

Copyright Amendment Bill: Contradictions to Hit the South African Education Sector

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Abstract

This article maps the latest developments in South Africa's complex battle to update its Copyright Amendment Bill across a path strewn with legal pitfalls. Driving the agenda of the American-derived "fair use" and other copyright exceptions at the expense of content creators are the state, under the guise of "access" to education, and Big Tech companies focused on data mining, paraded as users' rights to content. The emerging Bill has given rise to a set of major contradictions that will directly and negatively impact especially educational book publishing, from primary to tertiary sectors. The updated Bill risks violating authors' rights and international treaties. The authors identify contradictions in public policy and sketch the most contentious aspects within debates around the Bill. The implications for the national research economy are considered, while the need to adequately protect the copyright of open access content is raised. The article closes with a summary of the issues of "fair use" and fair dealing, the predatory implications, and the outcome of the contradictions for the industry. The relevance of writing about a moving target is because a) the Bill has been in contestation for eight years now; b) universities and the whole educational sector have failed to respond coherently to the threats portended in the Bill; c) the nature of the claims and counter-arguments raised by the Bill will continue well after it has been promulgated; and d) the analysis is alert to open access imperatives and to the threat of South Africa becoming a haven for servers hosting pirated content should the Bill become law.

Keywords: Copyright Amendment Bill; South Africa; "fair use"; fair dealing; open access; creative industries; predatory publishers



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Introduction

Copyright assists to prevent plagiarism, the unscrupulous copying of, or any parallel re-use of an author's content by any means. Authors can either retain their copyright, share it with others or transfer it. In support, a publisher's basic responsibility is to enable the protection of an author's rights, while it handles permission requests on behalf of an author. Should an author opt to retain her/his rights, the clearance process is directed to the author, while if rights are shared, the risk of fraudulent use increases.

South Africa's Copyright Amendment Bill (CAB) (RSA 2018) continued with its legal flaws and contradictions at the time of writing, July 2023, despite an ongoing public international debate on its provisions. As the Bill neared finalisation following its consideration by the National Council of Provinces (NCOP) in June 2023, copyright holders, textbook writers, scholarly authors, and creatives were concerned with good reason about inadequate protection, lack of clarity, and threat to their livelihoods. Steering the Bill, which has veered off course from its original good intentions to benefit creatives, are certain government officials who have secured themselves as the only source for legislators' information on the Bill, and who, heavily influenced by a small group of mostly American academics who agitate for "users' rights" to limit rights of copyright (Dean 2022; Tomaselli 2019), present the supposed benefits of "fair use" as axiomatic (see PMG 2023) despite the absence of a cogent policy or impact assessment that supports these claims (Myburgh 2023). The Bill's passage is eagerly anticipated by the state and users, both academics and students, to cut their cost for copyright content that they would otherwise have to purchase. This would leave the content creators empty-handed and with lower incentive to create new works, especially with regard to textbooks that do not draw state financial incentive recognition yet were written with local readerships in mind.

Very little has been written on the Bill's anticipated effects on the national research economy as applied by different universities. The exceptions are articles written by Tomaselli (2022), and three joinders to it (Beiter 2022; Karjiker 2021, 2022; Wafawarowa 2022). The present analysis explores some further implications as they have arisen since publication of Tomaselli's warning in December 2022.

The thousands of pages of prior discussions and submissions to Parliament are perhaps best summarised in three places. The first document is the 2021 South African Cultural Observatory (SACO) report, commissioned by the Department of Sport, Arts and Culture (DSAC), which balances the arguments of the pro and opposing lobbies, and which concluded that the Bill was in need of significant revision.

The second and much more extensive critique of the Bill was published in April 2023. Authored by a group of intellectual property lawyers, *Copyright Reform or Reframe?* (Myburgh et al. 2023; see also Dean 2021; Myburgh 2019) anticipates and rebuts many of the recurring appeals in the presentations made to legislators in Parliament.

