Moderator: Sihawukele Ngubane, ANFASA chairman
Introducer: Monica Seeber, ANFASA copyright
Panellists:
Robin Crewe, University of Pretoria
Andrew Joseph, Wits University Press
Tusi Fokane, ReCreate
John Degen, Chair: The Writers Union of Canada
Keyan Tomaselli, University of Johannesburg

Introducer
During the time that the Copyright Amendment Bill was in development, ANFASA fought hard in respect of authors’ rights which were being eroded by provisions in the Bill. That is our job, the promotion and protection of the rights of our constituency: authors.
It is also our job to inform our constituency how they will be affected – because there is a great deal of uncertainty about that.
That is why ANFASA has organised this symposium. The purpose is not to keep fighting against the Bill, although we remain fundamentally opposed to elements of the new copyright regime which, in our view, will cause damage to writing and publishing in South Africa. The purpose of this seminar is to debate and to contribute to an understanding of what will happen next. We have invited as panellists some who share our view and some who don’t. It has never been ANFASA’s way to suppress dissent.
Mainly, we are here to share information, and we look forward to this dialogue and to a better understanding of the role of copyright in the academic sphere.

Robin Crewe
I am the chair of the Academy of Science Scholarly Publishing Committee that has been looking at the publication of scholarly journals and also of scholarly books, and developing
guidelines to try and ensure that the quality of South African publications is of an international standard.

At the beginning of this millennium the Academy of Science entered into a discussion with the Department of Education and the Department of Science and Technology about the impact of technology on scholarly publications. That coincided with a time when international publishers of scholarly journals began to raise their subscription fees to levels that many people believe is completely unjustifiable. In addition, our feeling was that they were eroding author’s rights because they were forcing authors to assign their copyrights. The Academy realised that the new technologies which were developing in electronic publishing would change that scenario radically. The EU Commission and a coalition of research funders have developed the programme ‘Plan S’ for journals and are mobilising globally for people to join that programme.

In Plan S, authors will retain copyright. Creative Commons licences will allow the re-use and copying of the material. The data will be deposited in university repositories. The plan will have a significant impact on scholarly publishing because it upends the current business models. There is some suggestion that the process would extend to scholarly books as well. The response of the journal publishers of course, is not to take any of this lying down, but to focus on ‘Article Processing Charges’ (APCs); authors will pay if their papers are accepted; the change is from a model in which the reader pays for access to the material to a model in which the reader can access the material without paying.

My feeling is that there are difficulties and pitfalls that arise from these changes. We need to be aware that the European Union and the funders are behaving like evangelists. They present the idea as having seen a brave new world that we should all move towards as rapidly as possible, but I think the question is how we respond to it to make sure that scholarly publishing in southern Africa and elsewhere on the African continent will be maintained, because I believe we need to maintain true open access – the access to read, but also the access to publish.

The current discussion is about capping article processing charges at about $2000 per article at the bottom end. At the top end it is substantially more; maybe up to the order of $10 000. For most African authors these costs are a substantial barrier to authorship. The African Academy of Science has started an open access journal with external funding and I asked the editor what the cost of producing articles was; she said that currently it is about £800 per article so you can see that for most people the costs are significant – somehow we have to create a sustainable business model for the benefit of the authors, but also for the benefit of the readers.

**Speaker from the floor**

Predatory publishing will increase. If you have a credit card, then you can publish whatever rubbish you like. There is nothing new. In the past, the sustainability of a journal depended on its quality. If it’s worthwhile, people pay for it. We can’t allow this to lower the standard of publications.
Speaker from the floor

My experience so far has been that the open source publications make authors pay. I prefer to publish in a journal which doesn't cost me. Copyright law today does not stop open source journals. Open source is in fact enabled by copyright legislation. The beauty of copyright is simply that it is a completely liberal system. It does not tell you to charge for access; it gives you the option to charge for access. I think there is an issue of the pricing of journals, but that is a political rather than a legal issue. We have set the debate up in South Africa as though money is the problem. Publication costs money. Of course it costs money, but money is not the problem and anybody who has been alive in the last ten years should know that.

