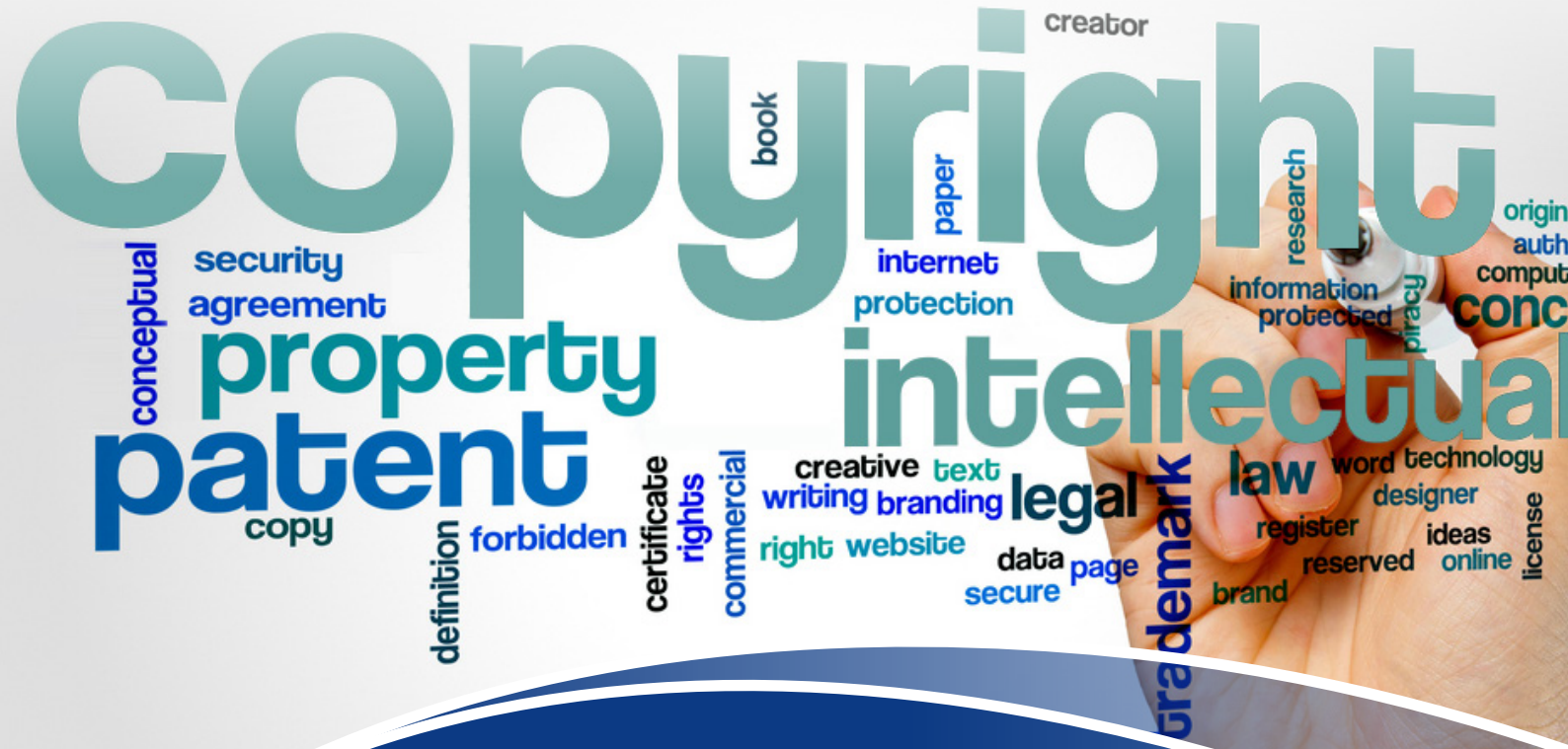
PROCEEDINGS REPORT

The Copyright Amendment Bill Virtual Workshop

29 JUNE 2021

Programme Director: Richard Joseph Goldstone
(Emeritus Justice of the Constitutional Court)



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Copyright Amendment Bill Workshop

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The Academy of Science of South Africa (ASSAf) was inaugurated in May 1996. It was formed in response to the need for an Academy of Science consonant with the dawn of democracy in South Africa: activist in its mission of using science and scholarship for the benefit of society, with a mandate encompassing all scholarly disciplines that use an open-minded and evidence-based approach to build knowledge. ASSAf thus, adopted in its name the term 'science' in the singular as reflecting a common way of enquiring rather than an aggregation of different disciplines. Its members are elected based on a combination of two principal criteria, academic excellence and significant contributions to society.

The Parliament of South Africa passed the Academy of Science of South Africa Act (No 67 of 2001), which came into force on 15 May 2002. This made ASSAf the only academy of science in South Africa officially recognised by government and representing the country in the international community of science academies and elsewhere.

This report reflects the proceedings of Copyright Amendment Bill Workshop held on Zoom Webinar.

Views expressed are those of the individuals and not necessarily those of the Academy nor a consensus view of the Academy based on an in-depth evidence-based study.

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WELCOME AND BRIEF BACKGROUND

(PROF IRVY (IGLE) GLEDHILL)

Prof Gledhill opened the webinar, welcomed everyone and introduced the topic. In March 2021, Prof Salim Karim, in an interview on PowerFM, was asked about "dissent in the scientific community". His reply was that diverse views are at the heart of academia, and that academia would not function without them. Prof Gledhill observed that it was 'miraculous' that ASSAf succeeds in arriving at outcomes through consensus study. The miracle is performed by finding common goals, and a great deal of hard work. Part of ASSAf's role is to seek out issues that are important to science (understood in the broad sense, including not only the natural sciences and engineering, but also disciplines such as health, law and humanities) and allow them to be aired, find common ground, and identify the essence of the matters of contention. It sometimes occurs that difficult concepts can be dissected out and an objective report can be attained. The results open the practical way forward, and that is the purpose of the present virtual workshop.

Why is copyright important? The Copyright Act and the Copyright Amendment Bill (CAB) are fundamentally important to science, in the broad sense, and to research. The Act and the Amendment Bill are also fundamental to South Africa, its systems, economy and its capacity for innovation. Open Science has significant benefits, but these can only be gained if copyright is respected, and intellectual property (IP) rights are enforceable. Policy will state that Open Science should be as open as possible, and as closed as necessary. Similarly, the Copyright Act and the CAB are vital in moving not only to the Fourth Industrial Revolution, but also the preceding Third Industrial Revolution of digitalisation and data. In climate change and pandemics, the digital economy, digital education system, digital aspects of the health system, digital libraries, and digital museum collections are essential. Digitalisation of museum collections is fundamental to understanding climate change, for example. It does not take successive lockdowns to show this. The Copyright Act and the CAB are supremely important for the way in which South Africa is seen by international actors. Is it a safe space for the IP of partners in collaboration, or does it offer a 'generous buffet of loopholes' for international rapacity? Are its indigenous people protected, or exploitable? Are treaties respected, or disregarded?

With the importance of the issues established, why did ASSAf choose to call a workshop on the topic? The motivation for this virtual workshop is that the Copyright Act and the CAB are both contentious, and a workshop is a mechanism for seeking ways forward.

Why the rush, given that the CAB has been under development since 2017? Parliament referred the Copyright Amendment Bill of 2017 to the President for signature on 16 June 2021, but the

President sent the Bill back to Parliament, citing six concerns and asking Parliament to consider revisions to the Bill in the light of reservations about its constitutionality. The President singled out the Bill's provisions to guarantee remuneration to artists and to expand exceptions for educational, research, disability, and other public interest uses of copyright works.

Public comment on the process was open until 9 July 2021. Given the role of copyright in the practice of science, in relation to due acknowledgement of data and digitalisation, it is important to address this opportunity. The intention of this workshop was to collect comment, to be submitted by ASSAf by the 9 July 2021 deadline.

The CAB has since become no longer a national bill, but a bill that must be considered by the provinces and traditional leaders, a process that is known as re-tagging. The implications include a statement that Parliament wishes to have the Bill finalised by the end of 2021. Constructive submissions within the provinces and indigenous knowledge systems will be needed.

The objectives of the present workshop are therefore to inform academics and institutions, to hear the issues, to start to formulate comment for submission by 9 July, and to start the process of formulating practical reforms for the Bill. We seek a coherent way forward that benefits the many diverse stakeholders: South Africa, science in South Africa, science from South Africa, and science in collaboration with South Africa. Participants are asked not to revisit old arguments, but to apply their ingenuity to solving the issues.

INTRODUCTION

(PROGRAMME DIRECTOR: JUDGE RICHARD GOLDSTONE)

Judge Goldstone thanked Prof Gledhill for providing the background. The Copyright Amendment Bill, drafted by the Department of Trade, Industry and Competition, had been referred back to Parliament by the President, raising grounds on which he believed that the Bill is unconstitutional.

One of these had been addressed in that the Bill had been re-tagged as a provincial bill, and therefore has to be considered by the National Council of Provinces. This will cause considerable delay in having the Bill passed by Parliament. In the meantime, ASSAf and other interested parties have to submit their comments by 9 July, notwithstanding that there is bound to be an extension. The submissions that can be made by 9 July are limited to the issues that have been raised by the President. The subject matter of this webinar is similarly limited.

INTRODUCTION OF SPEAKERS

Dr Sanya Samtani is a doctoral research scholar at the law faculty of the University of Oxford as a Rhodes Scholar. Dr Samtani was a foreign law clerk at the Constitutional Court of South Africa from July until December 2018. She has spoken and written widely on the issue of copyright reform in South Africa in popular media and academic writing.

Prof Keyan Tomaselli is a distinguished professor in humanities at the University of Johannesburg, and chair of the ASSAf Committee on Scholarly Publishing. He is the founder and co-editor of two international journals.

