South Africa has the potential to make meaningful inroads in fostering a forward-looking copyright landscape by adopting a more expansive fair use exception in the age of AI — one that not only benefits creators but also ensures that copyright’s function of facilitating access in the digital environment remains intact. It further shows that while critics are of the view that such an expanded exception is inappropriate for a developing nation, jurisdictions such as Nigeria and Uganda have employed fair use (or expansive fair dealing exceptions) to moderate success. The article finds that this introduction is, in fact, a justified reform.

The article highlighted that the certainty that critics rely on cannot be proven when only one case has been heard by the South African courts, and even then, foreign laws were relied on because of the vague and outdated phrasing of the fair dealing provision in the Copyright Act. The article also argues that with any new legislative adoption, some hurdles are inevitable and will only become easier the more cases are heard, and domestic jurisprudence is formulated.

The article further dispelled the notion that South Africa will contravene its international obligations by showing that the copyright exceptions contained in Berne and TRIPS allow enough flexibility to its member states to adopt an

<sup>174</sup> Band (n142).

<sup>175</sup> M Forere ‘The compliance of the fair use clause in the South African Copyright Amendment Bill with the three-step test and the Constitution of South Africa’ (2025) *Journal of Intellectual Property & Practice* 457.

exception that works in the domestic territory within a given period. Further, no claim for infringement has been levelled against the US, which has used fair use for decades. In this regard, the article argues that those who are arguing against this adoption are furthering the US's agenda to not have any direct competition in the creative industry.

The article further argues that creators are already not benefiting adequately from the purported advantages that copyright seeks to provide. In this regard, a romanticised view of the benefits of copyright persists — one that is not reflected in the lived realities of South African creators. In this regard, fair use offers more visibility for works by these creators and promises proper remuneration, subject to the proper licensing system being put in place. It will also situate South Africa as a forward-looking jurisdiction where AI training is concerned and prevent instances where AI investment is sought elsewhere due to restrictive copyright limitations and exceptions.