The 2022 Copyright Amendment Bill: Implications for the South African universities' research economy

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Abstract

The South African Copyright Amendment Bill of 2017 was passed in 2022. In justifying the weakening of copyright protections with regard to the educational arena, the Bill's proponents have largely applied rhetorical discourses published in the popular media, also aggressively propagated at their public meetings. In contrast, the publishing industry has generated many hundreds of pages of economic impact studies supported by detailed legal arguments with reference to global treaties. My analysis assesses the different positions taken by the pro-Bill lobby, ReCreate, in comparison to the Copyright Coalition that questions the importation of an American fair use doctrine. The potential implications of the Bill for South African authors and artists operating in the educational environment are described. Since the object of study has been a moving target, and still was at the time of submission of this article, the conclusions that arise out of the ongoing debates are tentative – but prescient for the current conjuncture. The analysis relies on cross-referencing stakeholder submissions, newspaper articles and statements made by all parties to the discussion. In addition, a number of rejoinders were invited, which are published below. The study reveals the stark contradictions within emerging state policy relating to the creative industries in an era when information has economic value. My conclusions are that: a) a significant portion of the state publishing incentive that currently finances research activities would be in the parallel context of open access rerouted to meet publication charges, were the Bill to be enacted in its current form; and b) the effects might witness: i) a swing away from the publication of homegrown textbooks in favour of copyright-protected expensive imports; with clear implications for the ii) de-colonisation of content; iii) a reluctance of international firms to collaborate with South African publishers; and iv) a significant contraction of the South African publishing industry. And c) while the Creative Industries Masterplan piloted by the Department of Small Business Development (DSBD) aims to protect intellectual property rights, the Bill will undermine such rights.

Keywords

copyright, intellectual property, fair use, fair dealing, South Africa, big tech, author rights, ReCreate, Copyright Coalition, Creative Industries Plan

PREAMBLE

To start, here are some tweets that were circulated during September 2022 by the Publishers Association of South Africa (PASA). They capture the Copyright Coalition of South Africa's (CCSA) concerns about the Copyright Amendment Bill (CAB):

- A strategically important sector, the creative economy, is at stake. The defective CAB risks to hand over local content on a platter to big tech companies for their sole profit – without sustainability and benefit-sharing.

- For South African readers, listeners, learners, and cultural artistic life "hybrid fair use" may look like a freebee. But the price will be foremost paid by authors and performers locally who will have to cater for foreign markets.
- SA consumers will be switched to consume more foreign only content and depend on foreign textbooks – the perceived freebee will turn into desertification of the local content creation landscape.
- The CAB is sold to politicians as a promise of long overdue of redress, a quick fix, of "more for authors and performers". Yet more of less is less for those very authors and performers.

The issuing of these kinds of tweets as a last resort to influence public opinion is indicative of PASA's recognition that threats to legitimate copyright regimes were being driven by a populist discourse about the publishing industry and its supposed exploitative relationship with the academic sector. The subsequent muddling of cause and effect has resulted in a stand-off between this industry on the one hand and anti-copyright activists on the other.

INTRODUCTION: WHAT IS COPYRIGHT?

The rights given to persons with regard to the creations of their minds are known as intellectual property rights (IPR). Such rights confer upon the creator an exclusive right over the use of his/her creation for a specific period. Copyright is the exclusive and assignable legal right, given to the originator for a fixed number of years, to print, publish, perform, film, or record literary, artistic, or musical material.

IPRs, such as copyright, trademarks, patents, designs and trade secrets, as well as traditional and indigenous knowledge, as a modus for wealth creation, are being rapidly transferred onto previously unvalorised sectors beyond conventional markets. These include cultural forms, fabric designs, folklore, knowledge of natural resources, dance choreographies, and even body odours.[1] As such, IPRs are central for development and innovation with regard to information-led economies where content is the prime good being traded, whether or not on open access (OA). To put it bluntly, the jobs of the future depend on a successful IPR strategy as one of the foundational elements of the so-called 4th Industrial revolution (4IR).[2]

South African universities conduct regular workshops to educate their employees on how IP can be valorised. In contrast, the same universities have been ambivalent, if not neglectful, when it comes to copyright issues relating to books and articles published by their staff and students.

Copyright aims to protect the rights of authors, among others, and to prevent unauthorised expropriation for commercial gain. Globally, copyright law denies schools and universities the right to freely make copies of books, or of substantial extracts from books, as this would deprive authors and their publishers of the royalties earned from sales or from the licensing of extracts for educational purposes. That reproductions licensed by the Dramatic, Artistic, Visual and Literary Arts in South Africa (DALRO) make materials affordable to students is simply dismissed as evidence of exploitation by the pro-Bill lobby. Copyright legislation, however, should be balanced, respecting equally the rights and interests of the creator and the consumer, the writer and the reader. The Bill, however, favours the reader or 'user.'

This article examines the potential consequences of a failure to deal appropriately with copyright issues in the context of the contemporary IP economy, with special reference to the public university sector. This analysis updates and expands on my earlier studies (2019a, 2019b) with regard to the implications of the 2017 Bill that was finally adopted by the National Assembly (Parliament) on 1 September 2022.

1 For an extended early discussion on copyright issues as they relate to the political economy of culture, including Africa, see the special issue of *Critical Arts*, 20(1), 2006, which anticipated many of the questions relating to the Copyright Amendment Bill under scrutiny here.

2 See Moll (2021) for a critique of the whole idea of the 4IR. Moll's analysis calls into question this easy categorization. However, we have entered the digital age that the Bill needs to address.

From there it was routed to the National Council of Provinces for its consideration. The Bill had been earlier approved by Parliament in 2019 but had languished on President Ramaphosa's desk for over a year. He then referred the Bill back to the National Assembly because he was concerned that some of its provisions might be unconstitutional.

The process of copyright reform in South Africa was initially intended to benefit authors of musical works who were not receiving their royalties. The process started with a complaint to President Jacob Zuma. He then made a speech on 17 November 2009 that directly addressed the issue of IP theft.[3] That led to the Copyright Review Commission, whose report was completed in 2011.[4] It became clear from the draft of the Bill published in 2015 and from the Bill itself published in 2017, that the writers at the Department of Trade, Industry and Competition (DTIC) had extrapolated measures meant to benefit musicians across all creative industries, including educational writing and publishing, without proper consideration and impact assessment.[5] In other words, the needs and interests of writers, especially those serving the educational sector, were neglected.

"Cutting through the rhetoric" by Sadulla Karjiker (2021; also in this volume) offers a trenchant analysis of the doctrine of fair use and its relation to South African copyright law. Fair use, as it affects authors, relies on how much of a written work may be photocopied to satisfy the requirements of someone who neither needs to read the entire work nor who can afford to buy it. Fair use is not about use that is fair. Fair use entails the reproduction or use of copyright protected material without the author's prior consent or permission.

Karjiker, as does Owen Dean (2021), lays to rest the uncertainty and unfounded claims regarding the utility and wisdom of incorporating fair use in South African legislation. As they forcefully point out, no reasoned arguments have been published in favour of, or motivating, the incorporation of this of what Dean describes as an alien American doctrine.[6] Dean observes that:

> In copyright law 'Fair Use' denotes an American doctrine that entails exceptions being made to a copyright owner's exclusive rights according largely to the discretion or whim of a judge hearing an infringement case. Even in its home environment this libertarian flexible form of excusing copyright infringement on an ad hoc basis is dubious, but it is at least subject to various domestic checks and balances. However, when transplanted into South African law, which does not contain the checks and balances, it has the propensity to run wild like a noxious weed and choke the garden. It should not be allowed to take root. The Fairmaster is, however, consciously planting this invasive weed in our law by means of the Copyright Amendment Bill.[7]

This comment poses the questions of how and why the Bill came about and whose sectional interests the Bill will serve.