Third are the thousands of pages of closely argued legal comment and submissions from the above-mentioned commentators. In addition are the detailed submissions from local and international professional and trade associations and corporations and writers' organisations from South Africa and all over the world (see Act Now SA n.d.; PASA 2015–2023; SAIPL 2017–2023). All these submissions warn about specific flaws in the Bill and offer constructive suggestions for revision.

The Coalition for Effective Copyright has requested some technical and legal revisions that would actually enhance the original intentions of the Bill and strengthen the South African publishing industry. The Coalition is a broadly representative group mainly comprised of local trade and industry associations representing hundreds of local companies that drive investment into South Africa's creative and education sectors, creating jobs and opportunities for tens of thousands of creatives in the publishing, music, film, animation, and other industries.¹

Fair Dealing, “Fair Use”

Fair dealing exempts the use of copyright works for certain statutorily defined purposes relating to particular types of works. The relative advantage of the fair dealing approach is that it provides more extrajudicial clarity to users. “Fair use”, by contrast, was created by the American bench when first applied in *Folsom v. Marsh* (9 F case 342 1841) and subsequently taken up in statute, currently embodied in section 107 of the Copyright Law of the United States (17 USC 1978). It provides inherent flexibility by not restricting its application to numerous clauses of permitted purposes of use. “Fair use” is best understood as a mechanism to determine whether a user's conduct is fair rather than whether a set of requirements are met. This presents a marked advantage to users and embodies the broad array of public interest reasons to legitimately use copyright works without prior authorisation or paying compensation. It is said to enable “transformative use” of digital content for a perpetually expanding range of applications. However, the two mechanisms cannot operate in unison, because they serve the same function in different ways, as fair dealing will be largely subsumed by “fair use” (Shay 2016).

While the Coalition has queried several clauses in the Bill, here we focus on the “fair use” versus fair dealing discrepancies. “Fair use”, an ill-fitting alien doctrine (Dean

¹ Coalition members: the Independent Black Filmmakers Collective (IBFC), the Music Publishers' Association of South Africa (MPASA), the Publishers' Association of South Africa (PASA), Academic and Non-Fiction Authors of South Africa (ANFASA), PEN Afrikaans, Printing SA (PIFSA), the Recording Industry of South Africa (RiSA), RiSA Audio Visual (RAV), the Dramatic, Artistic and Literary Rights Organisation (DALRO), Writers Guild SA, Audio Militia, Animation SA, the Musician Association of South Africa (MASA), the Southern African Music Rights Organisation (SAMRO), the Composers, Authors and Publishers Association (CAPASSO) and the Visual Arts Network of South Africa (VANSA), the Independent Producers Organisation (IPO), and the Academy of Sound Engineering. See Copyright Coalition of South Africa (2021) (Letter dated 16 July 2021 addressed to the chairperson, Parliamentary Portfolio on Trade and Industry).

2022) emphasises “user rights” that permit free use of content. Fair dealing in the 1978 South African Copyright Act enables affordable reproduction of licensed materials for educational use in course packs, in terms of international treaties. “Fair use”, to emphasise, is not about use that is fair given the fact that in the South African version the door is opened to unlimited use by the inclusion of the “such as” phrase (see below). “Fair use”, to summarise, entails the reproduction or use of copyright-protected material without the author’s (or publisher’s) prior consent or permission. Additional exceptions for education that “fair use” will enable will transfer a disproportionate burden from public funding to authors and publishing businesses. To clarify, authors and publishers will be unfairly positioned by the legislation to absorb the cost of ensuring student access to textbooks. The Coalition’s argument is that fair dealing provisions as provided for in global statutes and instruments such as the Marrakesh Treaty, which South Africa still has to ratify, do augment access for designated communities, while also protecting publisher viability.

Fair dealing and “fair use” are defences to allegations of copyright infringement. For the Coalition, the specific issue is Section 13 of the Bill’s “fair use” clause.² The opened fair use category occasioned by the insertion of “such as” into Section 12A will rob authors of the right to thwart unauthorised use of their property. The inclusion of “such as” reconstitutes a list of previously specific uses into mere examples of the diffuse kinds of uses that might qualify in legal terms. Where fair dealing stipulates what is specifically acceptable, “fair use” directs the intending user to the considerations to take into account before acting. If the mark is overstepped, then a court of law will decide on the appropriateness of the use. In other words, case law rather than statutory law will decide what “fair use” includes.³ 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—let alone the lack of legal precedents in South Africa compared to the United States (US).

