

## Submissions on Copyright Amendment Bill [B13D-2017]: presented before the Western Cape Provincial Parliament in February 2023

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### 1. Executive summary

1. Blind SA and SECTION27 submit and recommend, in line with the Constitutional Court judgment in *Blind SA v Minister of Trade, Industry and Competition and Others*, that:
  - a. The definition of ‘accessible format copy’ as in the Constitutional Court crafted remedy be adopted as it is in line with the Marrakesh VIP Treaty;
  - b. No change required to the definition of ‘persons with disabilities’ as the breadth of the definition fulfils South Africa’s Bill of Rights and international disability rights obligations;
  - c. The definition of ‘permitted entities’ as in the Constitutional Court crafted remedy be adopted in the definition of ‘authorised entities’;
  - d. No change required to the application of s 19D to all types of works under copyright as the breadth of the scope fulfils South Africa’s Bill of Rights and international disability rights obligations;
  - e. Section 19D(1) be made operational immediately through minor modifications to its language recommended below so that our access is not delayed further;
  - f. Minor amendments to be effected to s 19D(2)(a) and 19D(3) to ensure that these provisions do not unintentionally prevent the making and sharing of accessible format copies between Blind SA and the people whom we serve;
  - g. Section 28P(2) be deleted, in accordance with the Constitutional Court judgment and the Marrakesh VIP Treaty, to ensure that technological protection measures do not prevent accessible format shifting and

inadvertently cause further unfair discrimination against us by requiring us to seek the copyright owner's authorisation;

- h. No change required to sections 12A-D and 19C as they fulfil several rights in the Bill of Rights, including the rights to education, equality, freedom of expression, culture, dignity, among others.

## 2. Introduction

2. Blind SA and SECTION27 welcome the opportunity to submit written comments on the Copyright Amendment Bill [B13D-2017] before the Standing Committee on Finance, Economic Opportunities and Tourism at the Western Cape Provincial Parliament.
3. These submissions to Parliament are made jointly by SECTION27 and Blind SA.<sup>1</sup> They relate to the provisions of the Copyright Amendment Bill ("CAB") regarding disability and education, and the impact that these provisions have on our constitutional rights to equality, education, freedom of expression, and dignity that are guaranteed to all.
4. SECTION27 is a public interest law centre that seeks to influence, develop and use the law to protect, promote and advance the rights to basic education and health in South Africa. The name of the organisation is drawn from s 27 of the Constitution, which enshrines everyone's right to health care services, food, water and social security.
5. Blind SA is an organisation that aims to equip people with visual disabilities with the skills they need to fully and independently participate in society, through education, braille and developmental services. Moreover, Blind SA advocates for equality, and standing up for the rights of people with visual disabilities across the country.
6. We are generally strongly in favour of the sections of the CAB that relate to our work and our participation in society, but in order to make these sections fully workable and to bring them in line with certain constitutional requirements, as recently clarified by the Constitutional Court, certain small but critical amendments have to be made. Our submissions set out what these critical amendments are.
7. As noted by the Minister of Trade, Industry and Competition in 2021<sup>2</sup> and the Constitutional Court of South Africa in 2022,<sup>3</sup> it is imperative that Parliament expedites the finalisation of this Bill, as continued delays exacerbate the

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<sup>1</sup> These submissions have been prepared by Dr Sanya Samtani, Senior Researcher, Mandela Institute, University of Witwatersrand.

<sup>2</sup> The Minister of Trade, Industry and Competition's comments at the meeting of 9 November 2021 included that the CAB has already received extensive public consultation. At the same meeting, the Minister noted the passage of a 'lengthy period of ten years' over which the CAB has been debated and discussed, with further public consultation as and where required. See Meeting of the National Assembly Portfolio Committee on Trade and Industry on 9 November 2021, Parliamentary Monitoring Group <[https://static.pmg.org.za/211109pctrade\\_am.mp3](https://static.pmg.org.za/211109pctrade_am.mp3)>.

<sup>3</sup> *Blind SA v Minister of Trade, Industry and Competition* [2022] ZACC 33 [102], [112] (*Blind SA CC*).

discrimination experienced by our disability community and other marginalised groups seeking access to education.

