

Political Economy of the Copyright and Performers Protection Bills

Implications for Universities



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The protection of Intellectual Property Rights (IPRs) is often alleged to be opposed to the idea of the 'creative commons', or what is now called open access (OA). This claim is made as IPRs as a modus for wealth creation are being transferred onto other previously unthought of sectors external to the familiar orbit of 'the market': indigenous cultural forms, music, fabric designs, folklore, knowledge of natural resources, dance steps, advertising catchphrases and so on. As such, IPR law is now a focal concern, not only for the lawyers and business, but also for policies on development, innovation and political economy. IPR is the key factor in this creative and information-led economy now characterised as the so-called Fourth Industrial Revolution (4IR).

However, IPR is argued by its critics to favour only the North, though the latitude granted the

global South is quite wide (Markus, 2000). This essay argues that copyright is necessary also for 'Southern' economies that have yet to fully embrace 4IR.

The South African Conundrum

Sometimes, new legislation starts off well-intentioned, but then loses its way and is subjected to partisan constituency manipulation. One such example was the Protection of State Information Bill (2015) that was intended to consolidate existing legislation into a single omnibus compilation. But it ended up being labelled the 'Secrecy Bill' and was appropriated for anti-democratic purposes rather than those originally intended.¹

The Copyright Amendment Bill (CAB) is another that has gone off the rails. It applies a very wide-ranging definition of 'fair use' on all materials to be used for 'education'. The Bill creates exceptions to rights where the right still exists but is limited in some way.

The issue for the book publishing industry is the Bill's extended version of fair use, which favours users and is prejudicial to creators, especially authors of scholarly works and school or university textbooks. The revised Bill (2017) introduces a plethora of new ways in which works may be copied, reproduced, distributed, adapted and accessed by users without author or publisher permission. As copyright lawyer Scollo Carlo Lavizzari concludes, 'This kind of originality nihilism negates the role of the author altogether' (email to author, 2 May 2019). Weak copyright protection does not stimulate indigenous innovation, but rather disincentivises the creation of new and original content and cultural expressions and artefacts.

Those who celebrate fair use typically argue that copyright protection and the public interest are diametrically unopposed. By means of this rhetorical device they counter-intuitively argue that fair use is critical for innovation and creation. And, while claiming to argue for 'creators rights', they campaign for the introduction of more ways in which users can make unlicensed usages of creators' works.

One such group is OA fundamentalists ReCreate (ZA), a group of academics, librarians and documentary filmmakers who are funded in part by Google, the world's largest user of copyright-protected materials, to promote the

¹ See Duncan (2018).

Bill and to advocate for the advantages of fair use and increased user rights. While they claim to champion the rights and interests of creators, they promote and advocate the introduction of arguably the broadest set of copyright exceptions in the developed world into South African copyright law. Such law would make it virtually impossible for creatives, authors and indigenous communities to enforce their rights and to protect their works against unlicensed usages.

Why universities should be concerned

To start, the Bill's extended and wrongly calibrated fair use value chain unfolds as follows: you commenced as an author, but if your work is 'recreated', you ended up as a mere content provider for someone else's creative work for which s/he can take credit (Anfasa, 2019a). That is, when your work is copied because it falls into fair use, you do not have to be identified as the author if this is not 'practicable'. Your name might be lost en route or used to add credibility where none is due. Consequently, your work might not be cited, grievously affecting your university's performance management assessment. The promotion or grant you were applying for might now be denied by the new managerialist assessment criteria that need specific author outputs and citations to measure – and this may open the door to plagiarism.

In contravention of the Berne Convention,² by limiting the rights of educational authors and publishers and making published work 'free' to be reproduced for educational purposes, the Bill could thus alienate authors from the fruits of their labour, as well as the right also to be cited. University presses fear that they will be directly affected, that some might close, merge and/or downsize due to weakened copyright provisions. International publishers might refuse to partner with local presses as they will not control the rights in, and use of, their own product in which they have invested (Wightman and Joseph, 2019). Full-time educational authors (especially of school and university textbooks) could be deprived of royalties,

² The principle Berne article that is contravened by the CAB is Article 9: 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. 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. S 9(1) says the author has the exclusive right, but CAB s 9(2) limits that right. The CAB exceeds the three-step test (certain special cases, no conflict with normal exploitation, prejudice legitimate interests).

