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)

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Online ISSN
1727-3781

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Date Submitted

5 November 2023

Date Revised

5 June 2024

Date Accepted

5 June 2024

Date Published

16 August 2024

Editor

Prof H Chitimira

Journal Editor

Prof W Erlank

How to cite this contribution

Forere MA "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)" *PER / PELJ* 2024(27) - DOI http://dx.doi.org/10.17159/1727-3781/2024/v27i0a17202

DOI
http://dx.doi.org/10.17159/1727-3781/2024/v27i0a17202

Abstract

Central to this contribution is Article 4(1)(a) of the *Marrakesh Treaty*, which the Constitutional Court used to limit the exclusive right of adaptation of copyright owners in the case of *Blind SA v The Minister of Trade, Industry and Competition*. This contribution finds that while states can add other limitations in their national laws beyond Article 4(1)(a), they can do so relying on Articles 4.3 and 12 of the *Marrakesh Treaty* while observing the three-step test and their other international obligations. It is, therefore, recommended for our courts to provide clear guidance on normative development, which can, in turn, assist the legislature in its troubled path to domesticate the *Marrakesh Treaty* ahead of the planned ratification.

Keywords

Blind SA; *Copyright Act*; *Copyright Amendment Bill*; *Marrakesh Treaty*; accessible format copy; adaptation; reproduction.

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1 Introduction

Given the high temperatures that the *Copyright Amendment Bill* (hereinafter CAB) has caused among South Africans and friends abroad, it is important to state at the outset that this paper is not about a "book famine" facing people living with print and visual disability and how the *Marrakesh Treaty* addresses such a book famine.[1] It is also not about South Africa's policy on making works accessible; rather, it is about how the Constitutional Court interpreted Article 4(1)(a) of the *Marrakesh Treaty*. To this end, the author does not question the end goal (access for people with disability through limiting the exclusive right of adaptation, if this is the intention of the legislature) but the process followed in limiting the adaptation rights. At the outset, it must be clarified that the text of the new section 13A of the *Copyright Act* 98 of 1978 (hereinafter the Act) does not mention, verbatim, the limitation of adaptation rights or reproduction rights; however, it is trite that permitting third parties to exercise restricted acts is centred on the limitation of the exclusive rights of the copyright owner. Throughout the judgment the Constitutional Court adopted an interpretation that the rights that are triggered when making the work available in accessible format copies are reproduction rights and adaptation rights, thereby warranting the limitation to reproduction and adaptation rights. It is the limitation of adaptation rights that gave rise to the reading-in of section 13A, thereby rejecting Professor Dean's suggestion that the Minister can remedy the defect by adopting regulations to limit the right of reproduction in order for persons with disability to have works in accessible format copies. Had the court agreed with Professor Dean that only reproduction rights require limitation in order to have accessible format copies, there would not have been any need for reading in section 13A.

Copyright law is one of the fields that has been affected the most by technological developments and the internet. Since the internet knows no borders, concerted efforts to create new rights and the accompanying limitations thereof led the World Intellectual Property Organization (WIPO) to adopt the twin-treaties in 1996 – the *WIPO Copyright Treaty* (WCT) and the *WIPO Performances and Phonograms Treaty* (WPPT).[2] Of importance to this work is the *Marrakesh Treaty*, which was adopted in 2013 and

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1 Fitzpatrick 2014 *BC Int'l & Comp L Rev* 139; Watermeyer 2014 *African Journal of Disability* 1.

2 *WIPO Copyright Treaty* (1996) (WCT); *WIPO Performances and Phonograms Treaty* (1996) (WPPT).

entered into force in 2016. The purpose of the *Marrakesh Treaty* is to make provision for people with visual and print disability to access literary works by introducing exceptions to the rights contained in the *Berne Convention* and the new bundle of rights that came with the twin treaties.[3] Since copyrights are also rights that are protected almost all over the world, their limitation is carefully considered and the rights that are subject to limitations are specified. Accordingly, Article 4(1)(a) of the *Marrakesh Treaty* limits the exclusive rights of reproduction, making available distribution rights as contained in the twin treaties (and the right of reproduction as contained in the *Berne Convention*), being the rights that WIPO identified as implicated for people living with print and visual disability to access literary works. For the purposes of Article 4(1)(a) that the court dwelt on, the ceiling for encroachment is on the right of reproduction, the right of making available, the right of distribution and no more.

South Africa embarked on a law reform journey in 2008, to prepare for the ratification of the above-mentioned international treaties, as South African society is not insulated from the technological developments that affect traditional copyright law, as contained in the *Berne Convention*. The bills amending both the *Copyright Act* and the *Performers Protection Act* 11 of 1967 were tabled in Parliament in 2015, and they are titled the *Copyright Amendment Bill* (CAB) and *Performers' Protection Amendment Bill* (PPAB) respectively. Whereas there have been various versions of these Bills,[4] the version that was the subject of litigation was B13B-2017. The focus of this contribution is limited to the CAB, thus excluding the PPAB.

Given that copyright law in the 21st century is embedded in technology, it naturally becomes a very distinctive and complex subject causing Parliament and the National Council of Provinces to seek training workshops to learn the basics of copyright law before handling public submissions, and I have been privileged to be part of this exercise. As a result, the CAB's law reform process has become very long but productive in the sense that the current version of the CAB has improved tremendously from its earlier drafts, which often contained themes alien to the field of copyright while conflating copyrights with related rights. Despite its improvement the CAB is still not perfect, as evidenced by the President's remittal of the Bills back to Parliament on constitutional grounds.[5] At the time of writing, B13F-2017 has been adopted by the National Council of

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3 *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired or Otherwise Print Disabled* (2013) (*Marrakesh Treaty*).

4 *Copyright Amendment Bill* (CAB) [B13-2017]; [B13B-2017]; [B13D-2017]; [B13E-2017]; [B13F-2017].