Prof Klaus D. Beiter is an associate professor of law at North-West University. He is an affiliated research fellow at the Max Planck Institute for Innovation and Competition, in Munich, Germany. He teaches in IP law, socio-economic rights and international social justice.

Prof Owen Dean is perhaps the doyen of copyright lawyers in South Africa. He was for many years the senior partner and is presently a consultant of the law firm Spoor and Fisher, a leading intellectual property firm of attorneys. He served on the South African government's Standing Advisory Committee on Intellectual Property for some 20 years. He was the first incumbent of the Anton Mostert Chair of Intellectual Property at Stellenbosch University.

PRESENTATIONS

BENEFITING AUTHORS AND USERS AS CONSTITUTIONAL RIGHTS BEARERS

(DR SANYA SAMTANI, POSTDOCTORAL RESEARCHER, UNIVERSITY OF PRETORIA)

Why the Copyright Act inhibits research and education, and how the Copyright Amendment Bill fixes it

Any discussion of law in South Africa must start with the idea that South Africa is a constitutional democracy founded on the values of equality, dignity and freedom. The Constitution itself is intended to be radically transformative and contains a strong Bill of Rights to that end as a cornerstone. This means that Parliament is specifically obliged to act within the constitutional frame and further the rights in the Bill of Rights. This applies to Parliament when it passes laws, among other functions. Parliament also has a specific duty to amend all apartheid-era pre-1994 laws that are incompatible with the Constitution and the Bill of Rights. This has been the focus of a decades-long movement that has resulted in the Copyright Amendment Bill, which seeks to urgently rectify the unconstitutional status quo created by the old-order Copyright Act 1978.

Researchers and educators are simultaneously authors and users, who create, innovate and engage in knowledge seeking and knowledge generating. Researchers and educators need access to existing work to create. Newton and Pascal were right that researchers are dwarfs that stand on the shoulders of giants. The South African Bill of Rights recognises this interconnectedness in several of its provisions:

The Bill of Rights protects academic researchers under the freedom of expression guarantee, which includes

> "16. (1) Everyone has the right to freedom of expression, which includes—
> (a) freedom of the press and other media;
> (b) **freedom to receive or impart information or ideas;**
> (c) freedom of artistic creativity; and
> (d) **academic freedom and freedom of scientific research.**"

The Bill of Rights protects all researchers equally, because the right to equality undergirds the realisation of all other rights. Academics must be able to realise their rights without discrimination on any grounds including race, gender or disability or other socio-economic markers, or grounds that are analogous to them:

> "9. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) **Equality includes the full and equal enjoyment of all rights and freedoms.** […]

(3) The state **may not unfairly discriminate directly or indirectly** against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

The Bill of Rights protects the right to further education, subject to measures that the state takes, among which are exceptions and limitations to copyright:

"29. (1) Everyone has the right—
(a) to a basic education, including adult basic education; and
(b) to further education, which the state, through **reasonable measures**, must make progressively **available and accessible**."

The Bill of Rights protects the right of everyone to participate in linguistic and cultural life:

"30. Everyone has the right **to use the language and to participate in the cultural life** of their choice, but no-one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights."

The current old-order Copyright Act 1978 inhibits the realisation of these rights in many different ways. Some of these are set out in a joint academic opinion that Dr Samtani co-authored together with a loose coalition of international and South Africa academics (one of whom was the third speaker, Prof Beiter).

Joint Academic Opinion of South Africa's Copyright Amendment Bill (B-13B of 2017), Forere et al., posted by Infojustice Eds, 10 May 2021. Available at: http://law.nwu.ac.za/sites/law.nwu.ac.za/files/files/10-May-2021-CAB-Academic-opinion.pdf.

Dr Samtani had also expounded this position in her PhD thesis, which would soon be openly accessible.

The CAB seeks to rectify the unconstitutional status quo for several groups in particular, namely people living with disabilities, people living in poverty, and importantly for the present deliberations, for academics, researchers, authors and students.

The rest of the presentation will discuss four key rights-limiting problems caused by the current Copyright Act 1978 and how the CAB fixes it:

1. **Unfair discrimination:** The current Copyright Act 1978 unfairly discriminates against people living with disabilities, including researchers living with disabilities. The Act does not allow any accessible format shifting for people living with disabilities. This is in contrast to the 96 countries in the world that have such provisions (and the number of these countries is growing) as well as parties to the Marrakesh VIP Treaty to facilitate access to education and cultural materials for people living with disabilities, who have access to a worldwide accessible network of library materials. The CAB is one of the steps that Parliament is taking to ratify this treaty, and this provision thus becomes extremely salient.

   Accessible format shifting entails, for example, the closed captioning of films,

conversion of text to audio, and reproduction in large print, which are all technically unlawful under the current regime without seeking express consent from the holder of copyright. This creates a situation in which, even if a licence to a particular work is purchased at full price from the market, for it to be meaningfully accessible to people across the full spectrum of disabilities, there is an additional onerous requirement of finding the right holder and asking for permission to convert text to speech or reproduce the text in large-print format, for example. This is a burden placed only on people living with disabilities. This onerous requirement effectively renders works inaccessible for people living with disabilities and places their access at the behest of the right holder.

Similar issues also arise with the licence to use particular works that are tied to specific devices, which ignores the realities of how assistive technologies work, and the importance of using the same work across different devices to make it more accessible. Frustrated by this 'book famine', BlindSA, representing the interests of visually impaired people across the country, launched litigation twice: first, against the President for his delay in signing the Bill, and again now to realise their right to equality of access, highlighting the pressing urgency of their ongoing deprivation. Retired Constitutional Court Justice Yacoob also filed an affidavit in support of BlindSA and has been extremely vocal about this problem.

The CAB explicitly contains a provision to enable accessible format shifting, which directly rectifies problems of accessibility for people living with disabilities [CAB, s 19D]. It also further contemplates time shifting and device shifting requirements [CAB, s 12B(1)(i)], for the meaningful use of assistive technologies. In addition to assisting people living with disabilities, universal design in the form of format shifting, time shifting, and device shifting are important for everyone. The COVID-19 pandemic that we are still living through has thrown the importance of adaptability of works into stark relief.

Dr Samtani shared an example from her own experience. When the UK went into lockdown at the beginning of March 2020, all the libraries at the University of Oxford were physically closed and remained shut for almost the entire academic year. That was the year in which she was writing up her PhD thesis. Oxford's libraries are legal deposit libraries. Dr Samtani required a recent article to aid her research, and the only copy was an electronic legal deposit. This led to the strange situation in which the library had a legal copy, but could not email it to her, because according to copyright law in the UK, it could only be accessed on a library computer within the library, and the library was intermittently closed due to the pandemic. In order to enable access, the library started to buy package subscriptions to articles that were already deposited in the legal deposit, thus effectively buying access to something they already had, to make it accessible outside the library building, but still on a secure server. This seems like a waste of the library budget. This is an issue present in several universities across the world. The CAB solves some of these adaptability problems in South Africa through the listed provisions.

2. **Does not facilitate the use of new technology:** The current Copyright Act 1978 is obsolete as it does not contemplate the use of more recent text, content and data mining methodologies (including machine learning) for research, thus significantly

limiting the right to scientific research, which leads to the limitation of innovation, and the synthesis of new knowledge from existing knowledge that is not physically possible without using programs that, for example, trawl through literature on a particular issue and help to determine patterns. In order to carry out such research, copies are often required for coding purposes, which the current Copyright Act does not contemplate. The Act limits research exceptions somewhat arbitrarily only to literary and musical works, and entirely excludes sound recordings, software and cinematograph films from research exceptions [s 12(1)(a)]. This leads to a slow pace of innovation with respect to other categories of works, which simply cannot be justified. Innovation is then confined only to the areas in which the human eye can read, rather than making use of innovations in technology.

The CAB rectifies this problem through s 12A(a), which does not distinguish between categories of works, but applies to all works. The Bill creates a hybrid model of 'fair dealing' and 'fair use'. It creates an inclusive list (through the words 'such as'), with useful illustrations of particular uses that Parliament has legislatively considered to be fair, of which research, scholarship and teaching are a few. The inclusiveness of the list also means that the CAB is future-proofed, since it can apply to text, content and data mining, machine learning and technologies, and the use of algorithms (emerging technologies of which we are still to unlock the full potential). When new technologies emerge to aid innovation, the CAB will not require repeated lengthy processes of amendment.

Dr Samtani emphasised that she was not arguing for a 'free for all' situation. The only uses that can be included within such an illustrative list are analogous uses, rather than random uses, according to canons of legal construction. In any event, it is important to note that copyright does not protect ideas, only expressions of ideas. The illustrative list is something that the parliamentary consultation explicitly called for submissions on.

3. **Does not enable the preservation of cultural heritage:** The current Copyright Act 1978 does not contain exceptions to enable the mass digitisation of collections of libraries, archives museums and galleries, contains very limited regulations that deal with the making of copies, and refers to outdated technology such as facsimiles. In the devastating fire that ravaged the rare African Studies Collection at the University of Cape Town Library, massive damage was caused, and rare manuscripts belonging to the priceless cultural heritage were lost. The scale of the loss was in part due to the current copyright regime not clearly allowing for the digitisation of various collections.

   The CAB addresses these limitations by containing detailed exceptions for libraries, archives, museums and galleries to facilitate preservation and storage [CAB, s 19C]. The Bill enables inter-library loans and emergency temporary access [CAB, s 19C], as well as the realisation of the rights to education, participation in cultural life, scientific and academic research, free flow of information through libraries, archives, museums and galleries through dedicated provisions.