The contradictions arising from the convoluted Bill process, identified by all the Bill’s critics, are as follows.

The First Contradiction

A parallel concurrent process with the CAB was the development of the Creative Industries Masterplan (RSA 2022). The Plan, piloted by the Department of Small Business Development (DSBD), unlike the CAB, was negotiated in sustained sectoral consultation with representatives of all creative industries, including the Publishers

² For the broader context, see ANFASA (2019b) and ASSAf (2022) reproduce arguments presented at a colloquium for and against—in the context of open access initiatives.

³ This observation was made in the ANFASA submission of comments on the Copyright Amendment Bill (B13B-2017) to the Portfolio Committee for Trade and Industry (ANFASA 2022).

Association of South Africa (PASA) and the Academic and Non-Fiction Association of South Africa (ANFASA).

The respective practices and outcomes of the two simultaneous initiatives, however, evidence a curious inter-government policy dissonance. That is, the Masterplan (and the Competition Commission [see Crouth 2023]) that supports intellectual property (IP) and copyright as protecting creative industries is at odds with the CAB in that the Bill *undermines* the very sectors that the Masterplan seeks to develop and which the Competition Commission seeks to empower.

The Second Contradiction

The Bill's proponents—in a category mistake—confuse access to information (i.e., the user) with actual published content (made by the creator who has the right to earn income from the fruits of their labour, as is embodied in the Berne Convention). Why impoverish content-generating industries and individual creatives simply to enable free access to their intellectual property?

The Third Contradiction

Textbooks and creative and scholarly works that can be copyrighted and traded do not automatically translate into heartless corporate expropriation of either creators or consumers/users (which, ironically, is what the present Bill would enable any individual or firm to do). User rights are foregrounded at the expense of the moral rights of the creator, author, and designer, which are not recognised nor protected by the Bill.

The Fourth Contradiction

The CAB and the Masterplan, though contradicting each other, initially emanated from the Department of Trade, Industry and Competition (DTIC). Both were then migrated to DSAC, which sits with the resulting policy impasse. SACO, which devised the Creative Industries Masterplan, is the contracted research arm for DSAC and, as mentioned above, itself has drawn attention to the multiple flaws in the Bill. These, however, are not mentioned in the Masterplan, given that the Plan cannot be reconciled with the CAB.

The Fifth Contradiction

IP, and therefore copyright, is recognised by the courts as a right of property, protected by Section 25(1) of the South African Constitution (RSA 1996).⁴

⁴ See submission of the South African Institute of Intellectual Property Law (SAIPL 2023, 43). See also André Myburgh's "Advice on the Copyright Amendment Bill, No. 13 of 2017" (2018, 34 para 2).

Where the Creative Industries Masterplan sees IP as possessing tradable value and thus being a key commercial good in the information age, the CAB “fair use” override will squander the IP value of content, when books, articles, films, and other materials are used especially for educational purposes. That, in turn, will collapse much of the South African publishing and book selling industry, educational materials being the mainstay of local publishing (PWC 2017).

The Sixth Contradiction

Where university research budgets are finite, publishing charges will escalate. This means that a) there will be less funding for doing actual empirical research; and b) fewer authors might get into print with South African presses. *In other words, the new open access (OA) model (exacerbated by the Bill) will eliminate the publisher as a co-investor and intellectual collaborator.* Legacy publishing is a high-risk and cost-intensive industry, since expenses need to be invested upfront without any guarantee of market success. In the author-pays OA model, our conclusion is that we will see more desk-bound work recycling other people’s ideas and less empirical testing (in the humanities at least).