The critics of the Bill include the entire publishing industry, involving all South African university and scholarly presses, and significant swathes of the creative industries who united under the CCSA, that

3 https://www.polity.org.za/article/sa-zuma-address-by-the-president-of-south-africa-to-the-report-back-meeting-with-performing-artists-cultural-industry-sector-johannesburg-17112009-2009-11-17/

4 See https://publishsa.co.za/wp-content/uploads/2021/08/Copyright-Review-Commission-Report-2011.pdf

5 See André Myburgh's 2018 Advice: https://legalbrief.co.za/media/filestore/2018/10/andre_myburgh.pdf

6 South African law is largely Roman-Dutch and English in origin, which in contrast to indigenous/customary law could also be regarded as foreign. The Constitution allows for courts (and by extension, the legislatures) under certain circumstances to rely on and therefore incorporate foreign and international law into the legal framework when gaps arise – as long as that law is not against the Constitution. The argument against the incorporation of a foreign law doctrine into SA law cannot merely be that it is because it is alien (Oscar Masinyana, pers. comm., 20 September 2022).

7 See: https://blogs.sun.ac.za/iplaw/2021/06/24/the-use-fair/

includes PASA and the Academic and Non-fiction Authors Association of South Africa (ANFASA). The Coalition has repeatedly requested that the state conduct a socio-economic impact assessment study on the likely effects of the Bills,[8] but to no avail; though PASA itself did so (PwC, 2017). While the overall purpose of the legislation is the promotion of the economic interests of creators, a huge chasm had resulted "between those that support the bills and those that are opposed to them, including publishers, performers, academics, government officials and different associations"[9] (Brian Wafawarowa, PASA Chairman, statement, 29 August 2022; he is also Chair of the African Publishers Network; also in this volume).

The groups working under the auspices of the Coalition requested some key changes to specific clauses that weaken copyright protections. As Wafawarowa points out:

> The concern for many in the intellectual property industry is that the fair use provision and exceptions for educational purposes will turn copyright in South Africa on its head: a user can essentially access and re-use a work unless the copyright holder proves that a use is unfair. This 180-degree reversal of current law has the potential to create an environment where copyright infringement and the use of copyright materials without compensation may increase in an industry that is already on the precipice due to unauthorised access.

A recent example of this occurred with regard to Sabata-mpho Mokae's novel that was subject to an illegal reproduction by the Department of Arts and Culture, North West Province. Observed Mokae ironically "... this was done by the department which is supposed to protect the rights of artists."[10]

Continued Wafawarowa:

> In higher education for example, the estimated number of copies sold as a percentage of enrolled students for whom the textbooks is prescribed is 30%, with the rest being fulfilled mainly by piracy and illegal copying. There is a further concern that deep-pocketed big tech companies will use copyright content on their platforms to generate advertising revenue without compensating rights holders, claiming to be covered by the presumed fair use by their users (ibid.)

Concerns of being massively short-changed by Big Tech are shared by holders of rights in indigenous and traditional knowledge, who are lumped together with all kinds of rights holders for purposes of an expansive fair use. This will make it onerous for rights holders to litigate on each account, given an environment with very little precedent. Arguments favouring fair use include that it opens the door to innovation through unrestricted uses (including uses that have not yet been invented). Excessive attention to the digital future without consideration of present needs such as basic literacy could turn out to be one of the most disastrous ramifications of the Bill.[11] The CCSA stressed to the Portfolio Committee in November 2021 that there are material differences between the Bill's "fair use" clause and the "fair use" affirmative defence to copyright infringement that applies in the United States. The factor of "substitution effect of the act on the potential market for the work"– instead of the classic formulation "the effect of the use on the impact on the potential market" – simply has no precedent anywhere in the world. This factor

8 The Performers' Protection Amendment Bill is the second bill, not dealt with here.

9 See Academy of Science of South Africa (ASSAf, 2022) proceedings where different scholars discuss the Bill's pros and cons.

10 https://www.dfa.co.za/news/dept-slammed-for-photocopying-local-authors-novel-b6292010-7642-4486-a8ab-ead0978b2231/amp/

11 See Monica Seeber, ANFASA communication, Copyright Legislation: The Copyright Amendment Bill and its Impact on Authors.

will seriously undermine creatives' ability to protect and trade their work in the Internet economy.[12]

The Bills will additionally limit copyright assignments to 25 years, thus opening a window for Big Tech to freely appropriate content developed at great expense by authors, universities and their publishers. Over-limiting the period also means that publishers will hesitate to invest in authors and projects at precisely the moment when investments might be recouped in the form of best sellers and long-sellers. Instead of re-investing in the 'long tail', local publishers would be left telling another 'short tale' of disempowerment by mostly international companies. This has, as Wafawarowa points out, the potential to return the industry, the knowledge and the education sector, to an era of extreme dependency on international content.

Rightsholders globally fear that South Africa will offer a lobbying example by anti-copyright organisations that to date have failed to undermine or further limit copyright protection in other jurisdictions (see e.g., Degen, 2021: 11-12). While authors and rightsholders stand fully for the right of greater access for the public to information and education materials, a careful balance is required between enhancing access to information and for education on one hand, and, on the other, providing adequate protection for rights holders. The key is to create an environment that incentivises creators and publishers to reinvest in knowledge development and dissemination. Additional exceptions for education will transfer a disproportionate burden from public funding to authors and publishing businesses. In other words, authors and publishers will be positioned to absorb the cost of ensuring student access to textbooks. The Coalition's argument is that current fair dealing provisions as provided for in global statutes and instruments like the Marrakesh Treaty, which South Africa still has to ratify, does enhance access for designated communities, without stifling publishing financially.

In contrast, the Bill's proponents have largely responded with rhetorical claims justifying their insistence that weakening of copyright on education materials is somehow in the national economic interest. To distil the pro-Bill argument, the critics of copyright and IPR allege that the Big Five academic publishers based in the North[13] are operating cartels that are deliberately impoverishing students on the one hand, while opportunistically leveraging the 'free labour' of scholarly writers on the other, whose salaries are paid from other sources (see also Beiter in this volume). Yet, the solution offered by the pro-Bill lobby is to nevertheless enlist educational and scholarly authors and their publishers to cover state funding shortfalls. Such savings will be enforced by tolerating unrestricted copying of printed materials and the right to 'recreate' an original work as and when they wish,[14] as already experienced by Mokae. My analysis deals with the ensuing contradictions that arise from the two contrasting positions.