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as might authors writing in African languages when their books are adopted as class readers – a key market for indigenous language publications. Textbook production might largely cease.

The pro-Bill position argues exactly the opposite: All will be well, because information freedom and information justice will be obtained. The alleged avaricious behaviour of international commercial publishers that derive excess profits from donated knowledge facilitated by academic institutions will be checked (Merrett, 2006). In turn, this will stimulate national intellectual innovation and economic growth. This position draws on arguments that now propose OA as the prime form of information dissemination. But this OA argument confuses access with content. The actually stated intention is to phish the work of creators and transfer their content to big tech firms (Flynn and Palmedo, 2017; see also Ford’s 2017 dismissal of Flynn and Palmedo’s study), seemingly because such content will then be made ‘free’ to browsers and users (e.g., students, lecturers and researchers). What these sharing sites do, however, is harvest browser attention and personal data on mass scales to sell these on to advertisers. In so doing, they commoditise the dissemination of academic works by means of the OA financial model. The communication channels and associated transactions are thus presented as ‘free’ to readers.

The CAB expects publishers and authors to subsidise shortfalls in state university funding. ReCreate’s chairman – a film producer – leveraging the critiques of international publishers because they are alleged to be overcharging students for their products, told a meeting called by Sisters Working in Film and TV (SWIFT) in March 2019 that: ‘The downfall of the publishing industry is the start of the digital age. Students are poor. Must make a difference by making information free.’

But he wants to get paid for his own film work while denying authors and publishers their due. Moreover, this statement fails to acknowledge that publishers are now as digital as are the film and music industries. In effect, the savings for students will be minimal, about R129 per year per student for a blanket license (Anfasa, 2019a), which will not be passed onto students if the Canadian experience is anything to go by (Degen, cited in Anfasa, 2019b: 11–14).

Who Pays for OA?

The question is, who pays for OA? OA will see a shift from ‘reader-pays’ (via libraries and campus bookshops) to ‘author-pays’ – and the likely ‘death’ of textbook authors as far as acknowledgement is concerned. The question of who pays is of concern to the Academy of Science for South Africa (ASSAf, 2019) since the ‘author-pays’ model can be prohibitively expensive, especially for young scholars publishing early in their careers.

The pro-Bill lobby has managed to discursively frame the fair use exceptions such that this provision seems harmless to the educational publishing sector. Evidence to the contrary is ignored (PwC, 2017; Anfasa, 2019b; Myburgh, 2019). For many senior university administrators, then, the CAB is understood as ‘a matter for the Library’ or is thought only to affect textbook production. Since the South African academy, astonishingly, does not value textbooks as a bona fide academic (i.e. research and/or scholarly) output, universities are able to turn a blind eye in this regard. However, as Jeremy Wightman (HSRC Press) and Andrew Joseph (Wits University Press) have argued, the loss of homegrown textbooks will have implications for the decolonisation of curricula, one of the key performance indicators added to many universities’ performance assessment categories since the #feesmustfall student movement of 2017. ReCreate relies on misdirection (almost as expertly as does Trump!) and has hosted workshops on ‘user rights’ with the Department of Trade and Industry (DTI), and thereby managed to discursively conflate the issues. ‘User rights’ are not defined in the Bill or in the Act, so they do not exist in law, having been concocted by the anti-copyright lobby. Consequently, universities are unsure of whether or not to support the Bill, or to how assess it in its broader politico-economic context.

ReCreate, comprising just 34 individuals belonging to various organisations claiming to represent half-a-million, has been promoting the Bill on the grounds that it will propel South Africa into the digital twenty-first century.³ This will occur as the evidence points to the financial interest of big tech in the outcome of this debate. Google and the academics it sponsors like Flynn and Palmedo (2017) are actively guiding, and even financing, some supporters of the Bill. The South African pro-Bill lobby promotes disinformation such as that the CAB will replace ‘apartheid-era legislation that favours historical and international monopolies which have control of money and power’. They argue that the Bill offers a ‘transformative vision for a more equal and just society’.⁴ Neither of these claims bears a vestige of truth.

