



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

AUTHOR(S)

Klaus D. Beiter

Klaus D. Beiter, B.Iur. LL.B. (UNISA, Pretoria), Dr. iur. (LMU Munich); Associate Professor, Faculty of Law, North-West University, Potchefstroom, South Africa; Affiliated Research Fellow, Max Planck Institute for Innovation and Competition, Munich, Germany.

Email: Klaus.Beiter@nwu.ac.za.

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Rather than focusing on the intricate detail of the Copyright Amendment Bill (CAB), the purpose of this short reply is to outline the broader context against which copyright reform, as it affects the higher education and scientific spheres, must be understood. This context demonstrates that provisions such as Section 12A (fair use, inter alia for purposes of research and education) or Section 12D (allowing substantial reproduction, sometimes of whole textbooks, for educational purposes) constitute a bare minimum of "what is required," and also permissible under international copyright law.

Knowledge is so important that it is recognised as a public good.¹ According to Paul Samuelson's economic theory, public goods must be available and accessible to all. It is the responsibility of the state to secure this, as the market, essentially driven by a profit motive, fails to achieve this outcome. Intellectual property rights, including copyright, are exclusionary rights. Their effect is to render access, subject to the ability to pay. Insofar as copyright relates to public goods – such as educationally or scientifically relevant knowledge in the university context – its effect is to convert public into private goods. This, entailing a denial of access to knowledge to many, can only be acceptable if a highly plausible justification for that were provided.

Some say this lies in the fact that the creators of knowledge need to be rewarded. Labour benefiting others must be compensated. In fact, international law recognises a human right of authors to draw material (and moral) benefit from their works.² An important point should be noted, however. The human right to such a reward, based on the personal link that exists between author and work, belongs to humans, as the bearers of human dignity, only.³ Publishing companies, with whom most copyrights these days lie (as authors customarily assign their rights to such companies), do not themselves have a *human* right to a reward. Human dignity as the basis for the award of human rights is lacking here. This is not to say that they would not be entitled to a reward as well, but their copyright has a purely contractual basis. This is of relevance when their rights need to be constitutionally weighed against those of access to educational and scientific knowledge.

South Africa does not expressly recognise this international human right

1 "Knowledge is perhaps the clearest example of a public good": E. Zedillo, T. Thiam, et al., Meeting Global Challenges: International Cooperation in the National Interest: Report of the International Task Force on Global Public Goods (Stockholm: International Task Force on Global Public Goods, 2006), at 65.

2 Article 15(1)(c) of the U.N. International Covenant on Economic, Social and Cultural Rights of 1966.

3 U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He or She Is the Author (Art. 15(1)(c) of the ICESCR), U.N. Doc. E/C.12/GC/17 (12 Jan. 2006), paragraphs. 2, 7, 13, 15.

of authors in its Constitution. However, the Constitution does protect the right to property in Section 25. This could potentially protect IP rights, including copyright, against arbitrary interference. However, apart from the fact that the Constitutional Court thus far has (wisely) refrained from categorically considering IP rights covered by the property clause, the same human dignity-based reasoning must apply here. As this country's foremost constitutional property law scholar had explained, "property rights must reflect ... the fundamental choices we have made in favour of living in a democracy characterised by *dignity*!"⁴ Accordingly, in balancing conflicting rights, the question that remains also here, is to what extent is this or that property grounded in human dignity? Publishers' copyright does not really fall into this category.

What one may conclude at this point is that copyright does justify a reward, in some instances even as a human right. However, a reward can often also be realised without according comprehensive exclusionary rights. Inter alia, with regard to educationally or scientifically relevant knowledge in the university context, why should the author of such knowledge be rewarded by being allowed to comprehensively exclude others from access to such important knowledge, if authors can yet be made to adequately benefit from their works? Insofar as both "valuable" literary works prescribed for teaching, as well as specific instructional materials are concerned, authors' reward may be adequately secured by a regulation of author-publisher contract law, securing adequate remuneration for authors, including generous initial payments. Excepting many university presses, a reason why many authors "get so little out of" their works is not because students or universities do not pay, or are exempted from paying, for use, but because publishers retain too large a portion of profits for themselves.⁵ Many countries have meanwhile embarked on strengthening authors' rights vis-à-vis publishers.⁶ In South Africa, this field remains essentially unregulated. Insofar as scientific works produced by academics are concerned, the reward can legitimately take the sole form of proper salaries paid by governments or universities to academics as employees ex ante, duly appreciating their publishing activities. No more would be required to reward these authors.⁷

