

# **Copyright Amendment Bill**

## **[B13D-2017]**

**Denise Rosemary Nicholson**  
**Scholarly Communications & Copyright Consultant, Scholarly Horizons, SA**  
**Published Author – [orcid.org/0000-0002-8591-3276](https://orcid.org/0000-0002-8591-3276)**  
**[Denise.Nicholson@scholarlyhorizons.com](mailto:Denise.Nicholson@scholarlyhorizons.com)**

**National Council of Provinces Select Committee on Trade & Industry, Economic Development,  
Small Business Development, Tourism, Employment & Labour.**  
**Public oral hearings – 7 March 2023**



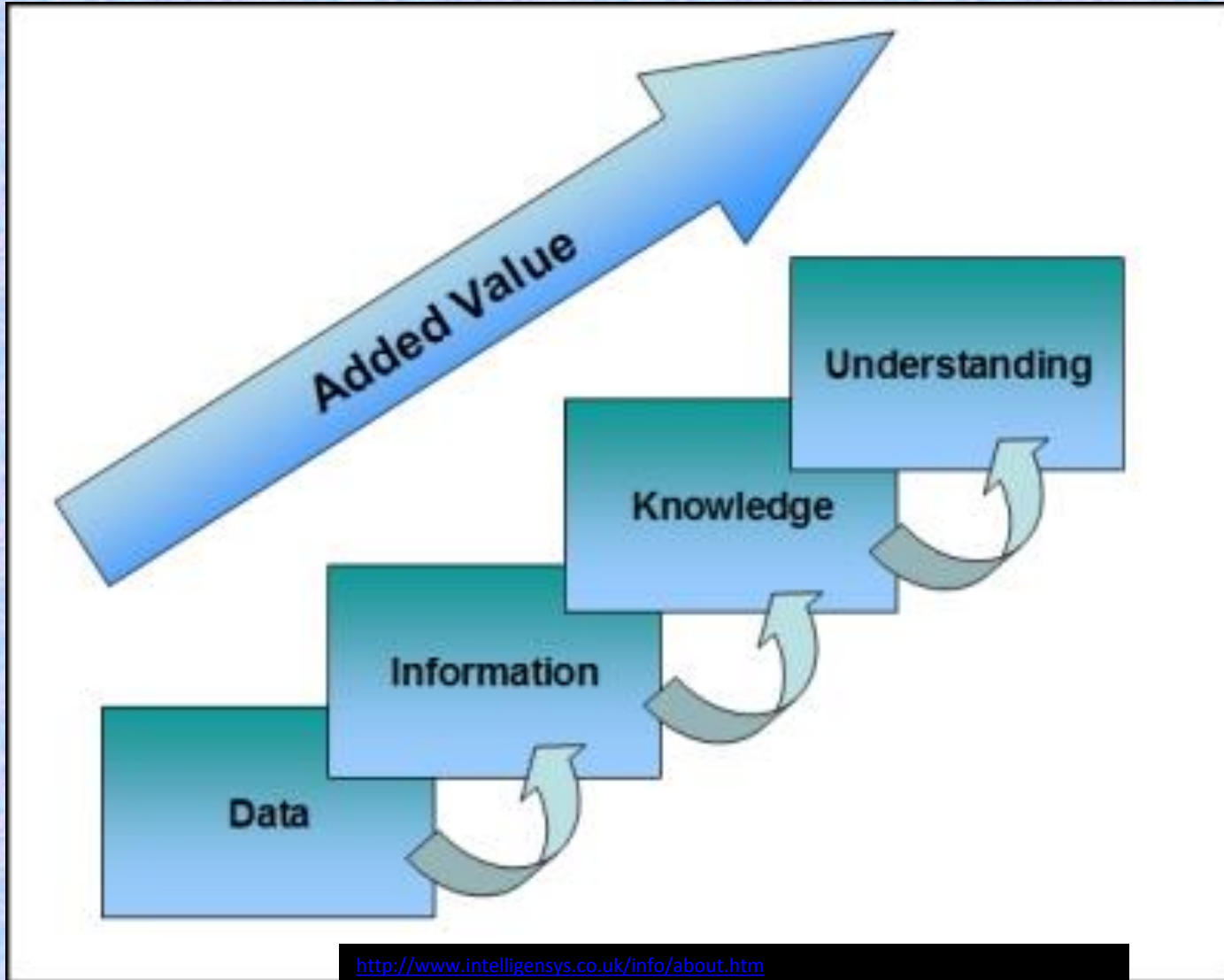
# International Copyright Trends

- To **shrink** the public domain & **restrict** access to knowledge
- To **strengthen** protection and **erode** information-users' rights
- To **take and control** copyright from authors/creators
- To **commodify** knowledge and **double-dip** to increase revenue streams
- To **monopolise** royalties and **privatise** profits
- To **fail to remunerate** rightful authors and creators
- To **create** knowledge and digital gaps
- To **override** exceptions in contracts

# Creators are Users & Vice-Versa

- **Creators are users and users are creators in the digital space.**
- **Library and information entities and research and educational institutions are collectors, custodians, users, creators, etc., They all use information on a daily basis.**
- **Without the print and online resources managed and made accessible by libraries and archives, authors and creators would not be able to innovate and create new works.**
- **Everyone relies on existing information to create or innovate - ‘Standing on the shoulders of giants’. Many embrace ‘fair use’ without even realising it!**
- **Rights and user activities have also become intertwined in the digital space. So where is the line between user and creator?**
- **The way technology is advancing, it is impossible to apply for permission and pay a fee every time you need to use other’s works (e.g. Trevor Noah)**

# Knowledge Hierarchy



<http://www.intelligensys.co.uk/info/about.htm>



# Unconstitutionality of Copyright Act



In September 2022, the Constitutional Court declared the Copyright Act to be unconstitutional as it relates to visually impaired people. It is arguably unconstitutional for other reasons too, such as:

