

ASSESSING THE LIMITATIONS AND EXCEPTIONS TO COPYRIGHT INFRINGEMENT: SOUTH AFRICA IN PERSPECTIVE. (2)*

Abstract

Flowing from the previous paper¹ this part deals with the South African aspect of the paper and the comparative analysis of both countries. This paper presents a completion of the comparative examination of the limitations and exceptions to copyright infringement in Nigeria and South Africa with a focus on South Africa. Copyright law is essential for promoting creativity and innovation, but it also restricts the use of copyrighted works by others. Therefore, limitations and exceptions to copyright infringement are crucial for balancing the interests of copyright owners and users. This study analyzes the legal framework for limitations and exceptions to copyright infringement in Nigeria and South Africa, considering their historical development and current application. The study also identifies similarities and differences in the legal provisions and their interpretation by the courts. The analysis reveals that both countries have adopted similar limitations and exceptions, such as fair use and educational use, but the scope and interpretation of these exceptions differ. The paper concludes that the issue of copyright limitation and exception carries a lot of weight; they are necessary in this part of the world where access to educational material can be a challenge.

3.2 South Africa

The provision of the South African Copyright Act (SCA) is structurally different in comparison to its Nigerian counterpart as regards exceptions and limitations to copyright. Under the SCA exceptions are provided based on the genre of protected work and further explanation is given in the Copyright Regulations, 1978,² as a result, the discussion below will follow the pattern adopted in the law for easy understanding.

a. Literary and musical works.

The first exception provided for in the Act deals with ‘General exceptions from protection of literary and musical works’.³ Section 12 (1) provides for ‘fair dealing’ and states that:

Copyright shall not be infringed by any fair dealing with a literary or musical work—

(a) for the purposes of research or private study by, or the personal or private use of, the person using the work;

(b) for the purposes of criticism or review of that work or of another work;

or

(c) for the purpose of reporting current events—

(i) in a newspaper, magazine or similar periodical; or

(ii) by means of broadcasting or in a cinematograph film:

Provided that, in the case of paragraphs (b) and (c) (i), the source shall be mentioned, as well as the name of the author if it appears on the work. This provision creates an exception for users of the work and it provides a form of permission to use without asking the right owner although within the limits of fair dealing with the work. There is no statutory definition of fair dealing in

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¹ TO Oloko, ‘Assessing the Limitations and Exceptions to Copyright Infringement: Nigeria in Perspective’ available at <https://www.ajol.info/index.php/naujilj/article/view/225877>.

² Copyright Regulations, 1978 as published in GN R1211 in GG 9775 of 7 June 1985 as amended by GN 1375 in GG 9807 of 28 June 1985.

³ South African Copyright Act 1978, s 12.

the SCA, it seems that what is fair dealing would be left for the determination by the courts. Over the years' certain factors have been employed in determining what constitutes fair dealing - which is the effect it would have on the potential market and the amount of work taken. Accordingly, fair dealing is based on the circumstance of each case. Prior to the recent case of *Moneyweb (Pty) Limited v Media 24 Limited and Another*⁴ there was no applicable decision, for this reason, it becomes imperative to briefly discuss this case.

i. Summary of facts of MoneyWeb case

Moneyweb and Media24 the applicant and the first respondent respectively are both in the business of publishing articles on the Internet. These are not their only activities but, for purposes of this case, it is not necessary to list their full range. Moneyweb publishes business, financial and investment news, primarily on the Internet, but also on other digital platforms. Media24 publishes online magazines and newspapers, including Fin24, an online financial publication. Moneyweb and Media24 are therefore direct competitors. The second respondent was the editor of Fin24 at all relevant times.

Moneyweb seeks a declaration that the publication of seven articles by Media24 was unlawful. Moneyweb contends that Media24 infringed its copyright under the Copyright Act 98 of 1978 and that Media24 has engaged in an unlawful competition. Media24 contends that it is absolved from liability by virtue of the statutory defences in sections 12(1)(c)(i) and 12(8)(a) of the Act. Three issues appear to be at the centre of this matter:

- a. First, there is a dispute concerning the originality of Moneyweb's articles. Media24 argues that Moneyweb has failed to prove originality in any of its articles.
- b. Second, if Moneyweb is able to prove originality in any of its articles, the issue arises as to whether Media24 has reproduced a substantial part of the relevant article. Media24 admits reproduction of part of the Moneyweb articles but denies that the reproduction was substantial.
- c. Finally, Media24 contends that it is absolved from liability by virtue of the statutory defences in sections 12(1)(c)(i) and 12(8)(a) of the Act.