While no previously published paper to contest Karjiker or Dean was forthcoming from the ReCreate constituency, my invitation to Klaus Beiter to write a rejoinder to my own interventions, did result in his

12 PASA's Open Letter to the Portfolio Committee for Trade Industry and Competition in reply to the responses by the Department of Trade Industry and Competition and the Parliamentary Legal Adviser to the public submissions on the Copyright Amendment Bill, No B13 of 2017. Signed by Chola Makgamathe

13 In the academic arena, the common claim is that the Big Five include Springer, Elsevier, Wiley, Macmillan Palgrave, and the smaller Taylor & Francis, Sage and Pearson, amongst others. This categorisation is rule of thumb and based on the assumption that all academic authors provide their intellectual labour for free (or at taxpayer and/or donor expense), and thereby are contributing to publishing companies' excess profits. For a listing of revenue of top 50 publishers for 2020 and 2021 see: Publicado en blog Bluesy-emre https://bluesyemre.com/2022/10/16/top-publishers-worldwide-by-revenue-2021/

14 See, eg., http://infojustice.org/wp-content/uploads/2019/03/Gray-and-Oriakhogba-NCoP-Submission-February-2019.pdf. Also, Nicolson (2022): See also Karaganis (2018). When these kinds of arguments enter common sense discourse, they tend to assume that students are inexplicably denied the materials that are actually available via institutional libraries. The problem is one of practice however, for as Karabo Kgoleng observes: "I work with undergraduate students at the Wits Writing Centre and this [claim of exclusion] comes through regularly. Even during the lockdown, many students had no idea how to familiarise themselves with their institutions' e-catalogues and, considering that librarians are the unsung 'info plugs' for students, the latter lose out from not just having an edge on their studies, but building lasting, valuable relationships with librarians", ANFASA Magazine, 5(1), 2021, 10. See also: https://www.dailymaverick.co.za/article/2022-06-12-sas-new-copyright-law-backed-by-google-is-slated-by-the-creative-industry/ and Karjiker, S. https://www.businesslive.co.za/bd/opinion/2018-10-19-shambolic-copyright-amendmentbill-will-favour-google-and-its-ilk/

compelling essay published in this volume of *Communicare*. He offers a comprehensive analysis of the political economy of publishing globally, and the ways that authors are constituted as free labour for the big publishing firms especially, who then allegedly (over)charge universities for the resulting products. He makes the key point that for academics copyright is of little interest, if any. The external motivation for academic researchers is to establish their reputations as scientists and thereby to move up the promotional ladder. Further, for employed South Africans, as I have argued elsewhere, the state publishing incentive lodged with universities is an additional factor in writers taking little interest in copyright issues, permissions or author rights. As such, both universities and their authors are paid by the taxpayer via a form of academic capitalism, irrespective of publisher royalties or permissions payments. Few academics, however, query this extra income stream, a kind of perverse rent-seeking, that rewards already employed authors for just doing their jobs (Muller, 2017; Tomaselli, 2018).

The ensuing contradictions are myriad and examined below.

When "user rights" were removed from the exceptions in a subsequent revision of the Bill in October 2017, a new organisation, ReCreate, lobbied to retain exactly the same copyright exceptions that were in the original Bill. Now, however, these same provisions were relexified as "creator rights" (Myburgh, 2019). ReCreate is closely associated with Sean Flynn of the American University Washington College of Law, and Google, promoting also the idea of "user rights" (Flynn & Palmedo, 2017).[15]

The ReCreate website in 2019 listed just 34 members, comprising visual media producers and 'creators' (fields not specified). Despite ReCreate's small constituency that is alleged to be broking free IP on behalf of Big Tech, it has received much more favourable consideration from parliamentarians than had the much larger Coalition. Unlike the Coalition, ReCreate spokespeople tend to speak in platitudes rather than in legal language, claiming, for example, in Freedom Charter vein that 'the Bill will open the doors of learning to the previously marginalized.' For the first time, however, the vagueness of such claims is clearly specified now by Beiter in his detailed rejoinder in this volume. The questions that arise for us in South Africa include: a) why are South African authors to be victimised in the Bill for the sins of big international publishers? b) is the new law intended to allow schools to make copies of books when education departments fail to deliver them? Or c) will the inexpensive licensing of extracts in universities be substituted with free copying? And d) is copyright "unconstitutional" because it is claimed to deny

15 Academics sponsored by Google are listed at https://www.techtransparencyproject.org/articles/google-academics-inc and https://django.techtransparencyproject.org/table/ Funding for the Global Expert Network on Copyright User Rights was provided by the International Development Research Centre.

Open Society Foundations, Ford Foundation, and through an unrestricted gift to the American University Washington College of Law Program on Information Justice and Intellectual Property from Google, Inc. The CCSA wrote to the Minister on 15 November 2021 that it is "extremely concerned about the apparent pervasive influence of big technology companies, specifically Google" and that certain amendments to the Act will only benefit big technology companies at the expense of South African creators of copyright works. CCSA pointed out that Google has supported the Bill since its introduction. See: https://legalbrief.co.za/media/filestore/2018/10/andre_myburgh.pdf

CCSA writes that (1) the Bill was publicly introduced by the DTI in July 2017 at a Pretoria event co-hosted by Google, (2) it was recorded in Parliament that Prof. Flynn, who co-authored the "Joint Academic Opinion" with Dr T. Schonwetter and Prof. Forere and whose work is quoted in the Minister's response, was funded by Google at least at the time of his visit(s) to South Africa in August 2017 it was revealed in Parliament that Google had funded Media Monitoring Africa to make submissions in support of the Bill to Parliament in August 2017 and that the Freedom of Expression Institute operated a similar programme. The source of the subsistence and travel costs of Prof. Flynn's many trips to South Africa, including in a delegation of four legal academics and a lawyer from the United States to attend programmes to support the Bill in December 2019, remains unknown." "If the costs of these American academics were not paid by parties in South Africa, one can only deduce that there must be a lot of interest from well funded organisations in the United States to have the Bill passed as it is" (letter from CCSA to The Honourable Mr Duma Nkosi, Chair Parliament of the Republic of South Africa, 15 November 2021). See also another report on fair use by Flynn in Australia https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2773646

In addition, the following media reports are of relevance: a) https://www.theguardian.com/technology/2017/jul/13/google-millions-academic-research-influence-opinion ; b) https://campaignforaccountability.org/new-report-reveals-googles-extensive-financial-support-for-academia/ ; c) on author disclosure oversights: https://www.bizjournals.com/sanjose/news/2017/07/11/google-funded-favorable-academic-research-stanford.html; and d) https://www.cnbc.com/2017/07/11/google-has-been-paying-academic-researchers-report-says.html . These sites include information on contradictions arising from a variety of relations between academics, Google and other funders. Nothing is crystal clear.

the right to an education? Mokae's experience, even as the 1978 legislation had remained in play, seems instructive.

The bigger questions are first, why does the pro-Bill lobby oppose publishers while unreservedly supporting Big Tech in appropriating the former's intellectual property without due compensation? Second, what are the implications for universities' resource planning, on which very little has been written with regard to publications?[16] And third, what are the implications of 'recreating' a work without permission, or even attribution?

To begin to answer these questions, we need first to revisit the basics of copyright and how it is applied. What is known as the three-step test is a clause included in most international treaties on IP. Signatories agreed to standardise possible limitations and exceptions to exclusive rights under their respective national copyright laws.

THE THREE-STEP TEST

The test was established in 1967 in relation to the exclusive right of reproduction under Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works. At the core of the many submissions made by the Coalition to the Parliamentary Portfolio Committee was Article 9, to which South Africa is a signatory. The test reads:

1. Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorising the reproduction of these works, in any manner or form.
2. It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.
3. Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention.

The test ensures that:

1. Limitations and exceptions cannot be "overly broad" [= "certain special cases"]
2. Limitations and exceptions cannot "rob right holders of a real or potential source of income that is substantive" [= "conflicting with normal exploitation of the work"]
3. Limitations and exceptions cannot "do disproportional harm to the rights holders" [= "prejudice legitimate interests"]. (Hugenholtz & Okediji, 2012).