Robin Crewe (in response to comments from the floor)

In relation to the first comment, on predatory journals: their rise has been exponential over the last 5-6 years; they are a result of the pressure academics are under to publish. You seek the easiest path for publication.

I don’t think it’s true that predatory journals are going to lead to a decline in the quality of journals. Journals have to adhere to certain important guidelines to protect the quality of the material that appears in them. That’s been one of the major issues that the Academy of Science has been involved with and it is also one of that the DHET has been looking at. If you look at the publication in predatory journals, the order is about 4 per cent, the latest analysis shows, lower than most other countries.

The DHET accredits journals for subsidy purposes. The National Research Fund is based on peer review and rejects applications for articles which have appeared in predatory journals. I think that’s a question of managing the process and it’s got nothing to do with open access journals. In relation to open source journals, the major academic publishers are looking for different models that they can use to actually keep their businesses going when they can no longer charge subscriptions. The article processing charges are one way of doing that and interestingly in this past month, all of the university journals have gone into an agreement to continue to pay what was originally called subscription fees, but those subscription fees will cover article processing charges for all their staff. This means that their staff will have access to all of those journals at no cost. I think there are a range of these kinds of arrangements being introduced at the moment.

The National Research Foundation and the Department of Science and Technology have said that they endorse the principles of Plan S and of the coalition of funders, and that they are going to put similar restrictions on the authors who receive government funding so that they have to publish the material in open access journals and they have to deposit the data – you can see that in the current amendment bill (clause 12 D).

In scholarly publishing, South Africa is very, very small in global terms. So if you think we can create a system locally entirely at variance with that global market I think is wishful thinking.
– and the other part of wishful thinking is that we gain huge benefits from collaboration in the work we do with people globally.

**Moderator**

Let’s keep those thoughts on the burner. I now invite Andrew Joseph from Wits University Press.

**Andrew Joseph**

When I was preparing for this symposium I was thinking that the topic should change today from benefits (who gains) to who loses, and I came up with a series of questions about the practical effects of this bill – apart from its being contradictory in places and divisive in others.

There are concerns that it will not benefit us, and these have raised a lot of feedback. So, perhaps I am preaching to the choir, but if you are not then please speak up. I think these discussions are important to have.

Speaking with my university press hat on, I think there are four things that we are interested in: interoperability and internationalism; standards – fitting in or standing out; the politics of standards; and ownership and control.

Interoperability is one of those techy words to allow formats speak technically to systems. This relates to standards and in a way is more about us fitting in than standing out – making sure that we make publications that are relevant and used as widely as possible; that allow our content to interact with world systems without the need to have to define new systems. Equally we don’t have to perform any special tasks and most importantly, international partners and organisations don’t have to do us any favours. It is important that we are able to do this for ourselves.

The third thing we are aware of is the politics of standards and the context in which these standards are developed. Mostly these developments are driven by global capital, which rarely has a positive effect on things and large chunks of our research that is produced here contributes to. This is particularly relevant to the humanities and social sciences, which by its essence critiques and contests the control that larger organisations and economies have over us, and that is the final point I want to raise – we want ownership and control of our own content.

The idea of sacrificing our content simply to have the availability or simply to have a service provided is definitely not advantageous. University presses are driven by the independence of the press, independent peer-review and as wide dissemination as possible. Money has come into this conversation now and there are greater restrictions, limitations perhaps on the need for presses to be profitable (I am talking specifically about university presses). In addition to being independent and the widest possible dissemination, there is profitability, with further implications for publishers. Robin Crewe says we in South Africa are ‘minnows’. Granted, we are not large, but we actually rate comparatively high for citations and the uses of our publishing output according to SciMago and Web of Science. I
think there is a problem with understanding this in the context of global publishing and the research imperatives of the state. My question would be how much of that content is actually published here in South Africa, and how much of that is actually published by South African authors with international publishers? It relates to my original point about ownership and control.

How much of the CAB goes towards supporting that aim, of us retaining more and more control and building presses, and aligning them to be able to expand in ways that meet research agendas, and meet our mandate as university presses in South Africa?