4. **Does not distinguish between authors and intermediaries:** The current Copyright Act 1978 does not take into account the ecology of academic publishing where

academics are funded by universities rather than through royalties, contributing to journals without any payment. It does not account for authors as users, and university libraries often have to buy back the published research of the institution's own staff.

The CAB addresses this by specifically enabling institutional repositories, and re-use for academic assignments [CAB, s 12D]. It makes publicly funded research publicly accessible [CAB, s 12D], and introduces a reasonableness requirement for licences and access to textbooks [CAB, s 12D]. The CAB provides for clear textual limitations in these provisions ensuring that they are fit for purpose.

The CAB is important because it realises authors' and users' constitutional rights. Without the CAB, we would remain in an unconstitutional and obsolete status quo. The need for reform is urgent, especially during COVID-19. Parliament has a constitutional imperative to replace the unconstitutional old-order and obsolete Copyright Act with a statute that is modern, inclusive and gives proper effect to the rights of academic researchers among other constitutional rights-bearers.

THE CAB: IMPLICATIONS FOR UNIVERSITY PLANNING AND RESEARCH RESOURCE MANAGEMENT

(PROF KEYAN TOMASELLI, DISTINGUISHED PROFESSOR OF HUMANITIES, UNIVERSITY OF JOHANNESBURG)

Prof Tomaselli was speaking as a practising academic, occupying an office either at his university or at home, who has to negotiate the kinds of impacts that the CAB will have on the daily work of academics, performance assessment and research funding. His presentation would take a general perspective before homing in on specifics.

Intellectual property rights (IPRs), as modus for wealth creation, are being transferred on to previously unvalorised sectors beyond 'the market': cultural forms, fabric designs, folklore, knowledge of natural resources, dance steps, and so on. As such, IPRs are central for development and innovation in information-led economies of the Fourth Industrial Revolution. Weak copyright protection, however, disincentivises the creation of new and original content.

His concern thus related to (1) the potential impact of the Bill on the national research, creative and publishing economy, and (2) the allocation and management of research and publication resources and rewards within universities themselves. The intricate complexities of the value chain remain a largely hidden transcript in the day-to-day work of academics, making it difficult to assess the implications of the Bill.

Prof Tomaselli concluded that a significant portion the publishing incentive that

universities receive from the Department of Higher Education and Training (DHET), which currently finances research activities, would be rerouted to meet publication charges and costs. He posed the question of whether South African institutions were ready for the impending sea change.

The CAB broadens the numerous exceptions of the Act such that unauthorised, unpaid, and even unacknowledged use of an author's work is permitted if it is for education, which is an undefined purpose that is wide open to misinterpretation. Noting that the first speaker (Dr Samtani) and third speaker (Prof Beiter) were co-authors of an opinion promoting the Bill, subject to certain conditions, will proponents of the Bill in the upcoming Parliamentary session also propose the retention of moral rights in the 'fair use' clause? The academic need for citation practice is a key component of verifiability in the scholarly project.

There is an argument that publishers are deliberately impoverishing students, so in effect the solution is to enlist educational authors and their publishers to cover state funding shortfalls by tolerating unrestricted copying of printed materials. Currently, a system of permanent identifiers helps to manage this, but the proposed Bill might undermine such mechanisms. We are rhetorically told that 'all will be well' because information freedom and information justice will be obtained, and this will in turn stimulate national innovation and economic growth. In effect, the savings for students will be minimal, about R150 per student per year for a blanket licence from the Dramatic, Artistic and Literary Rights Organisation (DALRO). This saving is unlikely to be passed on to students, if the Canadian experience applies. The publishing industry will contract.

The very wide-ranging definition of 'fair use' is of grave concern to the National Scholarly Book Publishers' Forum, which is convened by ASSAf. The negative financial implications, as assessed in an analysis by PricewaterhouseCoopers (PwC), are that the Bill's extended version of fair use, and its educational exceptions, are overbalanced towards users and prejudicial to creators. Since the Department of Science and Innovation (DSI) has not released its own impact assessment report, now an additional study to consider post-pandemic conditions and projections is necessary. Prof Tomaselli suggested that this task awaits ASSAf.

The 'fair use' exceptions in the Bill are far more extensive than in the USA when coupled with an indiscriminate contract overwrite clause, but without the protections such as statutory damages that would discourage fair use beyond the limits of fairness. There are questions over the extent to which authors and publishers will retain control over the ways that their creations are used. In publishing, local university presses that lack sufficient institutional support will be directly affected. Some might close, merge, or downsize. International publishers partnering with local presses might cease. Full-time educational users, especially of school and university textbooks, could be deprived of royalties, as might African language authors when their books are adopted as class readers, a key market for indigenous language publications. Local textbooks could stall, with no sustainable backup plan. Local university presses are inadequately resourced, unlike the large international publishers that proponents of the Bill have in mind. However, the open access argument confuses access with content.

Access in desirable format will see a shift from reader pays through libraries and

campus bookshops, to author pays, which can be prohibitively expensive, especially for emerging humanities and social sciences scholars publishing their first monographs. There is no consensus yet on how to sustainably fund monograph publishing. Economies of scale stretched across tens of thousands of subscribing libraries and millions of readers will be replaced by author pays for users to read. Under this scenario, article-processing charges will replace the costs currently borne by publishers.

Big tech companies are indeed eyeing the digital future. The broader the 'fair use' regimes worldwide, the easier it will be for them to appropriate IP. The actually stated intention of big tech is to engage in information prospecting and appropriation. Their argument is that information is then made free to browsers and users, including students, lecturers and searchers. What most sharing sites do, however, is to harvest browsers' personal data and sell these on to advertisers. The communication channels and the subsequent transactions are thus presented as free to readers. Whichever financial model is at play, however, commodification remains the outcome. Thus, protecting rights is not just the preserve of multinationals, but all organisations and individuals irrespective of their economic status should be protected.

For university administrators, the Bill is understood as a matter for the library or is thought to mainly affect textbook production. However, as the Human Sciences Research Council (HSRC) and Wits University Press have argued, the loss of home-grown textbooks will have implications for the decolonisation of curricula, one of the key performance indicators now listed in performance assessment categories in response to the 'Fees must Fall' movement. The downside will be that South Africa will again become reliant on expensive international texts written for the general reader. The Bill will also incentivise academic and non-fiction authors to publish abroad where their rights would not be subjected to the same restrictions and limitations.

Universities' research funding regimes will be directly impacted. Hefty article-processing charges and up-front book-publishing subventions will be required, as publishers will no longer absorb the risks and costs of publishing. This would leave less funding for actual research expenses, leading to less research being published locally, and less often. Given that the variable income from DHET to universities derived from research publication is a major factor in South African university financing, the entire research subsidy system would have to be revisited, re-engineered and re-managed, to find some funding for research expenses over the increased payments for publication purposes. Institutional savings would occur in the short term if the Bill is enacted, as libraries will be relieved of course pack licensing, and through the closure of copyright offices that currently regulate the reproduction of materials for classroom use.

Some broader contradictions need to be highlighted. If authors' rights are to be restricted, then how could IPR policy be reconciled with copyright policy? For example, the University of KwaZulu-Natal (UKZN), one amongst many, recognises the institution as a repository of knowledge generated through research and disseminated through applied research and consulting, teaching, community service and archiving. This IP is reflected in forms such as copyright, patents, trademarks, designs, trade secrets and know-how. UKZN insists that IP must be identified and properly managed for mutual benefit of the university's community, the creators thereof, and society in general. UKZN will uphold the rights of its IP creators. These will be recognised to further ensure that IP

is supportive of the primary function of the university, namely scholarship and research.

If the CAB is to be supported by universities, then the contradiction is clear. Universities should also place their patents, software and inventions into the public domain, and allow big tech companies to harvest them for their own profits.

Transformation is high on the agenda, but emerging academics would be most heavily affected by the author pays model. There is far more funding available for open access in the developed countries of Europe and North America than there is locally. It is likely that fewer articles would be published, which would impact especially on emerging scholars who are trying to establish themselves in the academic system.

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 licence is the solution. Protections thus extend to the funder, the author, the publisher and the reader to read.

The exceptions that the first speaker raised are pertinent, particularly during the current COVID-19 pandemic and moments of crisis. Prof Tomaselli's presentation had instead looked at the day-to-day work of universities. The CAB will have an impact on performance assessment criteria of academics, research funding allocations, and publication outcomes.

NOT THE SOUTH AFRICAN COPYRIGHT PIRATE IS PERVERSE, BUT THE SITUATION IN WHICH (S)HE LIVES: TEXTBOOKS FOR EDUCATION, ACCESS TO KNOWLEDGE IN THE SCIENCES AND LINGUISTIC HUMAN RIGHTS

(PROF KLAUS D. BEITER, ASSOCIATE PROFESSOR OF LAW, NORTH WEST UNIVERSITY)

The presentation focused particularly on the President's concerns that the CAB does not comply with international law. It should be borne in mind that South African law needs to align not only with international copyright law, but also international human rights law.

The origins of copyright can be traced back to England with the Statute of Anne (also known as the Copyright Act, 1710), which was formally titled 'An Act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of copies, during the times therein mentioned'. In the USA, Article I, Section 8, Clause 8, of the United States Constitution Grants Congress the enumerated power, "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

In both these examples, access features prominently, apart from the reward for the author, to a greater extent than reward for the publisher.

In an essay by Jane C. Ginsburg, who with Sam Ricketson wrote a well-known commentary on the Berne Convention, she writes, "I have a theory about how copyright got a bad name for itself, and I can summarize it in one word: Greed…Copyright owners, generally perceived to be large, impersonal and unlovable corporations (the human creators and interpreters – authors and performers – albeit often initial copyright owners, tend to vanish from polemical view), have eyed enhanced prospects for global earnings in an increasingly international copyright market. Accordingly, they have urged and obtained ever more protective legislation that extends the term of copyright and interferes with the development and dissemination of consumer-friendly copying technologies". In the insistence on the rights of publishers, the rights of authors tend to be forgotten. The rights of authors are something that the CAB seeks to strengthen.