FAIR DEALING AND FAIR USE

"Fair dealing" and "fair use" are both defences to a charge of copyright infringement. The specific issue under consideration here revolves around Section B-13B of the 2017 (CAB) "fair use" clause.[17] The open-ended fair use category occasioned by the insertion of "such as" into Section 12A[18] will deprive authors

16 See, for example, https://www.anfasa.org.za/south-africas-copyright-amendment-bill-implications-for-universities/ Also see: ADVICE on the COPYRIGHT AMENDMENT BILL, NO 13 OF 2017, REVISED AS AT 3 SEPTEMBER 2018 for the PORTFOLIO COMMITTEE ON TRADE AND INDUSTRY OF THE PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA by André Myburgh. See also PASA Submission to DTI PC Draft 2, 9 July 2021 (1 Oct. 2021).

17 Little has been published on the anticipated effects of the Bill's fair use provision on the university research economy other than Tomaselli (2019a, 2019b). Also, ANFASA (2019b) reproduces arguments presented at a colloquium for (i.e., Recreate) and against – in the context of open access initiatives.

18 Technically, until a Bill is passed into an Act, its 'sections' are referred to as clauses. However, I retain the word 'sections' as done by the copyright lawyers advising the Coalition and to how it is used in the Bill itself. My thanks to Masinyana for this insight (pers. comm., 20 September 2022).

of the power to prevent unauthorised use of their property. The inclusion of the words "such as" turn a list of previously specific uses into mere examples of the diffuse kinds of uses that might qualify in legal terms. But whereas fair dealing lays what is specifically acceptable, fair use directs the intending user to the considerations to take into account before acting. Should the mark be overstepped, a court of law will decide whether the fair use rules have been followed appropriately. In other words, case law rather than statutory law will decide what fair use includes.[19] The practical implementation of the direct implications for authors to contest authorship and the protracted period of non-resolution, make it neither practically viable nor in line with an author's constitutional right to "speedy justice". Having to institute a court action to determine whether a use is fair is a costly and lengthy exercise beyond the resources of South African authors and local publishers.

As six American law professors concluded:

> While South African courts apply a common law approach to fair dealing determinations, they are not well situated to effectively implement a fair use doctrine shaped by nearly two centuries of foreign case law. Fair use determinations in the United States are considered on a case-by-case basis, yet the doctrine can be applied with a certain amount of predictability that stems from years of interpretation and refining. The evolution of fair use in the United States has resulted in a detailed elaboration of the four factors to be considered, how they are to be balanced and weighed in particular cases, and what presumptions should be applied.[20] Without this well-developed body of case law, South Africa's incorporation of the U.S. fair use doctrine will result in uncertainty for copyright owners and users alike. The confusion and hesitancy stemming from the mashup of laws and the expansive new exceptions cannot support a robust market or local creative economy, and a redrafting of the proposed amendments is necessary to ensure that South African creative ecosystems flourish and U.S. interests are preserved.[21]

The "fair use" exceptions, Section 12A and a transition provision in 39B, is far more extensive than that of the USA. The Bill lacks protections like the statutory damages of the US legislation that would discourage "fair use" beyond the limits of fairness. This is a prime objection to the Bill levied by the Coalition that requested specific modifications, and whose representations have been rhetorically dismissed by the Bill's proponents as irrelevant.[22]

The 1978 Act, however, is claimed to be unconstitutional by its critics because the Bill of Rights gives citizens the right to impart and receive information, and the right to an education, a key issue for Blind

19 This observation was made in the ANFASA submission to Chairperson Copyright Amendment Bill [B13B-2017]: Submission of comments by the Academic and Non-Fiction Authors Association of South Africa (ANFASA). Portfolio Committee on Trade and Industry Parliament of the Republic of South Africa.

20 See: International Intellectual Property Alliance (IIPA) 2019 Special 301 Report on South Africa, p. 71 (Feb. 7, 2019); Available at: https://iipa.org/files/uploads/2019/02/2019SPEC301SOUTHAFRICA.pdf

21 Comments On Behalf of Intellectual Property Law Scholars in the Matter of South Africa Country Practice Review Docket No. 2019-0020 Generalized System of Preferences (GSP)) Request for Public Comment. Before the Office of The United States Trade Representative Washington, D.C. 20006, p. 4.

22 See, e.g., Forere, M. et al, 10 May 2021. Joint Academic Opinion Re: Copyright Amendment Bill (B-13B of 2017).

SA.[23] As do many who make this point in the wider arena, Tanya Samtani, for example, fails to explain how the 1978 Act prevents an author from writing informative works and how it stops a reader from reading them.[24] Because a statute was drafted during the apartheid period does not render the entire act irrelevant in the current context.[25] Take the earlier example of the Protection of State Information Act of 2013. When the minister concerned proposed a consolidation of many pre-existing clauses regarding information across many fragmented pieces of legislation, all of the apartheid era, his objective was to bring the bits and pieces into a single more workable document applicable to the post-apartheid period. He was not accused of apartheid era thinking, though the outcome after he had left office was far worse than during apartheid, as regressive elements within the state sought to fashion it after their own interests.[26]

All parties support the need for amendment of the original Copyright Act of 1978. That Act was designed for the analogue era and needed updating in line with the new digital environment and with regard to the blind. The Coalition and Dean, who wrote the 1978 Act, had all agreed on this. The Coalition, however, insists that trying to fix the current poorly drafted Bill is insufficient and argues that moral rights entail the right to be recognised as the author of the copyright-protected work in question (paternity right). That a creative work can be copyrighted and traded does not automatically translate into heartless corporate expropriation, provided that the moral rights of the creator, author and designer are protected. Intellectual property, and therefore copyright, is recognised by the courts as a right of property, protected by Section 25(1) of the Constitution.[27]

Another is the right to integrity of the work – the right of the author to object to any distortion, mutilation or modification of the author's work to the extent that any such distortion, mutilation or modification would be prejudicial to the author's honour or reputation (as per Section 20 of the Copyright Act).This crucial principle is implicitly recognised in the Creative Industries Masterplan (2022) simultaneously devised by the Department of Small Business Development (DSBD) in very close and sustained consultation with representatives of the creative industries, including PASA and ANFASA. The Plan was accepted by Cabinet in August 2022. Addressing copyright issues, the Plan states that:

> The creative economy is increasingly producing "dematerialised" (digital) goods and services. Ensuring IP protection (through the Copyright Amendment Bill under discussion) to enable monetisation in the digital environment is an absolutely fundamental part of enabling the sector to grow and develop. Even sectors like visual arts, craft and design that produce more material outputs than other sectors are increasingly having to face IP and Copyright issues in terms of protecting their work from counterfeit, low-quality copies that dilute the market and reduce the value of their work.[28]

23 See Blind SA judgment (Blind SA v Minister of Trade, Industry and Competition) on the constitutionality of certain provision(s) in the Copyright Act 98 of 1978. See also Owen Dean's submissions in this regard on the section(s) not being unconstitutional. Also see Owen Dean https://www.news24.com/news24/columnists/guestcolumn/opinion-blind-spot-in-the-copyright-law-20210422 Finally, as PASA interpreted the Constitutional Court judgement, "the Constitutional Court declined to declare the entire Copyright Act unconstitutional. Instead, the Court decided that only the three sections that grant exclusive rights to authors of literary and artistic works are unconstitutional to the extent that they prevent the making of accessible format copies of published literary works and embedded artistic works without authorisation." See: https://publishsa.co.za/wp-content/uploads/2022/09/ConCourt-PA-SA-Statement.pdf

24 See: https://mg.co.za/article/2019-08-19-00-the-new-draft-copyright-bill-could-help-unlock-the-doors-of-learning-and-culture/

25 See: https://publishsa.co.za/constitutional-court-blind-sa-court-delivers-unanimous-decision-on-access-to-published-works/

26 See: https://www.r2k.org.za/secrecy-bill/ Also see Klaaren (2015).

27 See André Myburgh, Advice on the Copyright Amendment Bill, No 13 of 2017, revised as of 3 September 2018 for the Portfolio Committee on Trade and Industry. Masinyana further points out that IP as property protected under section 25 of the Constitution cannot be expropriated without compensation/ arbitrary deprivation (pers, comm., 20 September 2022).