8. On the basis of significant delays at the National Assembly level exacerbating pervasive violations of our rights, SECTION27 and Blind SA launched litigation at the Pretoria High Court in 2021. None of the parties, including the Minister, the President and Parliament, opposed the matter. The High Court held that by failing to include a provision that enables the conversion of works from one format to another for the purpose of facilitating access for people with visual and print disabilities, the apartheid-era Copyright Act 1978 was discriminatory and therefore unconstitutional to that extent.<sup>4</sup> SECTION27 and Blind SA, mindful of the fact that Parliament was engaged in copyright reform, proposed the reading-in of proposed s 19D of the CAB<sup>5</sup> as the remedy.
9. The matter went up to the Constitutional Court as part of ordinary constitutional procedure.<sup>6</sup> It remained unopposed by all parties. The Court confirmed the High Court's finding that the Copyright Act 1978 was unconstitutional to the extent that it discriminated against people with visual and print disabilities and violated our rights to equality, dignity, and participation in cultural life.<sup>7</sup> Importantly, the judgment of the Constitutional Court regarding the Copyright Act's unfair discrimination and violations of our rights as people with visual and print disabilities centred on the specific requirement of authorisation by the copyright owner.<sup>8</sup>
10. The Court was sensitive to the fact that the CAB continues to be debated in Parliament. Its declaration of constitutional invalidity was thus suspended for a period of two years to give Parliament time to legislate to fix this unconstitutionality.<sup>9</sup>
11. However, in order to provide us with immediate redress and to ensure that our rights do not continue to be violated, the Court read in its own, court-crafted remedy, s 13A, for that interim period.<sup>10</sup> Section 13A thus provides a **baseline** (an **absolute minimum**) which Parliament must meet in its formulation of provisions that impact our disability community, in order to rectify the unconstitutionality of the Copyright Act 1978 and fulfil its constitutional obligations set out by the judgment. We submit that s 13A does not function as a ceiling or a prescription: Parliament's proposed legislative protection for our rights cannot go lower than s 13A,<sup>11</sup> but it certainly can and, we submit, should go higher in view of South

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<sup>4</sup> *Blind SA v Minister of Trade, Industry and Competition* [2021] ZAGPPHC 871.

<sup>5</sup> At the time, the CAB was the [B13B-2017] version at the National Assembly.

<sup>6</sup> Since the High Court held that the Copyright Act 1978 was unconstitutional, this declaration of unconstitutionality had to be confirmed by the Constitutional Court for it to be operational.

<sup>7</sup> *Blind SA CC* [112], order.

<sup>8</sup> *BlindSA CC* [64]-[66]; [71]-[74] citing the violations of the rights under sections 9(2), 10, 16(1)(b), 29(1) and 30 of the Constitution.

<sup>9</sup> *Blind SA CC* order paras 2, 5.

<sup>10</sup> *Blind SA CC* order para 6.

<sup>11</sup> To the extent that Parliament seeks to rectify the unconstitutionality identified by the Court.

Africa's concurrent constitutional and international human rights obligations to ensure that people with disabilities do not experience discrimination. In addition, Parliament has the discretion to use its own language and is not bound by the language of the Court, as long as it has the same effect.

12. In our submissions and recommendations, we focus on aligning ss 19D and 28P with s 13A and the Bill of Rights. As recognised by the Court, through the CAB process, Parliament is engaged in giving domestic effect to its existing international obligations as well as creating the legislative framework for South Africa to ratify the Marrakesh VIP Treaty. The Court makes it clear – and we agree – that s 13A is only part of that broader legislative reform.
13. We also emphasise the importance of retaining ss 12A-D and 19C as is, in order to realise the right to education for all, without discrimination.

### **3. Request for permission to make oral submissions**

14. Blind SA and SECTION27 also request that we be permitted to make oral submissions at the public hearing. We remain available to assist should there be any further request for clarification on our submissions or any related matter.