I spoke to a few of the local presses and asked them to send me a summary of their questions; things that were of concern to them. We are interested in the practical effect the Bill will have on us, the practical implications of enforcing the Bill for publishers, for authors and for universities. That is my interest here and to highlight how the lack of clarity in the Bill has led to the situation where we are asking these questions in a state of panic.

Publishers’ and authors’ contracts will have to be revised but we don’t know whether that needs to be done retrospectively; how far back that goes; exactly what those revisions are. We don’t know what the financial implications will be for publishers and for universities – in the case of university presses this could be hugely problematic or it could be minimal – in either event it is unclear what we need to do.

We’re concerned about the blanket licence regarding the use of published material in coursepacks. Widespread copying of copyright material without permission will deny publishers their right to an income, ultimately reducing their ability to maintain the required levels of profitability I mentioned earlier.

Then there is the principle of national treatment, and unwaivable claims for royalties to be paid internationally. This is not to say that publishers don’t have to pay royalties, but it has to be made clear. We have to know what we are doing in order to plan for it.

People are concerned how the Bill will affect DHET policies particularly in relation to the subsidies awarded to accredited publications, what effect they believe this will have on publication levels and submissions and what plans are in place to deal with the effect?

We are worried about the effect of diminishing profit for the publishing sector in general. The predicted reduction in profits for larger educational publishers will almost certainly affect the industry as a whole and what effect will that have on small independent or university presses?

We are worried about our reputation as international publishers. We are beginning to attract more international authors partly by investing in long-term programmes and trying to excel at our core objectives; quality and dissemination. If this reputation is damaged it will be extremely hard to undo.

The Bill says that citations should be included as far as it is practicable. This is a major concern to any scholarly publisher. The importance of citation in scholarship is but one of those fundamental principles that we adhere to; the looseness of this definition is a huge problem. Lack of citations in academic work would also challenge your role as educators and affect your overall university system, devaluing it.
When titles are produced overseas and are available in libraries, South African presses have traditionally bought these titles in and have made them available at affordable retail prices. It is problematic arrangement in many ways, especially of the direction of the flow of the transfer of knowledge, but it does make such books available at retail prices to the general public. A further concern for international publishers would be the use of their titles, apparently in contravention of their copyright law – where that applies.

Finally, the proposed limit of 25 years on copyright is problematic for authors as well as publishers, unable to extend publishing plans beyond a few years.

**Speaker from the floor**

I don’t have a problem if the government wants to turn universities into a one-stop shop, but then fund universities on that basis. We don’t sign up to academic publishers because we want to hand them profits. Universities are not specialist publishers. We don’t have the expertise.

I think people must realise that the basis of copyright is to create an incentive for intellectual creation and innovation. That’s the purpose of copyright and what we are doing is actually cutting off those incentives right at the knee and that is a real problem.

**Andrew Joseph**

I think we have to be cautious about exactly how scholarship is made available. You also said we can do this if we are funded to do it and that is true, but then again we are publishers of scholarly work who want to make sure that it is as widely available and widely read as possible. Your business model has very little to do with that; whether you are open access or totally profit or self-branding or capitalistic is not the point.

**Tusi Fokane**

I think that so far this has been very interesting and stimulating. I was inspired by the opening remarks, but I think from the comments in the room it seems as though the fight is far from over.

I’m from ReCreate, a coalition of various creators: some are academics, some are photographers, poets and essentially creative people. We are encouraged by the changes in the Copyright Amendment Bill, particularly by the opportunity to enhance access to knowledge, access to information and bring South Africa a little bit more in line internationally.

We have made various submissions to Parliament to ensure that there is a little bit more of a balance between what we think of as complimentary rights and clarity around general and specific exceptions. I know that there has been a lot of concern around these things, but from our perspective, we have really welcomed the four factor test which will bring greater clarity in terms of how copyright is protected,. We also bear in mind that the government had to play a balancing act given that we are a developing economy. The Bill takes into account issues of access to educational material; contractual agreements and commissioned
works; the right to earn from your copyright works through better recognition and collective management organisations and particularly the right to create your own original work, to express yourself, exercise your right to freedom of expression and also to re-create.