28 *Creating and Designing for Growth South Africa's Creative Industry Masterplan to 2040. A Report of the South African Creative Industry Masterplan Project,* p. 27. Department of Sport, Arts & Culture, May 2022.

The Plan further states that "The main focus of the strategy is to grow an innovative and sustainable Creative Industry ... so that it effectively contributes to the creation of decent work in the South African economy" (Masterplan Section 1.1, p. 1). Weak copyright protection, however, will disincentivise the creation of new and original content and will detract from the Masterplan's goal of "decent work" in the creative industries.

The Masterplan's aim is to ensure a "Globally competitive, innovative, sustainable, vibrant and transformed Creative Industry that creates prosperity for creatives, entrepreneurs and broader society" (p. 3: 1.2.1 Vision 2040) and to establish and strengthen:

> A social compact that supports the development of a flourishing and competitive Creative Industry that enhances sustainable inclusive economic growth, creates quality employment, promotes transformation and contributes to sustainable economic development, while enriching lives, celebrating national identity and cultural diversity, contributing to nation building and social cohesion. (1.2.2).

The Plan implicitly recognises that copyrighted properties are priced differently to other economic goods. The first copy of a copyright property is very expensive, while subsequent reproductions are relatively cheap. The first print run of a book, for example, is expensive, whereas subsequent impressions are cheaper because the publisher has already covered the origination costs.

In a parallel way, the scholarly journal subscription-driven reader-pays model will decline in a dematerialising (i.e., intangible) publishing OA environment. This means that economies of scale stretched across tens of thousands of subscribing libraries and millions of readers will be increasingly replaced with "author pays" for readers to read journals and digital books "for free". Authors who lack access to institutional or donor funding will have to pay from their own pockets and/or from their own research grants to secure publication. Under this scenario, funding for processing charges will substitute for the cost (and risk) currently borne by publishers.

Readers as book buyers affect what is worth publishing. However, when authors or funding agencies pay, then they will shape what is worth publishing (but not necessarily reading). The cost of publication will be no longer absorbed by publishers whose own peer review mechanisms may now respond less strictly to market forces. If a book is to be published at the author's expense, then there is less incentive on the part of publisher to promote and market it, to distribute it or to follow through in other ways unless these functions are also directly paid for, and monitored, by the author.

Where copyright producers are prevented from recovering the cost of investment in the copyrighted-protected good, an undersupply will occur relative to the socially optimal level, imperilling local cultural industries.[29] As the Creative Industries Masterplan states, it is necessary to "Combat digital and physical copying of textbooks in tertiary institution environments to ensure that the development of local knowledge textbooks remains sustainable and that students are not deprived of access to international textbooks because of an unenforceable copyright environment" (2021, p. 24).

Yet, in an extraordinary contradiction, the CAB intends precisely to undermine this protection so clearly required by the Masterplan, especially where "educational use" (that includes primary and secondary schools) is concerned. The problem is identified by Myburgh and Hollis (2020: 4) as the arbitrary deprivation of property that is not compliant with the WIPO Treaty. While claiming "creators' rights", the pro-Bill campaign is aimed at enabling unlicensed usage of creators' works. In reality, this will prevent creators from enforcing their rights and will remove creators' ability to be remunerated for their work.

29 See Nwauche (2003) on Nigeria, and Le Pan (2016) on Canada

THE PUZZLING CONTRADICTIONS: SQUANDERING VALUE

The contradictions are myriad in the contested current South African context where different government departments are working at seemingly irresolvable cross-purposes. If consumers/readers rights are to be expanded at the expense of authors and publishers, then how does one square IPR and copyright as necessary protections of economic value by the proposed DSBD Masterplan with the CAB that aims to actually enable works to be reproduced by educational institutions and to be used at no cost? The University of KwaZulu-Natal (UKZN), for example, in its recurring circular (first dated May 2019), recognises the institution as a repository of knowledge, disseminated through applied research and consulting, teaching, community service and archiving. This knowledge, observes UKZN, is embodied in IP and encoded in forms such as copyrights, patents, trademarks, designs, trade secrets and know-how. UKZN and most South African universities sensibly insist that IP be identified and properly managed for the mutual benefit of the university's community, the creator thereof, and society in general.[30] Furthermore, where appropriate, commercialisation of IP is a university objective rather than leaving it lying idle and unamortised, though this is a minor income stream compared to the publication subsidy of R2.5 billion annually. In identifying and managing such IP, universities will uphold the rights of its IP creators. These will be recognised as such to ensure their right to share in any proceeds generated by the commercialisation of such IP, and to further ensure that such IP is supportive of the primary function of the university – scholarship and research.

At the University Level

My specific concern relates less to the constitutionality of the Bill, but, rather, to the a) potential impact of the Bill, if implemented, on the national research, creative and publishing economies, and b), the allocation and management of research and publication resources and rewards within universities themselves. The intricate complexities of the publishing value chain remain largely a hidden transcript in our academic day-to-day work of teaching, research and publication budgeting and related reward policies. Getting to grips with the implications of the Bill is proving difficult because of the potential change in funding regimes that both the parallel process of open access and the Bill will bring about. Where copyright remains a feature of OA, and is not automatically up for grabs, in the South African context whether OA or closed, copyright would be weakened when materials are mass produced for educational purposes. A concomitant reduction in library budgets may adversely affect library collection and preservation policies, as most materials will now be mainly available digitally through databases remotely accessed from publishers or large repositories, most of them situated abroad.

Are our institutions ready for the impending sea-change?

The PASA-commissioned Price Waterhouse Cooper (PWC) Report (2017) is the only available study that quantifies the potential effect of the CAB on the sustainability of local publishers. Pre-Covid, a key finding predicted a 33% decrease in sales, resulting in significant restructuring, retrenchments and – in some cases – business closure. On a weighted basis, a 30% decline in employment was anticipated. The volume of imported publications would grow, while exports would decrease with South Africa becoming more dependent on imported knowledge production (PwC, 2017). To simply dismiss this analysis as 'inaccurate' as ReCreate has done, is insufficient, as its critics must engage with it in detail. As already argued, the negative financial implications, as assessed by PWC, is that the Bill's extended version of fair use and its education exceptions are over-balanced towards users and prejudicial to creators. A graphic example of such imbalance and "recreation" is illustrated below in the rather startling example where artist Graeme Williams found that his image of a township scene had been "recreated" by another artist without his permission or knowledge.

