

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No: 14996/21

In the application for leave to intervene of:

MEDIA MONITORING AFRICA TRUST

Applicant for admission as
the Second *Amicus Curiae*

In the matter between:

BLIND SA

Applicant

and

MINISTER OF TRADE, INDUSTRY AND COMPETITION

First Respondent

**MINISTER OF INTERNATIONAL RELATIONS AND
COOPERATION**

Second Respondent

SPEAKER OF NATIONAL ASSEMBLY

Third Respondent

**CHAIRPERSON OF THE NATIONAL
COUNCIL OF PROVINCES**

Fourth Respondent

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

Fifth Respondent

and

THE INTERNATIONAL COMMISSION OF JURISTS (ICJ)

First *Amicus Curiae*

FILING SHEET

KINDLY TAKE NOTICE THAT Media Monitoring Africa Trust files its Heads of Argument.

SIGNED at DURBAN on 17 SEPTEMBER 2021.



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HEADS OF ARGUMENT ON BEHALF OF MEDIA MONITORING AFRICA TRUST

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INTRODUCTION

1. The right to freedom of expression¹ is integral to the advancement of dignity and autonomy, and it serves to enable an array of other human rights and constitutional values. The right to receive or impart information or ideas² is an essential element of the right to freedom of expression, and the rights to freedom of expression and access to information³ are inherent to all persons and apply to all persons equally. In this regard, states are enjoined to take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and access to information, including the freedom to seek, receive, and impart information and ideas on an equal basis with others and through all forms of communication.⁴
2. The Copyright Act 98 of 1978 (“**the Copyright Act**”) creates considerable barriers for persons with print and visual disabilities to exercise their rights to freedom of expression and access to information on an equal basis.⁵ However, these challenges — when considered in line with South Africa’s domestic, regional, and international law obligations — can be overcome in a manner that ensures that the rights to freedom of expression and access to information can be fostered, rather than restrained, by copyright laws.
3. It is for these reasons that the Media Monitoring Africa Trust (“**MMA**”) seeks to be admitted as an *amicus curiae* in this matter, in accordance with Rule 16A of the Uniform Rules of Court, in order to offer assistance to this Court in navigating the barriers imposed by the Copyright Act, in particular, the challenges pertaining to freedom of expression and access to information.

¹ Section 16 of the Constitution of the Republic of South Africa, 1996.

² *Id* at section 16(1)(b).

³ *Id* at Section 32.

⁴ Convention on the Rights of Persons with Disabilities (2006) at article 21.

⁵ Similarly to the Applicants, MMA uses the phrase “persons with visual and print disabilities” to refer to all persons who fall within the scope of the definition of a “beneficiary person” in Article 3 of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (2013) (“**the Marrakesh Treaty**”).

4. As a not-for-profit organisation that operates in the public interest to promote the development of freedom of expression and access to information in South Africa and the rest of the continent, MMA seeks to intervene in the matter as an *amicus curiae* to assist this Court by highlighting the challenges for persons with visual and print disabilities accessing works under the present copyright regime in South Africa.
5. In making its submissions, MMA limits itself to legal arguments and does not seek to adduce new evidence. As a general proposition, MMA aligns with the remedy sought by the Applicants in this matter.
6. In line with MMA's particular areas of interest and expertise, and fully cognisant of the duty of an *amicus curiae* not to repeat any of the submissions that have already been canvassed by the parties, MMA's substantive submissions are narrowly tailored to three key issues of law that are relevant to the present matter:
 - 6.1. **First**, the challenges associated with advancing the right to freedom of expression in the context of persons with visual and print disabilities accessing works under the present copyright regime in South Africa.
 - 6.2. **Second**, the importance of appropriately realising the right to freedom of expression and the ability to share knowledge and ideas in the digital era.
 - 6.3. **Third**, international and comparative law perspectives on how the right to freedom of expression can be fostered, rather than restrained, by copyright laws.
7. These written submissions are structured in two parts. First, we deal with the application for admission as an *amicus curiae*. Thereafter, we deal with the substantive submissions advanced on behalf of MMA.