### **4. Provisions relating to our rights as people with disabilities**

#### Key definitions s 1

15. The CAB defines 'accessible format copy',<sup>12</sup> 'person with a disability',<sup>13</sup> and 'authorized entity'<sup>14</sup> in section 1. In *Blind SA CC*, the Court found the definition of accessible format copy in the CAB to be 'truncated', and so opted to read in the entirety of the definition from the Marrakesh VIP Treaty verbatim instead.<sup>15</sup>

**RECOMMENDATION:** We suggest that the Western Cape Provincial Parliament retain the Court's definition of accessible format copy for coherence with *Blind SA CC* and conformity with the Marrakesh VIP Treaty .

16. The CAB defines 'person with a disability' broadly to include physical, intellectual, neurological, or sensory disabilities.<sup>16</sup> The definition centres the constitutional guarantee of non-discrimination in describing how accessible format shifting should work 'to enable that person to access and use the work in the same manner as a person without a disability'. The CAB's definition provides for access for people with disabilities across the spectrum and is in line with s 9 of the Constitution as well as South Africa's international obligations under the UN Convention on the Rights of Persons with Disabilities.<sup>17</sup> The Court does not acknowledge the existence of this definition (even though it was present in CAB

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<sup>12</sup> CAB, s 1(a).

<sup>13</sup> CAB, s 1(j).

<sup>14</sup> CAB, s 1(c).

<sup>15</sup> *Blind SA CC* [106]. Compare Marrakesh VIP Treaty, art 2(b) with s 13A(1)(a).

<sup>16</sup> CAB, s 1(j).

<sup>17</sup> UNCPRD, s 30(3).

B13B-2017) and instead reads in the definition of ‘beneficiary person’ for the purposes of accessible format shifting.

17. However, we submit that the Court’s definition of ‘beneficiary person’ is narrower than the CAB’s definition of ‘person with a disability’. The Court limits its definition to persons with visual and print disabilities. The key reason for this,<sup>18</sup> is because the case before the Court was brought by our community, people with visual and print disabilities. This does not mean an adverse ruling regarding people with other disabilities, or any statement that the CAB’s definition is unconstitutional. Rather, we submit that the CAB’s definition applies the principle of non-discrimination to people with other disabilities, as well, removing the need for future mobilisation and potential litigation from each of those groups.<sup>19</sup>
18. This is not an outlier: a scoping study conducted by the WIPO SCCR found that 28 WIPO member states did not limit the type of disability of beneficiary persons to visual and print disabilities. Rather they included people with disabilities across the spectrum.<sup>20</sup>

**RECOMMENDATION:** We therefore submit that the definition in the CAB is in line with the Constitution as it provides protection to disability groups analogous to our group and ensures that people with disabilities across the spectrum can be full participating members of society. We suggest that the Western Cape Provincial Parliament retain the CAB’s definition. **No change required.**

19. With regard to the definition of ‘authorised entity’ in the CAB, we submit that the definition is much narrower than the court-crafted definition of ‘permitted entity’ in s 13A. This runs the risk of excluding entities like ourselves from serving our community. This is because the CAB’s definition of authorised entity specifies that the entity must be part of government *or* a non-governmental organisation (NGO).
20. On the other hand, court-crafted s 13A adopts Marrakesh VIP Treaty’s inclusive definition with government and NGOs as *examples* of organisations that could be considered permitted entities. We are concerned that the CAB’s restrictive definition, on a narrow interpretation, could limit libraries, associations and private schools and universities amongst others from assisting beneficiary persons who may require accessible format shifting within these organisations.

**RECOMMENDATION:** We suggest that the Western Cape Provincial Parliament adopt the court-crafted definition of ‘permitted entity’ by simply introducing the underlined words at the start of CAB s 1(c)(b) to read as follows: (b) **an entity, including** a government institution or non-profit organisation [...]

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<sup>18</sup> *Blind SA CC* [104].

<sup>19</sup> People with disabilities across the spectrum experience different challenges regarding accessing materials under copyright. See, for a full explanation of the various challenges on the basis of specific types of disabilities, Caroline B. Ncube, Blake E. Reid, and Desmond O. Oriakhogba, ‘Beyond the Marrakesh VIP Treaty: Typology of Copyright Access-enabling Provisions for Persons with Disabilities’ (2020) 23 *The Journal of World Intellectual Property* 149.