It is instructive to reflect on the reasoning and the holding of the court following the provisions of section 12(1)(c)(i). of the Trade Marks Act posited that: The key provisions of section 12(1)(c)(i), for purposes of this case, are that the dealing must be "*fair*"; the purpose must be to report "*current events* and the source, including the name of the author, must be "*mentioned*. For guidance, only the court referred to the case of *In Ashdown v Telegraph Group Ltd*,⁵ the English Court of Appeal was concerned with whether the Human Rights Act 1998 impacted the protection afforded to owners of copyright by the Copyright, Designs and Patents Act 1988.⁶ On the defence of "*fair dealing*",

Lord Phillips MR held: Where part of a work is copied in the course of a report on current events, the 'fair dealing' defence under s 30 will normally afford the court all the scope that it needs properly to reflect the public interest in freedom of expression and, in particular, the freedom of the press. There will then be no need to give separate consideration to the availability of a public interest defence under s 171".⁷

⁴ unreported case no. 31575/2013, 5 May 2016.

⁵ [2001] 4 All ER 666 (CA).

⁶ Section 30(2) of the Copyright, Designs and Patents Act 1988 provided: *Fair dealing with a work (other than a photograph) for the purpose of reporting current events does not infringe any copyright in the work*

⁷ *Ashdown v Telegraph Group* (above) at 683b-c, par [66].

Lord Phillips approved the general context of section 30 was implored in the fair dealing test as follows:

"It is impossible to lay down any hard-and-fast definition of what is fair dealing, for it is a matter of fact, degree and impression. However, by far the most important factor is whether the alleged fair dealing is commercially competing with the proprietor's exploitation of the copyrighted work, a substitute for the probable purchase of authorised copies, and the like. If it is, the fair dealing defence will almost certainly fail. If it is not and there is a moderate taking and there are no special adverse factors, the defence is likely to succeed, especially if the defendant's additional purpose is to right a wrong, to ventilate an honest grievance, to engage in political controversy, and so on. The second most important factor is whether the work has already been published or otherwise exposed to the public. If it has not, and especially if the material has been obtained by a breach of confidence or other means of underhand dealing, the courts will be reluctant to say this is fair. However, this is by no means conclusive, for sometimes it is necessary for the purposes of legitimate public controversy to make use of "leaked" information. The third most important factor is the amount and importance of the work that has been taken. For, although it is permissible to take a substantial part of the work (if not, there could be no question of infringement in the first place), in some circumstances the taking of an excessive amount, or the taking of even a small amount if on a regular basis, would negate fair dealing"

Although, the court stated clearly that the test approved by Lord Phillips cannot simply be imported into the South African law and that the Copyright Act must be interpreted through the prism of the Constitution of the Republic of South Africa, 1996. In order to survive constitutional scrutiny, the Act must be capable of being interpreted in a manner that is consistent with the Constitution.

Accordingly, the court highlighted the relevant factors needed to determine fairness within the meaning of section 12(1)(c)(i). The list of factors is not exhaustive, they include the nature of the medium in which the works have been published; whether the original work has already been published; the time lapse between the publication of the two works; the amount (quality and quantity) of the work that has been taken; and the extent of the acknowledgement given to the original work. One factor may be more or less important than another, given the context in which publication occurs.⁸ The court also examined whether the reproduction was covered by the fair dealing provision of s12 (1)(c)(i). The court stated that providing a hyperlink sufficiently complies with the requirement that the source must be mentioned. For the rest, the court noted a lack of South African case law concerning fair dealing and therefore, cautiously, considered English case law, under consideration of the Constitution of South Africa, 1996. Accordingly, the issue of fair dealing that has long been avoided was brought to the fore and decided upon.

The SCA further provides that

The copyright in a literary or musical work shall not be infringed by using the work for judicial proceedings or by reproducing it for a report of judicial proceedings.⁹

⁸ *ibid* para 113.

⁹ SCA 1978, s 12(2).