MMA'S ADMISSION AS AN AMICUS CURIAE

Role and importance of an amicus curiae

8. In *Hoffman v South African Airways*, the role of an *amicus curiae* was described as follows:

“An *amicus curiae* assists the Court by furnishing information or argument regarding questions of law or fact. An *amicus* is not a party to litigation, but believes that the Court's decision may affect its interest. The *amicus* differs from an intervening party, who has a direct interest in the outcome of the litigation and is therefore permitted to participate as a party to the matter. An *amicus* joins proceedings, as its name suggests, as a friend of the Court. It is unlike a party to litigation who is forced into the litigation and thus compelled to incur costs. It joins in the proceedings to assist the Court because of its expertise on or interest in the matter before the Court. It chooses the side it wishes to join unless requested by the Court to urge a particular position.”⁶

9. Furthermore, in *In Re: Certain Amicus Curiae Applications; Minister of Health v Treatment Action Campaign*, it was explained that the role of the *amicus curiae*—

“is to draw the attention of the court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an *amicus* has a special duty to the court. That duty is to provide cogent and helpful submissions that assist the court. The *amicus* must not repeat arguments already made but must raise new contentions; and generally these new contentions must be raised on the data already before the court.”⁷

10. Our courts value the role of *amicus curiae*, and have noted the role of *amicus curiae* as “very closely linked to the protection of our constitutional values and the rights enshrined in the Bill of Rights”, with the purpose of Rule 16A “to facilitate the role of *amici* in promoting and protecting the public interest.”⁸

⁶ [2000] ZACC 17; 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 at para 63.

⁷ [2002] ZACC 13 at para 5.

⁸ *Children's Institute v Presiding Officer of the Children's Court, District of Krugersdorp and Others* [2012] ZACC 25; 2013 (2) SA 620 (CC); 2013 (1) BCLR 1 (CC) at para 26.

11. In the present matter, MMA is duly cognisant of the “special duty” that it owes to this Court to provide cogent and helpful submissions, to be of assistance to this Court in the determination of this matter, and to promote constitutional rights and values. MMA does not seek to adduce new evidence, but rather raises substantive matters of law that are relevant to the constitutional and contextual underpinnings of this matter. In what follows, we address the requirements to be assessed in considering MMA’s application for admission as an *amicus curiae*.

Requirements for admission as an amicus

12. It is trite that in order for a party to be admitted as an *amicus curiae*, the following requirements must be met:

12.1. It must have an interest in the proceedings;

12.2. The submissions to be advanced must be relevant to the proceedings;
and

12.3. It must raise new contentions that may be useful to the court.

13. It is submitted that MMA meets all three requirements:

13.1. **Interest:** MMA’s interest in the matter has been set out above as well as in the founding affidavit in MMA’s application for admission as an *amicus curiae*.⁹ As set out therein, MMA is a not-for-profit organisation that operates in the public interest to promote media freedom, freedom of expression, and access to information in South Africa and the rest of the continent. Over the past 28 years, MMA’s work has consistently related to key human rights issues, always with the objective of promoting democracy, human rights, and encouraging a just and fair society. MMA has engaged in extensive

⁹ MMA, FA at paras 18-24, 032-9 - 032-12.

work in navigating the appropriate balance to be struck between freedom of expression and other competing rights and interests and has a keen interest in advancing the ideals of equality and inclusion, particularly in the context of freedom of expression and access to information. In addition, MMA engaged in the various public participation processes relating to the Copyright Amendment Bill (“**CAB**”). In its submissions, MMA welcomed the inclusions in the CAB that recognised the rights of persons with disabilities and recommended that South Africa urgently ratify the Marrakesh Treaty.¹⁰ MMA submits that the issues raised in the present matter fall within MMA’s focus areas and the work in which it is involved.

13.2. **Relevance:** The substantive submissions to be advanced by MMA are directly relevant to the constitutional and contextual underpinnings of this matter. Specifically, MMA seeks to contribute submissions that will highlight the challenges to freedom of expression and access to information posed by the present copyright regime in South Africa, demonstrating how the regime falls short of South Africa’s domestic, regional, and international obligations in advancing freedom of expression and access to information. This, MMA submits, is relevant to this Court’s determination of the issues of constitutionality presently before it. In formulating these submissions, MMA has had regard to the papers to ensure that the submissions are narrowly tailored to the pertinent issues before the Court. In doing so, MMA submits that these submissions are relevant to the adjudication and determination of this dispute.