<sup>20</sup> WIPO SCCR, Revised Scoping Study On Access To Copyright Protected Works By Persons With Disabilities prepared by Professor Blake E. Reid and Professor Caroline B. Ncube (March 2019) SCCR/38/3.

## Scope of s 19D

21. Section 19D does not limit the types of works from which accessible format copies can be made. It includes all works under copyright. We submit that this is the appropriate solution to pervasive discrimination against our community who are excluded from accessing all types of works under copyright in the mainstream market.
22. For instance, the court-crafted remedy s 13A(1)(c) is limited to literary works and does not include musical works and sound recordings. The latter two categories of works are defined in s 1 of the Copyright Act.<sup>21</sup> Although it is arguable that sheet music is a 'literary work' in that it is often published in the form of a book, the current Act does not include it as an explicit example within the inclusive definition of literary works. Rather, the definitions of musical works and, in particular, sound recordings (as it refers to the fixation of signals representing sounds) are arguably the appropriate provisions within which sheet music would fall.
23. A textual interpretation would entail that despite the *BlindSA* judgment, blind musicians are still unlikely to be permitted to make Braille copies or accessible format copies of sheet music that contains graphical musical notations without permission from the rights holder, excluding them entirely from participating in cultural life.

**RECOMMENDATION:** We suggest that the Western Cape Provincial Parliament continues to permit accessible format shifting for all types of works under copyright. This avoids the need for further litigation to be brought on the basis of exclusion from particular types of cultural activities by people with disabilities. **No change required.**

## Immediate operation of s 19D(1)

24. We submit that the Court explicitly specified the need to ensure that the provision permitting accessible format shifting was operational **immediately**, without requiring ministerial regulations.<sup>22</sup> In crafting interim remedy s 13A, the Court held that 'The starting point is this: persons with print and visual disabilities should not have to wait further to secure a remedy. [...] There must be a remedy granted that provides immediate redress.'<sup>23</sup> Section 13A(2), read with the inclusive definition of 'permitted entity' guarantees the immediate effect of the reading-in. This entails that organisations like BlindSA can immediately engage in accessible format shifting under that provision. Parliament, however, has the final say through the CAB.

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<sup>21</sup> Regarding 'musical works' in s 1 of the Copyright Act, the definition reads as follows: "musical work" means a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music. Regarding 'sound recordings' in s 1 of the Copyright Act, the definition reads as follows: "sound recording" means any fixation or storage of sounds, or data or signals representing sounds, capable of being reproduced, but does not include a sound-track associated with a cinematograph film.

<sup>22</sup> *Blind SA CC* [102], [109].

<sup>23</sup> *Blind SA CC* [102].

25. We submit that the CAB's s 19D(1), as interpreted by the Court, requires regulations to make the provision operational.<sup>24</sup> This is problematic and risks delaying the realisation of our rights and placing their fulfilment in the hands of the minister.
26. This interpretation is clear from the text of s 19D(1) read with the definition of 'authorised entity' in s 1(c)(b). The relevant part of s 19D(1) reads: 'Any person as may be prescribed **and** who serves persons with disabilities, including an authorized entity, may [...]'. The underlined word 'and' entails that both conditions must be fulfilled: that the person in question (including an authorised entity) must be prescribed by regulations and must serve persons with disabilities. Even if the concerns surrounding the definition of authorised entity were addressed (making the definition in s 1(c)(b) more inclusive), the text of s 19D(1) still limits its scope by requiring that regulations be promulgated to enable authorised entities and others who are prescribed to engage in accessible format shifting.
27. This, as the Court holds, would delay the rectification of rights violations set out in the judgment and therefore continue to perpetuate unfair discrimination that we already experience in our daily lives.<sup>25</sup> This is unconstitutional.