5 The Presidency 2020 https://www.gov.za/speeches/president-cyril-ramaphosa%C2%A0refers-copyright-and-performers%E2%80%99-protection-amendment-bills.

Provinces and is under consideration in the National Assembly; however, the case in discussion and the relevant clauses thereof were based on B13B-2017. The submissions made by the public remain intense and it is important to note that the CAB remains one of the rare Bills that have attracted so much national and particularly international interest.

Against the backdrop of the law reform process highlighted above and the status of the CAB, Blind SA, which is an organisation of people with print and visual disability, lodged a case against the Minister of Trade, Industry and Competition (hereinafter the Minister) and others, alleging that the current *Copyright Act* violates a plethora of their constitutional rights including the rights to equality, human dignity and freedom of speech, to the extent that the Act is not aligned to the *Marrakesh Treaty* by not allowing them to convert literary works into formats accessible to them without the consent of the owner of the copyright in those literary works.[6]

Section 6 of the *Copyright Act*, which deals with the protection of literary works, provides as follows:

> Copyright in a literary or musical work or any substantial part thereof vests the exclusive right to do or to authorize the doing of any of the following acts in the Republic:
>
> (a) Reproducing the work in any manner or form;
>
> (b) publishing the work;
>
> (c) performing the work in public;
>
> (d) broadcasting the work;
>
> (e) causing the work to be transmitted in a diffusion service, unless such service transmits a lawful broadcast, including the work, and is the original broadcast;
>
> (f) making an adaptation of the work;
>
> (g) doing, in relation to an adaptation of the work; any of the acts specified in relation to the work in paragraphs (a) to (e) inclusive.

Consequently, anyone doing or performing the above acts without the authorisation of the copyright owner commits copyright infringement as laid down under section 23 of the Act.

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6 In terms of s 1 of the *Copyright Act* 98 of 1978, "literary work" includes, "irrespective of literary quality and in whatever mode or form expressed—
(a) novels, stories and poetical works;
(b) dramatic works, stage directions, cinematograph film scenarios and broadcasting scripts;
(c) textbooks, treatises, histories, biographies, essays and articles;
(d) encyclopaedias and dictionaries;
(e) letters, reports and memoranda;
(f) lectures, addresses and sermons; and
(g) written tables and compilations."

Blind SA requested the North Gauteng High Court to declare the Act unconstitutional, without stating the implicated provisions. The requested remedy was the reading-in of section 19D of the CAB.[7] The High Court granted the prayers, and the matter went to the Constitutional Court for confirmation. The Constitutional Court identified and confirmed the relevant sections as unconstitutional and the new section 13A, which was informed by the section 19D of the Bill, including definitions thereof,[8] was read into the Act.

In granting the orders referred to herein, the Constitutional Court interpreted Article 4(1)(a) of the *Marrakesh Treaty* as including a limitation to adaptation rights in order for people living with print and visual disability to access literary works whose copyright terms still subsist. This contribution, therefore, analyses the said Article 4(1)(a) to determine the correctness of the finding of the Constitutional Court. In unravelling this question, the work is organised in four parts as follows: part one is the introduction as above, while part two gives a summary of the *Blind SA* case. Part three analyses Article 4(1)(a) to determine if it can be used to limit adaptation rights and considers how adaptation rights can be limited through other provisions of the *Marrakesh Treaty*. Part four concludes the discussion.

2 Summary of the *Blind SA* case

As indicated in the first asterisk above, I have summarised this case in my other work titled "The Ramifications of International Law in South Africa: *Blind SA v Minister of Trade, Industry and Competition* (CCT 320/21) [2022] ZACC 33 (21 September 2022)".[9] Consequently, similarity in the summary of this case between these two works is unavoidable.

At the core of this case are people with print and visual disability who are not able to access literary works because they are not in a format that is accessible to them. As 95% of books were found not to be in accessible format, the phenomenon is dubbed "book famine".[10] Blind SA claimed that there was discrimination against them as they always have to seek consent from the copyright owner, who is often a publisher, to change a book into a perceptible format because the Act prohibits format shifting, unless consent is obtained from the copyright owner.[11] They indicated that the accessible formats include:

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7 *Blind SA v Ministry of Trade, Industry and Competition* 2021 BIP 14 (GP) (hereafter *Blind SA* (GP)).

8 *Blind SA v Minister of Trade, Industry and Competition* (CCT 320/21) [2022] ZACC 33 (21 September 2022) (hereafter *Blind SA* (CC)).

9 Forere 2024 *PELJ*.

10 Fitzpatrick 2014 *BC Int'l & Comp L Rev* 139; Li and Selvadurai 2019 *China Quartely* 1066; Watermeyer 2014 *African Journal of Disability* 1.

11 *Blind SA* (GP) para 4.

> Brailles, audio versions, or copies of published works in large print. For electronic versions, they include digital formats that enable the use of screen readers, adding audio descriptions to films and broadcasts, as well as subtitles.[12]

Specifically, the Applicant argued that the Act is unconstitutional for discriminating against people with visual and print disability to the extent that it limits or prohibits such persons from accessing works that persons without such disability can access, and for not making provision for persons with print and visual disability to access such works in a manner contemplated by the *Marrakesh Treaty*. Resultantly, the group as represented by public interest organisation Section27 claimed that the prohibition of free format shifting is a violation of an array of their constitutional rights as contained in the Bill of Rights, specifically a violation of the right to freedom from all forms of discrimination as espoused in section 9 of the *Constitution of the Republic of South Africa*, 1996 (the Constitution). As a remedy, the applicant requested the reading-in of section 19D of the CAB as the case was lodged against the backdrop of ongoing law reform to revise both the *Copyright Act* and the *Performers' Protection Act*.