In asserting the rights of publishers, access also tends to be forgotten. In a 2010 study by Heather Morrison, she showed that profit margins in scholarly publishing had reached almost 40%, whereas ethical businesses tend to operate at profit margins of 5–10%. In South Africa, the Competition Commission launched an investigation in 2018 into price-fixing of school and university textbooks, a practice that had allegedly been ongoing since the 1980s.

Royalties and licence fees flow from the global South to the global North. By buying textbooks that are published internationally (or by locally incorporated international publishers), poor students in developing countries are financing shareholders in wealthy countries.

Copyright has the dual purpose of protecting remuneration and ensuring access. Christophe Geiger (a former colleague of Prof Beiter's at the Max Planck Institute in Munich) wrote that there is "[a] need to rethink copyright in order to adapt **its rules to its initially dual character:** 1) of a right to secure and organise cultural participation and access to creative works (**access aspect**); and 2) of a guarantee that the creator **participates fairly in the fruit of the commercial exploitation of his works (protection)**". Geiger, C. 2017. 'Copyright as an access right: securing cultural participation through the protection of creators' interests', in R. Giblin & K. Weatherall (eds.), *What If We Could Reimagine Copyright*. ANU Press.

The issue is how to achieve both access and protection for the author in international law. The Vienna Convention on the Law of Treaties of 1969, Article 31(3)(c), entrenches the principle of systemic integration, which means: "When interpreting a treaty, there shall be taken into account, together with the context of treaty terms, **any relevant rules of international law applicable in the relations between the parties**". This is potentially a reference to international human rights law. In that context, the principle of the primacy of human rights must be observed, as articulated, for example, by Olivier De Schutter et al. (p. 1122).

De Schutter, O. et al. 2012. 'Commentary to the Maastricht Principles on extraterritorial obligations of states in the area of economic, social and cultural rights', *Human Rights Quarterly*, 34: 1084–1169.

The Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement contains the idea of the balance in IP law between the creation and dissemination of knowledge, the rights of IP holders and users, and the rights and duties of IP holders:

Article 7 (Objectives):
The protection and enforcement of intellectual property rights should contribute to **the promotion of technological innovation** and to **the transfer and dissemination of technology**, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

Article 8 (Principles):
1. Members **may**, in formulating or amending their laws and regulations, **adopt measures necessary** to protect public health and nutrition, and **to promote the public interest in sectors of vital importance to their socio-economic and technological development**, provided that such measures are consistent with the provisions of this Agreement.
2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

The Berne Convention permits limitations and exceptions to copyright protection for various purposes, including education:

Article 8
1) Authors of literary and artistic works … shall enjoy the exclusive right of making and of authorizing the translation of their works …

Article 9
1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.
2) It shall be a matter for legislation in the countries of the Union to **permit** the **reproduction** of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author

Article 10
1) It shall be permissible to make **quotations** from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.
2) It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for

teaching, provided such utilization is compatible with fair practice.

3) Where use is made of works in accordance with the preceding paragraphs of this Article, mention shall be made of the source, and of the name of the author if it appears thereon.

Article 9(2) contains the so-called Three-step Test, namely that in their legislation, countries may permit reproduction of protected works (1) in certain special cases, (2) provided that such reproduction does not conflict with a normal exploitation of the work, and (3) does not unreasonably prejudice the legitimate interests of the author. This condition is to be read in the light of international human rights law: "[I]t will be readily apparent that the Three-step Test must perfectly mirror the demands of human rights. Or, stated differently: the Three-step Test must permit any such use as constitutes an entitlement under human rights. Naturally, a solution that is legitimate in a developing country need not be so in an industrialized country."
Beiter, K.D. 2020. 'Not the African Copyright Pirate is Perverse, but the Situation in which (s)he Lives: Textbooks for Education, Extraterritorial Human Rights Obligations, and Constitutionalization "from below" in IP Law', *Buffalo Human Rights Law Review*, 26(1): 54–55.

The 'other', human rights side of international law includes the right to development, as expressed in for example law UN Declaration on the Right to Development of 1986, which has been overlooked in the President's instruction to review the CAB. The Draft Convention on the Right to Development (2020), Article 4 states: "Every human person and **all peoples have the inalienable right to development** by virtue of which they are entitled to participate in, contribute to and enjoy economic, social, cultural, civil and political development that is consistent with and based on all other human rights and fundamental freedoms."

There is known to be a close correlation between economic growth, social welfare and the strength of IP protection. The duty of a country is to find the balance. If IP protection is not strong enough, there is no incentive for innovation; if IP protection is too strong, progress may become unaffordable. It needs to be acknowledged that markets in different countries are different. The ideal level of IP protection will thus differ from country to country. South Africa is different from Europe and the USA and cannot have the same level of IP protection as these countries. South Africa must find an IP protection level that suits the economic development needs of the country.

Disadvantaged students who cannot afford textbooks will have to share textbooks or try to pass without textbooks. The ramifications of this situation for the socio-economic development of South Africans are that setting IP protection too high means social welfare suffers.

The famous 2002 Report of the UK Commission on Intellectual Property Rights states (on p. 4):

> In order to improve access to copyrighted works and achieve their goals for education and knowledge transfer … **[d]eveloping countries should be allowed to maintain or adopt broad exemptions for educational, research and library uses in their national copyright laws…**

> In some cases, **access to scientific journals and books** at subsidized prices for a limited period would help greatly.
>
> In others, local publishers with limited markets need easy and inexpensive access to foreign books in order to **translate them into the local language**. In a different context, permission to **reprint books from the industrialised countrie**s in the original language is needed to serve [the local] population … unable to pay the high cost of imported books.

According to Grosse Ruse-Khan, Article 7 of TRIPS provides 'policy space' to tailor IP protection and enforcement to fit domestic needs:

> In sum, the notion of **balancing the IP system and the overarching aim of promoting socio-economic welfare** in **Article 7** imply **policy space for implementing TRIPS** that allows members **to tailor IP protection and enforcement to fit domestic needs**. Since there is hardly any interest not affected by IP protection, this balancing exercise include needs based on **any sort of public interest considerations**, such as public health, environmental protection, or preserving biodiversity. **Article 7 thereby becomes a relevant tool for integrating the interests and objectives pursued in other international agreements and for facilitating mutual coherence between their norms and TRIPS.**
> Grosse Ruse-Khan, H. 2016. *The Protection of Intellectual Property in International Law*. Oxford and New York, NY: Oxford University, para. 13.44.

This implies that the Three-step Test must be applied in accordance with the domestic needs of each country.

Another aspect of the 'other' side of international law is the right to education, as embodied in Article 13 of the International Covenant on Economic, Social and Cultural Rights:

1) The States Parties to the present Covenant recognize the right of everyone to education. [...]
2) The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
   (a) Primary education shall be compulsory and available **free to all**;
   (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by **the progressive introduction of free education**;
   (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by **the progressive introduction of free education**.

The right to education inter alia entails that teaching materials must be economically accessible:

- '**Accessibility**' covers to '[e]conomic accessibility'. The Committee has held that 'free' means the absence of "[f]ees imposed by the Government, the local authorities or the school, and other direct costs. **Indirect costs … can also fall into the same category**". **(Textbooks are an example of**

an indirect cost.) UN Committee on Economic, Social and Cultural Rights, General Comment No. 11, Plans of Action for Primary Education (Art. 14 of the ICESCR), UN Doc. E/C.12/1999/4 (10 May 1999) para. 7. This is to be read with General Comment No. 13, paras. 6(b), 10, 14, 20.

- The Committee has thus called upon a state party to "**gradually reduce the costs of secondary education**, e.g. through subsidies for **textbooks**."
  Concluding Observations on the Initial Report of the former Yugoslav Republic of Macedonia, UN Doc. E/C.12/MKD/CO/1 (15 Jan. 2008) para. 47.
- Regarding another state party, the Committee categorically stated that it "is **concerned about indirect costs in primary education, such as for textbooks**".
  Concluding Observations on the Initial to Third Reports of the United Republic of Tanzania, UN Doc. E/C.12/TZA/CO/13 (13 Dec. 2012) para. 26.

In South Africa, the cost of textbooks is comparably higher than in many developed countries.

The right to education further entails that teaching materials must be acceptable in terms of language.

- '**Acceptability**' requires ensuring that education itself conforms to established human rights standards, is relevant, of good quality, and culturally **appropriate**.
  UN Committee on Economic, Social and Cultural Rights, General Comment No. 13, The Right to Education (Art. 13 of the ICESCR), U.N. Doc. E/C.12/1999/10 (8 Dec. 1999) para. 6(c).
- Acceptability therefore entails that "**opportunities for instruction in the mother tongue must be maximised**".
  Beiter, K.D. The Protection of the Right to Education by International Law: Including a Systematic Analysis of Article 13 of the International Covenant on Economic, Social and Cultural Rights (Brill 2006)
- In its Concluding Observations, the Committee on Economic, Social and Cultural Rights in 2015 expressed its concern at the situation of minority education in a States Party. Inter alia, the Committee **was concerned at "a shortage of textbooks in minority languages**".
  UN Committee on Economic, Social and Cultural Rights, Concluding Observations on the Combined Second and Third Periodic Reports of Tajikistan, UN Doc. E/C.12/TJK/CO/23 (25 March 2015) para. 37.