13.3. **Novelty and usefulness:** In this regard, MMA submits that its submissions will assist this Court in three key respects. *First*, it will

¹⁰ MMA, ‘Submissions on the Copyright Amendment Bill 2017: Portfolio Committee on Trade and Industry’ (2017) at para 2.1. MMA also made submissions to the members of the Generalized System of Preferences Sub-Committee, in response to the submission made by the International Intellectual Property Alliance regarding the Copyright Amendment Bill, see MMA, ‘submission to the members of the Generalized System of Preferences (GSP) Sub-Committee, in response to the submission made by the International Intellectual Property Alliance (IIPA) regarding the Copyright Amendment Bill B13B-2017’ (2020).

assist the Court in assessing the legal obligations on the state to advance the right to freedom of expression for persons with disabilities. *Second*, it will place the issues at hand in the context of the digital era, illustrating the need for South Africa's copyright regime to be reflective of the application of human rights both on- and offline. *Third*, it will be of use in providing perspectives on how the right to freedom of expression can be fostered, rather than restrained, by copyright laws. MMA notes that the Applicant argues that the Copyright Act directly limits the rights to freedom of expression and access to information and scientific research. While MMA supports these arguments, MMA submits that its submissions go further in highlighting these challenges. MMA raises novel arguments in relation to South Africa's legal duties, the context of the digital era, and unpacks the potential to harmonise freedom of expression and the present copyright regime in South Africa. These submissions will be of use to the Court in considering the implications of the present copyright regime on freedom of expression and access to information.

14. In addition to the substantive requirements, Rule 16A provides certain procedural requirements. As laid out in the founding affidavit for its admission as an *amicus curiae*, MMA requests that its non-compliance with the Uniform Rules be condoned, submitting that the parties have not or will not be prejudiced by the late entry, and that the delay in filing this application is reasonable in the circumstances.¹¹
15. MMA further submits, that in the interest of convenience and expedience, its application, which is unopposed, should be heard together with the Main Application. This too does not cause prejudice to any parties, and the submissions which MMA seeks to advance are relevant to the proceedings, will assist this Court, and are different from those of the other parties.

¹¹ MMA, FA at paras 7-17, 032-7 - 032-9.

SUBSTANTIVE SUBMISSIONS ON BEHALF OF MMA

Scope of submissions

16. As mentioned above, MMA advances three submissions in this matter:

- 16.1. **First**, the challenges associated with advancing the rights to freedom of expression and access to information in the context of persons with visual and print disabilities accessing works under the present copyright regime in South Africa. To this end, MMA seeks to illustrate that South Africa falls short of its domestic, regional, and international law obligations in relation to the right to freedom of expression.
- 16.2. **Second**, the importance of appropriately realising the right to freedom of expression and the ability to share knowledge and ideas in the digital era. MMA submits that South Africa's copyright regime should be brought in line with the regional and international law position which dictates that the same rights that apply offline apply online.
- 16.3. **Third**, an appropriate balance can be struck that ensures that the right to freedom of expression can be fostered, rather than restrained, by copyright laws. This balance, as will be illustrated, can be struck through the remedy proposed by the Applicants, and is a balance that finds application in international law and across multiple foreign jurisdictions.

Challenges associated with advancing the right to freedom of expression

17. MMA submits that the Copyright Act creates a significant accessibility barrier for persons with print and visual disabilities which, in turn, hinders the full realisation of the right to freedom of expression. This is contrary to the Constitution, as well as regional and international law.

The right to freedom of expression

18. As a point of departure, and in considering the challenges posed by the Copyright Act, it is necessary to highlight the scope and content of the right to freedom of expression.
19. It is well established that the right to freedom of expression is a crucial right, both in itself and as an enabler of a range of other rights.¹² Section 16(1) of the Constitution affords every person the right to freedom of expression, which includes the freedom to receive or impart information or ideas. While section 16(2) details what does not form part of the scope of the right — expressly excluding certain expression from constitutional protection — the application of section 16, in its entirety, is all-inclusive. It is a right that applies to all persons equally.
20. Our courts have described the right to freedom of expression as “a *sine qua non* for every person’s right to realise [they’re] full potential as a human being”.¹³ It is thus “constitutive of the dignity and autonomy of human beings”.¹⁴ In *Print Media*, the Constitutional Court explained that “the right cognises an elemental truth that it is human to communicate, and to that fact, the law’s support is owed.”¹⁵ More recently, the Constitutional Court has confirmed that freedom of expression “is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm” because it “is an indispensable facilitator of a vigorous and necessary exchange of ideas and accountability”.¹⁶

¹² UNHRC, ‘Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression’ (2011) A/HRC/17/27 at para 22.