The said section 19D of the CAB reads as follows:

> (1) Any person as may be prescribed and that serves persons with disabilities may, without the authorization of the copyright owner, make an accessible format copy for the benefit of a person with a disability, supply that accessible format copy to a person with disability by any means, including by non-commercial lending or by digital communication by wire or wireless means, and undertake any intermediate steps to achieve these objectives, if the following conditions are met:
>
> (a) The person wishing to undertake any activity under this subsection must have lawful access to the copyright work or a copy of that work;
>
> (b) The copyright work must be converted into an accessible format copy, which may include any means necessary to create such accessible format copy but which does not introduce changes other than those needed to make the work accessible to a person with a disability; and
>
> (c) The activity under this subsection must be undertaken on a non-profit basis.
>
> (2)
>
> (a) A person with a disability, or a person that serves persons [with] disabilities, to whom the work is communicated by wire or wireless means as a result of an activity under subsection (1) may, without the authorisation of the owner of the copyright work, reproduce the work for personal use.

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12 *Blind SA* (GP) para 4.

> (b) The provisions of paragraph (a) are without prejudice to any other limitations or exceptions that the person referred to in that paragraph may enjoy.
>
> (3) A person with a disability or a person that serves persons with disabilities may without the authorization of the copyright owner export to or import from another country any legal copy of an accessible format copy of a work referred to in subsection (1), as long as such activity is undertaken on a non-profit basis by that person.
>
> (4) The exception created by this section is subject to the obligation of indicating the source and the name of the author on any accessible format copy in so far as it is practicable.

None of the respondents opposed the case. There were three *amicus curae* who made submissions in support of the applicant, those being the International Community of Jurists (ICJ), the Media Monitoring Trust and Recreate. Like the applicant, the ICJ argued that the Act must be aligned to the *Marrakesh Treaty* and other international obligations for South Africa as contained in agreements such as *Convention on the Rights of Persons with Disability* (CRPD) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). These two agreements enjoin states parties to safeguard the protection of the rights to education and participation in cultural activities.[13] To this end the High Court held that:

> The protection of intellectual property at the expense of human rights of access to information requires a coherent international approach to dislodge the beneficiaries of the protection of their controlling powers.[14]

Equally, the Media Monitoring Trust argued that the Act is unconstitutional as it fails to safeguard the right to freedom of expression and the need to receive and impart knowledge in the digital era.[15] Lastly was ReCreate, whose arguments were not found useful.[16]

The Court mentioned a possible judicial overreach in reading-in section 19D; however, without deliberating on the matter deeper, the Court found no judicial overreach in reading-in the proposed section 19D and found that the CAB must not be delayed any further, thereby granting the relief sought.[17] The Court declared the *Copyright Act* unconstitutional pending confirmation by the Constitutional Court, read in section 19D of the CAB and suspended the declaration of unconstitutionality for 24 months in order for Parliament to address the unconstitutionality.[18]

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13 *Blind SA* (GP) para 18.
14 *Blind SA* (GP) para 20.
15 *Blind SA* (GP) para 22.
16 *Blind SA* (GP) para 26.
17 *Blind SA* (GP) para 27.
18 *Blind SA* (GP) para 31.

As a matter of procedure in the findings of unconstitutionality, Blind SA proceeded to the Constitutional Court for confirmation of the finding of unconstitutionality by the High Court. Whereas the litigants including the *amicus curae* remain the same except that ReCreate no longer filed, there was also Professor Owen Dean, who filed papers as *amicus* opposing the relief sought.[19] The same arguments raised in the High Court by the applicant and the *amicus* in support of the applicant were raised in the Constitutional Court. Thus, the applicant petitioned the Constitutional Court to declare the *Copyright Act* unconstitutional for discriminating against people with visual and print disability to the extent that the Act limits or prohibits such persons from accessing works that persons without such disability are able to access and for not making provision for persons with print and visual disability to access such works in a manner required by the *Marrakesh Treaty*.[20] Professor Dean opposed the reading-in of the proposed section 19D of the CAB. Instead, he advised the Court that the Minister could use section 13 of the *Copyright Act* to make exceptions to the right of reproduction in order to allow people with print and visual disability to access literary works.[21] In response, the applicant submitted that section 13 limits regulations to reproduction exception while Article 4(1)(a) of the *Marrakesh Treaty* goes beyond reproduction to cover the right to distribution and the right to make available as provided for in the WCT.[22] This debate led to the distinction between reproduction and adaptation, because Blind SA and Media Monitoring Africa argued that there are works that require adaptation in order for them to be converted into accessible format copy thereby making sections 13 and 39 inadequate because they are limited to reproductions.[23] Professor Dean indicated that converting protected works into accessible format copy requires reproduction only and that adaptation is a separate exclusive right altogether.[24] Professor Dean bolstered his opposition to the reading-in of the proposed section 19D by submitting that the said section 19D is not self-executing to the extent that certain terms such as "persons with disability" and "accessible format copy" require definitions, which are not catered for in the *Copyright Act* or in the proposed section 19D.[25] He further argued that the proposed section 19D fails to

19 Professor Dean is an Emeritus Professor of Intellectual Property (IP) at the University of Stellenbosch who has practised intellectual property (copyright and trademarks) for over five decades. He has been highly influential in shaping IP jurisprudence and is cited by the courts in almost every case on copyright. His expertise cannot be faulted. His bio is available on Anton Mostert Chair of Intellectual Property 2018 https://blogs.sun.ac.za/iplaw/about/staff-members/owen-dean.

20 *Blind SA* (CC) paras 1, 15.

21 *Blind SA* (CC) paras 33, 36.

22 *Blind SA* (CC) para 22.

23 *Blind SA* (CC) para 40.

24 *Blind SA* (CC) paras 37-39.