- It omits exceptions for and discriminates against legal deposit libraries, museums and galleries (custodians of our cultural heritage). It is inflexible and restrictive regarding education, academic activities, research, libraries and archives, and of course, translation, digitisation and curation, and prevents sharing and most, if not all, activities in the digital space. It is not future-proof for ever-changing technologies so stymies access to information, research, innovation and creativity.
- It prohibits translations and fails to address orphan works (part of our historical records or cultural heritage).
- It prohibits parallel importation. One of the reasons SA has such high prices is that the publishers focus on only about 10% of the market who can afford books to make their profits, and secondly the Competition Commission has been investigating the publishing industry for alleged price-fixing of textbooks and other reading materials in SA for decades. The report has not yet been made public. This prevents fair competition and harms everyone in the knowledge chain. See: [https://www.compcom.co.za/wp-content/uploads/2021/02/CC\\_Annual-Report-2019\\_20s.pdf](https://www.compcom.co.za/wp-content/uploads/2021/02/CC_Annual-Report-2019_20s.pdf) and <https://www.theguardian.com/books/2021/jan/15/amazoncom-and-big-five-publishers-accused-of-ebook-price-fixing>
- The law minimises the control that authors/creators have over their works. It fails to protect them from exclusive licences, permanent assignments, biased contracts and unfair royalty payments because collecting societies are not transparent or accountable. Many scandals in the media.

# Cost and Control of Knowledge

- SA-produced research is repackaged and sold back to SA libraries at excessive prices.
- Publishers hold the copyright in journal publications – main beneficiaries of copyright monies.
- Research sources, article processing charges & copyright fees (triple dipping!) – exorbitant costs for SA institutions and academics.
- More than 65% of copyright fees collected from public universities flows out to developed countries.
- Publishers control who can publish, what can be published, where it can be published and charge high APCs, control permissions and what goes onto open repositories, etc.!