¹³ *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Others* [1996] ZACC 7; 1996 (3) SA 617 (CC); 1996 (5) BCLR 608 (CC) at para 26.

¹⁴ *Khumalo v Holomisa* [2002] ZACC 12; 2002 (5) SA 401; 2002 (8) BCLR 771 at para 21.

¹⁵ *Print Media South Africa and Another v Minister of Home Affairs and Another* [2012] ZACC 22; 2012 (6) SA 443 (CC); 2012 (12) BCLR 1346 (CC) at para 53.

¹⁶ *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22 at para 68, quoting *Economic Freedom Fighters v Minister of Justice and Correctional Services* [2020] ZACC 25; 2021 (2) SA 1 (CC); 2021 (2) BCLR 118 (CC) at para 1.

21. In addition to the constitutional protection of the right to freedom of expression, and the primacy it is given by our courts, it is a right recognised by international and regional legal frameworks.
22. International human rights law establishes the right of everyone to freedom of expression. Article 19 of the Universal Declaration of Human Rights provides that “[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”¹⁷ Article 19 of the International Covenant on Civil and Political Rights — which South Africa has signed and ratified — similarly provides that “[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of [their] choice.”¹⁸
23. The right to freedom of expression is further recognised in article 21 of the Convention on the Rights of Persons with Disabilities (“**CRPD**”). The CRPD, signed and ratified by South Africa, requires state parties to—

“take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice”.¹⁹
24. Regionally, article 9 of the African Charter on Human and People’s Rights, to which South Africa is a signatory, provides that “[e]very individual shall have the right to receive information”, and that “every individual shall have the right to express and disseminate [their] opinions within the law”.²⁰ The Protocol to the African Charter on Human and People’s Rights on the Rights of Persons with

¹⁷ Universal Declaration of Human Rights (1948).

¹⁸ International Covenant on Civil and Political Rights (1976).

¹⁹ Convention on the Rights of Persons with Disabilities (2006).

²⁰ African Charter on Human and People’s Rights (1986).

Disabilities in Africa (**“Protocol on the Rights of Persons with Disabilities”**), to which South Africa is also a signatory, provides that “[e]veryone person with a disability has the right to freedom of expression and opinion including the freedom to seek, receive and impart information and ideas through all forms of communication of their choice”, and that state parties have an obligation to take policy, legislative and other measures to ensure that these rights can be exercised on an equal basis.²¹ Further regional recognition has been provided by the recently adopted Declaration of the African Commission on Human and Peoples’ Rights on Freedom of Expression and Access to Information (**“Declaration on Freedom of Expression”**). The Declaration on Freedom of Expression provides that:

“Freedom of expression and access to information are fundamental rights protected under the African Charter and other international human rights laws and standards. The respect, protection and fulfilment of these rights is crucial and indispensable for the free development of the human person, the creation and nurturing of democratic societies and for enabling the exercise of other rights.”²²

25. It further affirms that everyone, inclusive of persons with disabilities, shall have the right to exercise freedom of expression and access to information without distinction of any kind.²³ The Declaration on Freedom of Expression further requires states to—

“take specific measures to address the needs of marginalised groups in a manner that guarantees the full enjoyment of their rights to freedom of expression and access to information on an equal basis with others. Marginalised groups include women, children, persons with disabilities, older persons, refugees, internally displaced persons, other migrants, ethnic, religious, sexual or gender minorities.”²⁴

²¹ Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa (2018) at article 23.

²² Declaration of the African Commission on Human and Peoples’ Rights on Freedom of Expression and Access to Information (2019) at principle 1.

²³ Id at principle 3.

²⁴ Id at principle 7.

26. From the above it is clear that the right to freedom of expression, inclusive of access to information, occupies a prominent position in human rights discourse, being a constitutionally and internationally protected right, applicable to all persons without discrimination.