25 *Blind SA* (CC) paras 26, 34.

comply with the three-step test as required by the *Berne Convention* for provisions that provide for blanket access to accessible format copies.[26] The Applicant argued that definitions can be taken directly from the *Marrakesh Treaty*.[27]

While the case remained unopposed by the respondents on the merits, the Minister objected to using section 13 of the *Copyright Act* to make regulations, indicating that section 19D goes beyond the *Marrakesh Treaty* as it embodies wider government policy to align the *Copyright Act* with various other international obligations for South Africa, without mentioning what those obligations were other than listing international conventions.[28]

Before the Constitutional Court could go into the substance of the petition, it had to decide whether Blind SA had standing. The Court invoked Article 3 of the *Marrakesh Treaty*, and found that the organisation had standing as it fell within the class of persons in the definition of "beneficiary persons".[29] Dealing with the merits, the Constitutional Court held that the requirement of authorisation from the copyright owner in order for people with print and visual disability to have access to accessible format copies of literary works was an unfair discrimination on the ground of disability contrary to section 9(3) of the Constitution,[30] the right to dignity contrary to section 10 of the Constitution,[31] and the freedom to receive and impart information contrary to section 16(1)(a) of the Constitution.[32]

On the issue of whether section 13 could be interpreted as giving the Minister power to make regulations as put forward by Professor Dean, the Constitutional Court found that the proper interpretation of section 13 rested on drawing the difference between reproduction and adaptation.[33] To this end, the Court held that it was hard to draw distinctions between reproduction and adaptation,[34] and upheld the Applicant's submission that some accessible format copies go beyond reproduction and require adaptation;[35] consequently, section 13 failed to cure such constitutional infirmity because it was limited to reproductions.[36] Having found the

26 *Blind SA* (CC) para 35.
27 *Blind SA* (CC) paras 26-27.
28 The said obligations include the *Trade-Related Aspects of Intellectual Property Agreement* (1994) (*TRIPs Agreement*), the *Berne Convention for Protection of Literary and Artistic Works* (1886) (*Berne Convention*), *International Covenant of Economic, Social and Cultural Rights* (1966) (ICESCR) as well as the *Convention on the Rights of Persons with Disabilities* (2006) (CRPD); *Blind SA* (CC).
29 *Blind SA* (CC) para 47.
30 *Blind SA* (CC) paras 66, 70.
31 *Blind SA* (CC) para 71.
32 *Blind SA* (CC) para 72.
33 *Blind SA* (CC) para 79.
34 *Blind SA* (CC) para 83.
35 *Blind SA* (CC) paras 83, 90.
36 *Blind SA* (CC) para 89.

unconstitutionality of sections 6 and 7 read with section 23 of the *Copyright Act* in their application to persons with print and visual disability,[37] the Court proceeded to make a ruling on the appropriate remedy in terms of section 172 of the Constitution. The Court found that the finding of unconstitutionality and the remedy thereof had to be measured against the Constitution, not the *Marrakesh Treaty*.[38] In respect of the remedy, the court read-in the new section 13A in the Act, as informed by section 19D of the Bill, but limited it to literary works and artistic works forming part of such literary works. The Court then adopted definitions from the *Marrakesh Treaty* relating to an accessible format copy and a beneficiary person.[39] As far as the scope of the limitation of rights was concerned, the Court held that it was reproduction and adaptation rights that would be limited.[40] In respect of entities that would make accessible format copies, both the *Marrakesh Treaty* and section 19D required that they must be authorised entities; and to this requirement the Court held that it was a remit of legislature but went ahead to stipulate such entities as those providing education, instructional training, adaptive reading, or information access to beneficiary persons on a non-profit basis to make accessible format copies.[41] In so doing the Court has done away with the government authorisation that is required by the *Marrakesh Treaty* and reflected in the CAB as well.[42] In conclusion, the Court read-in the new section 13A in the *Copyright Act* with the above stipulations as follows:

> 6. During the period of suspension referred to in paragraph 5, the Copyright Act shall be deemed to include the following additional provisions:
>
> 'Section 13A Exceptions applicable to beneficiary persons
>
> (1) For the purposes of section 13A—
>
> (a) "accessible format copy" means a copy of a work in an alternative manner or form which gives a beneficiary person access to the work, including to permit the person to have access as feasibly and comfortably as a person without visual impairment or other print disability. The accessible format copy must be used exclusively by beneficiary persons and it must respect the integrity of the original work, taking due consideration of the changes needed to make the work accessible in the alternative format and of the accessibility needs of the beneficiary persons;
>
> (b) "beneficiary person" means a person who—
>
> (i) is blind;

37 *Blind SA* (CC) para 97.
38 *Blind SA* (CC) para 94.
39 *Blind SA* (CC) para 106.
40 *Blind SA* (CC) para 106(d).
41 *Blind SA* (CC) para 109.
42 *Blind SA* (CC) para 109.

(ii) has a visual impairment or a perceptual or reading disability which cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability; or

(iii) is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would normally be acceptable for reading regardless of any other disabilities;

(c) "literary works" means literary works as defined in section 1 of this Act, and shall be taken to include artistic works forming part of a literary work;

(d) "permitted entity" means an entity, including a government institution or non-profit organisation, that provides education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis, and has the provision of such services as one of its primary activities or institutional obligations.

(2) A permitted entity may, without the authorisation of the owner of copyright in a literary work, make an accessible format copy of the literary work; obtain from another permitted entity, an accessible format copy, and supply those copies to beneficiary persons by any means, including non-commercial lending or by electronic communication by wire or wireless means, and undertake any intermediate steps to achieve those objectives, provided that all of the following conditions are met—

(a) the permitted entity wishing to undertake said activity has lawful access to that work or a copy of that work;

(b) the work is converted to an accessible format copy, which may include any means needed to navigate information in the accessible format, but does not introduce changes other than those needed to make the work accessible to the beneficiary person;

(c) such accessible format copies are supplied exclusively to be used by beneficiary persons; and

(d) the activity is undertaken on a non-profit basis.