**RECOMMENDATION:** In addition to making changes to the definition as suggested in the previous section, we suggest the deletion of the phrase that is struck out below, entailing that s 19D(1) read as follows: 'Any person ~~as may be prescribed~~ **and** who serves persons with disabilities, including an authorised entity [...]'.  
~~as may be prescribed~~  
**and**

#### Beneficiary persons / persons with disabilities s 19D(2)(a)

28. The Court ensures that in its remedy, a beneficiary person or person acting on their behalf can not only engage in accessible format shifting but also make use of accessible format copies that they have lawful access to. This is limited to personal use of the beneficiary person but it does not preclude the exchange of accessible format copies through the utilisation of other exceptions and limitations. This covers a situation where, for instance, a blind person were to photocopy and then convert to Braille a chapter of a book from a university library for the purposes of completing coursework for their degree; or a librarian were to make available that Braille copy to other people with visual and print disabilities also completing their coursework. There is thus no need to make a *fresh* accessible copy at every stage: the same accessible copy can be made available as long as it is lawfully accessed: through the market or the exercise of other exceptions and limitations (the whole plethora under ss 12-19B of the current Act).
29. Section 19D(2)(a) on the other hand confines its operation to 'an activity under subsection (1)'. Thus, interpreting s 19D(2)(a), only if an accessible copy has been freshly made by a permitted entity under s 19D(1) can a person with a disability use the work and make copies of it, subject to those copies being lawful under other exceptions.

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<sup>24</sup> *Blind SA CC* [102], [108], [109].

<sup>25</sup> *Blind SA CC* [102] citing Constitution s 237.

30. This is problematic as it excludes the possibility of a blind person already having lawful access to a work (say, through an e-library) and converting it to an accessible format on their own; or already having lawful access to a work that is in an accessible format and needing to lawfully share such copies. It does not speak to the realities of how access to accessible format copies takes place – through both individuals *and* permitted entities. This has the possibility of further practically restricting access to accessible format copies and perpetuating the discrimination that the Court sought to address.

**RECOMMENDATION:** We suggest the deletion of the phrase that is struck out below, entailing that s 19D(2)(a) reads as follows: ‘A person to whom the work is communicated by wire or wireless means ~~as a result of an activity under subsection (4)~~ may [...]’.

### Import and export of works s 19D(3)

31. The court-crafted remedy focuses on accessible format shifting. However, by rendering accessible format shifting a non-infringing use, the Court has interpretively ensured that the *exchange* of accessible format works does not get hit by the secondary infringement provision in s 23(2).<sup>26</sup> However, we submit that in order to ensure that cross-border exchange is clearly regulated in a manner that international libraries like Bookshare recognise,<sup>27</sup> s 19D(3) remains important to broadening and facilitating access for us.
32. Section 19D(3) creates a foreseeable domestic framework for the domestication of the Marrakesh VIP Treaty.<sup>28</sup> However, there is a similar difficulty with regard to the language in proposed s 19D(3)(a) where the scope of exchange is constrained to those accessible format copies *created* by permitted entities under s 19D(1). The relevant section reads: ‘[...]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)[...]’.
33. This is problematic for two reasons: first, it only allows export of those copies that are created under proposed s 19D(1) and not copies otherwise lawfully accessed or created. And second, it creates a contradiction where import is also confined to copies made under s 19D(1). This is not practically possible as internationally imported accessible format copies would be created *outside* of South Africa and therefore *outside of South African permitted entities*. This contradiction makes it difficult to operationalise s 19D(3).

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<sup>26</sup> See the arguments advanced by Prof. Owen Dean to this effect during the Blind SA CC hearing. See also, Owen Dean, Handbook of South African Copyright Law’ Revision Service 15 [30 September 2015], JUTA [8.12] – [8.14].

<sup>27</sup> See, for a personal account of the full extent of difficulties in gaining access to Bookshare, Claudia Jansen van Rensburg, ‘Accessing the Right to Research in South Africa: Reflections, Copyright and Visual Impairment’, (Paper presented at ‘The Right to Research in Africa’ Conference 24-27 January 2023, Pretoria and Cape Town). Dr van Rensburg is the Blind SA/Postdoctoral Research Fellow, Chair: Identities and Social Cohesion in Africa, Nelson Mandela University.

<sup>28</sup> In particular, Marrakesh VIP Treaty, art 5.