Challenges to freedom of expression engendered by the Copyright Act

27. The Copyright Act provides for, among others, the controls and restrictions on the conversion, reproduction, publication, performance, broadcast, transmission, and/or adaptation of original works. This often means that copyrighted works cannot be changed or adapted. This serves the purpose of providing legal protection to content creators, such as authors, composers, computer programmers, and website designers, allowing them to control the economic use of their work in a number of ways, and to receive payment. This, in turn, seeks to promote innovation and the progress of creativity, and the development of knowledge, information, art, and science.
28. In order to realise this purpose in an inclusive and equitable way, the notion of limitations and exceptions has developed over time, recognising that certain published works may need to be adapted in order to be accessible to persons who are blind, visually impaired, or otherwise print disabled. This follows the wide acceptance that visually impaired persons make use of various systems and assistive and adaptive technologies that allow them to advance their right to freedom of expression and receive and impart information and ideas, engage with artistic and creative content, and receive and share academic work and scientific research.²⁵
29. These systems and technologies often require works to be copied, adapted, or changed.²⁶ In order to bridge the accessibility challenges of printed work, for example, text from a printed page can be adapted into an image of the printed

²⁵ See Hersh and Johnson (eds), 'Assistive Technology for the Hearing-impaired, Deaf and Deafblind' (2008).

²⁶ Rens, 'Realising Human Rights in South African Copyright Legislation' *Report on Fundamental Rights, and Global Copyright Legislative Best Practise for Access to Knowledge in South Africa*.

page making it an accessible digital text file.²⁷ Another example is that of speech, text and braille conversion technology which allows content to be converted between speech and text, making the information accessible to persons with disabilities. These technologies or devices “adapt” the work, which on the face of it, may amount to a copyright infringement. Exceptions, however, allow for the use of assistive devices and technologies, and their consequent adaptations to content, to enable access for persons with visual and print disabilities to access the content.

30. The South African government acknowledges the important role of assistive devices and technologies and the need for reasonable accommodation measures. The Department of Social Development’s White Paper on the Rights of Persons with Disabilities (“**White Paper**”), acknowledges the important role of assistive devices.²⁸ The White Paper defines “assistive devices” as any device, product, equipment, or tool that is designed or adapted to enable persons with disabilities to participate in activities, tasks or actions, which may include technology aids such as computers for alternate and augmentative communication, screen readers, magnifiers, and text in audio format. The White Paper views “assistive technology” as an umbrella term that includes assistive, adaptive, and rehabilitative devices and services for persons with disabilities, which enable persons with disabilities and learning differences to attain independence. Notably, in relation to “reasonable accommodation”, the White Paper explains that necessary and appropriate modification and adjustments are needed to ensure that persons with disabilities can enjoy and exercise — on an equal basis with all others — their rights and freedoms. Such accommodation includes assistive devices and assistive technologies which provide persons with disabilities with access to information and communication.
31. Regrettably, the Copyright Act as it presently stands does not envisage exclusions, does not appear to align with the White Paper’s stance on reasonable accommodation measures, and places limitations on adaptations. This, in turn,

²⁷ Hersh above n 25 at 555. See also, Li, ‘Facilitating Access to Digital Content for the Print Disabled: The Need to Expand Exceptions to Copyright Laws’ (2015) *Intellectual Property Journal*.

²⁸ White Paper on the Rights of Persons with Disabilities (2016).

hinders the ability of persons with visual and print disabilities to access information and enjoy their right to freedom of expression. The Report of the Open Review of the South African Copyright Act explains:

“The Copyright Act often makes it impossible for certain works to be made accessible for many South Africans. For example, it is illegal to create a version of a work in Braille, make work more visual or adapt it as text to speech without first obtaining permission of the rights holders. This means that visually and hearing-impaired South Africans have no access to a great deal of copyright work”.²⁹

32. This is inconsistent with the inclusive underpinnings of “everyone” being afforded the right to freedom of expression. This is contrary to the Constitution. Hindering the use of assistive and enabling technologies as a means to advance copyright protections is not a reasonable and justifiable limitation of the right to freedom of expression.
33. MMA submits that both copyright and freedom of expression are important, and MMA recognises the purpose of protecting copyright works. However, when considering the nature of the right to freedom of expression, the clear and disproportionate obstructions imposed by the Copyright Act for persons with print and visual disabilities, as well as a common and attainable option for an exemption³⁰ as a far less restrictive means to enable access to copyright works — as seen in the Marrakesh Treaty, and the proposed exemption in section 19D of the CAB — it is clear that the right to freedom of expression is limited by the Copyright Act in a manner that is neither reasonable nor justifiable.
34. Moreover, the Copyright Act falls short of the regional and international legal positions highlighted above. As a result of the current copyright scheme, it is an unjust challenge for persons with visual and print disabilities to seek, receive and impart information and ideas on an equal basis with others through all forms of communication of their choice.