Thus, where a musical or literary work is used for judicial proceedings, or in the process of reporting judicial proceedings, such use will not be considered an infringement of the copyrighted work. In essence, the use of works such as law reports that contain copyrighted work will not be infringing on the original work.

Furthermore, the SCA states that:

The copyright in a literary or musical work that is lawfully available to the public shall not be infringed by any quotation therefrom, including any quotation from articles in newspapers or periodicals that are in the form of summaries of any such work: Provided that the quotation shall be compatible with fair practice, that the extent thereof shall not exceed the extent justified by the purpose and that the source shall be mentioned, as well as the name of the author if it appears on the work¹⁰

Under this provision, the Act permits quotation from any literary or musical work which is lawfully available to the public, as well as quoting from an article in a newspaper or periodical which is in form of a summary of the lawfully available literary or musical work. The only requirement under this provision is that the literary or musical work be properly acknowledged. This provision encourages easy use of literary and musical works for research purposes, a researcher does not need to go through the rigorous steps of taking permission from the author to use the work, provided the proper acknowledgement of the source is done.

In addition, subsection (4) of section 12 provides that where a literary or musical work is used *to the extent justified by the purpose* for which it is used in an illustration in any publication, broadcast or sound or visual record for teaching, such use will not be regarded as an infringement of the copyright, so long as the work and its creator are properly acknowledged. The phrase *to the extent justified by the purpose* is a form of limitation, in that the user does not have unlimited use of the work without permission, what the user can use must be an amount that is reasonable or necessary for the task. Also, various illustrations of the work in the form of publication, broadcast or sound or visual record for teaching will not be an infringement provided it is compatible with fair practice and the source mentioned and the author's name.¹¹

Subsection 5 provides an exception to uses that are exclusively for lawful broadcasts of musical and literary works. The provision however has a proviso that stipulates that such work will be destroyed within six months from the time the work was created or within a time agreed by the owner and user of the work.¹² By virtue of the above provisions, where a broadcaster with its facilities reproduces a work for the sole purpose of broadcast, such use will be regarded as fair dealing, as long as the reproduced work is destroyed before the expiration of six months after the reproduction or within a time agreed to by the owner of the relevant part of the copyright in the work. However, where the work reproduced is *of an exceptional nature*, the work may be stored for a period of time beyond the statutorily stipulated six months, although, such work may not be used for broadcasting or any other purpose without the consent of the owner of the relevant part of the copyright in the work.¹³

¹⁰ SCA 1978, s12 (3).

¹¹This provision is similar to article 10(2) of the Berne Convention.

¹²SCA 1978, s 12 (5) (a).

¹³ SCA 1978, s 12 (5) (b).

The SCA also provides that public lectures and addresses and other similar works delivered in public may be reproduced by the press or broadcasted if such reproduction or broadcast is for an informatory purpose.¹⁴ Also, articles published in newspapers, periodicals and broadcasts about current economic, political or religious topics may be reproduced by the press if such reproduction is not expressly reserved and in this case, the source and its creator must be properly acknowledged.¹⁵ Furthermore, the Act removes every official text of a legislative, administrative and legal nature, or official translations of such texts; speeches of a political nature or those delivered in the course of legal proceedings; and news of the day that are mere items of press information from protection.¹⁶ In other words, these works are simply not protected because they are facts that are inevitable in the transmission of information related to those issues. However, their authors have the exclusive right to make a collection of them.¹⁷ It is further provided that where a dealer in radio or television receivers or any such recording or playback equipment uses a literary or musical work to demonstrate the workings of the equipment to a client in good faith, such use will be considered fair dealing.¹⁸ Finally, the Act provides that where a literary work is authorized to be used as a basis for a cinematograph film, such authorisation, in the absence of any agreement to the contrary includes the right to broadcast such film.¹⁹

b. Permitted Reproduction of works

Section 13 of the Act provides that in addition to reproductions permitted under the Act itself, other reproductions may be permitted by regulations, but in such a way that there will be no conflict *with the normal exploitation of the work*, and it is not *unreasonably prejudicial to the legitimate interests of the owner of the copyright*. Reproduction of works can be made for research or private study provided that the use is reasonable, what is considered reasonable use of a work is limited to one copy of the work per student or the teacher though this may be considered as multiple copies for classroom use it would not amount to an infringement of the work.²⁰ It is however, considered unreasonable exploitation to create or replace or substitute anthologies, compilations and collective works.²¹ Also, copies of ephemeral works are excluded from reproduction. The Regulation made it clear that such uses should not in any way preclude the purchase of books and repeated copying of the same material by the teacher from term to term is not allowed.²²

