

**AUTHOR:**Keyan G. Tomaselli<sup>1</sup>**AFFILIATION:**<sup>1</sup>Department of Communication Studies, University of Johannesburg, Johannesburg, South Africa**CORRESPONDENCE TO:**

Keyan Tomaselli

**EMAIL:**

keyant@uj.ac.za

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# South Africa's Copyright Amendment Bill: Implications for universities

'Free to Reproduce, Free to Exploit' was first published in *The Conversation* on 14 March 2019.<sup>1</sup> *The Conversation* encourages republication with acknowledgement and *The Star* republished the article on 20 March 2019, changing the title to 'Opening Door to Plagiarists'.<sup>2</sup> Ironically, attribution was missing from *The Star's* version. Perhaps this omission was a sub-editing error? Or maybe it was mischievous on the part of *The Star*, to prove a point on the very day that the National Council of Provinces had approved the Copyright Amendment Bill?

## Plagiarism

The point arising from *The Star's* headline is that the Copyright Amendment Bill might open the door to plagiarism, non-attribution and 'free' reproduction of academic research and data and impinge directly on established rights. The contradiction is clear: *The Conversation* is sponsored by universities that are paying for subscribers to read for 'free'.

*The Conversation* article was reproduced on Moneyweb. Responses to online stories tend to take on lives of their own as writers muse about what they are reading. One Moneyweb respondent, who no doubt expects his own labour to be compensated at market value, insisted that all information, including academic research publications, must be made free. He is thus denying the right of authors to also earn from their work, and publishers to remain viable.

The real question is: who pays for someone else to consume for 'free'? The issue for the Academic and Non-Fiction Authors' Association for South Africa (Anfasa) concerns sections of the Bill that sanction free use 'for education'. This applies to Clause S.12D that permits educational institutions to engage in product substitution. Substitution involves assemblages of previously published extracts for course packs without permission or compensation to the authors and publishers of those works. As copyright lawyer Andre Myburgh observes, this section 'will also allow for wholesale cut and paste of content from copyright works into assignments, portfolios, theses or dissertations', thus promoting plagiarism. Moreover, he observes that such compilations could be used for personal use, and also 'library deposit or posting on an institutional repository'. For researchers whose value is often measured via the currency of citation, the Bill now enables reproduction to be done without permission with the author's name only having to be stated, worryingly, 'as far as is practicable'<sup>3</sup>. Citations will, under these circumstances, lose their meaning for South African based academic authors. Universities that internally disburse research funds based on citation metrics may need to revisit their policies.

## Beguiling discourses

Of concern also to the academic sector are the beguiling discourses, both populist and academic, swirling around this Bill. The Parliamentary process has been described by a Professor of Law as 'shambolic', that the Bill was railroaded for political reasons, and that the state ignored voluminous cautionary submissions from the copyright, author, film, music, arts, software and publishing communities.<sup>4</sup> The pro-Bill discourse has been supported by the not-so-subtle infiltration of the Trumpian 'fake news' narrative emanating from ReCreate ZA, a group of 34 people claiming to represent South African 'creators'. ReCreate's lobbying for the Bill received preference from the ruling party in Parliament over the nine national organisations representing the above creative sectors. ReCreate, in fact, was established to lobby for the Bill so as to retain the exceptionally wide copyright exceptions now labelled as 'creator rights'.

ReCreate's general invitation (14 March 2019) to a Panel Discussion in Cape Town on 19 March organised by them, was expressed thus: 'Although the Select Committee has applauded the Department of Trade and Industry on its public participation process and its attempt to keep all stakeholders in mind during this process, there has been an upsurge in efforts to prevent the Bill from being passed through the spreading of *false* information' (emphasis added).

Numerous commentators have revealed that ReCreate seems to be in the palm of the not-so-hidden-hand of Google and is associated with the architect of a US study published by the Program on Information Justice and Intellectual Property. This Program calls for copyrighted materials to be exploited at no charge by the tech giants.<sup>5</sup> During the August 2017 Parliamentary public hearings, Sean Flynn, one of the authors of the study who was present in addition to many publisher organisations, claimed that a causal relationship exists between countries that have 'fair use' and other 'open exceptions', and a supposedly advanced state of innovation in those economies. The Chief Economist of the Phoenix Center for Advanced Legal and Economic Public Policy Studies, George Ford, has, however, totally discredited the Flynn and Palmedo Google-funded study. Ford concludes that their statistical results 'are merely the consequence of basic errors in both the design and implementation of the empirical analysis, rendering spurious correlations'<sup>6</sup>. Further, Ford alleges many errors in the study, which disqualifies it for policymaking purposes. Myburgh, who was called as an expert witness by Parliament, argued that Flynn's justification of the revised draft<sup>7</sup> accepted by Parliament in December 2018 relies on 'mere slogans substituting for academic consideration'<sup>3</sup>.

