



A rejoinder to Keyan Tomaselli's *The 2022 Copyright Amendment Bill: Implications for the South African universities' research economy*

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In his article, "Copyright Amendment Bill: Implications for South African Universities", Prof Keyan Tomaselli has focused on the implications of the Copyright Amendment Bill (the "Bill") for academic publication.¹ His article seeks to engage with the Bill at a level that proponents of the Bill simply refuse to do (or have displayed an unwillingness, or inability, to do); they have been allowed to lobby for and defend the Bill at the level of rhetoric.² While Tomaselli's contribution to the debate on the Bill focuses on the possible consequences for academic publication, his article brings together some wider concerns as regards the credibility of the process that has led up to the Bill.

First, the origin of the Bill is shrouded in mystery. As Tomaselli has correctly noted, the only recognised review of copyright law leading up to the draft Bill was the Copyright Review Commission Report (2011) (the "Farlam Report"), which focused on the regulation of collecting societies, given the concern about the welfare of artists and performers. If anything, the Farlam Report and government remarks leading up to the Bill suggested that the overriding concern was to protect artists and creatives so as to ensure that they receive their due entitlements under copyright. However, the Bill only pays lip service to those concerns, and also does not lay the foundation for us, as a country, to meaningfully enter the so-called fourth industrial revolution, which government claims we seek to do. In fact, the Bill erodes the rights of authors and copyright owners to such an extent that it makes a mockery of claims that it seeks to enhance the position of artists and other creators.

The Bill came about without the involvement of the Statutory Advisory Committee on Intellectual Property, which is provided for in the Copyright Act. Why, and where did it come from? To date, no explanation — let alone a satisfactory one — has been furnished by the Department of Trade, Industry and Competition (DTI). We are all, by now, painfully aware of the consequences of the erosion of good government, and the hollowing out of state institutions over the past 15 years; and, it is submitted that the failure to ensure a functioning, properly staffed DTI and Statutory Advisory Committee is yet another casualty of a dysfunctional government. That kind of vacuum leaves the process of proper custodianship of our copyright legislation vulnerable to abuse, and to be captured by particular interests. If that were not bad enough, Tomaselli's article suggests that some of the Bill's most enthusiastic proponents (and who enjoyed a level of access to the DTI and

1 The first draft of the Copyright Amendment Bill appeared in the GN 646 of 2015 in GG 39028 (27 July 2015). Since then, there have been subsequent versions of the Bill, with the latest version of the Bill being the "D" version of the Bill, "B13D-2017", which has been passed by the National Assembly on 31 August 2022. The Bill will now be sent to the National Council of Provinces for approval.

2 Given the fact that Prof. Tomaselli is not a legal expert, one can forgive his missing some of the finer technicalities of copyright law.

the Portfolio Committee that other stakeholders did not) have been funded by the technology company Google. Based on the aforementioned — given the recent revelations of the extent of state capture — it is surprising that there have not been any calls for a detailed account of how the Bill came into existence. In fact, the Bill erodes the rights of authors and copyright owners to such an extent that it makes a mockery of claims that it seeks to enhance the position of artists and other creators.

The concerns about the credibility of the process are further underscored by the fact that very little of substance has changed in the various drafts of the Bill. It has left outsiders with the distinct impression that the various calls for written submissions, and the public hearings that have been held, have merely been exercises in creating the impression of proper consultation and public engagement. My initial — and somewhat naïve and overly generous — assessment of the first version of the Bill was that the erosion of rights proposed by the Bill simply suggested a failure to understand the purpose of copyright protection, if not an explicitly ideological antagonism to copyright protection. However, it is now clear that particular interests are being advanced, at the cost of South African authors, creators, and copyright owners. If there is one proposed change in the Bill that epitomises this erosion of the rights, it is the proposed introduction of the US concept of “fair use”, as noted by Tomaselli. The problem is only compounded by the sweeping nature of exceptions for educational purposes.

Given the trenchant criticism of the first draft Bill by experts and stakeholders, the Portfolio Committee for Trade and Industry (“Portfolio Committee”) decided to take over the drafting process, and has now been responsible for more versions of the Bill than the DTI! When deciding to do so, one would have expected that the Portfolio Committee demand an account from the DTI how it came to be that such a skewed and technically flawed Bill was even before parliament for consideration. By simply choosing to take over responsibility for the further drafting, the Portfolio Committee, effectively, condoned the DTI’s failures and made a mockery of the imperative of accountability and transparency. Having said that, I realise that that may be a bit too much to expect, given the lamentable erosion of good government for more than a decade, which we all hope can now be arrested and reversed. It is hoped that the lights are still on for long enough for some members of the ruling party, who are still trying to do the right thing, to recognise that there are serious concerns and failures that should not go unaddressed.

Following the President’s referral of the Bill back to parliament, almost inexplicably (that is, if it was not for the erosion of good government that we have witnessed), the Portfolio Committee has, instead of appreciating the significance and essence of the issues raised by the President, been trying to doggedly, and in problematic fashion, defend the Bill. The Portfolio Committee dealt with the President’s reservations in a piecemeal manner: for example, only calling for written submissions on the exceptions (more particularly, the introduction of fair use). This is, arguably, either mischievous or amounts to wilful blindness. It is like trying to convince us that a donkey is a horse by requiring us simply to focus on the fact that it has four legs and a tail.

However, as Tomaselli has correctly noted, the result of dysfunctional government is not simply the squandering and theft of our financial resources that we will be seeking to quantify in time to come, but we will also be intellectually impoverished as a consequence of the changes proposed in the Bill. Perhaps there are some simple questions that the members of the Portfolio Committee could ask themselves about the Bill, as a sanity check, as to whether it would have good consequences for the country. Should the Bill become law, is it more, or less, likely that there will be more publications published by South Africans in South Africa than at present, particularly educational books and academic journals? Will the continued economic viability of authors and publishers in South Africa, especially those specialising in educational and academic publications, be enhanced? In relation to both the aforementioned questions, how will they be financed? The answers to these questions require serious engagement with the issues raised by Tomaselli, and proponents of the Bill must know that their rhetoric rings hollow. If it did not ring hollow, why has the rhetoric not convinced more jurisdictions elsewhere, like Germany, to adopt similar amendments? I agree with Tomaselli’s answer to the latter question: perhaps their political institutions are more robust, and not so easy to capture. Until proponents of the Bill are able to justify their support of the Bill with more than rhetoric, it would not be unfair to suggest that they have done nothing to support good

governance of copyright in South Africa; on the contrary, the Bill will relegate South African creatives, authors and publishers (the majority of whom are Black) to being second-class citizens in the global copyright community. The message is clear: South African (and, by implication, probably African) authors and copyright owners are not entitled to the same legal protection in respect of their creations as their counterparts in Europe and the US. Why are they granted lesser protection? Tomaselli's message to the proponents of the Bill is clear, "Please spare us the rhetoric when addressing these questions."