Implications for the Research Economy

The tension in academia is that publication is the lifeblood that underpins appointments, promotion, access to funding, and job security. These opportunities for career mobility are compromised when an author’s ownership of content is threatened. In assessing the specific likely effects on universities and the book sector, a further contradiction is that a significant portion of the state publishing incentive that currently finances research activities in the parallel context of open access would be *rerouted* to meet upfront publication charges were the Bill to be enacted in its current form. This will see a shift from the publication of homegrown textbooks customised for local users in favour of copyright-protected imports with clear implications for the *re-colonisation* of content. Allied to these will be loss of incentive for local textbook authors given that they and publishers will be unable to monetise their products. In addition, a reluctance of international firms to collaborate with South African publishers will result, reducing global exposure for local authors and content. Already, the lodging of prepublished papers or an extract publicly available on institutional repositories opens them to misappropriation, despite the application of one of the Creative Commons licences.

In line with the drive to publish, the cushioning effect of the publication incentive of the Department of Higher Education and Training (DHET) and the “publish or perish” syndrome push South African academics towards overproduction. This partially results in “facsimile science” where much work is simply repetition with difference, involving textual recycling across a range of different publishing venues (Muller 2022; Thomas 2019), including predatory journals (Mouton and Valentine 2017), at great cost to the fiscus.

The contradiction that follows is that the gaming of the DHET scheme is perversely justified as incentive-seeking by both universities and individual authors (Muller 2017). With the growth of the international indexes, which are framed by the DHET as legitimisation systems, copyright issues fade from mind as leveraging of state publication incentives overrules other considerations. Some universities now additionally promote citation incidence as a new measure of performance, arguably enhanced by OA publishing, though the jury is still out on this count (Langham-Putrow, Bakker, and Riegelman 2021). Without copyright protection authors vacate their ownership and control over the reuse of their own work. Where the range of Creative Commons licences are used to protect OA content, in contrast, the CAB's "such as" clause makes defending copyright abuses largely impossible for South African authors, unlike the American "fair use" mechanism.

Those academics who support an OA free-for-all in the name of epistemic and information justice fail to recognise their own roles in this unique form of South African academic capitalism that is funded, not by markets, but by the taxpayer. Most universities allocate financial incentives (for research purposes) over and above salaries, based on publication in so-called accredited titles. These are geared to producing products that attract additional state payments and benefits (beyond any royalties that might be allocated by the publishers themselves). The populist attack on the Big Five publishers forgets that these same publishers (along with the local DHET-accredited list) are the conduits that enable South African university-affiliated authors to rake in the financial, symbolic, and career benefits that drive the whole system, which has been hugely successful in elevating South Africa's global and local research output since 2010.⁵ Editors and peer reviewers, working mostly *pro bono*, sacrifice their own time and productivity with little institutional acknowledgement to enable others to publish and draw the taxpayer-funded benefits accruing to universities and authors, but not editors or journals. So noticeable has this lack of editor acknowledgment become that the Academy of Science of South Africa (ASSAf) constituted a sub-committee in 2022 to compose a statement that requests universities to include editing and peer reviewing in academic performance assessments.

Editors, journals, and publishers facilitate the annual R3.4 billion of taxpayer-derived DHET incentive funding transferred to universities, and via these, in most cases, a percentage is paid into authors' research accounts. And, against the spirit of the statute, some universities permit their authors to claim all or part of these funds as taxable take-home pay. This may be one reason why South African authors treat copyright so casually. The taxpayer pays whether or not anyone buys, reads, cites, applies or critiques their work. Copyright issues again fade from view, though many journal authors complain about the lack of payment from publishers, while failing to acknowledge the risk and cost of production and value-adding services, promotion, and the cost and risk

⁵ As reported annually at the National Scholarly Editors' Forum by the Centre for Research on Evaluation, Science and Technology, Stellenbosch University, contracted by the DHET. Also see ASSAf (2019).

of maintaining databases and archives in perpetuity. The Bill sweeps away many of these protections.