(3) A beneficiary person, or someone acting on their behalf, including a primary caretaker or caregiver, may make an accessible format copy of a work for the personal use of the beneficiary person or otherwise may assist the beneficiary person to make and use accessible format copies where the beneficiary person has lawful access to that work or a copy of that work.'

Accordingly, section 13A(2) as quoted above is understood to allow a permitted entity to make literary works available in accessible format copies by limiting the exclusive right of reproduction, and the right of adaptation, where applicable, of the copyright owner.

Any interpretation of section 13A(2) that is contrary to that adopted above that the Constitutional Court limited not only the right of reproduction but also adaptation rights in order to have works available in accessible format copies must agree with Professor Dean that the regulations limiting the right of reproduction would be sufficient and that section 13A is therefore unnecessary. It is on the basis of this interpretation that the discussion below ensues.

3 Reproduction/adaptation conundrum and compliance with the *Marrakesh Treaty*

At the heart of the *Blind SA* case was whether section 13 of the *Copyright Act* could be used to rescue the Act from the declaration of unconstitutionality. To this end the Constitutional Court held that section 13 covers only reproduction rights while accessible format copies can require works to be adapted, thereby necessitating a limitation on adaptation rights as well. To arrive at this conclusion the Constitutional Court made the following statements that are worthy of consideration:

> The exact boundary between the reproduction and adaptation of a literary work is hard to draw. We know that the translation of a literary work, by definition, is an adaptation. That assists us to understand what makes an adaptation distinctive. Language is not simply made up of words that signify identifiable and distinctive things in the world.[43]

Still on section 13 of the Act, from which Professor Dean argued that it can be used to allow the Minister to make regulations that can allow reproduction exceptions for format shifting, thereby averting a declaration of unconstitutionality, the Constitutional Court found that section 13 was inadequate, as format shifting goes beyond reproduction. This is specifically what the Court said:

> What this means, as the final sentence of Article 4(1)(a) of the Marrakesh Treaty provides is that '[t]he limitation or exception provided in national law should permit changes needed to make the work accessible in the alternative format'. The exposition of the examples described above indicates that this cannot, with any measure of certainty, invariably take place by way of reproducing literary works (with their inclusion of artistic works), no matter how generously that term is reasonably interpreted.[44]

The statements above are intriguing, and they form the bases of inquiry for this section. With respect to the statement regarding the difference between adaptation and reproduction, the question is whether the line is hard to draw, as the Court found. In respect of the second statement, the inquiry is whether the last paragraph can be used to add more rights that are to be limited over and above the ones mentioned in the first paragraph of Article

43 *Blind SA* (CC) para 83.
44 *Blind SA* (CC) para 89.

4(1)(a), and whether South Africa can in fact go beyond Article 4(1)(a) of the *Marrakesh Treaty*. The reading of the said Article 4(1)(a) is as follows:

> Contracting Parties shall provide in their national copyright laws for a limitation or exception to the right of reproduction, the right of distribution, and the right of making available to the public as provided by the WIPO Copyright Treaty (WCT), to facilitate the availability of works in accessible format copies for beneficiary persons.
>
> The limitation or exception provided in national law should permit changes needed to make the work accessible in the alternative format.

3.1 Is the line hard to draw between adaptations and reproductions?

Normatively, reproduction in relation to literary works is defined in the *Copyright Act* as including a reproduction in the form of a record or a cinematograph film, while adaptation in relation to literary work includes in the case of a non-dramatic work a version of the work in which it is converted into a dramatic work, and vice versa. It also includes a translation of a work.[45] Whereas it is correct that both reproduction and adaptation rest on copying, the difference between the two is that with the latter the work is able to stand on its own; so much so that it is distinguishable from the original work. Specifically, the difference between these two separate rights hinges on the *corpus mysticum* of the work; thus, reproduction does not relate to the change in the content of the work while adaptation does.[46] However, the change in content needs to be so great that the work can stand on its own, and this addresses the Constitutional Court's view that:

> content-based distinction between reproduction and adaptation will not always be definitive. When words are changed in a text, in an act of plagiarism, we might want to conclude that the text is nevertheless a copy because there remains sufficient objective similarity, and hence the work is a reproduction. However, its content has, in some measure, also been changed. An adaptation that is a translation is not merely a copy because there is an interpretative engagement with the text so as to render its meaning.[47]

I contend herein that the reading of the entire *Marrakesh Treaty* framework is not to change the *corpus* of the work but just the form, so that the works concerned can be perceptible to people with disability, specifically those with visual disability. Hence, adaptation rights were not included in the first place. This interpretation is also adopted by other scholars such as Kouletakis, who interprets Article 4(1)(a) thus:

> It is important to note that the limitations and exceptions in the Marrakesh Treaty 'do not extend to substantive modifications that would amount to adaptations', an exclusive right given to the copyright owner of a literary work according to article 12 of the Berne Convention for the Protection of Literary

45 Section 1 of the *Copyright Act* 98 of 1978.

46 Hugenholtz and Senftleben 2011 https://www.ivir.nl/publicaties/download/Fair%20Use%20Report%20PUB.pdf 26.

47 *Blind SA* (CC) para 84.