c. Records of musical works

Under the heading of ‘Special exception in respect of records of musical works’,²³ the Act provides that where a person makes a record or adaptation of a musical work from an *imported disc, tape, matrix or otherwise*, such act will not be considered an infringement of the copyright in the musical work, provided the record containing the work was previously made in or imported into South Africa for the purpose of retail sale or with the license of the owner of the

¹⁴ *ibid* s 12 (6) (a).

¹⁵ *ibid*, s 12 (7).

¹⁶ *ibid*, s 12 (8).

¹⁷ *ibid*, s 12 (8) (b).

¹⁸ *ibid*, s 12 (12).

¹⁹ *ibid*, s 12(13).

²⁰ Rule 7 and 8 CR 1978.

²¹ Guidelines for Photocopying of Printed Works by Not-for-profit Educational Establishments available at [https://wikisites.cityu.edu.hk/sites/upolicies/ippolicy/Documents/PhotocopyingGuidelines\(Eng\).pdf](https://wikisites.cityu.edu.hk/sites/upolicies/ippolicy/Documents/PhotocopyingGuidelines(Eng).pdf) accessed 19 November 2016.

²² Rule 9 CR 1978.

²³ Section 14, SCA 1978.

copyright in the work,²⁴ or the person making the record gave the prescribed notice of his intention to the owner of the copyright before making it,²⁵ also where the person making the record intends to sell it by retail or supply it to someone who intends to sell it by retail or to use it to make other records to be so sold or supplied,²⁶ and the person making the record to be so sold or supplied pays royalties to the owner of the copyright in the musical work.²⁷

The provision of the SCA which relates to exceptions from the protection of artistic works is contained in section 15 of the Act. The section is to the effect that where an artistic work is included in a cinematograph film or a television broadcast or transmission in a diffusion service, and such inclusion is merely by way of background or incidental to the *principal matter* represented in the film, such use will not be regarded as an infringement of the copyright in the artistic work,²⁸ nor will there be a case of infringement where such inclusion or reproduction is in a work which is permanently situated in a street, square or a similar public place.²⁹ The section also provides that the copyright in a work of architecture or similar drawings will not be infringed by the reconstruction of that work on the same site, in the same style as the original.³⁰

In respect of cinematograph films³¹ and sound recordings,³² the SCA provides that its provisions under sections 12(1)(b) and (c), (2), (3), (4), (12) and (13) should apply, and where sounds embodied in a soundtrack associated with a cinematograph film are also embodied in a record other than such a soundtrack or a record derived directly or indirectly from such a soundtrack, the copyright in the film shall not be infringed by the use of that record.³³ In respect of broadcasts, the provisions of sections 12(1) to (5), (12) and (13) are to apply.³⁴

With regards to programme-carrying signals, the SCA provides that copyright in them shall not be infringed by the distribution of short excerpts of the programme carried, that consist of reports of current events; or compatible with fair practice, and to the extent justified by the informatory purpose of such excerpts.³⁵ This provision however does not extend to a programme carried by programme-carrying signals representing a sporting event.³⁶ Concerning published editions, the provisions of sections 12 (1), (2), (4), (5), (8), (12) and (13) are to apply.³⁷

In cases concerning computer programs, the provisions of sections 12 (1) (b) and (c), (2), (3), (4), (5), (12) and (13) are to apply, subject to the provision of section 23(2)(d).³⁸ Where a person in lawful possession of a computer program, or an authorised copy of it makes a copy of it to the extent reasonably necessary for backup purposes, for private or personal purposes,

²⁴ *ibid*, s 14(1) (a).

²⁵ *ibid*, s 14(1) (b).

²⁶ *ibid*, s 14 (1) (c).

²⁷ *ibid*, s 14(1) (d).

²⁸ *ibid*, s 15(1).

²⁹ *ibid*, s 15(3).

³⁰ *ibid*, s 15(2).

³¹ *ibid*, s 16(1).

³² *ibid*, s 17.

³³ *ibid*, s 16(2).