The critical financial situation of the (non-commercial) university presses, again, is not the result of students or universities not paying, or being exempted from paying, for use, but, as the literature acknowledges, of the so-called "serials crisis." University libraries, in the digital age, frequently shift resources from the acquisition of books to journal subscriptions, since the numbers of electronic journals constantly increase, and as continuously increasing and excessive licensing fees need to be paid to the publishers of e-journals.⁸ Moreover, many science evaluation systems (falsely) reward the publication of articles at the expense of the publication of books. These two interrelated factors are the cause for the demise of the university publishers, for whom the publication of books has always been their bread and butter. Strengthening the university presses requires a control of licensing fees, a change in science evaluation systems, and state subsidy being paid to support the university presses.

However, it is also said that copyright as an *exclusionary* right would be required, because IP rights essentially are to provide an incentive for the production of works; without it, authors would not produce works. The empirical evidence meanwhile demonstrates that copyright, overall, provides a rather weak

4 Van der Walt, A.J. (2014-2015). The Modest Systemic Status of Property Rights. *Journal of Law, Property, and Society*, 1:15, at 101-02.

5 See Ginsburg, J.C. (2002). How Copyright Got a Bad Name for Itself. *Columbia Journal of Law & the Arts*, 26:61, at 61-62 ("greed [of] ... large, impersonal and unlovable corporations").

6 See, e.g., Sentleben, M. (2018). Fair Remuneration Rights in Germany and the Netherlands. *Columbia Journal of Law & the Arts*, 41:413.

7 See Bellia, M. & Moscon, V. Academic Authors, Copyright and Dissemination of Knowledge: A Comparative Overview (Max Planck Institute for Innovation and Competition, Research Paper No. 21-27, 2021), at 2 (it is in the interest of science to reward scientists with "salaries not directly related to scientific outputs").

8 See, e.g., Morrison, H. Scholarly Communication for Librarians (Chandos, 2009: 3, 59, 69, 140).

incentive for the creation of works.⁹ "Valuable" literary works are created because the authors of these works have a very personal urge to create "culture," not because they know that they can subsequently exclude others from access in order to make a profit. For academic writers, copyright creates no incentive at all. The external motivation for academics to write is to establish a reputation as scientists.¹⁰ That IP rights do not fulfil a motivating function in this sphere is clearly borne out by the fact that academics do not receive money for the articles they write, and yet there is no problem of underproduction.¹¹ On the contrary, there is "an overproduction of truth," detrimental to science.¹² Global scientific output grows by eight to nine per cent every year, and doubles every nine years. More than 80 percent of published papers in some fields do not receive a single citation. In certain fields of science, up to 90 per cent of papers detail research that is irreproducible.¹³ Altbach and De Wit accordingly require drastic cutbacks in academic publishing.¹⁴ The reason for the overproduction lies in science evaluation systems that reward quantity and in publishers' appreciation that quantity means enhanced profits for them.

If copyright's incentive function thus does not lie at author level, it can at most lie at publisher level – that is, in the secured prospect of recovering costs and making a profit which copyright creates for publishers for their production of books and journals. This would clearly have had its justification in the analogue age, where publishers, at great expense, had to produce a physical product from raw materials through industrial processes and then ship this to far-off places. In the digital era of "desktop publishing," this reasoning does hold true anymore. Publishers' costs continuously decrease, yet their profits increase.¹⁵ With regard to scientific works, Reichman and Okediji therefore argue that, while publishers should be allowed to charge for their *technical services*, there is no longer a justification for granting them *exclusive rights* to downstream uses of a *scientific product*.¹⁶