> and Artistic Works 1886 and which is omitted from article 4(1)(a) of the Marrakesh Treaty.[48]

In fact, if format shifting in the *Marrakesh Treaty* limited adaptation rights, this would mean that the work that is now reformatted would have the attributes of standing on its own from the original copy, in which case the beneficiary persons would not be getting the same work that people without disability were getting. Therefore, since “adaptation” in a technical copyright sense refers to changes in the content of the work to such a degree that the changed work can stand on its own, one concludes that the term “adaptation” when used literally to refer to "changes in form" is a misnomer, and that another term that has no technical legal implications should be used. I note that Professor Ncube and her team use the term “remediation” when referring to changing formats to make works accessible to people with disability. Perhaps this should be the term to be used instead of “adaptation” when we are not referring to changes in a work that make the adapted work stand on its own to such a degree that it qualifies for copyright protection as an “adaptation”.[49] The dilemma that arises in using “adaptation” when we are referring to mere necessary changes to make a work perceptible to people with disability is reflected in the laws of other countries, where the use of "adaptation" is qualified because it does not refer to the work that embodies characteristics of originality to qualify for copyright protection; rather, it simply refers to format shifting while the work remains the same. As an example, Latvia requires that adaptation should not exceed the extent necessary.[50] Ecuador grants copyright protection to adaptations provided such adaptations meet the standard of originality.[51] This means that the new work must be able to stand on its own. On the other hand, for adaptations of works for people with disability, the study prepared by Professors Reid and Ncube for WIPO shows that Ecuador requires that adaption cannot introduce more changes than is necessary to the nature of the original format.[52] One can argue that the changes envisaged in these countries for works to be in accessible formats are to such a degree that the "adapted work" cannot stand on its own from the original work. Hence, the changing of works in different formats cannot be said to require a limitation to adaptation rights.

Had it been that the line between adaptation and reproduction was hard to draw, thereby suggesting that adaptation rights are vital for making accessible format copies, there is little doubt that Article 4(1)(a) of the

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48 Kouletakis 2020 *SCRIPTed* 62.

49 Ncube, Reid and Oriakhogba 2020 *JWIP* 153.

50 Reid and Ncube 2019 https://www.wipo.int/edocs/mdocs/copyright/en/sccr_38/sccr_38_3.pdf 72.

Section 9 of the *Ecuador Copyright Act* in Official Journal No 149 of 14 August 1976.

52 Reid and Ncube 2019 https://www.wipo.int/edocs/mdocs/copyright/en/sccr_38/sccr_38_3.pdf 44.

Marrakesh Treaty could have included adaptation rights as well. The complexity surrounding adaptation rights and their limitations thereof is captured in this quotation:

> In this respect, altering the form of the work in order to make it accessible, normally, does not require any modification of the intellectual content, of the *corpus mysticum* of a work protected by copyright.[F] It is questionable, however, whether other exclusive rights can be impinged upon where the work has to undergo further changes necessary to make it accessible in the alternative format, taking due consideration of the specific needs of the print disabled person. Thus, for instance, it might be necessary to add navigational aids to digital files, so that a print disabled person can access the work for private study as comfortably as a person without visual or other impairments.[F] In addition to the broad right of reproduction 'in any manner or form', Art. 12 of the Berne Convention establishes a separate right of adaptation, requiring that '(A)uthors of literary or artistic works shall enjoy the exclusive right of authorising adaptations, arrangements and other alterations of their works.' While the Berne Convention does not contain any clear definition of the terms employed in the provision under consideration, and in particular of the adaptation right, there is also no provision for exceptions to the adaptation right. Arguably, Berne Union countries enjoy ample latitude in shaping the contours of the adaptation right in their own jurisdiction. As a result, its discipline varies considerably from country to country.[53]

It could have been helpful for the Court to lay out clear principles reflecting the contours of adaptation rights and limitations thereof for South Africa. Where adaptation rights are intended to be subjected to limitations, countries are specific, because copyrights are taken seriously and so are the limitations thereto. Adaptation is not inferred from reproduction. The WIPO study by Sullivan that was published in 2007 shows that countries that intend to make an adaptation exception do so expressly,[54] and this is because the two are separate rights in their own standing – they simply cannot be conflated. If in 2007 a few countries had already identified adaptation rights as necessary to be limited for people with disability to have accessible format copies and Sullivan had indicated in her study that adaptation can in certain circumstances be necessary,[55] the question is – why were adaptation rights not included in Article 4(1)(a), especially noting that there is no provision regarding adaptation exceptions in the *Berne Convention* for literary and artistic works?

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53 Vezzoso 2014 *ICC* 796.

54 Sullivan 2006 https://www.wipo.int/edocs/mdocs/copyright/en/sccr_15/sccr_15_7.pdf.

55 "The reason that it might be relevant to be able to make an adaptation of a work is that it might be necessary to, for example, rearrange the layout of the work, describe drawings and pictures and include navigational aids, all of which might come within the scope of the restricted act of adaptation." Sullivan 2006 https://www.wipo.int/edocs/mdocs/copyright/en/sccr_15/sccr_15_7.pdf 35..

Despite the fact that very few countries, twenty to be exact,[56] have included adaptation rights to the list of exceptions, it is difficult to see how adaptation rights could be affected. It is difficult to see how a work that simply needed format shifting can stand on its own from the original work to the extent that adaptation rights should be affected when the content of such a work has not changed. One will recall from the history of copyright law that the Government of Venice stopped granting privileges to reproductions that were simply in another format – the requirement was for the work to be new.[57] Therefore, the issue of whether adaptation, used in a technical copyright sense, is required for format shifting seems to elevate works that are simply copies of the original work to a status of protection that they do not deserve.

As the law reform process is ongoing, it remains to be seen how Parliament will address the *Blind SA* judgment within the scope of the *Marrakesh Treaty,* as limitations to exclusive rights are to be expressly provided for in the national legislation in line with Article 4(2), taking into account South Africa's international obligations.

Based on the above, the question that the South African legislature needs to provide guidance on is whether reformatting the work or format-shifting or changing the format of the work while the content is the same amounts to adaptation, wherein the term “adaptation” is understood to refer to a work that is able to stand on its own and qualify for copyright protection? This question is indeed a delimitation of this contribution and it is important to unravel, as the Constitutional Court itself found that the term "adaptation" to be insufficiently defined in the Act, yet we are going to find ourselves dealing with the limitation of adaptation rights in the light of the *Blind SA* decision.