30 Yet Flynn argues for precisely the opposite in his support for the CAB. Flynn. S. https://www.ip-watch.org/2019/03/21/south-africa-moves-forward-with-creator-rights-agenda/

With respect to the Williams discovery, the CAB broadens the 1978 Act's numerous exceptions such that unauthorised, unpaid and even unacknowledged use of an author's work could be permitted if it is "for education" – an undefined purpose wide open to mis/interpretation (which might include a gallery, a museum or any exhibition). As Owen Dean explains:

> Section 13 of the CAB introduces various new sections containing novel exceptions. 12A causes the undisguised invasion of the alien American fair use doctrine into our law, while offending the Berne Convention and TRIPS, causing arbitrary deprivation of property, contrary to Section 25 of the Constitution.[31]

Sections 12B to 12D, which are essentially in the nature of "fair dealing" sections, are overlaid by the "fair use" provisions of Section 12A. Globally, most countries opt for one or the other of these systems. The CAB employs both, an anomalous and excessive approach (Dean, 2021). The Bill seeks to provide for certain exceptions in respect of infringement of copyright for educational purposes, e.g., the new section 12D [clause 13 of the Bill] which regulates the making of copies of works, recordings of works and broadcasts in radio and television for the purposes of educational and academic activities if the copying does not exceed the extent justified by the purpose. The Bill also proposes general exceptions regarding protection of copyright work for archives, libraries, museums and galleries.[32]

Sections 12B and 12D introduce new "fair dealing" type exceptions and vary some of the existing exceptions. In normal circumstances governed by global agreements, each of these has to be verified against the three-step test. Where they do not satisfy that test, they must be removed or varied. The Berne Convention states that: "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works [a] in certain *special cases*, provided that [b] such reproduction does not conflict with a *normal exploitation* of the work and [c] does not unreasonably prejudice the *legitimate interests* of the author."[33] This test is stretched in, for example, CAB Section 12(1)(i), that implicitly allows the making of a personal copy by an individual of entire works for non-commercial use, without qualifying that the activity must be fair. Unauthorised mass copying would destroy the market for most books. The exception does not meet tests 2 and 3 of the three-step test and the provision is unconstitutional.

Section 12D (2) permits unlicensed course packs, while12D (3) enables the reproduction of a whole, or substantially, a whole book "if a licence to do so is not available from the copyright owner, collecting society or an indigenous community on reasonable terms and conditions". A book's copyright owner is the author (copyright in the content) and the publisher (copyright in the published edition). If a compilation, the contributors each retain copyright in their own works. Illustrations are owned by the respective artist or photographer. Tracing such individuals and securing a licence would be an insurmountable obstacle. A licence to copy a whole book would not be available from a collecting society because reproduction rights organisations (RROs) are not mandated by rights owners to license more than a percentage (usually 10%) of a work. An indigenous community or the spokesperson for such a community might be hard to locate. Ultimately, Section 12D (3) permits the reproduction of an entire book, and authors would be denied a royalty based on the purchase price of the book or a royalty payable by an RRO for the use of an excerpt.[34] Current documented examples of this has already occurred in the Mokae instance, and also where the

31 See https://www.news24.com/news24/columnists/guestcolumn/opinion-blind-spot-in-the-copyright-law-20210422

32 See: https://www.gov.za/sites/default/files/gcis_document/202207/220608b13d-copyright2017.pdf

33 https://www.eff.org/files/filenode/three-step_test_fnl.pdf

34 Much of this section is drawn from submissions to the Parliamentary Portfolio Committee, amongst which is one by ANFASA, which is concerned with the potential effects of the Bill on author's rights. The ANFASA submissions were led by Monica Seeber. While these submissions are not factual statements, they are indicative of the concerns of the respective stakeholders with regard to "what might happen".

North West Province's Department of Arts and Culture reproduced a Struik edition, Iincluding the Struik logo, of Galefele Matlhwăi Molema's biography of *Montshiwa*.[35]

The provisions of 12D add up to a leniency that prompts the question: Is it an undisguised attempt to make the course pack redundant? A university holds a "blanket licence" from a copyright management organisation and the licence fees collected are channelled back to the authors and publishers included in the course pack. This process meets the need for supplementary sources of information, relieving students of the need to buy the book when only a small portion of it is needed.

The university is liable for the annual blanket licence fee which is calculated according to the number of students in the university. In 2020 the fee was under R150 per student per annum. In this balanced solution, students gain access to extensive information for a small fee. Authors and publishers receive royalties if their works are copied. They make possible the publication of research materials, providing affordable access to information.

The real issue, as is articulated by Klaus Beiter, "lies with the monopolies of the commercial publishers in the field of science and the price implications." He does "support the education provisions as they are modelled on international law (the Berne appendix) and in as far as they enhance access." "Access", argues Beiter, "need not conflict with remuneration." On the one hand, contracts between publishers and authors need to protect authors, ensuring proper income (South African copyright law does not really deal with this)." On the other hand, as a Keynesian, Beiter favours taxation as a means of supporting cultural creation and artists (pers. comm., 22 Sept 2022). He underlines this Keynesian solution in his rejoinder, but observes that in South Africa, author rights remain unregulated. Indeed, this is the lack that ANFASA has chosen to rectify.

Section 12D will terminate licensing. One of the ReCreate arguments against licensing is that it results in substantial capital outflows from the country because foreign books and journals form the bulk of the material (see also Merrett, 2006). The solution, however, is not to implement laws that render material free. The objective should be rather to foster more knowledge production locally, to reduce the use of foreign works, while promoting South African works elsewhere. Annually, over 20 000 South African authors receive royalties on the use of their work, much of it coming into the country via the collecting agency, DALRO, as their major markets are often external, the internal market being very small. Capital outflows are thus balanced by capital inflows.

Promoters of the Bill, subject to certain corrections, do not also propose the retention of moral rights in the fair use clause.[36] Moral rights require proper attribution when one's work is used. However, I have often witnessed printed course packs that lack such attribution, and the lecturer's name is now affixed to the printed pack cover as the "editor" or "compiler", in such a way that students cite the lecturer as the "editor" or "author" of the reproduced volume in their essays, theses and exams, while original authors, volume editors and publishers sometimes disappear entirely.

Internally within universities, research management, impact and performance measuring systems would become confused. The system of permanent identifiers helps to manage publication, but the proposed Bill will undermine such mechanisms. The ascription of a work to an author becomes all the more important with OA imperatives. Ascription is necessary for the academy to be able to identify research produced by its staff and students, and to motivate for funding opportunities. Ascription is also the technology on which permanent Identifier systems are constructed – ORCID, ISNIs and DOIs are the key identifiers. Going further, in a performance assessment environment funders, research regulators and scientist rating agencies require detailed calculations on who wrote what sections and how the distribution of labour of a co-authored work is allocated. The disaggregation between co-authors by specific task

35 While the original text was in the public domain, Struik held the typographical rights that embrace the layout or presentation of a work. Even if a text is out of copyright, the layout of a particular edition receives copyright protection.

36 Forere, M. et al., 10 May 2021, Joint Academic Opinion Re: Copyright Amendment Bill (B-13B of 2017).

becomes a determining factor in allocation of resources and scientific recognition to individual academics (Tomaselli, 2021: 112-125). The Bill as it stands is therefore at odds with current trends in higher education productivity measurement and resource allocation. Author attribution is central to assessing output.

The pro-Bill response lacks such specificity of engagement as it claims that all will be well, because information freedom and information justice will be obtained. In turn, this is expected to stimulate national intellectual innovation and economic growth.[37]

CITATION PRACTICE - MORAL RIGHTS

The Williams example – see below - tests the "right to integrity of a work" and what might occur when copyright protections are weakened for creators but strengthened for users, such as in the unauthorised recreation of a work. Below are two images, the first an original by Williams, the second a recreation of the Williams image by American Hank Willis Thomas. The Daily Maverick that reported on the recreation asked: "*Acceptable artistic appropriation — or just plain old theft?*"[38]

Photographer Graeme Williams was astounded to see his photograph (taken in 1990 in Thokoza) massively enlarged and drained of colour, in a work signed by Thomas and exhibited at the Johannesburg Art Fair in September 2018. Williams told the *Daily Maverick* that: "I was disturbed to find a displayed image of mine credited to another photographer. By slightly whitening part of the image (possibly some comment on whiteness vs blackness) African American artist, Hank Willis Thomas has attempted to make this image his own."

37 For a systematic and utterly dismissive critique of the methodology applied by Flynn and Palmedo (2017) who argue the growth scenario, see Ford (2017). Also see Myburgh (2019).