See: The cost of accessing academic research is way too high. This must change - <https://theconversation.com/the-cost-of-accessing-academic-research-is-way-too-high-this-must-change-105583>

*If our copyright law is supposed to protect our authors and creators, then why are multinational conglomerates the main beneficiaries of copyright?*

# Framework of CAB [13D-2017]

- Human Rights and other international Conventions and Treaties
- Treaties supported by SA through the African Group at WIPO SCCR
- Progressive foreign copyright regimes
- eIFL Model Copyright Law - expands on WIPOs Model Law for Developing Countries - [http://www.eifl.net/system/files/resources/201607/eifl\\_draft\\_law\\_2016\\_online.pdf](http://www.eifl.net/system/files/resources/201607/eifl_draft_law_2016_online.pdf)
- SA Constitution and National Development Plan (NDP) and SDGs
- Various pieces of legislation relating to Libraries, Education, Archives, Disabilities, etc.
- International, regional and local research reports & studies on the current law
- South African Open Copyright Review - <https://ip-unit.org/wp-content/uploads/2010/07/opencopyrightreport1.pdf>
- 2015 Cape Town Declaration - commits to fair and balanced copyright laws - <https://www.ifla.org/files/asset/wlic/2015/documents/cape-town-decaration-of-ministers.pdf>

# International Treaties - Compliance

Parliamentary Legal Team confirmed Bill is compliant with our Constitution and international treaties. In passing the Bill a second time, the National Assembly has confirmed this too. See the following opinions that confirm compliance too:

- Susannah Cowen SC (South Africa) - Opinion: [https://libguides.wits.ac.za/ld.php?content\\_id=50611390](https://libguides.wits.ac.za/ld.php?content_id=50611390)
- Prof. T. Hoeren (Germany) – Opinion: [https://scholarlyhorizons.co.za/wp-content/uploads/2022/04/Prof-Hoeren-final-Legal\\_Opinion\\_CAB-2022.pdf](https://scholarlyhorizons.co.za/wp-content/uploads/2022/04/Prof-Hoeren-final-Legal_Opinion_CAB-2022.pdf)
- Copyright Reform in South Africa: Two Joint Academic Opinions on the Copyright Amendment Bill[B13B-2017] - <https://perjournal.co.za/article/view/13880/19364>
- The Domestic Effect of South Africa’s Treaty Obligations: The Right to Education and the Copyright Amendment Bill - <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1063&context=research>
- Fair use complies with the three-step-test - <https://www.alrc.gov.au/publication/copyright-and-the-digital-economy-alrc-report-122/4-the-case-for-fair-use/fair-use-complies-with-the-three-step-test/>

No WIPO or the WTO dispute mechanisms have been initiated against countries with similar provisions.



# Fair Use around the World

- Countries with fair use (majority have hybrid models) are: Ecuador, Israel, Liberia, Malaysia, Philippines, Poland, Singapore, Sri Lanka, South Korea, Taiwan, and U.S.
- Countries with fair dealing but apply the 4 factors of fair use – Canada, eSwatini, Hong Kong, Jamaica, Kenya, St. Christophe Nevis, St Lucia, St. Vincent and the Grenadines, New Zealand, Uganda, and recently Nigeria.
- Are Fair Use Provisions in the SA Copyright Amendment Bill Far Broader Than In The US? - <https://infojustice.org/archives/41522>
- Australia has had many positive recommendations to adopt fair use, but strong opposition by rightsholders and others has kept the status quo at this stage. [https://en.wikipedia.org/wiki/History\\_of\\_fair\\_use\\_proposals\\_in\\_Australia](https://en.wikipedia.org/wiki/History_of_fair_use_proposals_in_Australia)
- Canada's Copyright Statutory Review recommends addition of 'such as', to make the list of purposes an illustrative list, rather than an exhaustive one - one step closer to fair use - <https://www.ourcommons.ca/Content/Committee/421/INDU/Reports/RP10537003/indurp16/indurp16-e.pdf>
- New Zealand - Copyright in the digital age: ... <https://www2.deloitte.com/content/dam/Deloitte/nz/Documents/Economics/dae-nz-copyright-fair-use.pdf>
- In the Public Interest: How Kenya Quietly Shifted from Fair Dealing to Fair Use - [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2929252](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2929252)
- The Fair Use/Fair Dealing Handbook - <http://infojustice.org/wp-content/uploads/2015/03/fair-use-handbook-march-2015.pdf>