3.2 Can Article 4(1)(a) be used to add more rights to limitations?

Recalling that the Constitutional Court ruled that accessible format copies affect adaptation rights while interpreting Article 4(1)(a) of the *Marrakesh Treaty* – the question is whether this finding is consistent with the *Marrakesh Treaty*, which was a benchmark for this case. The Court specifically interpreted Article 4(1)(a) as follows:

> What this means, as the final sentence of Article 4(1)(a) of the Marrakesh Treaty provides is that ‘[t]he limitation or exception provided in national law should permit changes needed to make the work accessible in the alternative format’. The exposition of the examples described above indicates that this cannot, with any measure of certainty, invariably take place by way of

56 Reid and Ncube 2019 https://www.wipo.int/edocs/mdocs/copyright/en/sccr_38/sccr_38_3.pdf 72.

57 Kostylo "From Gunpowder to Print" 29.

> reproducing literary works (with their inclusion of artistic works), no matter how generously that term is reasonably interpreted.[58]

It was from the quotation above that the Court included adaptation rights to the list of rights *vis* the right of reproduction, the right of distribution and the right of making available, being the rights that need to be limited in order to make works available in accessible format copies. The question that is relevant for this part of this paper is: does the last paragraph of Article 4(1)(a) make provision for other rights to be included in the list?

It is notable that Article 4(1)(a) provides mandatory maximum standards of encroachment to the exclusive rights of copyright owners. It is important to recall that copyrights are protected in the international treaties, mainly the *Berne Convention*, the *TRIPs Agreement*, and the twin-internet treaties – WCT and WPPT. The rights contained in these international treaties provide minimum standards of protection. Therefore, while countries can always enhance their standards of protection, which, in the language of the World Trade Organization would be TRIPs-Plus standards,[59] they cannot go below these international norms as they are the minimum threshold unless as permitted through exceptions. Exceptions to these minimum standards of protections are carefully agreed upon – some are mandatory while others are left up to the national legislatures to decide.[60] The *Marrakesh Treaty* is one such treaty that specifically facilitates derogations from the minimum standards of protection as contained in the *Berne Convention*, *TRIPs Agreement* and WCT by limiting the rights of reproduction and distribution, and the right of making available as mandated by Article 4(1)(a) of the said treaty. This analysis is in line with the position adopted by countries during the conceptualisation of the *Marrakesh Treaty* as found in the *travaux preparatoire* of the *Marrakesh Treaty,* wherein Chile proposed in 2005 that countries were looking into *mandatory minimum exceptions* to make works available to the people living with disability.[61] However, for *Marrakesh Treaty* Article 4(1)(a) that the court relied on, the ceiling for encroachment to the exclusive rights permissible are the rights of reproduction and distribution, and the right of making available. For countries that choose to do so – they may limit the right of public performance as permitted by Article 4(1)(b), which is permissive, not mandatory, meaning that Article 4(1)(b) is the floor. These exceptions are expected to be provided for in the national law as stipulated in Article 4(2). Additional rights are not subject to limitation as per the reading of Article 4(1)(a).

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58 *Blind SA* (CC) para 89.

59 Ho 2011 https://papers.ssrn.com/abstract=1933252; Cohen-Kohler, Forman and Lipkus 2008 *HEPL* 229.

60 Ginsburg "Floors and Ceilings in International Copyright Treaties" 290-296.

61 Li 2014 *IIC* 753

So, what then is the significance of the last paragraph of Article 4(1)(a)? This paragraph simply means that legislation must not make exceptions to the listed rights in a manner that does not ensure that people with disability can have access to the protected works. Thus, it is common cause that in some instances exceptions can be couched in a manner that results in no exceptions at all. As an example, technological protection measures (TPMs) can render the exception to the right of reproduction meaningless, thereby effectively inhibiting people with disability from accessing protected works in formats that are perceptible to them. Therefore, the last paragraph of Article 4(1)(a) cautions against such tendencies whereby legislatures make exceptions in one section and take away that exception, usually unintentionally, in the next section, an example being made in the case of the strict provisions on TPMs.

Would South Africa not be Marrakesh-compliant if section 19D of the Bill had limited adaptation rights based on the discussion above? Certainly not. This is so because provisions of the *Marrakesh Treaty* other than Article 4(1)(a) and (b) permit countries to add more exceptions should they wish to do so. To this end, Articles 4(3) and 12 of the *Marrakesh Treaty* provide for such discretion.

The said Article 4(3) provides that "[a] Contracting Party may fulfil Article 4(1) by providing other limitations or exceptions in its national copyright law pursuant to Articles 10 and 11." While Article 10 stipulates the general principles of implementation, Article 11 creates obligations for countries that choose to add more limitations and exceptions over and above those under Article 4(1)(a). To this end Article 11 requires that any additional limitations or exceptions must be subject to the three versions of the three-step test found respectively in the Berne Convention, the *TRIPs Agreement* and the twin-internet treaties. The said three-step test requires that limitations to rights must be confined 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 rightholder."[62] Whereas some countries, twenty to be exact,[63] have limited adaptation rights in their national legislation without facing challenges of violating the three-step test, one would have expected the Court that adds adaptation rights to the list of exceptions to undertake an assessment as to whether adding adaptation rights to the list of rights to be limited complies with the three-step test, but this was not done. The importance of assessing limitations against the three-step test is summed up below:

62 *Berne Convention* Art 9(2); *TRIPs Agreement* Art 13, WCT Art 10.

63 Reid and Ncube 2019 https://www.wipo.int/edocs/mdocs/copyright/en/sccr_38/sccr_38_3.pdf 72.

> [N]ational policymakers who seek to stay within the legislative boundaries of a given IP regime can only devise and adopt L&Es [limitations and exceptions] within the framework set by the abstract criteria of the test.[64]

Nevertheless, this work is not about assessing whether an inclusion of adaptation rights to the list of exceptions complies with the three-step test; it is about showing how the Court that added more rights to be subjected to limitations omitted the three-step test assessment.