²⁹ Rens et al ‘Report of the Open Review of the South African Copyright Act’ (2008) at 15.

³⁰ Exemptions are discussed in more detail below.

The right to freedom of expression in the digital era

35. MMA submits that it is necessary to consider the right to freedom of expression and access to information in the context of the digital era for two primary reasons. *First*, the digital era has, and continues to have an impact on the advancement of the right to freedom of expression, and has provided new opportunities for persons with visual and print disabilities to access information. *Second*, international law norms and standards necessitate the protection and promotion of freedom of expression in the digital era.

Technological advancements

36. With the proliferation of new technologies, the manner in which we receive and impart ideas and information has evolved:

“An increasing number of activities in modern society are information-based. The use of electronic media has completely changed the way most information is created, stored, retrieved and accessed. There are a number of different ways in which information can be categorised, including by the technologies used to present or transmit, store and manipulate the information, the applications of this information, and the assistive technologies required to make this information accessible to blind and visually impaired (or other disabled) people.”³¹

37. New technologies, to varying degrees, have made it easier to advance access to information for persons with visual and print disabilities:

“Where new technologies are incorporated in providing access to information for the print disabled, it substantially enhances their involvement in education, communication and recreation. A wide range of ICTs has now been developed to enable visually disabled persons to use cell phones, computer software, the Internet, databases and online education forums.

³¹ Hirsch above n 25 at 444.

Accordingly, information and knowledge are conveyed and exchanged in accessible formats relating to these technologies.”³²

38. MMA submits that online tools and new devices allow for innovative advancements and opportunities for accessibility, the natural consequence should be increased access to information. However, in the absence of an inclusive copyright framework, persons with print and visual disabilities in South Africa may be unable to enjoy the full benefits of the technological advancements that adapt works to make them accessible. The unfortunate irony is that the opportunity to access information is hindered by the virtue of technologies that adapt works and advance accessibility.

International norms and standards

39. The United Nations Human Rights Council has reaffirmed on multiple occasions that “the same rights that apply offline apply online”.³³ Accordingly, the framework of international human rights law remains equally applicable to new communication technologies.³⁴ The Declaration on Freedom of Expression recognises the role of new digital technologies in the realisation of the rights to freedom of expression and access to information. It further requires states to facilitate freedom of expression and access to information online. Accordingly, MMA submits the right to freedom of expression of persons with print and visual disabilities should be understood and applied in the context of the digital era.
40. Further, and in the context of copyright, MMA highlights that copyright exceptions can apply to the digital environment. For example, the World Intellectual Property Organization (“**WIPO**”) Copyright Treaty (“**WCT**”) — which South Africa has

³² Li above n 27 at 359.

³³ United Nations Human Rights Council (“**UNHRC**”), ‘Resolution adopted by the Human Rights Council on 13 July 2021 47/16: The promotion, protection and enjoyment of human rights on the Internet’ (2021) *A/HRC/RES/47/16* at 2. See further UNHRC, The promotion, protection and enjoyment of human rights on the Internet (2012) *A/HCR/RES/20/8*; UNHRC, ‘The promotion, protection and enjoyment of human rights on the Internet’ (2016) *A/HRC/32/L.20*. See also, African Commission on Human and Peoples’ Rights, ‘Resolution on the right to freedom of information and expression on the internet in Africa’ (2016) *ACHPR/Res.362(LIX)*.

³⁴ UNHRC, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue’ (2011) *A/HRC/17/27* at para 21.

signed — is a special agreement under the Berne Convention,³⁵ that deals with the protection of works and the rights of their authors in the digital environment.³⁶ Article 10 of the WCT provides that copyright exceptions can be extended into the digital environment. To this end, contracting parties may, in their national legislation, provide for limitations or exceptions that are appropriate in the digital environment, provided that it does not unreasonably prejudice the legitimate interests of the author of the work.