³⁴ *ibid*, s 18.

³⁵ *ibid*, s 19(1).

³⁶ *ibid*, s 19(2).

³⁷ *ibid*, s 19A, s 19(1), s 19(1).

³⁸ *ibid*, s 19B (1), s 19(1).

and destroys the copy made when the possession of the computer program ceases to be lawful, such use will not be considered an infringement of copyright subsisting in the computer program.³⁹

4. A Comparative Analysis of the Limitations and Exceptions under the Nigerian and South African Copyright Acts

As observed above, Nigeria and South Africa recognise the necessity of protecting the rights of authors and the right for adequate access to the works by users. Nigeria provides for copyright exceptions and limitations in Schedules two to four of the Nigerian Copyright Act; South Africa has various sections on limitations and exceptions contained in the South African Copyright Act.

Thus, both Nigeria and South Africa have provisions on limitations and exceptions in their laws. A study of the relevant sections in their laws reveals various similarities and differences. Having discussed the two statutes in relation to their provisions concerning the exceptions and limitations to copyright protection in their various jurisdictions, next the focus will be on the similarities and differences in their provisions.

The first apparent similarity and dissimilarity they share lie in the category of creative works they protect. In Nigeria, copyright protection is limited to literary works, musical works, artistic works, cinematograph films, sound recordings and broadcasts.⁴⁰ Whereas, the South Africa Copyright Act protects all the works protected by the Nigeria Copyright Act and extends its tentacles to programme-carrying signals, published editions, as well as computer programs.⁴¹ On this point, it is obvious that the SCA which has a wider range is more adapted to contemporary issues that may arise as regards copyright protection with programme-carrying signals, published editions, and computer programs. It is also to be noted that the provisions of the SCA as regards programme-carrying signals, published editions, and computer programs are quite extensive,⁴² and so are the provisions for their exceptions.⁴³

A common factor the NCA and SCA share is the content of both Acts in respect of the exception of fair dealing. To understand the implication of the concept of 'fair dealing' as opposed to 'fair use' which operates in the United States, fair dealing has a limited range of applications. It does not apply to cases beyond the purview of the category of acts expressly provided by the relevant statute, whereas fair use as applicable in the United States has a wider range of applications and may be employed to apply to cases that are well beyond the confines of the expressly stated ones. Bearing the confining nature of fair dealing in mind, it becomes desirable that any jurisdiction which makes use of the more limited 'fair dealing' concept, makes provisions that are reasonably extensive and exhaustive. The range of application of the exception of fair dealing under both Acts is 'research, private use, criticism or review or the reporting of current events'.⁴⁴ Although, in the last category which is the reporting of current events, while the NCA leaves the provision open-ended, the SCA makes a slightly more restrictive provision as it provides that the reporting of current events as mentioned by it applies to those "*in a newspaper, magazine or similar periodicals; or by means of broadcasting or in a*

³⁹ *ibid*, s 19B (2) (a-c).

⁴⁰ NCA 1990, s 1(1) (a-f).

⁴¹ SCA 1978, s 2(1) (a-i).

⁴² SCA 197, ss 11, 11 A and 11B.

⁴³ SCA 1978, ss 19, 19A and 19B.

⁴⁴ Paragraph (a), Second Schedule NCA 1990; SCA 1978, s 12(1) (a-c).

cinematograph film".⁴⁵ The implication of this is that since the provision of the Act is fair dealing, the phrase "reporting of current events" will not be construed outside the provisions of sections 12(c)(i and ii). In addition, in May 2016 the issue of what may constitute fair dealing was addressed laying down certain factors that should be considered in determining fair dealing.⁴⁶

Under the heading of education as an exception to copyright protection, the structural differences between the SCA and NCA also extend to their various provisions as regards educational purposes as a distinct exception. While the NCA makes express provision for the heading,⁴⁷ the SCA tends to lean towards the passive side as no express mention of educational purposes was made (at least not in those exact words), but its provisions under Section 12 which concerns the general exceptions from protection of literary and musical works can be construed to cover all fair dealings including the use of literary works for '*...purposes of research or private study by; or the personal or private use of, the person using the work*'.⁴⁸