Does Google, allegedly seed-funded by the CIA and NSA (Nesbitt 2017), now have official South African approval? Are the real benefits of OA to be sacrificed in murky relationships between Google and the DTI? Such companies will be legally able to appropriate our intellectual property, monetize it and sell the fruits of academic labour to advertisers.⁵ A global readership indeed awaits us. But we will not own or control our own IPR or how it is used. South African researchers and textbook writers will be enriching Google shareholders and the OA publishing predators that ASSAf and the National Research Foundation have warned about, as they will not need permission to appropriate, nor buy, our work from our publishers or universities.

The Performers Protection Amendment Bill

Linked to the CAB is the Performers Protection Amendment Bill (PAB). Where authors and publishers will see their IPR significantly weakened, thus affecting their income streams, the PAB unambiguously guarantees performers’ rights to more favourable contracts and royalty payments. This contradiction that impoverishes the educational publishing sector supposedly to provide written education materials free of charge to students was approved by Parliament and sent to the President for signing in March 2019. The PAB is aimed at the creative industries that operate under entirely different value chains to educational authors and their publishers. How will the PAB

affect the Department of Higher Education and Training (DHET) incentives for creative work?

Basically, the ReCreate argument is that publishers are exploitative and are deliberately impoverishing students. So, astonishingly, the solution is to enlist academic authors and their publishers to cover state funding shortfalls. In contrast, performers (and possibly even production technicians) will be paid royalties on each and every copy made of their work and every time that it is streamed, televised and copied (except, I assume, when that work is used for educational purposes). The alleged exploiters in the media industries will be required to pay performers but the exploiters in the publishing industry will be denied the royalty and permissions income streams they need to recompense their own authors and grow their own industry.

At root, the actors are angry with the SABC and MultiChoice that have treated them badly. Academic and educational authors have been caught in the PAB slipstream. And, when connecting with the OA myth that information can be made free – no matter the cost of producing and managing it – those who take the fall are us, the educators.

Like the CAB, the PAB is also unworkable (as much as it may be desirable for film technicians and performers). Producers will be faced with nightmare accounting scenarios and continuous payment streams that will massively increase the costs of post-release administration. If performers, regardless of whether they are featured or non-featured performers like extras, are to be granted exclusive commercialisation rights and retrospective and future royalty rights with respect to each film produced in South Africa, whether or not successful, substantial disinvestment from South Africa would be the more likely outcome. International co-productions would be likely

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³ See Nicholson (2018) on the merits of the Bill.

⁴ See Rens (2019) and Flynn (2019); see Myburgh (2019) for a critique of Flynn (2019).

⁵ See Tomaselli (2019).

relocated elsewhere. The very performers who are presently campaigning for the controversial Bills to be enacted as they are presently worded seem unaware of the dangers posed to the viability of our film industry and the loss of employment opportunities that would result.

Implications for Universities

The implications of the CAB especially for universities will be considerable. Research funding regimes will be directly impacted, as hefty article processing charges (APCs) will be instituted as publishers will no longer absorb the costs of publishing, leaving less funding for actual research expenses. Performance management indicators 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, even though South African academics will continue to milk the DHET publication incentive.⁶ The reader becomes also a victim in this chain of events.

Copyrighted goods are priced differently to

other economic goods. The first copy of a copyright good is very expensive, while subsequent copies are relatively cheap. As UJ Executive Director: Library and Information Centre, Maria Frahm-Arp, observes of OA, 'Where before [publishers] would earn royalties through thousands of people buying a book, textbook or journal article they will now only get a production cost payment'. The result: 'the cost of open access publishing will go through the roof as publishers need to charge authors huge amounts in order to make back the money they are losing through the decline of the subscription model and cessation of royalties on books sold' (email to author, 2 May 2019). The subscription-driven reader-pays model will decline, which means that economies of scale stretched across tens of thousands of subscribing libraries and millions of readers will be replaced with author-pays for readers to read. The rank and file who do not have access to donor funding will have to pay from their own pockets and research grants. Under this scenario, additional DHET funding for APCs will be needed to substitute for the cost currently borne by publishers.

As Lavizzari concludes with regard to the exponentially expanding predatory publishing

⁶ A DHET publication incentive paid to universities on publications appearing in selected lists of journals. See Tomaselli (2018).