41. MMA submits, in line with the prevailing position regarding the applicability of rights both on- and offline, and in accordance with international norms and standards which extend the scope of exceptions to the digital environment, the exceptions relating to persons with print and visual disabilities should be inclusive of works in the digital environment.
42. MMA further submits that increased opportunities for access as a result of digital advancements, and advancements to assistive devices coupled with an inclusive copyright regime will create an enabling environment for persons with print and visual disabilities to meaningfully advance their rights to freedom of expression and access to information.

Striking the balance between copyright and freedom of expression

43. There is a perception that a tension exists between the imperative of copyright and the essential elements of the right to freedom of expression. This perception assumes that “copyright is antithetical to freedom of expression. It prevents all, save the owner of the copyright, from expressing information in the form of the literary work protected by the copyright.”³⁷ MMA submits that there is an alternative interpretation that achieves harmony at the interface of copyright and freedom of expression.

³⁵ Berne Convention (1887).

³⁶ WIPO Copyright Treaty (1996).

³⁷ *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142.

44. MMA proposes that a purposive interpretation of copyright is complimentary of the right to freedom of expression. In this regard, MMA recognises that “the purpose of copyright is to benefit society, promote the progress of science and the arts, facilitate growth, support creativity, and spread cultural expression”.³⁸ Freedom of expression enables creativity and innovation and allows members of society to seek, receive and impart information and ideas of all kinds, and enjoy the arts and share in scientific advancement. These are the very benefits that copyright exists to promote. Accordingly, copyright exists to play an integral role in the creation, production and dissemination of knowledge and ideas.
45. However, and as submitted above, there are serious impediments for persons with print and visual disabilities in accessing the full array of creative, innovative, and insightful works. In this context, a tension does exist.
46. Fortunately, these shortcomings of the copyright system can be overcome. Providing exceptions in relation to the protection of copyright works for persons with visual and print disabilities is a simple and effective means of addressing these shortcomings. Exceptions and limitations are “the catalysts which can bring about balance and practical resolution to ensure access to information is protected”, and have thus been developed to ensure a balance between rights of authors and creators, and the just demands of information users.³⁹ The existence of exceptions enables a person with print or visual disabilities to be able to enjoy the work as fully as possible, and on an equal basis with others. Exceptions, for example, would allow the copying of a text into Braille, or other accessible formats. MMA submits that through the use of exceptions the rights of persons with print and visual disabilities to receive and impart information and ideas can be fostered rather than restrained by copyright.
47. MMA submits that the remedy proposed by Blind SA, namely the interim reading in of the exemption clause contemplated in 19D in the CAB, is a simple and effective solution that advances equality and inclusion, and ensures that the right

³⁸ ARTICLE19, ‘The Right to Share: Principles on Freedom of Expression and Copyright in the Digital Age’ (2013).

³⁹ Nicholson, ‘Seeking Balance in Copyright Law for Persons with Sensory Disabilities’ *National Library Review* (2015) at 114 and 119.

to freedom of expression and access to information for persons with visual and print disabilities is safeguarded. MMA notes that it has previously welcomed the section 19D inclusions in the CAB that recognises the rights of persons with disabilities.⁴⁰

48. In what follows, MMA highlights the international position regarding exceptions and draws on foreign law to illustrate the exemption route is well established and can achieve the intended outcome of striking the balance between copyright and freedom of expression.

49. The international community has recognised the limitations to freedom of expression and access to information for persons with print and visual disabilities and has taken steps to advance exceptions as a practical and meaningful way to eliminate these shortcomings of the copyright system. The preamble to the Marrakesh Treaty recognises—

“the challenges that are prejudicial to the complete development of persons with visual impairments or with other print disabilities, which limit their freedom of expression, including the freedom to seek, receive and impart information and ideas of all kinds on an equal basis with others, including through all forms of communication of their choice, their enjoyment of the right to education, and the opportunity to conduct research.”

50. In order to overcome these challenges, the Marrakesh Treaty aims to improve the availability of certain works and other protected subject-matter in accessible formats for persons who are blind, visually impaired, or otherwise print-disabled. It promotes the provision of exceptions or limitations to copyright and related rights for the making and dissemination of copies, in accessible formats.

51. MMA notes that the Applicants and the First *Amicus Curiae* have advanced arguments in relation to the Marrakesh Treaty. MMA supports these arguments.

⁴⁰ MMA above n 10 at para 2.1.