The popular and pro-Bill lobby assumption that publishers are ruthlessly extractive (of authors and the public purse) denies the extensive beneficitation that legitimate publishers apply to the materials they process, produce, publish, protect, and promote—and in the digital era, that they now must maintain in perpetuity. As a highly skilled labour-intensive industry, the publisher investment in an article or book is considerable. Certainly, the embattled local scholarly university presses cannot be categorised in the international Big Five league, even where collaborations occur. If perceived excessive pricing by the Big Five is an issue, then that is a matter for Universities South Africa to address in terms of national purchasing agreements.

The Creative Industries Masterplan implicitly protects author rights and the integrity of their work. This is the right to object to any distortion, mutilation or modification that would be prejudicial to the author’s honour or reputation (as per Section 20 of the Copyright Act). Addressing copyright issues, the Plan states:

The creative economy is increasingly producing “dematerialised” (digital) goods and services. Ensuring IP protection ... 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. (RSA 2022, 28)

Though the Plan tactically misreads the CAB, it further states that 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” (RSA 2022, 1). Weak copyright protection in written work, however, disincentivises the creation of new and original content and textbooks within, or for, or to be taken up by the educational sector. Such appropriation without compensation prejudices the goal of “decent work” in the creative industries. The DHET scheme will then remain as the only financial reward for *bona fide* scholarly outputs in terms of institutional income generation if the Bill is approved.

The fact that the CAB makes provision for parallel imports of books from India or anywhere if such books are at lower costs will deal another blow to the local industry (PASA 2019, 3).

The Issues: “Fair Use” vs Fair Dealing

The proposed American-derived and widened “fair use” clause, amending Sections 12 and 13 of the principal Act, will override the concept of “exceptions” and broaden “fair use” to unrestricted and unlicensed copying for course packs and any other educational

purpose (which, according to the Dramatic, Artistic and Literary Rights Organisation [DALRO], the South African collecting agency, usually costs on average an affordable R150 per student per year in comparison to imports⁶). The clause holds negative consequences for the publishing industry and authors, *inter alia*:

- a. Extensive “copying of copyrighted” material without permission due to the “fair use” argument will negatively impact South African writers and publishers and their right to income.
- b. Similarly, the phrase “provided that the copying does not exceed the extent justified by the purpose” (RSA 2018, 21) leaves it to copyright holders (i.e., authors) to define what is the justifiable extent (in the context of differing disciplines). They would have to argue this in court should they believe their copyright has been infringed upon. “Fair use” does not protect creators, and costs of legal defence are unaffordable for most authors and publishers. Presses, especially those part of public institutions, would need to allocate resources for potential legal battles.
- c. Myburgh et al. (2023) restate SAIPL’s finding that no research supporting the “fair use” clause has been done, even as the Parliamentary Legal Adviser again raised unsupported claims at NCOP in April 2023 about “the economic and social benefits that a fair use exception would bring” (A. Myburgh email to Tomaselli, 21 April 2023) as a given. The DTIC made the unfathomable statement that “South African judges have already been applying the four factor US fair use test in their fair dealing jurisprudence” (A. Myburgh email to Tomaselli, 21 April 2023). Although some peripheral changes were proposed, the most significant proposal is the DTIC’s recommendation for an independent regulatory impact assessment of the Bill, even at this late stage. Although the history of the absence of impact assessment is not dwelt on in the book,⁷ Myburgh et al. (2023) blame the state of affairs on, first, the mistaken approach of extrapolating new rights and exceptions meant to apply to one class of works across all works in conceptualising the Bill; and, second, the absence of proper socio-economic studies and impact assessments that should have been done at the start of the process (A. Myburgh, email message to authors, 21 April 2023).

When authors’ and publishers’ rights to earn income from their creations are made subordinate to users’ rights to replicate their material without consent or payment, the CAB is in contravention of: a) the International Berne Convention, to which South Africa is a signatory; b) the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) between member nations of the World Trade Organization (WTO), signed by South Africa; and c) the Bill as it stands could compromise South

⁶ Figure revealed by DALRO at public meetings on the Bill attended by both authors.

⁷ For research demonstrating the absence of proper impact assessment for the Copyright Amendment Bill, see ANFASA, PASA, and DALRO (2022). A fake document, the “SEIAS_report_COPYRIGHT_AMENDMENT_BILL_29_May_2017”, was circulated in June 2023 to give the impression that an impact study was done.

