

Copyright Amendment Bill

[B13D-2017]

Denise Rosemary Nicholson
Scholarly Communications & Copyright Consultant, Scholarly Horizons, SA
Published Author – orcid.org/0000-0002-8591-3276
Denise.Nicholson@scholarlyhorizons.com

Standing Committee on Finance, Economic Opportunities and Tourism,
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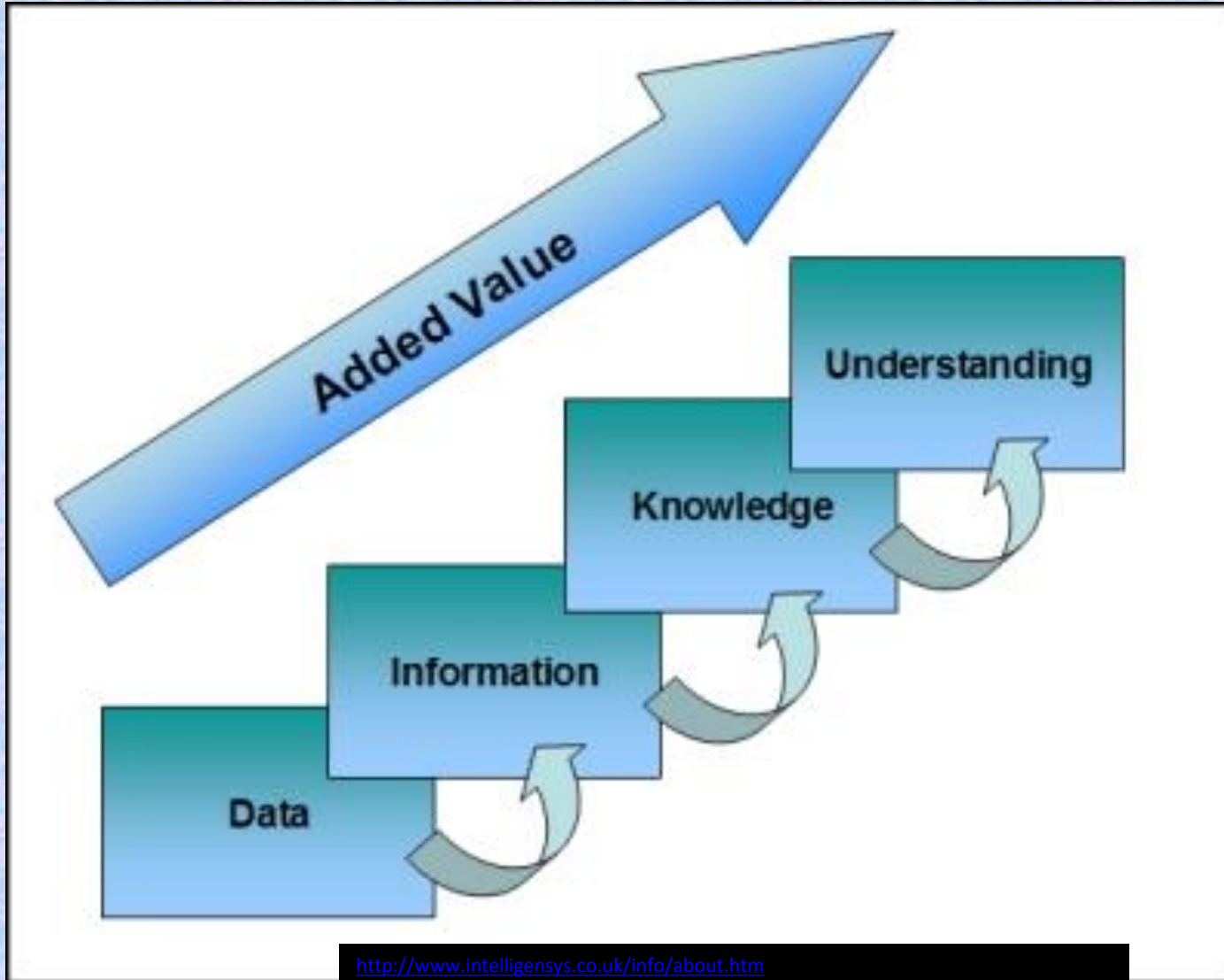
International Copyright Trends

- 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
- To **actively lobby** against copyright reforms that will benefit citizens

Creators are Users & Vice-Versa

- **No distinct lines anymore. Creators are users and users are creators.**
- **Library and information entities and research and educational institutions are collectors, custodians, users, creators, inventors, gamers and AI experts, authors and publishers, editors and reviewers, teachers or learners, and more. 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. 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, many of which form part of our historical records or cultural heritage.
- It prohibits parallel importation, despite the high prices of textbooks and other reading materials in SA, possibly caused by price-fixing and related practices. 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 and <https://www.theguardian.com/books/2021/jan/15/amazoncom-and-big-five-publishers-accused-of-ebook-price-fixing>
- It 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.
- Collecting societies are not transparent or accountable. Many scandals in the media.

Cost of Knowledge in SA

- SA-produced research 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 (incl. 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 through APCs, and what goes onto institutional repositories!

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
- 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-declaration-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
- Prof. T. Hoeren (Germany) – Opinion: <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.
- 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
- 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>
- In the Public Interest: How Kenya Quietly Shifted from Fair Dealing to Fair Use -
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2929252

See: 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
- 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>
- Commonly asked Questions about the Bill and Fair Use [https://libguides.wits.ac.za/Copyright and Related Issues/FAQs](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
- 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
- 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
- Australian – ‘Copyright and the Digital Economy’ - 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
- 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
- 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
- Letter from Creative Commons SA - https://libguides.wits.ac.za/ld.php?content_id=53415889

Support for the CAB



Much support for CAB internationally, regionally and locally.

- **In addition to Section 12A, the following sections are fully supported:**
- **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>**
- **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 will need to be amended though in accordance with Blind SA's ConCourt case. Also extends to other disabilities, including deafness, deaf-blindness, dyslexia, inability to hold a book, etc.**

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).
- 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.
- **Clear definitions** should be included for 'artists' and 'performers', 'data', 'digital rights', 'digital curation' and 'digitisation' and they be mentioned in relevant sections of the CAB.

CAB must progress

- **No law is perfect. Suggestions to send the CAB back to the drawing board are frivolous and regressive. Many developed countries have enjoyed similar exceptions for decades. Why shouldn't SA , a developing country, also benefit from them.**
- **Opponents of the Bill ignore the huge amount of work, public costs and involvement, human resources, parliamentary time, examination and input from copyright laws and documents from around the world, the whole review process and so much more that has been invested in this Bill, to ensure South Africans benefit from a modern, balanced law.**
- **It is imperative that solutions be found in this current process so that the Bill proceeds to the President for assent.**
- **The ongoing delay of the Bill will have a costly impact on our economy, on education, research and the functioning and development of libraries and archives, by reducing the ability of citizens to have access to information, knowledge and research in the digital environment.**

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.**
- **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!** 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.
- Parliament must please prioritise the needs of South Africans! Many issues can still be addressed or clarified in Draft Regulations, once the Bill is enacted.
- 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
- Copyright 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>

Thank you for your attention

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