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sector, ‘If the reader pays, the reader will determine what’s worth publishing. If the author/funder pays, then the author/funder will determine what is worth publishing (but not necessarily reading)’ (email to author, 2 May 2019). The risk and cost of publication will no longer be absorbed by publishers whose own peer review mechanisms may now respond less strictly to market (i.e. APC) forces. If an OA book is to be published at the author’s expense, then there is less incentive on the part of publishers to promote and market it, to distribute it and to follow through in other ways unless these functions are also directly paid for, and monitored, by the author. If a copyright producer cannot recover the cost of investment in the copyrighted good, an undersupply will occur relative to the socially optimal level. The CAB’s legitimisation of piracy will undermine local cultural industries, as Nwauche (2003) has concluded of the Nigerian experience. Protecting rights is not just the preserve of multinationals, who nevertheless engage in information prospecting and appropriation: all organisations and individuals, irrespective of their economic status, should be protected.

In the North, author-pays OA costs are partly mitigated by institutional funds (Springer, n.d.). For South Africans, few currently available funds pay for OA, especially for emergent and under-funded academics. But savings will occur as libraries will be relieved of the headache of licencing with the closure of copyright offices that currently approve and regulate reproduction of copyright materials for classroom use.

The good news for the anti-decolonialists will be that the South African educational publishing industry will decline, because the market will have been killed off, thus impeding homegrown publishers publishing homegrown localised books. We will again become reliant on expensive

international imports written for the general reader anywhere.

Contradictions for Universities

If authors’ rights are to be restricted, then how does one square IPR with copyright policy? University A(nonymised) (UA), in a circular to staff dated May 2019, for example, recognises the institution as a repository of knowledge, generated through research and disseminated through applied research and consulting, teaching, community service and archiving. This knowledge, UA observes, is reflected in IP created at this institution in forms such as copyrights, patents, trademarks, designs, trade secrets and know-how. UA sensibly insists that IP must be identified and properly managed for the mutual benefit of the university’s community, the creator thereof and society in general. Furthermore, where appropriate, commercialisation of IP is a university objective, rather than leaving it lying idle and unamortised. In identifying and managing such IP, UA 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 good research.

All well and good, but will UA also uphold the rights of authors and publishers with regard to their written IP?

UA’s IP policy is contradictory. While laudable, 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 UA is willing to cede the right of its authors and publishers (e.g. the UA 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 blatant plagiarism and unauthorised and unlicensed reproductions and re-distribution, whether by Google or predatory publishers.

If the CAB is to be supported by universities, then the following contradictions will arise due to the above-mentioned vulnerability:

Universities should place their patents, software and inventions into the public domain also and

allow tech companies to harvest them for their own profits.

Software applications used for educational purposes should be supplied free of charge and updated by the firms that designed them.

Technology companies should donate to educational institutions equipment used for educational purposes – computers, data projectors, white boards and all kinds of electronics – and maintained at no cost.

Anyone involved in teaching, or teaching support or administration, and top management, should waive their salaries or allocate a percentage to bursaries; it is the right thing to do in the pursuance of free education, free information and free access where the state is unwilling to cover subsidy shortfalls.

These donations will occur just once under coercive conditions and then close the university and wait for better days. Copyright organisations like DALRO working for authors and publishers (and readers) will be no longer able to protect authors from rampant exploitation by what remains of the educational sector, whether public or private.

If the global commons are 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 and Teer-Tomaselli, 2006: 17–18). For example:

Copyright organisations can facilitate IPR protection. Reproduction rights organisations can issue licenses, collect fees and distribute royalties.

Such organisations can work with local creators in ensuring fair use by informing them of the rules.

The prohibitive cost of imported information by the developing world can be balanced by developing their own knowledge-production resources.

Universities can best leverage information and creations as a generator of income in their own right by encouraging writing and publishing instead of stifling it.

Valorising public information to enhance the public sphere rather than corporations only can be done by taxing corporations for certain uses.

Authors' due royalties can be protected while ensuring that they remain an integral part of the global information commons.

Authors write in order to be read so they tend to support the free flow of information (but not the flow of free information). Reproduction under license is the solution. ■

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