

An assessment of the expected impacts of the Draft Copyright Amendment Bill on the South African market for copyright-protected published works

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Abstract

*Based on an economic impact assessment of the proposed introduction of fair use and extensive exceptions for educational use on the South African publishing industry, we find that the industry will suffer **significant negative consequences**, some of which will inevitably also filter through to lower levels of GDP and lower levels of taxation revenue for government. No doubt exists that these proposed amendments will result in declining revenue from sales of educational publications, a sharp reduction in licensing income via collective management and a substantial erosion of the incentive for the creation of educational works.*

This finding correlates with a literature study of the impact of recent copyright law amendments in other countries as well as the formal submissions made to the DTI by PASA and DALRO.

In the case of PASA, the opposition to the introduction of fair use is mainly related to the likelihood of overbroad educational exceptions threatening the viability of the educational publishing industry, as well as concerns over a potential increased level of litigation and legal uncertainty.

In the case of DALRO, the objection to fair use is even more problematic, as the organisation would in all likelihood cease to exist, with a severe negative impact on its members.

Executive Summary

At the dawn of the new millennium publishers around the world were confronted with the question of what would become of the print. Book publishers were forced to embrace digital technology and its many implications successfully, in order to remain relevant and solvent.

The printing and publishing industries were in the throes of unprecedented changes to their business environment, driven by rapid technological advancement, which had started to provide consumers at large with virtual unlimited access to electronic information and an array of publications.

In order to survive in the networked economy, where e-commerce is becoming the norm, the publishing industry has to ensure that it has an appropriate technology infrastructure in place capable of providing all of the types and levels of service that customers require.

To do so, publishers needed to build enterprise information architectures that integrate telecommunications and computing systems, front and back end operations, the whole of the supply chain, digital data flows, and state-of-the-art enterprise management systems.

The function of educational publishing is to supply learning material in all its different forms. An education system that is not supported by a competitive and efficient publishing supply chain will subject the ultimate beneficiary – the learner – to several disadvantages, especially via confusion over the quality and relevance of the learning material.

Educational books in printed or electronic format are essentially instruments of learning and vehicles of ideas, concepts, theories and empirical data, without which no society can progress. The task of bringing books and articles into existence and of purveying them to their readers is however a commercial one requiring resources and skills within the ambit of the free enterprise system (otherwise it could well be a propaganda exercise).

One of the key arguments against the introduction of fair use in South Africa is related to the legal uncertainty that would ensue, as clearly demonstrated by the experience of the United States. The decision by the UK copyright authorities not to introduce fair use was heavily influenced by the plethora of court cases on this issue that ensued in the US. According to research by PASA, fair use litigation in the US has outnumbered fair dealing cases in the UK by ten to one (between 1978 and 2015).

In addition to the usefulness of avoiding a replication of the costly system of punitive damages and statutory damages that exists in the area of fair use litigation in the US, the ability of South Africa's over-burdened courts should also be taken into account.

It would be a sad day for creativity in educational and artistic works to suffer as a result of the superior persuasive ability of one attorney over another, a point that has been underscored by PASA. Shifting the responsibility of determining public policy on copyright protection to the courts will not produce uniform outcomes and in some cases may be subjected to such long delays that it could act as a disincentive to owners and creators to object to infringements.

Furthermore, the proposed exceptions for educational uses and distance education poses an obvious threat to the financial viability of both authors and the existing collective management organization (CMO). The nature of intellectual property requires proper safeguards for licensing schemes to avoid pirating, otherwise the markets for creating and publishing educational works will suffer substantial financial harm.

Ultimately, this will exert a negative impact on an economy via lower output levels in the strategically important domain of human capital formation and developing a knowledge-based economy.