Flynn advocates for the diminishing of author's rights and the strengthening of 'user rights'. Such rights will benefit only the big tech firms, approving Google's opportunistic phishing for content across the world for 'free' uploading onto the Internet. This content, the outcome of hard-earned labour by authors and creators of all kinds, is then used to attract paying advertisers who are targeting web browsers. No financial benefit is returned to authors or their publishers or the institutions that employ them. So 'free' means at a real cost to author, publishers and universities, who keep the research economy lubricated via the web.

## The Google effect

Google Scholar has positioned itself as being the most comprehensive of all tracking devices within the academic monitoring and metrics field. However, Academia.edu, unlike Google, has been able to partly monetise scholarly writing through its Premium feature via which users can retrieve specific data analytics on their readers. Academia.edu is a dot.com operation, not an educational one despite its '.edu' tag. Scholars who provide free data to for-profit companies like Academia.edu are not participating in an open-source environment, thus making our Bill rather ludicrous.

Google's advantage is that it is better able to trawl the Internet and find both publications and citations. But unlike Scopus or Clarivate Analytics, Google applies fewer quality checks. Google is more comprehensive in that its metrics include theses, reports and unpublished materials. Monetisation is linked to traffic attracted – dependent on quantity and quality of content. The larger a firm's data sample, like Google's, the greater is the relevant data that can be mined, captured, stored, processed and commoditised for onward consumption.

Content may be freely accessible, but because access now is mediated by centralised agencies, the process is not truly fair or free. International firms that capture, analyse and exploit huge volumes of data act as the gatekeepers of our media and communications networks, including academic sharing sites. This information imperative is perhaps what Flynn advances in his argument that content freely harvested from publishers will benefit big tech firms, and thereby boost national innovation. Academics get a wider readership, Google gets more traffic, while the universities that sustain the research publication enterprise mainly get exposure – but no income.

This situation is unacceptable. Academics uploading their materials to sharing spaces will in due course be charged to access it, or their uploaded materials will be mined for sale in some manner, whether to advertisers or to other interested parties. As such, these sites are predicated on a parasitic relationship with public education. Academics and their employers are thus labouring without remuneration to help build privately owned platforms by providing the aggregated input, data and attention value. These venture capital enterprises are monetising communication between academics within their networked Internet domains, not providing them free.<sup>8</sup> What the proponents of the Copyright Amendment Bill are really supporting, then, is the commodification of publication sharing, but denying that this is what they are advocating. This is said not to condemn these sites outright as academically suspect, but simply to explain that their business models have implications for academic work and the ways in which researchers imagine themselves to be autonomous of these processes and incorrectly assume that they are participating in an open access commons.

## The dilemma of creator rights

The dilemma for South African publishers is that the Bill removes their ability to protect authors' rights, because Clause 33 gives the Minister the right to prescribe compulsory and standard contractual terms to be included in all agreements and applied across all sectors of all creative industries. In the USA, authors can take legal action against copyright infringements, whereas the same legal recourse stipulation is not offered in the South African Bill. Together with the blanket contract and override powers assigned to the Minister in Clause 34, the local Bill pushes South Africa back into a darker, more vulnerable age, with hardly any protection for authors' and creators' rights.

Anfasa points out that what formerly were termed 'user rights' are now relexified by ReCreate and Flynn as 'creator rights', permitting the free reproduction of copyrighted work for educational and other purposes considered to be 'fair'. In other words, the 'user' has become the 'creator' by means of being able to electronically reproduce materials, feeding off and exploiting for gain other authors' creativity and products.

ReCreate appears to target DALRO, a reproduction rights organisation based in Johannesburg that works in the interests of authors, by implying that it does precisely the opposite. Yet, no evidence has been presented that DALRO has not served authors and publishers appropriately.

Organisations like DALRO reduce the administrative load of universities by acting on behalf of publishers and authors. If every individual author in the future has to contact every department in every university globally to audit the use of their individual intellectual properties it is certain that everyone will sink under the ensuing administrative weight.

The ReCreate meeting invitation mentioned above was couched in 'fake news' discourse as its claim – by innuendo – that Anfasa and the clear majority of the delegates who spoke at the Johannesburg symposium had succumbed to 'false information' with regard to the potential effects of the Bill.<sup>9</sup> Where *The Conversation* articles are cross-referenced, many offering critical analyses penned for the lay reader, the ReCreate 'othering' discourse lacks any dialectical characteristics. It claims divine right by delimiting the discourse within its own narrow frame of reference that seems to echo those of Google and other tech phishers. Any discussions other than those supporting the Bill are thereby simply deemed to be 'false'. Academics and scholars should be very worried.