A similar reasoning applies to educational textbooks used in universities, at least in the mid- to longer term, as these are increasingly used digitally. Digital books can be offered much cheaper. Publishers should be allowed to charge for all their production costs, so as to facilitate proper remuneration of authors, and to make a profit. Copyright protection could be limited to, for example, three years. Additionally, wide free use or reuse should be allowed in universities. This would still render textbook production profitable, even if profits would thus be aligned more closely with those in other sectors of the economy. It should be emphasised that Article 13(2)(c) of the UN International Covenant on Economic, Social and Cultural Rights of 1966 (an international human rights treaty legally binding on South Africa) requires higher education to be made progressively free. The imperative of free higher education covers learning materials. While this does not mean that these materials may not cost anything, it means that the cost is not to be borne by the student. Overall, as is recommended by UNESCO, it is desirable that education, at all levels, move

9 See, e.g., Buccafusco, C. et al. (2014). Experimental Tests of Intellectual Property Laws' Creativity Thresholds. *Texas Law Review*, 92:1921.

10 Eger, T. & Scheufen, M. *The Economics of Open Access: On the Future of Academic Publishing* (Elgar, 2018: 10-11).

11 The reference here is to copyright-based remuneration. South Africa does, of course, perversely incentivise the production of articles (and books) through a system of government subsidies for publications (see Research Outputs Policy, 2015), absolutely destructive to science. This is not a copyright-based remuneration, however. Other countries do not, as a rule, maintain such systems of subsidy or pay copyright-based remuneration for articles, and yet there is no problem of underproduction of articles.

12 Pacchioni, G. *The Overproduction of Truth: Passion, Competition, and Integrity in Modern Science* (OUP, 2018).

13 On these figures and their sources, see Beiter, K.D. Reforming Copyright or Toward Another Science?: A More Human Rights-Oriented Approach under the REBSPA in Constructing a "Right to Research" for Scholarly Publishing. *Brooklyn Journal of International Law*, 48 (2023), at 19-20 (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4196341

14 Altbach, P.G. & De Wit, H. (7 Sept. 2018). Too Much Academic Research Is Being Published. *University World News*, <https://www.universityworldnews.com/post.php?story=20180905095203579>

15 See Van Noorden, R. (28 Mar. 2013). The True Cost of Science Publishing. *Nature*, 495:426 ("Cheap open-access journals raise questions about the value publishers add for their money").

16 Reichman, J.H. & Okediji, R.L. (2012). When Copyright Law and Science Collide: Empowering Digitally Integrated Research Methods on a Global Scale. *Minnesota Law Review*, 96:1362, at 1466.

towards open education resources.¹⁷ These can be used for free, as they are based on works forming part of the public domain or on copyrighted works that are subject to open content licences.

A director of the Max Planck Institute for Innovation and Competition in Munich, Germany, describes the current publishing model in the sphere of science – a “pay thrice” model – as “grotesque.”¹⁸ It is faculty, paid by the public, who write articles, but who then give these *for free* to the publishers. Yet, university libraries *buy back* the results of faculty’s labour at high prices, the public paying a second time for the same content. Added to this, universities enter into licensing agreements with collecting societies, undertaking to pay for various uses of works, for instance, the reproduction of articles for research purposes or inclusion in student course packs, the public hence paying a third time. Some of the big international publishers – whose content constitutes the bulk of works South African universities pay for – have obscene profit margins of over 40 percent, higher than Apple.¹⁹ A report produced by Deutsche Bank in 2005 accordingly finds the multiple-pay model “bizarre,” journals’ working capital requirements to be “minimal,” and the professional publishers, overall, to “add little value to the research process.”²⁰

Copyright in the sphere of science has mainly come to have the effect of siphoning off public resources for research to the scientific publishing industry. Accordingly, one must agree with Reichman and Okediji when they recommend that institutionalised science should start managing its upstream research assets itself.²¹ Scientific publishing can revert to academia. Academics already perform quality control (peer review). In the digital era all this is possible. This would, through an “open access” approach, secure wide access to, and use and reuse of, scientific writings within the scientific community and beyond, benefiting also ordinary citizens, who too need access to the insights of science, paid for by the public. Article 15(1) (b) of the International Covenant on Economic, Social and Cultural Rights ultimately states that everyone has the right “to enjoy the benefits of scientific progress,” the benefits covering scientific publications. The reason why open access does not work at the moment, excluding, as it does, researchers in poorer institutions and generally those in the global South, is that gold open access at this point in time often requires copyright to be redeemed at exorbitant prices charged by the commercial publishers.