38 https://www.dailymaverick.co.za/article/2018-09-17-graeme-williams-vs-hank-willis-thomas-acceptable-artistic-appropriation-or-just-plain-old-theft

This graphic appropriation (immediately above) by Thomas without citation of the Williams image, might qualify as an example of "fair use" in the USA, if very thinly, but it alienated Williams from the fruits of his own labour and deprived him of his moral rights, as he was not consulted by the appropriating artist, who argued in a YouTube video that the attribution was contained in an accompanying pamphlet available at the Gallery.[39] The educational exceptions in Section 12D might enable replications of such a case, but the question is: To what extent can authors and publishers retain control over the ways in which their creations are used, reused – and recreated?

The broader the "fair use" regimes worldwide, the easier it will be for Big Tech also to appropriate and monetise a creative's intellectual property. Their after-tax profits are as extraordinary are those of the Big 5 academic publishers, but the Big Tech firms like Google, Amazon, Microsoft, and Apple, are not also singled out for criticism by the pro-Bill proponents. Even the smaller academic sharing sites transfer academic content to commercial firms. What these sites do, is to also harvest browser attention and personal data and content on mass scales to sell these on to advertisers and site users, though they do this very differently. In so doing, tech site harvesters commoditise the dissemination of academic works that have already been paid for – multiply – as is discussed by Beiter. The communication channels and associated transactions are thus presented as "free" to readers – though sometimes they are sold back to browsers, many of whom themselves helped populate the academic sharing sites. In other words, the universities (or their authors) pay for the production and reproduction of a scholarly or training work, which is then harvested by academic sharing sites and made "free" to read by anyone who has data and a screen device. No royalties are returned to the universities or publishers to be reinvested in further research and publication, or to alleviate student or university financial debt.

Whichever financial model is at play, commodification remains an outcome and must be negotiated in some way. The misplaced assumption that copyright is "bad" because it protects the North-Atlantic, assumes that the Global South has nothing worth protecting. Such a position will simply enable post-colonial mining of Southern ideas, designs, music and science.

Research-funding regimes will be directly impacted, no matter the funding models that occur. Currently, university presses and the publishers supporting the sector are requesting hefty article

39 The Williams picture has been 'recreated' many times by any different artists: See: https://www.google.com/search?rlz=1C1GCEV_en&source=univ&tbm=isch&q=Hank+willis+Thomas+Youtube+%2B+Graeme+Williams+photo&fir=t7XOcYs_OZvKYM%252CekGKV-x-n3eCHM%252C_%253BAQW2lr6pe3NzSM%252CchLT1AuR54BM1M%252C_%253BE4P1WckdFSE75M%252CRWDE2zPeX4Ls5M%252C_%253BTn6PIHLsQu7wXM%252CekGKV-x-n3eCHM%252C_%253BeVZgiE8Wv0bojM%252C3IhU-orBpHWnxM%252C_%253Bt7RsdbqV1Nq0jM%252CekGKV-x-n3eCHM%252C_%253B1zDYxOya6AIKbM%252CE65D6Uw6T9BSrM%252C_%253BB9LNCsmpk2iRGM%252CchLT1AuR54BM1M%252C_%253BeCcRlSq5X-Yd7M%252CE65D6Uw6T9BSrM%252C_%253BOHnhkAyZpk5yPM%252CBwOqO2c2GQvSBM%252C_&usg=AI4_-kS38gFsca0ojMHok5bNe-dHMI9zqQ&sa=X&ved=2ahUKEwjh3Py9j4L6AhW0olwKHZE0B1oQjJkEegQIAhAC&biw=1261&bih=562&dpr=1.5

processing charges and upfront book publishing subventions. Publishers no longer want to absorb the risks and costs of publishing. Performance management indicators that measure academic publication outputs will need to change. Less work might be published less often as fewer authors will be able to access large sums via a limited number of donors to pay for article and book processing. Creativity will be muted, for when society turns its back on authors they have little incentive to create; though South African academics will, for a while yet, be shielded by the publication incentive paid out by the Department of Higher Education and Training (DHET).[40] Even though not yet signed into law by September 2022, Wafawarowa reported that: "Due to the high illegal use of copyright materials, there has been significant scaling down in areas like higher education and academic publishing. Some authors no longer seem to see the point of working on new editions when the sales potential of their publications has been slashed to as low as 30% by piracy and illegal copying" (PASA Statement, 29 August 2022). The reader becomes also something of a victim in this chain of events, now denied access to revisions, with the most impacted being underfunded emergent researchers.

For many university administrators, the CAB is understood mainly as "a matter for the Library". The ensuing decline of homegrown textbooks, however, will have implications for the decolonisation of curricula, one of the key performance indicators now listed in bi-annual assessment categories, a response to the #feesmustfall movement. The downside will be that we will again become reliant on expensive international imports written for the general reader anywhere. The CAB is also expected by the CCSA to incentivise South African academic and non-fiction authors to publish overseas, where their rights would not be subjected to the same restrictions and limitations. At the time of going to Press, the University of Cape Town (UCT) had announced that rising publication charges in the OA era had persuaded it to enter into a "read and publish" arrangement with Wiley, where its researchers can publish for free and read for free, linked to all content inside a certain collection.[41] In this model, unique deals are made between libraries and specific firms, and in the UCT case its authors need not pay to publish or to read content from the Wiley catalogue – though deals and bundles of content can vary. The contract is like a recurring subscription, ensuring a steady deal for the publisher and the library/institution. The downside for self-funding independent journals and book publishers is, as I have previously argued, that they are again excluded in terms of funding from the publishing value chain, again locking authors into a fixed relationship with specified commercial firms like Wiley, one of the Big Five. The independent journals managed by academics themselves and who are external to these arrangements may well come under financial stress, not to mention to lose authors also to the big international firms.

In the North, author-pays OA costs are partly mitigated by institutional funds (Springer). For South Africans, few currently available extra-university funds pay for OA. But savings will occur as libraries will be relieved of the headache of licencing, with the closure of copyright offices and their staff who currently approve and regulate reproduction of copyright materials for classroom use.

Contradictions for Universities

Actually, the UKZN IPR policy, replicated by most South African universities, is contradictory. While laudable, and if its IPRs are to be implemented, then this university would need to *oppose* the CAB as it is presently worded. This is because its IP would be vulnerable on many counts if the university is willing to cede the right of its authors and publishers. These might include, for example, the UKZN Press, the journals hosted by the institutional website, publications authored by its lecturers and students, software programmes and their other creations to protect their works from unauthorised and unlicensed reproductions, recreations and re-distribution, whether by Google or predatory publishers.

40 A DHET publication incentive paid to universities on publications appearing in selected lists of journals (see Tomaselli, 2018).

41 See https://www.news.uct.ac.za/article/-2022-10-26-working-towards-an-accessible-publishing-landscape

The following kind of contradictions could arise due to the above-mentioned vulnerabilities:

- Why not place patents, software and inventions deriving from public and donor-funded research into the public domain, enabling tech companies, amongst others, to freely harvest and monetise them?
- Technology companies should donate to educational institutions equipment used for educational purposes – computers, data projectors, white boards and all kinds of electronics – and maintain and upgrade them at no cost.
- Anyone involved in teaching, or teaching support or administration, and top management, should allocate a percentage of their salaries to bursaries, the pursuance of free education, free information and free access where the state is unwilling to cover subsidy shortfalls.