With respect to the use of copyrighted works for purposes that serve the interests of the public; as it must have been noted in the course of the above discussion, in the language of the two statutes, the main difference lies more in their construction. The Nigerian Act expressly provides that the use of copyrighted works to serve the interest of the public will not be considered an infringement of the copyright in such work, and does not share the same clear provision with its South African counterpart. However, the lack of an express provision such as this does not mean the SCA makes no provision at all for the use of copyrighted works for the interests of the public. Its provisions under sections 12(6)(a) and 12(8)(a) provide that the copyright in a lecture, address or other work of a similar nature which is delivered in public shall not be infringed by reproducing it in the press or by broadcasting it *if such reproduction or broadcast is for an informatory purpose*; and that no copyright shall subsist in official texts of a legislative, administrative or legal nature, or official translations of such texts, or speeches of a political nature or speeches delivered in the course of legal proceedings, or in the news of the day that is mere items of press information, respectively, may be construed to cover the ground of public interest.

As for equality of access for disabled persons, the SCA does not spell out any provision in plain terms, however, section 13 provides that "in addition to reproductions permitted in terms of this Act reproduction of a work shall also be permitted as prescribed by regulation", but such reproduction must not conflict with the normal exploitation of the work and it must not be unreasonably prejudicial to the legitimate interests of the owner of the copyright. This provision in addition to that of section 12(9) which imports the provisions of subsections (1) to (7) of the same section can be used as the basis for the adaptation of copyrighted works to ensure equality of access to such works for disabled persons. The SCA has no similar provision for literary works that are not available for sale in the republic, unlike the NCA which specifically makes provision for such under Paragraph (q) of the Second Schedule to the Act. In addition, South Africa's constant review of its law on copyright and the available access to copyright works generally, as evidenced by the recent and the various amendments that have been made over the years reveals a situation where effort is continually made to fulfil

⁴⁵ *ibid*, s1(c) (i-ii), SCA 1978.

⁴⁶ *Moneyweb (Pty) Limited v Media 24 Limited and Another* unreported case no. 31575/2013, 5 May 2016.

⁴⁷ Paragraph (h), Second Schedule NCA 1990.

⁴⁸ SCA 1978, s 12 (1) (a).

international obligations as well as to keep up with the ever-changing technological developments in this area of law.⁴⁹

5. Conclusion

Under the comparative study of the limitations and exceptions of copyright in Nigeria and South Africa, the article scrutinised the areas of similarity and difference in the legislations of the two countries. Various issues relating to the limitations and exceptions of copyright were highlighted and compared. Also, areas of deficiencies in need of reform were emphasised. The study has shown that both countries have adopted similar limitations and exceptions, such as fair use and educational use, but the scope and interpretation of these exceptions differ. This indicates that both countries have a shared commitment to balancing the interests of copyright owners and users, while also recognizing the importance of promoting creativity and innovation.

It is clear that both countries have taken steps to guarantee access to copyright works, but that their levels of commitment to ensure this access are different. Nigeria and South Africa are both parties to the Berne Convention,⁵⁰ therefore, their Copyright laws apply to anything published or performed in the country, regardless of where it was originally created, so long as the creator(s) or one of them is a citizen of or domiciled in a country that is a party to these international agreements.⁵¹ In other words, it is expected that the provisions of the Copyright Act of both countries conform to the standards set by the Berne Convention, which will render both statutes a lot alike. However, based on the analysis of the two laws, it comes to notice that despite the numerous similarities, there are certain distinctions between them. The differences aside, both have extensive provisions on the limitations and exceptions to copyright as applicable in their various jurisdictions.

The Court in South Africa broke jurisprudential ground in the copyright law by reflecting on an area that previously had no statutory or case law definition and by so doing gave credence to limitation and exception of fair dealing in the MoneyWeb case by stating factors that may be considered to determine fair dealing in a work.

The issue of copyright limitation and exception carries a lot of weight; they are necessary in this part of the world where access to educational material can be a challenge. The use of the materials and the ability for the owners to benefit from the fruit of their labour requires a delicate balance which the society must attain for a complementary approach to quality education that would yield continuous turn out of knowledge.

⁴⁹Since the enactment of the SCA in 1978, the law has been reviewed nine times and is currently undergoing review, while its Nigerian counterpart has only been reviewed twice. Although there has been an attempt to review the law, it has not come to fruition.

⁵⁰ Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886.

⁵¹See generally NCA 1990, s 5.