Learners have very limited opportunities to access education materials in minority languages. Language is an element of cultural enrichment, and the key to the cultural survival of a nation or group. Of the 6700 languages in existence today, over 3000 are considered to be in serious danger of disappearance. The famous linguist, Tove Skutnabb-Kangas, refers to this threat as 'linguistic genocide'. This term 'cultural genocide' is also used by William Schabas, one of the most renowned scholars of international criminal law. If we do not interpret Article 8 of the Berne Convention correctly, we could see linguistic genocide taking place in South Africa.

Another aspect of the 'other' side of international law is the right to culture and science,

as embodied in Article 15 of the International Covenant on Economic, Social and Cultural Rights:

1) The States Parties to the present Covenant recognize the right of everyone:
   (a) To take part in cultural life;
   (b) To enjoy the benefits of scientific progress and its applications;

"States should make every effort, in their national regulations … on intellectual property, to guarantee the social dimensions of intellectual property, in accordance with the international human rights obligations they have undertaken … **A balance must be reached** between **intellectual property** and **the open access and sharing of scientific knowledge and its applications**, …. The Committee reiterates that ultimately, **intellectual property is a social product** and has a social function and consequently, **States Parties have a duty to prevent unreasonably high costs** … for schoolbooks and learning materials." UN Committee on Economic, Social and Cultural Rights, General Comment No. 25, Science and Economic, Social and Cultural Rights (Article 15(1)(b), (2), (3) and (4) of the ICESCR), UN Doc. E/C.12/GC/25 (30 April 2020) paras. 61, 62.

The UN thus calls for a balance between intellectual property and the open access and sharing of scientific knowledge and its applications. However, universities have to pay heavily for access. Data mining of text is not possible in South Africa under the current Copyright Act 1978. A fair use provision would make this possible.

While Prof Beiter was at the Max Planck Institute, the Institute took the lead in developing a Balanced Interpretation of the Three-step Test in Copyright Law, which was signed by most renowned international copyright scholars (excerpts shown here):

The Signatories,

- Recognising the increasing reliance on the Three-Step Test in international, regional and national copyright laws,
- Considering certain interpretations of the Three-Step Test at international level to be undesirable,
- Perceiving that, in applying the Three-Step Test, **national courts and legislatures have been wrongly influenced by restrictive interpretations of that Test,**
- Considering it desirable to set the interpretation of the Three-Step Test on a balanced basis,

Declare as follows:

1. The Three-Step Test constitutes an indivisible entirety.
2. The **three steps are to be considered together** and as a whole in a comprehensive overall assessment.
3. The Three-Step Test does **not require limitations and exceptions to be interpreted narrowly**. They are to be interpreted according to their objectives and purposes.
4. The Three-Step Test's restriction of limitations and exceptions to exclusive rights to certain special cases **does not prevent**
   (a) Legislatures from introducing **open ended limitations and exceptions**, so long as the scope of such limitations and exceptions is reasonably

foreseeable; or

6. The Three-Step Test should be interpreted in a manner that respects the legitimate interests of third parties, including
   - **interests deriving from human rights and fundamental freedoms;**
   - other **public interests**, notably in **scientific progress** and **cultural, social, or economic development**.

The President's request to review the CAB overlooks the essential relevance of international human rights law to the issues of copyright.

Research on the compatibility of fair use with the Three-Step Test has reached the following conclusions and recommendations:

- "[T]he open-ended wording of the Three-step Test **supports flexible approaches** seeking to strike an appropriate balance in copyright law, **such as** allowing for '**fair uses**'".
  Geiger, C., Gervais, D. & Senftleben, M. 2014. '*The Three-step Test revisited: how to use the test's flexibility in national copyright law', American University International Law Review*, 29: 581, 612.
- "[T]he US **fair use limitation is compatible with the 'Three-step Test**."
  Samuelson, P. & Hashimoto, K. 2019 'Is the US fair use doctrine compatible with Berne and TRIPS obligations?" in T. Synodinou (ed.), *Universalism or Pluralism in International Copyright Law*. Wolters Kluwer.
- "**[T]he same questions will arise in the course of the interpretation of the Three-step Test** which are **also begged by the fair use doctrine**. The latter, however, has a much longer tradition than the Three-step Test and operates against the backdrop of a wealth of experience for which established case law gives evidence."
  Senftleben, M. 2004. '*Copyright, limitations and the Three-step Test: an analysis of the Three-step Test, in International and EC Copyright Law*. Kluwer Law International.
- **The quotation exception** in Article 10 of the Berne Convention **constitutes a global mandatory fair use provision**.
  Aplin, T. & Bently, L. 2020. *Global Mandatory Fair Use: The Nature and Scope of the Right to Quote Copyright Works*. Cambridge University Press.
- "The Australian Law Reform Commission considers that **fair use is consistent with the Three-step Test**. This conclusion is based on an analysis of the history of the test, an analysis of the words of the test itself, and on the absence of any challenge to the US and other countries that have introduced fair use or extended fair dealing exceptions."
  Copyright and the Digital Economy (Australian Law Reform Commission Report 122), 2013, para. 4.139.
- "No exceptions and limitations for the visually impaired or for technological protection measures and electronic rights management information... **Uncertainty surrounding the teaching exception has led to use agreements between collecting societies and educational establishments to the financial detriment of the latter**. [W]e suggest that the DTI [Department of Trade and Industry] should review the Copyright Act in order to **introduce limitations in accordance** with the Berne Convention three-steps test (article 9(2)) and **with the fair use provision** and to clarify clauses as necessary."

> Pouris, A. & Lotz, R.I. 2011. *The Economic Contribution of Copyright Based Industries in South Africa* (Report commissioned by the DTI from WIPO), p. 53.

Pouris and Lotz thus found that the teaching exceptions of the current Copyright Act 1978 cannot be beneficially used by educational institutions. Use agreements between universities and publishers now provide for renumeration for uses that are conceived as free uses.

The Australian Law Reform Commission makes the case for fair use. The following is broadly based on the Commission's views:

- Fair use is flexible and technologically neutral.
- Fair use promotes public interest and transformative uses (e.g. a search engine rendering of thumbnail sized photographs is transformative use).
- **Fair use assists innovation (e.g. text and data mining).**
- Fair use better aligns with reasonable consumer expectations (e.g. right to repair software embedded devices).
- Fair use helps protect right holders' markets (i.e. this is the second leg of the Three-step Test).
- Fair use is sufficiently certain and predictable.
- Fair use is compatible with moral rights and international law. Copyright and the Digital Economy (Australian Law Reform Commission Report 122), 2013, 87.

The CAB [s 12A] states that fair use does not infringe copyright for purposes that include ("such as"): research, private study or personal use; scholarship, teaching and education; preservation of and access to the collections of libraries. The factors to be taken into account in determining whether an act constitutes fair use include: the nature of the work, the amount of the work affected, the purpose and nature of the use (e.g. whether it is for educational purposes), and the potential market affected. Importantly, the source and name of the author must be acknowledged.

It is argued that in practice there is no fair dealings for education institutions in relation to prevailing copyright legislation. Publishers have no problem with individual students and teachers making copies, but when an institution makes copies, even of a single page, they must pay royalties; for instance, when an English literature professor makes copies of a single poem from an anthology of 600 poems. There is no fair dealing from the standpoint of administrative teaching. (Julien Hofman, Commonwealth of Learning, Department of Commercial Law, University of Cape Town, https://www.eff.org/deeplinks/2005/11/blogging-wipo-information-meeting-educational-content-and-copyright-digital-age)

The CAB [s 12D] provides for fair dealing in relation to education. According to the CAB, a person may make copies of works for the purposes of academic activities. Educational institutions may incorporate copies in printed and electronic course packs but shall not incorporate the whole or substantially the whole of a book, unless a licence to do so is not available from the copyright holder on reasonable terms. The right to make a reproduction of a whole textbook extends to where the textbook is out of print, the owner cannot be found, or authorised copies of the textbook are not for sale in South

Africa or cannot be obtained at a reasonable price. The right to make copies does not extend to reproductions for commercial purposes.

The CAB provisions in relation to copying whole books in a sense are a replication of what appears in the Berne Convention appendix and must thus be held in compliance with international law. These provisions have not often been applied, for various reasons, notably given that the Berne Convention appendix is very complicated. The provisions may only be applied after the copyright holder has been approached for a licence.

The CAB [s 12B(f)] also addresses fair dealing in relation to translation. The translation of a work by a person giving or receiving instruction is permitted provided that it is not done for commercial purposes, and the translation is used only for personal, educational, teaching, judicial proceedings, research or professional advice purposes.

The provisions in relation to translation in the CAB are not very well drafted. The authors of the Joint Academic Opinion of South Africa's Copyright Amendment Bill (B-13B of 2017), proposed amending the translation exception in 12B(1)(f) to promote the Bill of Rights, simplify and expand the translation right and reflect the full range of purposes for which a lawful translation may be made. Prof Beiter proposed that Section 12B(f) be worded: "the translation of such work into any language: Provided that such translation is done for a non-commercial purpose, is consistent with fair practice, and does not exceed the extent justified by the purpose." It should be taken into account that the purposes of translation in an educational setting include the need to facilitate research into neglected and indigenous languages.

FAIR USE – NEITHER FAIR NOR USEFUL

(PROF OWEN DEAN, PROFESSOR EMERITUS AT THE LAW FACULTY, STELLENBOSCH UNIVERSITY)

In Prof Dean's view, the CAB is a poor piece of legislation: it is badly drafted and riddled with anomalies and inconsistencies. Since his mandate was to deal specifically with the issue of fair use, that would be the focus of the presentation, rather than discussing the Bill as a whole.

Prof Dean recommended that participants refer to an article by a colleague of his at Stellenbosch University, which he considered to be a seminal contribution on fair use:

> Karjiker, S. 2021. Should South Africa adopt fair use? Cutting through the rhetoric', Journal of South African Law, 2: 240–255.