34. A better understanding of the reason for the cross reference to s 19D(1) is that legislators possibly intended to refer to the definition of ‘accessible format copy’ rather than limiting access to freshly created accessible format copies from permitted entities in South Africa. To the extent that the reference to s 19D(1) relates to the conditions under which accessible format shifting must take place (ie., where the person has lawful access to the work, is undertaking the conversion on a non-profit basis etc.), this is taken care of by the provisions on secondary infringement in the current Act.
35. Where an accessible format copy has been made abroad in violation of the conditions under South African law, their import will be considered secondary infringement under s 23(2). There is thus no real risk of importing copies that are not in compliance with South African law – and in any event, this reference to s 19D(1) is misplaced.

**RECOMMENDATION:** We suggest that the following change in s 19D(3) be made where ‘subsection (1)’ is replaced with ‘s 1(a) of the Act’ that defines accessible format copy: ‘[.]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)~~ s 1(a) of the Act[.]’.

The impact of Technological Protection Measures (‘TPMs’) s 27(5B) read with s 28P(2)

36. Fixing our experience of unfair discrimination and several rights violations, as per the Court’s judgment, requires that we and people who assist us be given ‘the greatest latitude to produce literary works in accessible format copies and to develop technologies to do so that are ever better at rendering the original work in the best possible way, tailored to the varied incidents of the impairments such persons suffer’.<sup>29</sup>
37. Accessible format shifting requires the conversion of works into formats other than the format in which it was published. For instance, running a software to read e-books aloud or printing an e-book in Braille. Often, the computer on which the e-book is accessed, say a library computer, does not have a Braille printer attached to it. What would then be required is for the e-book to be emailed / transferred on a flash drive to a computer that is connected to a Braille printer for us to access the e-book. However, technological protection measures (TPMs) that ‘lock’ e-books to a single device, for instance, prevent us from doing this entirely.
38. The CAB’s s 27(5B) criminalises any ‘unlocking’ (circumventing) of these digital locks irrespective of the purpose for which it is unlocked. However, it contains a set of exceptions under s 28P. In our submissions we focus on the requirements for engaging the exceptions under s 28P.
39. Section 28P(1)(a) expressly permits the circumvention of such locks if it is done for the purposes of giving effect to a legislated exception or limitation to copyright. This means that in the scenario described above, if accessible format shifting (that

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<sup>29</sup> *Blind SA CC* [89].

fulfils the conditions in s 19D) requires circumvention, then it is permitted. However, reading further, s 28P(2)(a) subjects the operation of s 28P(1) to the requirement of authorisation by the copyright owner.

40. In other words, if accessible format shifting requires circumvention, then we are back to the unconstitutional position that we litigated against at the Constitutional Court: the onerousness and sheer impossibility of seeking out the copyright owner to request their authorisation to facilitate our constitutional rights. In argument before the Court we explained, and the Court affirmed, how the requirement for us to find the copyright owner and seek permission to convert works into accessible formats constitutes unfair discrimination as well as violates our rights to equality, dignity, culture, freedom of expression and education. We demonstrated how copyright owners do not have an obligation to be contactable, and neither do they have an obligation to respond to us once we contact them. The Court understood that this was in effect an absolute barrier to us converting work into formats we could actually read. Moreover, studies around the world have confirmed that TPMs often interfere with assistive technologies that are used to ensure accessibility for us.<sup>30</sup>
41. We submit that the requirement under s 28P(2)(a) has the same effect, and that is clearly unconstitutional.
42. Section 28P(2)(b) tries to introduce a safeguard to prevent this unconstitutionality – that should the copyright owner not respond, or fail to respond in ‘reasonable time’, we can go ahead with our unlocking. However, we submit that this is inadequate as it treats us, persons with disabilities, like **second-class citizens**. People without disabilities can easily walk into a library and read a book without needing to track down and contact the copyright owner. People without disabilities can buy an e-book and read it on their Kindle (e-book reader) without needing to seek permission from the author to use the ebook on a different device. We submit that it is discriminatory to subject our access to further delays and create additional bureaucratic hurdles that people without disabilities do not have to contend with.
43. Moreover, s 28P(2) is not in line with the Marrakesh VIP Treaty.<sup>31</sup> The Marrakesh VIP Treaty stipulates that those States parties that elect to provide for anti-circumvention of TPMs in their laws ‘shall [...] ensure [...]’ that their laws do not prevent us, people with disabilities, from making use of the Marrakesh VIP Treaty’s exceptions and limitations. In other words, ‘a state must ensure that this prohibition prevents neither the creation of nor access to digital works, nor their legitimate sharing and use by authorized entities and beneficiary persons’.<sup>32</sup> By