# Fair Use – Enabler or Disruptor?

- Fair dealing is limited, inflexible, and doesn't address the ever-changing digital environment.
- The stricter the copyright law, the higher level of infringement (ACA2K Project, 2007-10)
- There is no empirical evidence anywhere in the world that shows that fair use destroys creative industries.
- Everyone needs access to knowledge. Fair use will address -
  - ever-changing technologies;
  - transformative users;
  - text and data mining;
  - new innovations;
  - 3D creations and AI
  - Unforeseen uses in the future
- Fair use in the U.S. Economy – 2017 Report - <https://ccianet.org/wp-content/uploads/2017/06/Fair-Use-in-the-U.S.-Economy-2017.pdf>
- Fair Use - Best Practices Guidelines - [http://libguides.wits.ac.za/Copyright\\_and\\_Related\\_Issues/fairuse\\_fairdealing](http://libguides.wits.ac.za/Copyright_and_Related_Issues/fairuse_fairdealing)
- Worldwide digital population 2023 - <https://www.statista.com/statistics/617136/digital-population-worldwide/>

# Debunking Myths about Fair Use



- What is Fair? Debunking Fair Use Myths - Australian Productivity Commission - <https://www.pc.gov.au/news-media/speeches/fair>
- Fair Use in the U.S. Economy : Economic Contribution of Industries Relying on Fair Use (2017) - <https://ccianet.org/wp-content/uploads/2017/06/Fair-Use-in-the-U.S.-Economy-2017.pdf>
- Debunking myths about Fair Use - [https://libguides.wits.ac.za/Copyright and Related Issues/FAQs CAB](https://libguides.wits.ac.za/Copyright%20and%20Related%20Issues/FAQs_CAB)
- Fair Use / Fair Dealing - [https://libguides.wits.ac.za/Copyright and Related Issues/fairuse fairdealing](https://libguides.wits.ac.za/Copyright%20and%20Related%20Issues/fairuse%20fairdealing)
- Fair Use in South Africa – YouTube – [https://www.youtube.com/watch?v=wsrfkFkS\\_xM](https://www.youtube.com/watch?v=wsrfkFkS_xM)
- Fair use complies with the three-step-test - <https://www.alrc.gov.au/publication/copyright-and-the-digital-economy-alrc-report-122/4-the-case-for-fair-use/fair-use-complies-with-the-three-step-test/>
- Best Practices for Fair Use for Various Stakeholders - [https://libguides.wits.ac.za/Copyright and Related Issues/BestPractice](https://libguides.wits.ac.za/Copyright%20and%20Related%20Issues/BestPractice)
- WIPO promotes Fair Use in ‘The Economic Contribution of Copyright-Based Industries in South Africa’ - [https://www.wipo.int/export/sites/www/copyright/en/performance/pdf/econ\\_contribution\\_cr\\_za.pdf](https://www.wipo.int/export/sites/www/copyright/en/performance/pdf/econ_contribution_cr_za.pdf)
- Gowers Review (UK, 2006) (p. 62), states: ‘Fair uses’ of copyright can create economic value without damaging the interests of copyright owners” - [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/228849/0118404830.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228849/0118404830.pdf)
- Australian – ‘Copyright and the Digital Economy’ - [https://www.alrc.gov.au/wp-content/uploads/2019/08/summary\\_report\\_alrc\\_122.pdf](https://www.alrc.gov.au/wp-content/uploads/2019/08/summary_report_alrc_122.pdf)
- Why Fair Dealing Is Not Destroying Canada Publishing - <https://www.ip-watch.org/2017/07/25/fair-dealing-not-destroying-canada-publishing>
- Canadian Copyright, Fair Dealing and Education, Part One – Setting The Record Straight - <https://www.michaelgeist.ca/2023/02/canadian-copyright-and-education-part-one-setting-the-record-straight>
- Copyright in the digital age: An economic assessment of fair use in New Zealand” – <https://www2.deloitte.com/nz/en/pages/economics/articles/copyright-nz-digital-age-google.html>
- ‘Fair use’ in new Copyright Bill benefits everyone - <https://www.dailymaverick.co.za/article/2019-09-17-fair-use-in-new-copyright-bill-benefits-everyone/>