Copyright has a rationale. It is a system for providing the creative person (the 'author' is the term used in the Copyright Act) with the facility to obtain financial reward as a

result of his/her efforts in producing the copyright material. Copyright has existed for centuries and has served the development of science and the arts very well. Obviously, in creating exclusive rights for authors, impact is made on the ability of the public to use the materials produced. A balance must be created between the rights of the authors and the rights of the public. This is done, and has traditionally been done, in copyright law by means of exceptions. South Africa's Copyright Act 1978 already provides numerous exceptions in sections 12 and 13. The object of the exceptions is to provide a balance between the rights of the copyright owner and rights of the public.

Prof Dean acknowledged the need for new and additional exceptions in the Copyright Act and did not have a problem with the fact that the CAB creates such new exceptions. Whether it deals with all the exceptions that are necessary is another matter, and whether it goes too far with some of the exceptions that it seeks to introduce is also another matter.

The Berne Convention, which is the basis of international copyright law, recognises the need for exceptions, and the convention contains numerous exceptions. It tests the validity, or the desirability, of exceptions by means of what is known as the Three-step Test. The provision in the Berne Convention in this respect are echoed in the TRIPS Agreement.

The Three-step Test comprises:

1. Exceptions should be provided only in **certain special** cases.
2. The exceptions must not conflict with the normal exploitation of the work (in other words, the exceptions must not deprive authors of the right to obtain remuneration from their works, otherwise there will be very little incentive to create material)
3. The exceptions must not unreasonably prejudice the legitimate interests of the right holder.

In Prof Beiter's presentation, he said that these three steps must be looked at with equal value. This is not what the international authorities say. As Prof Karjiker set out in his article, according to the international authorities, these three tests must be dealt with consecutively (i.e. the first test must be passed before moving on to the second test, and the second test must be passed before moving on to the third test). This places a strong emphasis on exceptions being provided only in **certain special** cases.

The fair use provision, which is sought to be introduced, is contained in the proposed new section 12A of the CAB. Fair use and fair dealing need to be differentiated. 'Fair dealing' is what is currently contained in the Copyright Act 1978, which relates to certain specified cases that are set out in the legislation. 'Fair use', however, is a far more open-ended form of protection. 'Fair use' amounts to anything that a judge, after having heard a case, decides is fair towards the alleged infringer of the copyright. There are certain criteria set out in the section that must be followed, but ultimately, it gives very wide, almost unfettered, discretion on the part of the judge to decide right at the end of the proceedings. No-one knows in advance whether or not the use was fair.

Fair use is an American doctrine and is designed to deal with American circumstances. It is promoted by interests in the USA, although the American government is not necessarily promoting the introduction of fair use into South African law. Ironically, the

US government is an opponent to many parts of the CAB.

There has been much criticism of fair use

- **Does not comply with the Three-step Test**: Prof Dean did not believe that fair use complies with the Three-step Test (unlike the position of Prof Beiter).
  It does not create a certain case but is an open ended system that allows for almost unfettered discretion.
- **Criticism in the USA**: Fair use is not even particularly well received in the USA, where it has been severely criticised by authorities such as *Nimmer on Copyright*. Even Lawrence Lessing, who is one of the proponents of more freedom of use of materials, is not a supporter of fair use.
- **International disfavour**: Only a small number of countries have adopted fair use into their laws, including South Korea, Israel, Singapore and Hong Kong. Efforts have been made by interests in the USA to promote the doctrine of fair use. Many countries have considered it, but most have refused it. The UK, Australia, New Zealand, the European Union and Canada, for example, have declined to introduce fair use into their law, for good reason.
- **Judge-made law**: The problem with fair use is that it is judge-made law, and thus uncertain. No-one can know in advance whether a particular use will be considered to be fair use or not. This will be determined by the judge only at the end of the court proceedings, which could go through three or four courts and ultimately end up in the Constitutional Court. It could thus take three to four years from the time that fair use is implemented by a potential infringer before anyone, even the parties, will know whether that use was fair or not.

Fair use developed in the USA; it is designed for the USA and works to some extent in that country. The circumstances under which fair use operates in the USA need to be scrutinised:

- **Statutory damages:** The USA has a very rigid system of statutory damages. A plaintiff who is successful with their copyright infringement case can claim statutory damages without having to prove any actual damages at all. These statutory damages can vary from US$750 in normal cases, to US$30,000. In wilful cases, statutory damages could increase to US$15,000 per word. A would-be infringer thus faces the prospect of having to pay very extensive damages.
- **No costs orders:** US litigation makes no provision for costs orders. A potential infringer also has to contend with the potential situation that the plaintiff will not be advised to pay the costs if the case is not successful.
- **Well-developed system of contingency litigation:** 'Ambulance chasing' is a very common practice in the USA.
- **Advantageous for plaintiffs and disincentive to infringers:** Fair use is an advantageous system for plaintiffs and a disincentive to infringers. Infringers have to think twice before practising what might someday be considered to be fair use.

The situation in South Africa is very different:

- **Damages must be proved and quantified:** There are no statutory damages in South Africa. There is only one reported case in South Africa in which copyright infringement damages were awarded, to the amount of only R25, being the cost of one audio tape.
- **Defendant's costs must be paid when the claim is unsuccessful.**

- **Contingency litigation is very rare in South Africa, and almost unheard of in relation to IP**: The reason is the unlikelihood of being able to claim substantial damages.
- **Copyright holders are loath to sue for infringement,** particularly when they are uncertain whether they will succeed.
- **Comparable to invasive alien vegetation:** Plucking a practice such as fair use out of US law and introducing it to South Africa could be compared to the metaphor of invasive alien vegetation. An alien plant that becomes invasive in South Africa does not spread uncontrolled in its home territory, where it is kept in check by the prevailing natural circumstances.

In conclusion, Prof Dean believes that introducing fair use into South African law is at odds with the Constitution [s 25], the much-discussed 'property clause', which prohibits the arbitrary deprivation of property. There is authority for the proposition that deprivation of property does not necessarily mean taking away the entire content of the property. If the property right is diminished, arbitrary deprivation is also being perpetrated. If the content of the right to copyright is reduced by means of excessive exceptions, this effectively deprives the copyright holder of his/her property.


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DISCUSSION

RESPONSES BY PANELLISTS

The panellists were invited to comment on the remarks made by other speakers.

Dr Sanya Samtani
Dr Samtani wished to address the concerns of Prof Owen that fair use is vague and indiscriminate, and of Prof Tomaselli related to unrestricted copying. She pointed out the sections of the CAB that prevent indiscriminate use and place limits on this hybrid model of fair use. The CAB provides the factors that must be taken into account to determine whether a particular use is fair use:

> **General exceptions from copyright protection**
> 12A (b) In determining whether an act done in relation to a work constitutes fair use, all relevant factors shall be taken into account, including but not limited to—
> (i) the nature of the work in question;
> (ii) the amount and substantiality of the part of the work affected by the act in relation to the whole of the work;
> (iii) the purpose and character of the use, including whether—
> (aa) such use serves a purpose different from that of the work affected; and
> (bb) it is of a commercial nature or for non-profit research, library or educational purposes; and
> (iv) the substitution effect of the act upon the potential market for the work in question.
> (c) For the purposes of paragraphs (a) and (b) the source and the name of the author **shall** be mentioned.

In response to Prof Tomaselli's concern, the source and name the author **shall** be mentioned (this is thus mandatory).

Furthermore, the substitution effect of the Act upon the potential market for the work in question is also a relevant factor to be taken into account in assessing whether a particular use, outside these areas of focus, is fair or not.

In section 12D, which deals with the reproduction of whole textbooks, a proportionality test is included in s 1, as discussed in Aplin and Bently's recent publication (2020). Copies must be on secure networks, accessible only by specific people. It is strongly stipulated in the negative that educational institutions shall not incorporate the whole, or substantially the whole of a book or journal issue, unless they cannot obtain the

licence to do so under reasonable terms and conditions:

> **Reproduction for educational and academic activities**
> 12D. (1) Subject to subsection (3), a person may make copies of works or recordings of works, including broadcasts, for the purposes of educational and academic activities: **Provided that the copying does not exceed the extent justified by the purpose**.
> (2) Educational institutions may incorporate the copies made under subsection (1) in printed and electronic course packs, study packs, resource lists and in any other material to be used in a course of instruction or in virtual learning environments, managed learning environments, virtual research environments or library environments **hosted on a secure network and accessible only by the persons giving and receiving instruction at or from the educational establishment making such copies**.
> (3) Educational institutions **shall not incorporate the whole or substantially the whole of a book or journal issue**, or a recording of a work, unless a licence to do so is not available from the copyright owner, collecting society or an indigenous community on reasonable terms and conditions.
> (4) The right to make copies contemplated in subsection (1) extends to the reproduction of a whole textbook—
>
> (a) where the **textbook is out of print**;
> (b) where the **owner of the right cannot be found**; or
> (c) where authorized copies of the same edition of the textbook are **not for sale in the Republic** or **cannot be obtained at a price reasonably related to that normally charged** in the Republic for comparable works.
> (5) The right to make copies **shall not extend to reproductions for commercial purposes.**

It is important to highlight the limits of the CAB legislation, and to emphasise that the Bill does not enable the free copying of all textbooks for all purposes.

Several other countries have provisions similar to the CAB, s 12D, drafted in similar language; for example, India, Canada, Afghanistan, Albania, Australia, China and Sudan all have similar provisions. Canada actually has a textually broader provision than the CAB, s 12D. It is also pertinent to remember that an article by Peter Yu (2019) points out that more than 40 countries have different models of fair use, even though it originated in the USA.