## The anticipated effects

A list of articles critical of the Bill would take far too much space here, but they include a financial impact study that predicts significant financial and job losses for the publishing sector.<sup>10</sup> Among the supposedly gullible 80 delegates at the Anfasa symposium were law professors, copyright lawyers, scientists, journal editors, publishing executives, commissioning editors and other stakeholders. The two ReCreate delegates were unable to convince this diverse professional audience as to why the copyright exceptions in the Bill should cause South African authors, publishers, universities and, ultimately, the taxpayer, to subsidise the tech companies.<sup>9</sup> When information is no longer a good with a monetary value, it can no longer be traded. Killing the creator of information is in this scenario the next logical step for Flynn and his starry-eyed artificial intelligence cohorts who cannot 'see the wood for the trees'.<sup>11</sup>

ReCreate contends that the Bill will help propel South Africa's copyright law into the digital age. Indeed it will as an unpaid export, because it will then do Google's bidding and impoverish South African research and imperil our publishing industry – both academic and private.<sup>12</sup> It will also exert negative multiplier effects across the economy, as one cannot sell and tax what has been given away. The impact on GDP and international competitiveness as we head into the so-called Fourth Industrial Revolution will be incalculable.<sup>13</sup>

How can the Bill, as ReCreate claims, elevate South Africa into the digital age given that it positions the country in contravention of several international copyright treaties. Internationally, authors' rights are protected by the Berne Convention. And, from 26 March 2019, the European Parliament's Copyright Directive in the Digital Single Market, in total contrast to the South African Bill, allows benefits sharing between online content creators and their Internet hosts, thus potentially easing cooperation between the two groups. In other words, the EU Directive includes key provisions for the publishing industry and authors who will now receive a share of the revenue that press publications generate online from the use of their work.<sup>14</sup> The operating principle behind this directive is appropriate and proportionate remuneration for authors.

Copyright exceptions in the EU Directive have been set up to enable fair text and data mining, by offering publishers direct control over re-use of their content by Internet platforms, such as online news aggregators. Article 11 sets up a 'link tax', which generates income for content creators, while also requiring websites, which mainly host content created by others, to ensure that all copyrighted materials are posted with due permissions, or face litigation. The implication for publishers and, in turn, universities, is clear: new income streams are opened rather than closed and donated to big capital, as will be the case in South Africa.

## Implications for South African universities

ReCreate claims support for the Bill from South African universities, yet our university presses, the first likely casualties, are amongst the most vocal critics of many aspects of the Bill. The Bill will affect research budgeting and performance management and will imbalance the value chain as authors will themselves now pay for publishing, rather than



readers – a cost that is currently absorbed by libraries and spread across global readerships. If copyright law aims to balance the interests of creators with the needs of society, then why does the Bill ignore the interests of creators, ironically the very constituency that ReCreate claims to represent. For universities, this means that author-pays (for publication) so that readers can read 'for free'. The likely impact on the unique South African research economy remains to be assessed, but what is certain is that research funds will now be consumed by massive article- and book-processing charges.

In turn, fewer items will be published because few academics have access to such resources. University presses will be affected, possibly having to merge, cut their inventories and commission fewer books. International publishing partnerships will stall as foreign firms will not want to lose rights to their products. Local textbook production will cease, and with it will end any decolonisation of curricula as international titles written for students everywhere in the world will replace them. Under this scenario authors *and readers* will have less choice, less access and less localisation of content. Many of the 323 self-sponsored South African journals that rely on reproductive permissions to cover their costs might cease publishing, again affecting the scale and scope for South African academic authors whose performance notches and promotions often are linked to publishing output. The Department of Higher Education and Training's publishing incentive, on which universities have become reliant for variable income, could be seriously disrupted, affecting the distribution of resources internal to institutions.

In terms of sustainability locally, the funding available for article-processing charges for open access opportunities to African authors is extremely limited when compared to their overseas counterparts. Globally, 250 funds support academics applying for open access charges, although they are mostly in Europe and North America, with only three funders of article-processing charges (for journals) and two funders of book-processing charges available to Africans.<sup>15</sup> Universities and their authors will now have to fill the gap.

## Public participation?

If the 'public participation process' was as open as Flynn and ReCreate insist it was, why is it that the entire publishing sector, as well as the film and music sectors, feel ignored, alienated and bruised? These direct stakeholders have argued that the same exceptions simply cannot apply evenly across all expressive sites: literary, artistic, film and video, musical, sound, published editions and computer programmes. They are each different, with different value chains, with different kinds of contracts.

The bruising occurred, because, as Polity's Deepening Democracy Through Access to Information site misspelled it in its Freudian slip headline, 'NCOP Committee Applauds Board Participation Of Stateholders [sic] On Copyright Bill'<sup>16</sup>. Language does have power, but sometimes the 'fake' will out.

The bias is clear. Shambolic indeed!

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