Africa's international legal standing, as it would be directly in breach of two agreements it has signed.

Publishers are contractually bound to protect author copyright, as well as to pay royalties based on sales (where applicable). Whereas the US "fair use" clause contains very few exceptions, the South African version added a clause enabling the education environment as well as libraries, online archives, and users to freely copy materials. This will:

- a) Negate the rights of authors of educational works.
- b) Enable a "contract override" where the DTIC Minister will be empowered to prescribe the terms of publishing contracts. This will be time-consuming, if ever accomplished, and will result in a rigid and inflexible system that interferes with freedom of contract between authors and publishers. It will remove bargaining power from authors and interfere with the healthy competitive environment for the best authors (see Dean 2021). As a result, authors may prefer to publish overseas given that their copyright will be protected.
- c) Cause a decline in incentives for local textbook writing and new editions, which are already being reduced, as local content suited to the South African context would no longer be worthwhile for either authors or publishers. South Africa offers only a small but competitive niche market locally and overseas, where scholarly publishers compete with trade presses, which have a distinct advantage.
- d) Cause scholarly presses to be unable to co-publish with external publishing partners due to the lack of copyright protection and contractual controls.
- e) Directly affect South African publishers' ability to attract authors—since they will not be able to protect their copyright, nor will authors and publishers be able to earn any income.
- f) Cause the pursuit of copyright infringements to be tricky and costly. The Canadian example since the 2012 implementation of a fair dealing principle widened for education resulted in a dramatic loss of income for authors and publishers. Yet, ironically, the cost of education materials increased simultaneously (Degen 2021).
- g) Raise the recurring question asked by the Coalition of the above: Why is it that South African authors and copyright owners are to be denied the same legal protection as their counterparts in Europe and the United States?

The CAB will allow technology companies "free access" to monetise content in which publishers (university presses in this context) and universities have invested to develop. Big Tech will thus be legally enabled to leverage public money for private profit making. Yet, in the same week that the NCOP was considering the Bill, the Competition Commission went in the other direction. The Commission's terms of reference focused on news aggregators, search engines, social media sites, and video-sharing platforms (see Crouth 2023). The inquiry was prompted by concerns that digital platforms are engaged in anti-competitive conduct by distributing content that may have adverse

implications for the news media sector in South Africa, that threatens fair payment for content, and that puts the sustainability of independent journalism at risk.

Assignment of copyright is now limited by the Bill to 25 years (25[b]2) instead of the original 50. Publishers invest in their authors over time—it is not uncommon for the first book of an author to start making profit after only the fifth, sixth or seventh book title (or edition), which could extend beyond 25 years (see Dean 2023). There is no fairness in allowing another publisher—or a platform such as Amazon—to free-ride on the first publisher’s effort. Amazon and others would reap what they have never sown, cherry-picking and leaving the rest stranded like a ship in the Namibian desert. Regardless of many public concerns raised about this aspect, at the April 2023 NCOP discussion, no change was recommended—despite the fact that international copyright extends to 50 years as a norm.

Predatory Implications⁸

The Bill will have the effect of legalising the distribution of published material by Sci-Hub and Library Genesis, among other pirates, alongside sites such as Amazon. It will be difficult, if not impossible, to sue or prosecute anyone for distributing commercially published material downloaded from such sites.

One can now imagine the following scenarios. One is that the Bill (if adopted in its current form) will lead to South Africa becoming an internationally recognised “pirate site”, a haven for, and “server asylum”, for mirror sites of such distributors. Given the broad definitions of the Bill, soon it will not be only a matter of academic and educational repackaging and redistribution, but also a matter of popular culture—a kind of free-for-all like YouTube. (Only, like Academia.edu, YouTube will also exploit the economic opportunities occasioned and start charging some kind of subscription fee, if only for ad-free viewing.)