In conclusion, the model of fair use that the CAB incorporates is a hybrid model. It is not a 'free for all', as it is sometimes portrayed. Rather, there is a specific list of purposes, and only analogous purposes can be included under the more general fair use idea. It is important to analyse exactly what the Bill stipulates, rather than a more general interpretation of fair use.

Prof Keyan Tomaselli
Anything is open to interpretation, and presenting the actual Bill is helpful. However, the problem is that the Coalition for Effective Copyright and the Publishers Association of South Africa have a completely different interpretation of the likely effects of aspects

of this legislation, where the term 'educational use' is just too broad.

The PricewaterhouseCoopers (PwC) study projected a massive contraction in the South African publishing industry should particular aspects of the CAB be approved, which would result in losses amounting to billions of Rands in production, job losses, and especially at university presses, the amount of local research that is published locally will decline accordingly.

Clearly there are different interpretations. The Publishers Association of South Africa has done a very detailed financial analysis of the potential implications of aspects of the CAB. The lobby in favour of the Bill has not engaged with the figures of the PwC financial analysis, and does not interact with critics of the Bill, even from a legal perspective.

In general, there is generally a broad ideological argument in favour of aspects of the CAB, that envisages a particular set of outcomes that are not actually grounded in any evidence or financial modelling.

Prof Tomaselli urged that the financial modelling that had been done be scrutinised and supplemented by additional financial modelling that takes the impact of the COVID-19 pandemic into account. The various parties should engage with one another over the pros and cons of the Bill, with a focus on looking at the evidence of the potential financial and industrial impacts, rather than just the surrounding philosophies, and do some scenario planning.

Prof Klaus D Beiter
Prof Beiter observed that different views had been expressed by members of the panel but emphasised that it was not a matter of opposing other points of view simply for the sake of doing so. He agreed with Prof Tomaselli's view that, for example, IP created by universities should be in the open domain. Prof Beiter therefore regarded it as problematic that the commercialisation of South African universities was taking place. The South African government obviously had a role in the commercialisation of universities. The funding of universities in South Africa in relation to GDP is far less than in many other countries, even some other African countries.

On the question of fair use in the South African context, Prof Beiter's understanding based on the literature was that South Africa was not adopting a doctrine from the USA. It could equally be argued that in contemplating the introduction of fair use, South Africa was adopting a doctrine from Israel. In the past, South Africa adopted the sectional title scheme (property law) from Israel, which had been very successful in South Africa. The pertinent issue is what is done with the doctrine in South Africa, not the theory as it is applied elsewhere. With the adoption of the South African Constitution, a high measure of trust is put in the courts, which is very different from the situation in the past.

South Africa had a fair dealing provision that came from UK law, but it is important to remember that South African law is very different from English law. English courts distinguish cases, rather than reason on the basis of systematic analysis; this is different from the Roman tradition that South Africa inherited. Changing to fair use doctrine, which applies the process of reasoning, seems to make a lot of sense for South Africa.

The Constitutional Court has so far not adopted a clear stance on whether the limitation of IP constitutes expropriation. It is good that it has not done so, because it is necessary to deliberate this before taking any nuanced position.

The human right to intellectual property is protected by General Comment no. 17 of the UN Committee of Economic, Social and Cultural Rights: 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, Para. 1 (c) of the Covenant), 12 January 2006, E/C.12/GC/17. The committee makes it clear that "the human right to IP" is the right of a natural person, the author, not companies. An intention of the CAB is also to strengthen author's' rights.

Prof Owen Dean

Prof Dean was not opposed to adopting law from another country, whether the USA, UK, Israel or any other country. His concern was that any law that is passed must work properly in South Africa. The South African version of fair use is essentially no different than the US system. The relevant factors for both sections are exactly the same. The only difference is that where the CAB provides some examples of what could constitute fair use, the US law does not.

The CAB is a poor piece of legislation, and Prof Dean did not believe that it could be made workable through 'panel beating'. In his view, the legislative amendment of the Copyright Act needs to start again from scratch and be looked at by a committee of experts with experience in practising IP law. Prof Dean speculated that the current drafters of the CAB had very little exposure to the practice of copyright law. He favoured the appointment of a new drafting committee and suggested that Judge Goldstone would make an excellent chairperson of such a committee.

Prof Dean cautioned against hurrying through the passing of an imperfect Act and recommended taking more time in order to end up with a good product.

He supported the inclusion of exceptions to meet the needs of people living with disabilities. The Bill contains a number of good things, but the real problem is how it is expressed and the legal tightness of the legislation, which is seriously problematic.

DISCUSSION

QUESTION AND ANSWER SESSION

Comment
Where do Google and big tech pay their taxes? Perhaps nowhere, but hardly in the least developed countries (LDCs).

The shrinkage of the Canadian publishing industry and its subservience now to US publishing are beyond dispute. The Canadian copyright act, which compares as rather mild when read side by side with the defective bills here, was a direct cause.

Response, Prof Dean: The USA does not favour the CAB to the extent that it incorporates US principles or practices. The impetus for many of the very widely expressed exceptions, particularly fair use, has come from the US business interests (e.g. Google and multinational corporations), which are the prime promoters of the Bill. One has to ask why. It suits those kinds of organisations to have free access, and not having to pay royalties, for the use of anything they put into their library.

Response, Prof Beiter: The problems do not lie within IP law but in the field of taxation. For that reason, there are endeavours at a global level to formulate a framework for the taxing of multinational corporations. This would mean that Google, for example, would have to pay taxes in every country in which it operates. Profit-shifting is the big problem of our times that needs to be resolved. Taxes from these sources would amount to millions of Rands, and could be used, for example, to nurture a local publishing industry in South Africa, or to support university publishers. Prof Beiter agreed with Prof Tomaselli on the importance of university publishing houses.

Question
The Copyright Bill should be viewed in the context of other legislation, such as the Department of Trade and Industry's National Industrial Policy, DSI's Patents Act and Indigenous Knowledge Bill, and the Department of Sport, Arts and Culture's Performers Protection Amendment Bill. All of them have major implications for livelihoods and innovation, and the UN 's right to development. Large multinational corporations, especially Google, are dominating these policy debates. Do we have countervailing public oversight and policy sovereignty?

Response, Prof Beiter: On the issue of the US government resisting the institution of fair use in South African law, we know that the US also resisted parallel imports for much-needed medicines in South Africa, leading to many HIV deaths in the country. Prof Beiter's position was not to rely too heavily on the position of the US government.

Question
Could panellists comment specifically on the potential benefits or impacts the CAB may have on research archives and collections where unpublished records are held (as opposed to libraries as such)?

Response, Dr Samtani: Although the specific provision of the CAB section 19C does not mention unpublished manuscripts, or unpublished materials at all, there is a general provision at the very end of section 19C that reverts to section 12(aa), which essentially encapsulates fair use. Unpublished manuscripts are thus likely to be protected, because they are analogous to published manuscripts, which are explicitly protected. The CAB's open-textured provisions are required in order to take into account things that people working within institutions believe to be important, but that the law does not explicitly list.

Comment
I agree with Prof Dean that the Bill is a bad piece of legislation. There is no use in replacing the current Act with a badly drafted Bill. My understanding is that the Bill has not even been subjected to a Socio-economic Impact Assessment Study (SEIAS). We should not push through legislation 'willy-nilly'.

Response: There was no response from the panel as to whether the assumption was correct that the Bill had not been subjected to a Socio-economic Impact Assessment Study.

Comment
The panellists seem to have vested interests. The criticisms of the Bill are therefore disingenuous. The comment that this is a badly drafted Bill is not helpful. Could the panel help by indicating what needs to be fixed in the Bill? I am a creative, not a lawyer. Creatives are dying as paupers; people living with disabilities are suffering. The delay in passing the Bill is unconstitutional. No piece of legislation is perfect. We would make progress if the Bill were passed, and we could then deal with issues as they arise. It is not right that we are now recommended to start from scratch in developing the Bill.

Whose property is it anyway? Creative work starts out as the property of creatives but becomes owned by intermediaries. The creators of the property suffer and die with nothing. If the US has provision for fair use, why can South Africa not have a similar provision? We should not be scared to enter uncharted waters.

Response, Prof Dean: The property conferred by the Copyright Act is conferred on authors. Authors are the keystone of copyright law. Unfortunately, what often happens is that assignments of copyright take place when parties such as publishers become involved. However, no author is compelled to assign their copyright. The creator remains the author as long as they do not execute a written document that transfers the ownership of the copyright to another party. Aspects of the Bill can lead to arbitrary deprivations of property, in which case it is the property of authors that is being deprived.

Comment
Please comment on the lessons learnt by Canada in their testing of fair use, and the detrimental effect it had on their local industry.

Response, Dr Samtani: The CAB makes provisions to prevent damage to the local industry in South Africa. The provision on the copying of textbooks, specifically, allows for only three circumstances in which that is possible. The first is where the textbook is out of print, which means that it is no longer being published, and there is no detrimental effect on publishers, whether international or local. The second is the provision for a situation in which the owner of the copyright cannot be found. This requires that the person seeking to copy the textbook must make reasonable efforts to find the copyright holder. The third provision is that where a particular edition of a textbook is unavailable in the South African market, can it be copied; this does not specifically affect the local publishing industry. The speculation in the comment that the fair use provisions would be detrimental to the local publishing industry is misplaced.

Question
Given the exorbitant cost of any legal action, what relevance does the legislation have to ordinary people who can never afford to institute action?

Prof Dean: There are provisions in the Bill that create a Commission. It seems this is intended to be some sort of easily accessible 'court' (which is referred to in the Bill in inverted commas). This section of the Bill is prone to uncertainty and bad drafting. It is not at all clear what the functions of this body are, or whether it is intended to deal with infringements or not. If it is intended to deal with infringement matters, it is certainly not specified that it is entitled to award damages. This is thus a very incomplete form of dealing with infringement. It also introduces an anomaly into South African law in providing that the proceedings must be done on an inquisitorial basis, which is altogether at odds with the way in which every other dispute is handled in South Africa. It does not seem that the drafters of the Bill had much experience of or insight into the practice of copyright law in South Africa.