# US/EU interference in CAB process

*The deplorable pattern of economic bullying and pressure on our President by USTR and EU, orchestrated by multinationals, must NEVER be allowed to happen again.*

See articles and letters about U.S. and EU interference in SA's domestic copyright reforms below:

- How the US and EU pressured South Africa to delay copyright reform - <https://www.politico.eu/article/how-washington-and-brussels-pressured-south-africa-to-delay-copyright-reform/>
- See Nicholson's submission in this regard to the USTR in January 2020 - [https://libguides.wits.ac.za/ld.php?content\\_id=51932196](https://libguides.wits.ac.za/ld.php?content_id=51932196)
- The majority of submissions made at the USTR hearings opposed a threatened USTR trade review – see: [https://libguides.wits.ac.za/Copyright\\_and\\_Related\\_Issues/tradeissues](https://libguides.wits.ac.za/Copyright_and_Related_Issues/tradeissues)
- Open letter to the EU Ambassador to South Africa on copyright laws - <https://www.apc.org/en/pubs/open-letter-eu-ambassador-south-africa-copyright-laws>
- Open letter to the President of South Africa on South African copyright laws - <https://www.apc.org/en/pubs/open-letter-president-ramaphosa-south-african-copyright-laws>
- IFLA and APC letter to President Ramphosa - [https://libguides.wits.ac.za/ld.php?content\\_id=54865085](https://libguides.wits.ac.za/ld.php?content_id=54865085)
- Letter from Creative Commons SA - [https://libguides.wits.ac.za/ld.php?content\\_id=53415889](https://libguides.wits.ac.za/ld.php?content_id=53415889)

# Support for the CAB

Much support for CAB, internationally, regionally and locally. I support the Bill, especially Sec. 12A, and other sections as below:

- **Sections 12B-D** exceptions for education and academic activities will help to transform research, teaching and learning programmes.
- **Section 15(1)** – allows freedom of panorama so photos can be taken of public monuments, sculptures, etc. which are still protected by copyright.
- **Section 19B** – allows temporary copies and interoperability in digital space.
- **Section 19C** has very helpful exceptions for libraries, archives, museums and galleries, which will help all stakeholders and help preserve our cultural heritage. Also allows authors to share their manuscript works in institutional repositories, if their research was funded 50% or more from public money. (adapted from the German Copyright law). Thousands of publishers already allow deposit of manuscript and/or final PDF versions - see: <https://v2.sherpa.ac.uk/Romeo> and <https://www.nrf.ac.za/media-room/news/statement-open-access-research-publications-national-research-foundation-nrf-funded>. Many funders insist on Open Access deposit & publications from research they fund.
- **Section 19C(10)** - allows parallel importation and hopefully this will present a more competitive market to avoid exorbitant prices, monopolies and price-fixing.
- **Section 19D** will stop discrimination against people with disabilities. It needs to be amended as per ruling in Blind SA's ConCourt case. It also extends to other disabilities, including deafness, deaf-blindness, dyslexia, etc. As sign language is due to become an official language, this Section will help the deaf community. Delete S.28P in line with ConCourt ruling.