Against the above background, Section 12A and 12D constitute a bare minimum to facilitate access to educationally and scientifically relevant knowledge in the university context as a public good. The CAB seems not to sufficiently protect authors, but this cannot be explored further here. Where Section 12D permits the reproduction of whole books, for example, where these are unreasonably priced, the provision broadly follows the Berne Appendix of 1971, which provides for the possibility of compulsory licences in the same type of situation in developing countries. While the Appendix has not been used extensively in practice because of its hardly comprehensible administrative provisions, the literature recognises the possibility of similar measures by countries also beyond the Appendix.²² Obviously, if Berne members considered the provisions of the Appendix to comply with the three-step test, then Section 12D would do so too.

Regarding Section 12A on fair use: Dean himself had stated that fair use and fair dealing are, in principle, synonymous²³ – fair dealing being the only concept South African copyright law has applied up to now. The only difference between the two is that fair use is deliberately framed in a way as to allow

17 UNESCO Recommendation on Open Educational Resources (OER) of 2019.

18 Hilty, R.M. (2005). Five Lessons about Copyright in the Information Society: Reaction of the Scientific Community to Over-Protection and What Policy Makers Should Learn. *Journal of the Copyright Society of the U.S.A.*, 53:103, at 123.

19 See, e.g., Morrison (n 8) Ch. 4 (on scholarly publishing and “the multi-billion-dollar industry”).

20 Klein, S.J. (5 Aug. 2019). Turning the Supertanker: Deutsche Bank on Elsevier’s Excess. KFG Notes, <https://notes.knowledgefutures.org/pub/supertanker/release/3>

21 Reichman & Okediji (n 16) Part III.

22 See, e.g., Isiko Štrba, S. *International Copyright Law and Access to Education in Developing Countries: Exploring Multilateral Legal and Quasi-Legal Solutions* (Martinus Nijhoff, 2012: 157-164).

23 Dean, O.H. *Handbook of South African Copyright Law* (Juta, 1987: 1-52).

for potential future uses, for example in the spheres of research and education, that could not have been foreseen at the moment of drafting. To mention an example already visible right now: Fair dealing for purposes of research, as currently provided for, is likely not to be broad enough to allow for new research methods in the form of computational analysis such as text and data mining (TDM) that will characterise research in the future (and which, for example, made possible the development of Covid vaccines). In the U.K., the legislator considered this, in fact, to be the case with regard to a similar fair dealing provision in U.K. law, and therefore explicitly provided for TDM to constitute a legitimate use of copyrighted works. A fair use exception as laid down in Section 12A would likely permit TDM without the need for legislative amendment.

All the limitations and exceptions suggested in this short reply would, of course, have to comply with the three-step test of international copyright law. The three-step test must be read taking into account international human rights law, following from the integration rule of treaty interpretation contained in Article 31(3)(c) of the Vienna Convention of the Law of Treaties of 1969. It must therefore be read in the light of, *inter alia*, the right to science and education, as referred to above. It is for this reason that the world's leading copyright scholars have, in a meanwhile famous declaration on the three-step test, prepared under the auspices of the Max Planck Institute for Innovation and Competition, held that, in assessing the permissibility of limitations and exceptions under the test, the legitimate interests of third parties "deriving from human rights and fundamental freedoms" and "other public interests, notably in scientific progress and cultural, social, or economic development," must be taken into account.²⁴

24 Geiger, C. et al. (2008). Declaration on a Balanced Interpretation of the "Three-Step Test" in Copyright Law. *International Review of Intellectual Property and Competition Law*, 39:707, at 712.