Comment
A lawyer from Flynn critiqued the PwC report for essentially being a survey of executives of publishing companies.

With respect to the comments about fair use having a negative impact on the Canadian publishing industry, it should be noted that the decrease has also coincided with the emergence of the digital era, and many universities have been relying more on blanket digital licences. It cannot be said that fair use has had no impact, but there is a lack of integrated understanding of the interrelated impact of the fair use provision and the growth in digital publishing.

The important differences between the creator and the copyright owner need to be realised. There seems to be a tendency to pay more heed to the interests of multinational publishers and the intermediaries who represent them, than to reckon with the fundamental interests of the creatives and communities on the ground who are affected by the copyright law. There should be more effort to bring the interested parties together so that communities, creatives and other stakeholders can work with government to improve the current copyright legislation. There is an urgent need for reform of the outdated Copyright Act 1978, and the implementation of improved legislation, because people are dying in poverty, not being able to profit from their

creations.

Why are the people involved with copyright legislation at an academic level, who seem to have all the answers, not doing more to work on the Bill, together with communities, stakeholders and the government, as opposed to just being mouthpieces for the intermediaries?

Response, Prof Tomaselli: Many individuals and organisations across all expressive sites in South Africa have been working on the CAB, as well as the Performers Protection Amendment Bill, debating these issues, identifying any contradictions, trying to work out what went wrong, and how to get it right. There have been meetings, workshops and webinars; thousands of pages of critique have been sent to the Portfolio Committee (and are available through open access), but those who have recommended revision of certain aspects of the Bill, particularly limits to the very broad notion of 'education', have not been listened to. This is one of the reasons why we are sitting here, debating sometimes from different positions, because we can foresee different outcomes, given different interpretations of what might actually come to pass. To say that nobody had been involved in this is wrong. Hundreds of organisations and thousands of people have been involved in trying to debate these issues.

The fundamental problem is that the CAB is a badly drafted piece of legislation that needs to be properly written. If a law is poorly drafted, it cannot be effectively implemented. It would ultimately be thrown out. To take the law to the Constitutional Court would be extremely expensive, and there would be further delays. Prof Dean has suggested a very elegant solution to the question of disability rights as an exception to the current Copyright Act while the remaining contradictions are being addressed, but no-one is following that up. Making the legislation clear helps in planning for the future.

Question
I want to ask the panel about the interaction of fair use in sections 12A and 12D of the CAB. Section 12D makes provision that whole textbooks may be copied if the copyright holder does not offer a reasonable licence. While this provision may sound reasonable, it masks that short of copying a whole book, copying only 80% of the book, for example would be permissible. Would fair use not have to be interpreted as even broader, if it is to be given any additional meaning side by side with these very broad exceptions?

Response, Prof Beiter: The current Copyright Act has a teaching exception. The problem is that there is much uncertainty concerning this provision, and universities currently do not rely on it to make available any information. During the apartheid era, universities used to make copies of articles available in class readers. This provision causes a lot of uncertainty. It should also be available to universities as institutions. This is what section 12D of the CAB provides for. The stipulation that copying does not exceed the extent justified by the purpose is a clarification that leaves fair dealing intact. Section 12D(3) and (4) are an integration of the Berne Convention appendix into South African law, and would only allow the copying of whole books in very limited cases.

Section 12A of the CAB contains the fair use provision, keeping open the option for potential cases of use that might arise in the future that cannot be covered under the other provisions. The enquiry for fair use is very much the same as in the case of fair

dealing; it is as limited, and the only difference is the words 'such as', which leaves future purposes possible.

Comment
This interaction was exciting, but in the latter period, we seem to be re-raising issues for which the opportunity has long since passed. Only a limited number of issues in the CAB still need to be discussed, as raised by the President. It is no longer a matter of whether certain exceptions and limitations will form part of the law. Many of the suggested flaws are no longer open for comment and are not considered as flaws by many other commentators, including myself. The CAB that is before us is a fairly decent piece of legislation to work with.

Prof Dean maintains that fair use is indeed in violation of international copyright law and international copyright treaties, but this was not sufficiently substantiated. We heard some arguments against this position put forward by Prof Beiter, which I would like to endorse. There is hardly anyone around the entire world who maintains any longer that fair use violates the Three-step Test in international copyright law. Some who were previously sceptical have changed their minds. Most importantly, the Australian Law Reform Commission was confronted with this very question in 2014, and after receiving 900 submissions and carrying out about 100 consultations with stakeholders, they concluded that fair use provisions, and the Three-step Test in particular, are not in violation of international copyright law. The Max Planck Institute for Innovation and Competition as well as many other commentators concur with at position. I am puzzled how this argument could still continue to be raised, since there seems to be almost unanimous support for the position that fair use provisions are compliant with international law and treaty obligations.

Response, Prof Dean: At the outset of my talk, I referred to what I consider to be a seminal article by Prof Karjiker on the issue of fair use. He reaches an entirely different position to Dr Schonwetter. To the contrary, he says that the preponderance of international opinion is that fair use does not comply with the Three-step Test, and the only reason why this has not been squarely addressed is because of the USA's economic strength, and the reluctance to tackle the USA on this issue. I refer anyone who is interested to Prof Karjiker's article. He makes the very valid point that no-one in South Africa has ever come forward with a rational documented approach as to why the country should adopt fair use; it has just somehow slipped in without being properly promoted by anybody.

CLOSING REMARKS AND WAY FORWARD

(PROF IGLE GLEDHILL)

There is agreement that the comparison between the current Copyright Act 1978 and the CAB touches on the issue of bringing laws into line with the Constitution, because the status quo is unconstitutional. It is generally accepted that there is a need to address the important discrimination that still persists through the current Copyright Act 1978 against people living with disabilities, including book famine and device-shifting problems. The CAB's incorporation of text and data mining technologies, as well as recording and software, does not seem to be contentious. These issues have not been contested in the present webinar.

The inclusive list that includes the controversial phrase 'such as' for future-proofing purposes, is, however, near the heart of the discussion. South Africa's current copyright law does not have use allowing mass digitalisation to preserve the cultural heritage.

We need to address the distinction between authors and their intermediaries.

The issue of transferring IP rights beyond the current market or scope needs engagement, in particular the following points:

- There is considerable concern about the impact on funding, especially incentives and disincentives to funding.
- There is concern about the threat to local publishers, and whether there is such a threat.
- There is also concern about royalties and the distribution of royalties, especially to indigenous publications.
- Inadequate local resourcing is a considerable concern, including the financial situation of government and fiscal constraints in the coming years.

Several concerns need to be addressed related to open access and open science; the potential shift of paywalls from the reader to the author; the economies of scale lost through article processing charges; and the significant impact on organisations and universities through the deployment of research funding.

There is a significant concern that big tech companies will harvest work placed in positions of access, or work thought to be unprotected.

In terms of the international context, we see the human propensity for greed, which can be exercised in such a way that the rights of the author are forgotten. This is a big concern.

Copyright deals with the dual aspects of access and remuneration, and human rights govern both and are at their foundation. The balance between intellectual property rights and social welfare needs explanation in this case. It has emerged that access to textbooks is a good test case for these.

The Three-step Test that arises from the Berne Convention and the TRIPS Agreement on special cases is in conflict with normal exploitation, as we are not sure what 'normal' now means.

The issue of 'no unreasonable conflict with the legitimate interests of right holders' certainly needs explanation. Fair use is at the heart of this debate. Again, the purchase of textbooks is a good test case.

New additional exceptions might be considered.

There is significant concern that with the Bill as it stands, fair use would rely on decisions of the court; that the decision is made after proceedings have been initiated; and that guidance will only develop through building up case law. South Africa can certainly use, recognise and be informed by international experience of fair use, but the South African context is at the heart of the country's law.

We need to establish whether fair use is constitutional. A transition is implied by the fact that the Copyright Act is so old, and the CAB comes so many decades later. The transition would have implications for the regulations arising from the Bill, for the many stakeholders involved and the significant effects on them.

We need to examine the interests of those who benefit from the new Bill, the fluid state of global views of taxation, whether unpublished material is protected or not, the socio-economic study background, expropriation of property, the implications of the National Data and Cloud Policy recently published in the Government Gazette, and how property conferred on authors is assigned within the community of practice.

This amounts to a call for clarity, and finally, a call for practical work on the Bill to take into account the balance of benefits of stakeholders in South Africa.

Any additional feedback can be submitted through the evaluation form available at https://forms.gle/S5Hu1PA5tuuYfg3E8. The comments should focus on the six comments of the President on the CAB, as circulated. Comments should reach ASSAf before 9 July 2021.

CLOSURE

Judge Goldstone thanked the panellists and participants for the informative presentations and robust dialogue, as well as ASSAf staff for organising this successful webinar. The large number of participants showed the strength of interest in the topic.

APPENDIX 1: LIST OF ACRONYMS

ASSAf	Academy of Science of South Africa
CAB	Copyright Amendment Bill
CC	Creative Commons
COVID-19	Coronavirus disease of 2019
DALRO	Dramatic, Artistic and Literary Rights Organisation
DHET	Department of Higher Education and Training
DSI	Department of Science and Innovation
EU	European Union
GDP	Gross Domestic Product
HIV	Human Immunodeficiency Virus
IP	Intellectual property
IPR	Intellectual property right
PwC	PricewaterhouseCoopers
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UK	United Kingdom
UKZN	University of KwaZulu-Natal
USA/ US	United States of America
USTR	United States Trade Representative