In effect, the Bill will legalise the theft of original South African work for reselling by international operators who paid nothing for it, yet who monetise access to it. That is the basic contradiction that the pro-Bill lobby fails to understand. As Gerhardus van den Heever describes it, “Metaphorically, it’s like Robin Hood stealing from the rich, but who also charges the landless indigents fees for accessing the stolen loot” (email to Tomaselli, March 2019).

Younger academics’ support for and use of sites such as Sci-Hub is claimed to be a kind of decolonial revolutionary act. To decolonise is to break open the treasuries of knowledge so that academics in the Global South can also be players in the bigger field. The perverse logic is that subscriptions to e-collections’ packages, journals, and the sale of books (the majority of which are produced in the Global North, given the historical

⁸ With thanks to Gerhardus van den Heever from the University of South Africa, whose ideas are reproduced in this section.

advantage of scale and their heft in the knowledge industries) are denominated in currencies such as the USD, sterling, and EUR.

With the vastly disadvantageous differentials in exchange rates with the South African currency ZAR (and any other Global South currencies except the AUD), South African universities are perpetually disadvantaged regarding the knowledge industry internationally. We can never play on a par with academics in the Global North, and we struggle to break into the global knowledge industry, compounded by local taxes and import duties on books, which by far outstrip for even a single book the DALRO per student reproduction licence for entire course packs. This is particularly a concern with academics in the humanities. The engineering, mining, medical, and other hard sciences have far less difficulty in raising funds to do internationally collaborative and recognised work. And yet, in terms of performance management and National Research Foundation scientist ratings, that is exactly where university managements and the state itself want us to be competitive!

The Big Tech firms are notorious for evading national taxes (see Neate 2021). Their after-tax profits are akin to the big publishers, but Big Tech firms are never criticised by the pro-Bill proponents, who are reliant on their support.⁹ By loosely South Africanising a tighter and testable (via the courts) American version of “fair use”, they will thus secure for themselves (and anyone) the conditions that will enable the reproduction and re-creation of creative and authored works without having to pay for it, license it or even acknowledging it.

Whichever financial model is at play, commodification remains an outcome. The misplaced assumption that copyright is “bad” because it protects the North Atlantic assumes that the Global South has nothing worth protecting, and therefore nothing worth selling. Such a position will simply enable postcolonial mining of South African ideas that will enrich the Big Tech information prospectors looking for unprotected works for which payment is not required. Where is the infojustice in that?

When addressing a public meeting at the University of the Witwatersrand (Wits) called by ReCreate to argue the Bill’s merits in August 2019, the then Vice Chancellor, Adam Habib, stated that he wanted the CAB to be a Napster-type intervention that will enable the free exchange of copyrighted materials that must be made international because they are collectively produced. Earlier, regarding the Homo Naledi excavation, Habib stated:

We often talk about science as having no boundaries, but in our world scientific knowledge has become commodified, and too often, what should be the bequest of the

⁹ Funding for the American research and the Global Expert Network on Copyright User Rights was provided by the International Development Research Centre, Open Society Foundations, the 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. (see Flynn and Palmedo [2017] and a critique of the latter by Ford [2017]).

world, the bequest of a common humanity, is locked up under paywalls that postgraduate students and researchers cannot get access to. (cited in Hawks 2015)

Astonishingly, if this quotation is correct, it appears that the Wits University Library is insufficiently funded and/or obstructively as matter of policy disables access to materials behind paywalls. Habib then claimed that “[w]e are not simply going to be beneficiaries of open access, but we are going to be contributors to open access, to the knowledge of a common humanity” (cited in Hawks 2015). OA can be a very expensive option, which, as already explained, relocates the publishing expense with the author and/or the author’s employer. Someone always pays.

The loss of homegrown textbooks resulting from insufficient OA funding and from the Bill’s weakening of IP protections will have implications for the decolonisation of curricula, one of the institutional key performance indicators, a response to the #RhodesMustFall movement. The downside will be that South Africa will remain reliant on expensive international imports written for the general reader anywhere (see Tomaselli 2021). As Dean points out, the proposed “fair use” exceptions will apply to both foreign and local works. This follows from the application of the international principle of “national treatment”. Thus, while South African authors may well be driven to publish overseas as local publishers may die out because of the destruction of their market, the exceptions will not be circumvented by publishing elsewhere (O. Dean, pers. comm., 28 July 2021).

