

# DISPUTE RESOLUTION ALERT

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# CONVERGENCE AND NEW MEDIA: USER GENERATED CONTENT AND COPYRIGHT

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**When you find a hybrid Pokémon at work or create Neymar's doppelgänger with a man-bun on EA Sports' FIFA, who owns the intellectual property in those works?**

Traditionally, software publishers own all the code and content on their platforms, as well as any new content that is created. Consumers have become more tech savvy, and with software applications having expanded their add-ons, it has become complicated to determine whether all modifications and changes to software would in fact revert to the proprietor.

In practice, End User License Agreements (EULA) regulate the relationship between the user and the owner of software. The EULAs of Playstation and Rockstar Games provide that proprietary software may not be reverse engineered, decompiled or modified in any way. If a new in-game character is created on these platforms, the creator would subsequently not have a claim to copyright ownership.

User Generated Content (UGC), which collectively refers to content that users create and make publicly available, has brought to life a new media movement and with it attendant challenges to South Africa's copyright regime. The Copyright Amendment Bill of 2017 is currently being redrafted and the insertion of the principle of fair use, which emanates from the United States, has created some controversy, especially where it may provide protection for UGC.

This fair use principle allows for the reproduction of copyright protected material, subject to a four-factor test. Two of the factors are that the reproduction of

the work will be assessed against criteria of substantiality (the quality and quantity of the work) and the effect of the use upon the potential market (the economic harm that may be suffered). This principle extends beyond South Africa's fair dealing doctrine, which is limited in nature.

Under the existing Copyright Act, 1978 South Africa's fair dealing defence provides for certain general exceptions. These are research, private study, personal or private use, criticism, or the review of literary and musical works. Although, the Copyright Act has lagged behind technological advancements, it is a sophisticated piece of legislation, that has created a clear regime, with few instances of copyright litigation since its enactment. The proposed fair use regime under the Copyright Amendment Bill may in fact create more uncertainties in relation to copyright ownership and UGC.

Copyright owners use different strategies to address UGC, not only to protect their valuable intangible assets, in the form of take-down notices, but also to commercially exploit their intellectual property, through advertising revenues.

YouTube has developed a system called ContentID, which assists in identifying possible infringing videos. The copyright owners are then entitled to decide what happens to the content with a Content ID claim, which ranges from blocking, monetising or tracking the video. The Nintendo Creators Program

# CONVERGENCE AND NEW MEDIA: USER GENERATED CONTENT AND COPYRIGHT

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*The fair use principle may not protect South Africa's emerging creative landscape in the same way.*



shares advertising revenue with users that upload creative videos which may feature elements of Nintendo's proprietary copyright.

Adopting a different approach, where Google is of the view that a fair use defence could withstand a take-down notice (in terms of the USA Digital Millennium Copyright Act of 1998), it may provide legal assistance, in an attempt to retain the work on its platform. This is indicative of the conflicts of interest which are likely to arise in the digital realm, as platform owners seek to retain traffic, even in instances where claims of copyright infringement have been raised.

One of the aims of the Copyright Amendment Bill is to protect the creative industry. As South Africa has a nascent creative industry, it is important that the legal framework addresses the challenges with UGC. The American entertainment and media sector is far more advanced, and the fair use principle may not protect South Africa's emerging creative landscape in the same way. Fair use is not a get-out-of-jail-free card, and users need to be cautious of UGC and potential copyright risks.

*Janet MacKenzie and  
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Tim Fletcher was named the exclusive South African winner of the **ILO Client Choice Awards 2017** in the litigation category.



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# PUTTING A LID ON PRESCRIPTION

*The ultimate issue to be determined was whether, under s12(3) of the Act, a lack of knowledge that the conduct of the debtor was actionable and wrongful, had prevented prescription from running against the plaintiff.*

*The majority view of the Constitutional Court was that an absence of appreciation for the fact that the conduct complained of was wrongful and actionable, was not a fact, but rather a conclusion of law (and therefore falls beyond the ambit of s12(3) of the Act).*



The Constitutional Court has recently had occasion to deal with the question as to whether or not s12(3) of the Prescription Act (Act), requires a creditor to have knowledge that the conduct of a debtor, giving rise to the relevant debt, is wrongful and actionable, before prescription might start running against that creditor.

In the matter of *Mtokonya vs The Minister of Police* [2017] ZA CC33, the Constitutional Court had to interpret the meaning and import of s12(3) of the Act, which stipulates "when prescription begins to run". The relevant sub-section reads as follows:

A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises...

In this instance, the plaintiff (Mr Mtokonya) had been arrested by the South African Police Service and then detained for a period in excess of 48 hours, without having been made to appear before a court of law. The plaintiff did not know, until advised by an attorney some years later, that his arrest and detention had been unlawful and actionable, and that he could in fact sue the police. By then, however, the prescription period normally applicable, had already run its course. The plaintiff sought to argue, however, that because he had not known of the availability of a remedy against the police, prescription had not yet begun to run.

The ultimate issue to be determined, in the circumstances, was whether, under s12(3) of the Act, a lack of knowledge that the conduct of the debtor was actionable and wrongful, had prevented prescription from running against the plaintiff.

The majority view of the Constitutional Court was that s12(3) of the Act does not require the creditor to have knowledge of any right to sue the debtor, nor does it require the creditor to have knowledge of legal conclusions that may be drawn from "the facts from which the debt arises". The question then to be answered was whether knowledge that the conduct of the debtor is wrongful and actionable, is knowledge of a fact?

The majority view of the Constitutional Court was that an absence of appreciation for the fact that the conduct complained of was wrongful and actionable, was not a fact, but rather a conclusion of law (and therefore falls beyond the ambit of s12(3) of the Act). For that reason, the plaintiff's claim (instituted outside of the time limits prescribed), had indeed become prescribed, and could not be pursued.

In reaching this conclusion the Constitutional Court emphasised the importance of prescription, and the "vital role time limits play in bringing certainty and stability to social and legal affairs.... Without prescription periods, legal disputes would have the potential to be drawn out for indefinite periods of time, bringing about prolonged uncertainty to the parties to the dispute".

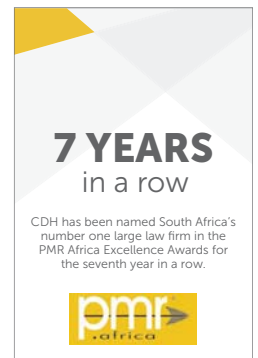
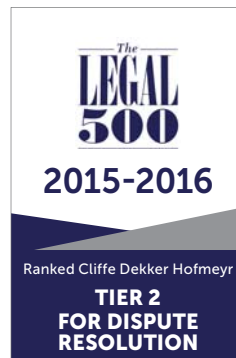
The view adopted by the majority judgment of the Constitutional Court is to be welcomed.

*Jonathan Witts-Hewinson*

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Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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