Another provision that can be used by countries to include further limitations and exceptions is Article 12 of the *Marrakesh Treaty*. Article 12 titled "Other limitations and exceptions" reads as follows:

> 1. Contracting Parties recognize that a Contracting Party may implement in its national law other copyright limitations and exceptions for the benefit of beneficiary persons than are provided by this Treaty having regard to that Contracting Party's economic situation, and its social and cultural needs, in conformity with that Contracting Party's international rights and obligations, and in the case of a least-developed country taking into account its special needs and its particular international rights and obligations and flexibilities thereof.
>
> 2. This Treaty is without prejudice to other limitations and exceptions for persons with disabilities provided by national law.

There is no doubt that South Africa is within its right to have adaptation rights limited pursuant to Article 12 of the *Marrakesh Treaty* should the legislature so wish to limit adaptation rights. However, one would have expected that the Court that traversed the *Marrakesh Treaty* as the Constitutional Court did would have given light on Article 12, but there was no mention of article 12 and its permissive nature to subjecting more rights to limitations and exceptions, while the second paragraph of Article 12 acknowledges that states can shape their national laws in any manner for the benefit of persons with disability.

The reading of Article 12, which says that states can limit other rights having regard to their economic situation indicates among other things that limiting adaptation rights would require an economic impact study, and we have seen how an insufficient economic impact study can plunge law reform processes into turmoil, as is the case with the CAB. In sum, adding limitations on adaption rights is not for the courts but for the legislature to determine, subject to the three-step test,[65] and taking into consideration the country's economic situation. In the lawmaking process the ends do not justify the means – thus, while it is good that South Africa is responding to the challenges of people living with disability the process must be

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64 Senftleben "From Flexible Balancing Tool to Quasi-Constitutional Straitjacket" 83-105.

65 Helfer *et al World Blind Union Guide to the Marrakesh Treaty* 67-74.

impeccable, as required by the Constitution and South Africa's international obligations.

One will recall that Article 31 of the *Vienna Convention on the Law of Treaties* (VCLT), which provides a guide on interpreting treaties, requires taking into account their context, object and purpose. Together with the context, there is a requirement that subsequent practice be considered, among other matters. In interpreting Article 4(1)(a) the Constitutional Court did not give Article 4(1)(a) its ordinary meaning because surely adaptation rights are not included in this provision. Further the Constitutional Court did not refer to other states' practice to see if the adaptation limitation was universally added to the list of rights mentioned in Article 4(1)(a) for people with disability to have accessible format copies subsequent to the implementation of the *Marrakesh Treaty*. Even Article 31(3)(c), which adopts the most onerous interpretation by requiring that other relevant rules of international law applicable in the relations between states, CRPD being such rules in point, must be considered, cannot be used by any stretch of the imagination to interpret Article 4(1)(a) as limiting adaptation rights. The inability to resort to methods of applying international law, the subject that features so prominently in the Constitution, was discussed succinctly by Professor Dire Tladi,[66]and it has clearly played out in the *Blind SA* case. The *Marrakesh Treaty* was applied as though it were a ratified treaty, it was only towards the end of the judgement that the Court remarked that the *Marrakesh Treaty* is not the standard for judging the constitutionality of the *Copyright Act*,[67] yet the remedy – section 13A – was almost a replication of the *Marrakesh Treaty*. It is notable that Professor Tladi established that our courts have used international law without explaining it or without using the cannons of interpreting international law as provided for in the VCLT.

4 Conclusion

This paper has focussed on the *Blind SA* case, the issue being the difference between adaptations and reproductions, and whether Article 4(1)(a) of the *Marrakesh Treaty* can be interpreted in such a way as to allow for the inclusion of adaptation rights to limitations and exceptions.

On the first aspect of the inquiry, that is, whether the lines between adaptation and reproduction are blurred, this contribution has shown that the distinction between these two concepts is very clear. Thus, with respect to reproduction, the content of the copy is the same as that of the original work. In adaptations, on the other hand, the *corpus mysticum* is different; thus, the adapted work embodies characteristics that would qualify it as a distinct work. That is, it is able to stand distinctively from the original work.

66 Tladi 2018 *SALJ* 708.
67 *Blind SA* (CC) para 94.

Therefore, it is concluded herein that it is incorrect to say that the lines are hard to draw between these two concepts.

With respect to the interpretation of Article 4(1)(a), especially the second paragraph, it is found herein that it cannot be used to add to the ceiling articulated in the first paragraph of the said article. It has been argued that had the international community at WIPO found adaptation rights as requiring limitation they could have done so, especially in the light of the findings of the study presented to WIPO by Sullivan in 2007. It has nonetheless been found that should South Africa wish to limit adaptation rights, the country has a right to do that as permitted by Articles 4(3) and/or 12, taking into account the country's international obligations and economic, social and cultural needs. As the legislature has 24 months to remedy the unconstitutionality finding, and taking into account that the decision in *Blind SA* interpreted Article 4(1)(a) of the *Marrakesh Treaty* as extending to adaptation rights, it is recommended that it should embark on this exercise and further define "adaptations", the term which seems as if it will be often used often in future.

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List of Abbreviations

BC Int'l & Comp L Rev	Boston College International and Comparative Law Review
CAB	Copyright Amendment Bill
CRPD	Convention on the Rights of Persons with Disability
HEPL	Health Economics, Policy and Law
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Community of Jurists
IIC	International Review of Intellectual Property and Competition Law

IP	intellectual property
JWIP	Journal of World Intellectual Property
PELJ	Potchefstroom Electronic Law Journal
PPAB	Performers' Protection Amendment Bill
SALJ	South African Law Journal
TPMs	Technological Protection Measures
TRIPs	Trade-Related Aspects of Intellectual Property Rights
VCLT	Vienna Convention on the Law of Treaties
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonograms Treaty