# Support for the CAB (2)

- **Section 22A** is totally impractical. It should be rewritten to allow the use of orphan works, for at least educational, research, and non-commercial purposes.
- **Sec 12D 7e and Section 39B** should be welcomed by authors and libraries – often get raw end of a contract. The Bill ensures that contracts will not override legitimate copyright exceptions in the future. It is intended to balance the playing fields between publishers/producers and those they contract with (e.g. authors, creators, libraries, etc.). *(Adopted from the EIFL Model Copyright Law and is in the Singapore copyright law and EU's Unfair Contract Terms Directive (93/13/EEC).*
- Section 28P should be deleted in view of the BlindSA ConCourt ruling.
- Once the CAB is signed, it will enable various legislative updates in the Dept. of Sports, Arts and Culture, the National Digitisation Policy, and Open Data & Cloud Policy to proceed. To date the Copyright Act has stymied their progress.
- **Authors and creators** will benefit from the above exceptions too. The Bill also gives them more control over their works, reversion of rights, better moral rights and contractual protection.
- **Regulation, transparency and accountability of CMOs** should enable authors and creators to get a fairer share of royalties, as well as royalties for artists and performers.
- Perhaps words like: 'data', 'digital rights', 'digital curation' and 'digitisation' should be defined and also mentioned in relevant sections of the CAB.

# **CAB must progress**

- **Suggestions to send the CAB back to the drawing board are counterproductive.**
- **Opponents of the Bill ignore the huge investment in this Bill and the length of time taken to get to this point.**
- **No law is perfect – nor does every law suit everyone.**
- **It is imperative that solutions be found in this current process so that the Bill proceeds to the President for assent.**

# Support for the PPB

- **Currently, performers and actors are treated as freelancers – No protection under the Labour Act, Copyright Act or any other related laws, and cannot earn royalties for their work.**
- **The Performers' Protection Bill and Copyright Amendment Bill are interdependent – cannot be split into independent Bills.**
- **Both Bills enable performers and actors to earn royalties for the first time ever.**
- **To avoid any confusion, clear definitions should be included for 'artists' and 'performers' in both Bills.**
- **Parliament is urged to pass both the CAB and PPB as a matter of urgency.**



# Conclusion

- The history of South Africa makes it a national imperative to build an informed nation, remove inequalities, create self-reliance amongst individuals through access to information and technologies, as well as to build and sustain vibrant communities.
- The Bill is long overdue! To avoid more delays, many issues can still be improved in this process, or addressed in Regulations.
- Further delays in the Bill will have a costly impact on the economy, creativity and innovation, education and research, and libraries and other information entities, by reducing the ability of citizens to have access to information, knowledge, and research in the digital environment.
- Please act [urgently](#) to pass the Bill - or else it will create an incongruent situation, where South Africa's own copyright laws cannot do domestically, what it is asking for at the international level.

# Useful Resources



- Bill B13D-2017 passed by National Assembly 2022 –  
[https://www.gov.za/sites/default/files/gcis\\_document/202207/220608b13d-copyright2017.pdf](https://www.gov.za/sites/default/files/gcis_document/202207/220608b13d-copyright2017.pdf)
- Copyright Reform & Other Resources -  
<https://scholarlyhorizons.co.za/resources/copyright>
- SA Proposed Amendments and various sub-tabs (historical record of CAB) -  
[https://libguides.wits.ac.za/Copyright and Related Issues](https://libguides.wits.ac.za/Copyright_and_Related_Issues)
- Right to Research in Africa seminars in South Africa (January 2023) –  
<https://youtube.com/@recreateza3943>
- Constitutionality of the Bill -  
[https://libguides.wits.ac.za/Copyright and Related Issues/Constitutionality](https://libguides.wits.ac.za/Copyright_and_Related_Issues/Constitutionality)
- Commonly Asked Questions about the CAB -  
[https://libguides.wits.ac.za/Copyright and Related Issues/FAQs CAB](https://libguides.wits.ac.za/Copyright_and_Related_Issues/FAQs_CAB)

**Thank you for your attention**

Denise Rosemary Nicholson  
<https://scholarlyhorizons.com>