The downside would be that:

- University Presses that lack sufficient institutional support might close, merge and/or downsize. International publishers partnering with local presses might cease doing so.
- Full-time educational authors (especially of school and university textbooks) could be deprived of royalties, as might African-language authors when their books are adopted as primary and secondary school readers – a key market for indigenous language publications. Local university presses are already inadequately resourced, unlike the international "straw men" Big Five that CAB proponents have in mind (though Beiter does exempt the local university presses from his critique).
- Copyright organisations like DALRO working for authors, publishers (and readers) will no longer be able to protect authors from unfair exploitation by what remains of the educational sector, whether public or private.

Conversely, if the global commons is to be protected, then universities and ordinary people need to retain ownership rights to their own intellectual property, while also securing for the public their rights to information at a fair price (Rønning, Thomas, Tomaselli & Teer-Tomaselli, 2006: 17-18). The following elements need to be better considered in a revision:

- The Bill confuses access with content.
- Copyright organisations can facilitate IPR protection. Reproduction rights organisations can issue licenses, collect fees and distribute royalties while ensuring that they remain an integral part of the global information commons.
- The prohibitive cost of imported information can be balanced by the Global South developing their own copyright protected knowledge production resources.
- Universities can best leverage information and creations as a generator of income in their own right by encouraging writing and ensuring affordable access to publishing.
- Valorising public information to enhance the public sphere rather than corporations only can be done by taxing corporations for certain uses and allocations.
- The Bill does not benefit creatives, but will aid persons who seek to benefit from the work of creatives without their permission and without remunerating them.
- In the envisaged copyright dispensation, the authors will be prejudiced because they would be expected to make countless court challenges where they feel their works have been abused. This in itself is a violation of their constitutional rights to earn a living and to economic participation.
- The Bill's "fair use factor" of "substitution effect" (in the place of "effect on the potential market") will seriously undermine the position of creatives to deal with their work in the internet economy. The Minister's response promotes the Bill's version of "fair use" as being necessary to achieve certain developmental policy objectives, without any legal assessment offered of how these outcomes are not achievable under the existing fair dealing system (CCSA letter to the Minister, 15 November 2021).
- The Bill represents a hasty attempt to adopt U.S. standards and incorporate them into a system that fails to provide adequate protection to creators and copyright owners. The mixing of legal standards, argue the six American Intellectual Property Law scholars, would result from

> connecting U.S.-style fair use with overbroad fair dealing exceptions. Along with numerous other vague and inequitable amendments, these would lead to an impractical and unpredictable copyright system that would harm U.S. industries, global ecosystems, and local South African creative sectors.[42]

The CAB is putting the cart before the horse and contradicts other sectors of state policy. More logical would be to finalise IP policy, and harmonise with the Master Plan and other policies, prior to finalising a new Copyright Act (which is sorely needed). Once IP policy is finalised, the drafting of new law, with the assistance of experts with a broad experience and knowledge, should follow. In fact, a shortlist of members of such an expert committee was waiting for signing off by the responsible minister.[43]

As the CCSA pointed out,

> There is a continued over-reliance on a specific group of academics who are stakeholders who favour a general weakening of copyright and have no credentials in the practice of copyright law. These academics have had access to the Committee in preference to creators in presentations made in December 2016, June 2017 and in August 2021, as well as in the formulation of the Minister's response. Professionals in the copyright industries and attorneys who practise copyright law consider their work to be unpersuasive and bad in law.[44]

The CAB, meant to bring South Africa into the 21st century, does not even have an exception for text and data mining. This is rather odd for a Bill that has extensive and specific exceptions that compliment and even duplicate the fair use exception. The major STEM publishers already allow free text and data mining of content to which universities subscribe in any event.[45]

As ANFASA observes, authors write in order to be read, so they tend to support the free flow of information – but not the flow of free information if their livelihoods depend on royalty earnings. Reproduction under license is the solution to ensure that South African created information as an export commodity will earn its rightful share in the international commons. That is the basis of the 4IR. The current rapidly changing publishing environment requires due planning that balances all unfolding processes. And, as Beiter argues, if the big international publishers are overcharging, then that is what needs urgent attention and would be best addressed by Universities SA in direct negotiations with them.

The Creative Industries Masterplan is an initiative of several government departments, civil society, labour and industry, aimed at growing the creative sector economy. However, such efforts will come to naught if the CAB is passed as is, as provisions like fair use and broader exceptions for education and interference with contracts, contravene the objectives of the Masterplan that wants to attract investment, participation and growth in an IP protected creative sector industry. As PASA copyright lawyer Carlo Scollo Lavvazani puts it: "Fair use is neither fair play, nor fair pay – it is a gift to platforms who are already raking it in! (PASA Email, 28 August, 2022)

As summarized by Owen Dean:

a. The CAB is detrimental and impoverishing of authors and copyright owners.
b. The CAB does damage to constitutional property rights and puts the boot into the Bill of Rights.

42 COMMENTS ON BEHALF OF INTELLECTUAL PROPERTY LAW SCHOLARS, ibid., p. 9

43 See: https://www.gov.za/sites/default/files/gcis_document/201808/41870gen518_1.pdf>

44 See: Oral submission for the SA Institute of Intellectual Property Lawyers on 11 August 2021; https://www.polity.org.za/article/rightsforcreators-or-dismantling-copyright-2019-03-27

45 See: the 2017 STATEMENT OF COMMITMENT BY STM PUBLISHERS TO A ROADMAP TO ENABLE TEXT AND DATA MINING (TDM) FOR NON COMMERCIAL SCIENTIFIC RESEARCHING THE EUROPEAN UNION: https://www.stm-assoc.org/2017_05_10_Text_and_Data_Mining_Declaration.pdf.

c. We are entitled to expect and to receive delivery of a first-class Bill and should not have to accept the defective Bill which the legislator appears to find sufficient.
d. Bearing the cost of the constitutional litigation will be high, to both the State (the tax payer) and private parties, which will surely follow in the event that the Bill in its current substantially flawed form is signed into law.[46]

A final word from the National Scholarly Book Publishers Forum, a body facilitated by ASSAf:

> In the case of scholarly publishers, we make important research conducted in South Africa available to local (researchers, students, policy makers and the general public) as well as international audiences; our publications contribute to a re-balancing of the geopolitics of knowledge and promote the research conducted in the Global South. In light of the post-Covid19 austerity and policy initiatives, it is especially important that the financial basis for scholarly publishers to continue publishing excellent content is not taken away by shifting the emphasis only onto the demand for free content; in the long run, the local academy will become increasingly dependent on content sourced at greater cost from international publishers. Unless revised, the CAB with its Fair Use and open list of exceptions will place the local scholarly publishing industry in jeopardy and disable it from protecting the rights of its academic authors [47]

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CONFLICT OF INTEREST STATEMENT

The author is a board member of ANFASA, he serves on the PASA Copyright Committee, and he was a participant in deliberations on the Creative Industries Masterplan (2019-2022). He is also co-chair of the ASSAf Scholarly Publication Committee of South Africa, and he chairs its National Scholarly Book Publishing Forum, and its National Scholarly Editors Forum (2021-2023). He is founder and co-editor of two international journals, one published by Intellect Books, Bristol UK, and the second is his own journal licensed to UNISA Press and Taylor & Francis. He serves on the editorial boards of book series published by UNISA Press, Toronto University Press and Michigan State University Press, and he is a board member of the University of Johannesburg Press.

46 https://www.news24.com/news24/opinions/columnists/guestcolumn/opinion-owen-dean-footing-the-bill-why-the-copyright-amendment-bill-needs-to-be-redrafted-20210731

47 Cecile de Villiers, Veronica Klipp and Hetta Pieterse, memo, July 2021

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