The Outcome

The above contradictions are succinctly summarised by ASSAf’s National Scholarly Book Publishers Forum. Its position is that scholarly presses

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.¹⁰

As the South African Cultural Observatory warns, “It would not help to have a legally sound and constitutional Bill that has dire effects on the South African economy and does not end up benefiting the people it is trying to protect” (SACO 2021, 41). That is why the Bill needed to be totally rewritten in light of the extensive set of critiques,

¹⁰ Cecile de Villiers, Veronica Klipp and Hetta Pieterse, memo, July 2021.

commentaries and arguments that it has generated. And yet, at the April 2023 NCOP, it was said that the Minister could no longer withdraw the Bill since “it had passed the second reading twice”. Many of the objections made against the Bill were said to have been covered by a process of public consultation—yet at critical points, the concerns raised by members of the public were simply swept aside without full explanation. If the DTIC’s actual objective is to get “fair use” and the exceptions through at all costs, the Bill will in all likelihood end up before the Constitutional Court to rule on its (un)constitutionality.

The prime reason for rising concern is that at the April 2023 NCOP, virtually every objection made against the CAB was ignored—and mostly in vague, non-substantive terms: The wide call for a study testing the impact of the CAB on the education and publishing industry was swept aside during this discussion. This is contrary to the warning by government’s socio-economic impact assessment system (SEIAS) (RSA 2015, 7) that during the creation of new policies, “(a) common risk is that policy/law makers focus on achieving one priority without assessing the impact on other national aims at all” such as, in our argument, the divergent aims of the Masterplan and Competition Commission.

To safeguard against this, government’s SEIAS provides six policy stages to be followed when proposing a new bill—of which Step 4 describes the “[d]evelopment of a final impact assessment that provides a detailed evaluation of the likely effects of the legislation in terms of implementation and compliance costs as well as the anticipated outcome” (RSA 2015, 8). Yet these policy stages were not followed for the Bill. In response to *why these policy stages were not followed*, it was said that the Committee was not the correct entity to look at the socio-economic impact of the Bill as this was not a parliamentary function.

Although the Bill still did not meet compliance with international treaties despite wide calls even from the International Publishers Association (IPA), objections were also dismissed—as a requirement met without any clear response. For instance:

- The Bill does not meet the Berne Convention’s three-step test for copyright exceptions.
- The question raised on the Bill’s constitutionality in terms of Section 25 in relation to the deprivation of property was not addressed.

The Coalition’s hope was that the CAB’s legal flaws could be corrected.

Regardless of the repeated flouting of compliance with international treaties, by the end of May 2023, eight of the nine members of the NCOP had supported the Bill. Some provinces nevertheless did raise appropriate concerns, and proposed some far-reaching amendments to, and reversals of, clauses in the Bill. Some rejected “fair use”, with four provinces explicitly proposing that an impact study first be done.

The key issue in the NCOP relates to the Bill's demand for "user rights", manifested by copyright exceptions and a "fair use" provision. The contradictions that we outlined at the start of this article have yet to be addressed by both the state and universities. The lack of harmonisation of policies within the state, and even within the same departments, is at the core of challenges facing the research economy and creative industries.

The Bill weakens protections of published materials used for educational purposes. Educational publishing is the backbone of the publishing industry in South Africa. The loss of copyright in this reading sector will cause significant industry contraction, not only in textbook publication, but in other sectors too—from an inevitable knock-on effect.

Conflict of Interest Statement

Both authors are members of the Academic and Non-Fiction Association of South Africa, serving on its copyright committee. Pieterse is employed by UNISA Press and Tomaselli serves on the board of UJ Press. Both serve on the PASA copyright committee. Tomaselli is, additionally, Chair of several ASSAf publications committees, where these issues are also debated. He also is an editorial member of book series published by Toronto and Michigan State University Presses. He also was a participant in the Creative Industries Masterplan discussions.

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