For the sake of brevity, and in order not to repeat arguments already advanced, MMA brings the Marrakesh Treaty to the attention of the Court as an illustration of the international community's acceptance of exceptions as an appropriate means to find accord between copyright and the rights to freedom of expression for persons with print and visual disabilities. In addition, MMA reiterates its position in recommending that South Africa urgently ratify the Marrakesh Treaty.⁴¹

52. As canvassed in MMA's founding affidavit, many countries, to varying degrees, have adopted specific legislation with provisions that address exceptions for persons with visual and print disabilities.⁴² Recent research conducted by WIPO presents a statistical summary of the prevalence of exceptions clauses across member states.⁴³ South Africa is listed among the countries that have no exceptions in their domestic copyright legislation. However, the research suggests that a significant number of states have exception provisions:

52.1. 24 countries have copyright legislation which includes exceptions for persons with visual disabilities only limited to print/text works; and⁴⁴

52.2. 72 countries have copyright legislation that provides an exception for persons with visual disabilities beyond print/text works/works not specified.⁴⁵

⁴¹ Id.

⁴² MMA, FA at para 38, 032-17-8.

⁴³ WIPO Standing Committee on Copyright and Related Rights, 'Revised Scoping Study on Access to Copyright Protected Works by Persons with Disabilities' (2019) at 10.

⁴⁴ Id at Table 1: Summary of finding. These countries include Argentina, Armenia, Azerbaijan, Belarus, Brazil, Bulgaria, Cameroon, China, Democratic People's Republic of Korea, Georgia, Grenada, Indonesia, Kazakhstan, Lao People's Democratic Republic, Mauritius, Nicaragua, Panama, Paraguay, Peru, Philippines, Rwanda, Ukraine, Uruguay, Vietnam.

⁴⁵ Id. These countries include: Albania, Australia, Austria, Bahamas, Belize, Bosnia and Herzegovina, Cabo Verde, Canada, Chile, Colombia, Cook Islands, Cote d'Ivoire, Croatia, Czech Republic, Denmark, Ecuador, El Salvador, Estonia, Fiji, Finland, France, Gabon, German, Greece, Hungary, Iceland, India, Ireland, Israel, Italy, Jamaica, Japan, Kuwait, Kyrgyzstan, Latvia, Liberia, Liechtenstein, Lithuania, Luxembourg, Malawi, Malaysia, Malta, Mexico, Mongolia, Montenegro, Netherlands, New Zealand, Nigeria, Niue, Norway, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, Saint Vincent and the Grenadines, Sao Tome and Principe, Serbia, Seychelles, Singapore, Slovakia, Spain, Sweden, Switzerland, Thailand, The former Yugoslav Republic of Macedonia, Turkey, Uganda, United Kingdom, United States of America.

53. MMA records that the diverse political, socio-economic, and cultural contexts of the various countries are indicative of the near-universal acceptance of the need for exceptions in copyright regimes. This, along with the Marrakesh Treaty, signals the strong trend of exceptions as the accepted practice as a means to advance freedom of expression and access to information for persons with disabilities.
54. MMA submits that the exceptions approach aligns with a purposive interpretation of article 21 of the CRPD, as well as the requirement in the Declaration of Freedom of Expression for states to take specific measures to address the needs of persons with disabilities in a manner that guarantees the full enjoyment of their rights to freedom of expression and access to information on an equal basis with others.⁴⁶
55. MMA submits further that in line with our constitutional imperatives and regional and international law commitments and obligations, the interim reading in of the exemption clause contemplated in 19D proposed by the Applicant is a feasible way to advance freedom of expression, while respecting the underlying purpose of copyright.

CONCLUSION

56. This matter presents an important and much-needed opportunity for the rights of persons with disabilities to be meaningfully realised. For this reason, and the reasons advanced above, this Court should grant the relief sought by the Applicant and declare the Copyright Act unconstitutional for unreasonably and unjustifiably limiting, among others, the right to freedom of expression for persons with visual and print disabilities. In addition, MMA supports the proposed reading in of section 19D of the CAB, as well as the proposals pertaining to the signing and ratification of the Marrakesh Treaty.

⁴⁶ Declaration on Freedom of Expression at principle 7.

MICHAEL POWER

(Attorney, with Right of Appearance)

TINA POWER

Johannesburg, 17 September 2021

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