Key conclusions drawn from the EIA

1. The nature of copyright in the age of exponential technological advancement, and recent global developments in the area of the statutory protection of copyright:

- 1.1 Countries generally have laws to protect intellectual property through copyright for two main reasons, namely: (i) Granting statutory expression to the rights of authors, creators and other innovators in their creative works, in such a way as to obtain a balance between these rights and the public interest through being able to access creations and innovations; and (ii) Promoting creativity and innovation through the incentive of financial gain, thereby contributing to the ongoing process of economic and social development via a broadening of the knowledge base

- 1.2 The experience of litigation around copyright infringement in the US confirms one of the fundamental flaws of fair use, namely the inability of this approach to provide clarity on the official policy approach on copyright law. The task of assessing the fairness of actual dealings with protected works has become a matter for the courts to decide.
- 1.3 The absence of adequate copyright protection results in a free rider problem – some users benefit from the consumption of goods without paying a market-related price. In turn, the resulting market failure leads to a production level of educational works below the socially desirable level.
- 1.4 One of the key implications of digital technology with its borderless nature is that copyright law has effectively become an international field of law. Countries that defy this reality will ultimately find themselves at a disadvantage relative to countries that manage to provide adequate and effective protection for authors.
- 1.5 Ultimately, a country with an inappropriate system of copyright protection, may also suffer an erosion of its international competitiveness, as quality educational attainment at all levels represents a key element of economic competitiveness in a world that is increasingly becoming characterised as post-industrial and dependent on high levels of intellectual capital.

2. *Literature study on the impact of copyright reforms and the economic role of the publishing industry value chain in other countries:*

- 2.1 The Canadian guidelines on copyright exceptions were drafted without adequate consultation with key stakeholders in the educational publication supply chain
- 2.2 Royalties paid over to the country's CMO have virtually been eliminated
- 2.3 More than 50% of the publishers surveyed in Canada indicated that they would, in future, limit the number and variety of works they publish, particularly for the education sector
- 2.4 A majority of surveyed publishers indicated that their financial ability to invest in the latest technological advancements in the publishing industry would be curtailed
- 2.5 The significant loss of licensing revenues, which represent 16% of the EBITDA of SME publishers, has had the predictable effect of lowering turnover in the education publishing industry, which has started to threaten the existence of large and small publishers alike
- 2.6 Between 2012 and 2015, large educational publishers have eliminated 10% of their staff complement. The shrinking economic footprint of the educational publishing industry will continue to result in job losses, also amongst SMEs
- 2.7 In the space of only two years between 2011 and 2013, the contribution made by the educational publishing industry to Canada's GDP shrank by more than 16%
- 2.8 Without the UK CMOs, the transaction costs of licensing would be prohibitive. PwC has estimated that this increase could amount to between 200% and 1000%

- 2.9 A total of 90% of the CLA members in the UK who receive the most from CLA licences suggested that this income was ‘essential’ or it was ‘important’ in supporting the development of new works. A 10% decline in CLA income would result in a 20% drop in output, according to authors surveyed by the ALCS, whilst a 20% decline in secondary licensing income would result in a 29% decline in output.
- 2.10 Quoting research conducted in Australia, the PwC analysis of the UK publishing industry suggested that an exception for digital copying would stunt the growth of the digital publishing industry
- 2.11 Whilst licensed works are a highly valued educational input in the UK (and elsewhere), the licensing costs borne by educational establishments for copying from those works are less than 0.1% of their total costs. The UK government’s proposed changes to education exceptions therefore trades off longer-term provision of educational materials and continued growth of an innovative exporting industry in favour of minor short-term cost savings.

3. *Summaries of the submissions on the Draft Copyright Amendment Bill (DCAB) by the Publishers’ Association of South Africa (PASA) and the Dramatic, Artistic and Literary Rights Organisation (DALRO):*

Both PASA and DALRO have documented support amongst its members for a number of the proposals contained in the DCAB. They have also expressed concern over the way in which the draft Bill was conceived and drafted. They believe that many of the updates needed to protect the rights and interests of creators, publishers and producers will be undone by new exceptions and defences not requiring permission or payment of royalties. The key objections to the DCAB have been summarised in section 3.

4. *Concluding note: an inferior educational market framework*

Viewed from a longer-term perspective, the real danger of undue copyright law reforms is that all the users of educational content – teachers, professors and students, will suffer as a result of the limited availability and quality of digital and country-specific content, due to an educational market framework that eliminates incentives for creativity, discourages innovation and inhibits the further development of a knowledge-based economy.