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<sup>30</sup> See, for instance K Ellis and M Kent, *Disability and new media* (Routledge, 2011); G Kerscher and J Fruchterman, ‘The soundproof book: Exploration of rights conflict and access to commercial eBooks for people with disabilities’ 7(6) *First Monday* (2002) available at <https://doi.org/10.5210/fm.v7i6.959>; GA Giannoumis, M Land, W Beyene, and P Blanck, ‘Web accessibility and technology protection measures: Harmonizing the rights of persons with cognitive disabilities and copyright protections on the web’ 11(1) *Cyberpsychology: Journal of Psychosocial Research on Cyberspace* (2017), article 5, available at: 10.5817/CP2017-1-5.

<sup>31</sup> Marrakesh VIP Treaty, art 7.

<sup>32</sup> LR Helfer and others, *The World Blind Union Guide to the Marrakesh Treaty* (Oxford University Press 2017) 150.

introducing onerous requirements, s 28P(2) is likely to cause a chilling effect on us accessing, creating, sharing and using digital works.<sup>33</sup>

44. With regard to concerns about infringement, copyright owners are already protected through the balance struck in every exception. For our constituency, on particular, s 19D sets out several safeguards preventing accessible format shifting from being abused to the detriment of the copyright owner – for instance, that we can only engage in it for the sole use of people with disabilities and that it must be a non-profit use, amongst others.

**RECOMMENDATION:** We suggest the deletion of s 28P(2) to prevent the perpetuation of the unfair discrimination that we have suffered for decades. We submit that it is enough to retain s 28P(1) that exempts the utilisation of circumvention for the purposes of exceptions and limitations that are in the Act. With this recommendation, read with the in-built conditions in s 19D, our rights will continue to be realised without negatively affecting copyright owners.

## 5. Provisions relating to access to education

45. We submit that ss 12A-D and 19C are crucial to realise the right to education and freedom of expression for all members of society. Our previous submission dated January 2022 set out the importance of educational exceptions to copyright as being required by the Constitution to ensure that copyright does not act as a barrier to accessing educational materials.<sup>34</sup>
46. In addition, s 19C is key to ensuring that our cultural heritage is adequately protected by providing for the digitalisation of the collections of libraries, archives, museums and galleries.
47. The Constitutional Court, in *Blind SA CC*, recognised the importance of access to educational materials for learners with disabilities as well as the fact that several learners with disabilities also live in poverty and are therefore doubly excluded from the market.<sup>35</sup>

**RECOMMENDATION:** All the provisions we have listed in this section have undergone significant public participation processes and we suggest they remain as they are in the CAB. **No change required.**

For any further enquiries, please contact:

### SECTION27

Dr Faranaaz Veriava  
Head of Programmes  
[veriava@section27.org.za](mailto:veriava@section27.org.za)

### BlindSA

Jace Nair  
CEO of BlindSA  
[ceo@blindsa.org.za](mailto:ceo@blindsa.org.za)

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<sup>33</sup> As the World Blind Union Guide highlights at p 156, ‘The essential purpose of Article 7 is to ensure that TPMs do not impede enjoyment of the rights guaranteed by the Marrakesh VIP Treaty. Avoiding this result is especially important for beneficiaries in developing and least-developed countries, who are likely to be unduly burdened by TPMs.’

<sup>34</sup> Blind SA and SECTION27, Copyright Amendment Bill Submissions January 2022 available at: <<https://section27.org.za/2022/02/copyright-amendment-bill-submissions-jan-2022/>>.

<sup>35</sup> *Blind SA CC* [64], [73].