I think the amendments take into account purposes brought about by the digital transformation that could not be foreseen. Someone raised an interesting question around the regulating of technology companies. It is an important debate to have because it is one that we can’t really get away from in the knowledge value chain and it is a debate that is happening globally as well, but I would like to caution for us to not lose sight of ensuring that there is more access to information and knowledge.

In conversations with people, there is a sense that the exceptions are not new. They have always existed for scholarly research, academic teaching purpose and I think what this Bill attempts to do is provide greater clarity and guidelines around what those exceptions are.

Like Andrew, I also struggled with ‘who benefits’. Perhaps the more appropriate question is who loses when we look at the broader kind of knowledge production and some reports that the local publishing industry could potentially benefit through encouraging the purchase of South African produced books. To go back to that global North-global South debate, it is a pity that in the socio-economic impact assessment that the DTI did they gave very scant attention to the issues that we are discussing now – for the publishing industry, for authors – and perhaps there is an opportunity. I don’t know what could be done in the next couple of days, but there is an opportunity to perhaps put together more research of what the actual economic consequences or the fear of economic loss is actually about.

We think the Bill will go a long way to redressing the kind of educational disparities in South Africa by ensuring access for educators and learners.

Speaker from the floor

We are better off not signing up to this Bill. Your confidence is something that maybe you should try and bottle.

Socio-economic assessment: I don’t know who drafted it. You mention that it is our job to do such assessment but I don’t think that is how legislation should be passed. You pass the legislation and then see what mayhem it causes? The government should have done the assessment and made it available so that we can scrutinise it. That has not been forthcoming. This whole process has been an uncertainty so there is nothing positive to say on that front.

Ask people like Peter Magubane, who has just had his photos Photoshopped by an American under your fair use provision because that is a type of re-mixing according to the American artist. Is that the type of uncertainty you want to put our artists under? Because that is what fair use will enable; people with deep pockets will rush it over South African creators because at the end of the day the person who determines if something is fair use is permissible or not, is a judge in a courtroom and that is an expensive process. Do the maths, and if you compare the amount of copyright cases in American with that in the UK or even
South Africa, we have a trickle of cases because we know what is permissible and what is not. Fair use does not suit South African creators.

**Speaker from the floor**

I’m Felicity and I am a researcher also from ReCreate. From a personal perspective, fair dealing is very problematic in a sense because it is undefined. In a recent decision, the court and Media 24 struggled to find the definition, whereas fair use is very clearly defined.

**Speaker from the floor (lawyer)**

I come from a music industry perspective. I must with due reference and great respect to the lady who has just spoken disagree. How in any realistic universe can it be alleged that fair use creates more certainty than fair dealing? On the contrary. I don’t consider myself an expert, but I do consider myself a person with an ability to read legislation and the practical effects of it. Fair dealing is a defined list of exceptions which are clear and on which one can rely in order to determine whether or not copyright may be used without permission. Fair use is the exact opposite. It is an open-ended wishy washy open exception by which a user has correctly or incorrectly, or rightly or not rightly, used your copyright. I would say to you the comment you have made is absolutely the opposite of the truth, with respect. Fair dealing at least provides us with some certainty. No problem with extending that list of fair dealing to include whatever the government invites us to include, but fair use will provide the opposite. There is no doubt about it.

**Speaker from the floor (lawyer)**

Fair dealing provides us with some certainty. I would have no problem in extending the fair dealing exceptions because rules will provide that there is reference to international research to determine the extent of usage. I was in fact asked to be part of the drafting task team but I found it to be shrouded in secrecy … the DTI impact study was not made available to us; it was not made available to anyone as far as I’m aware [but] those who have seen it are quite critical of its content and its one-sidedness. The impact study done by the [publishing] industry shows the contrary, that the book publishing industry will be almost decimated; jobs will be lost in the thousands; revenues will drop by 30 per cent, as an estimate …

**Tusi Fokane**

When it comes to the issue of fair use, which I think is an important part of public policy consideration, the reactions from some … is that there is a sense of apprehension and mistrust and that we should rather sit and do nothing because if it isn’t broken why try and fix it. The unfortunate reality is that we have legislation on the table that proposes to bring South Africa in line with its international obligations in the digital age. We need to know that we are not in 1978 any more and we have to ensure that the rights of authors and writers
are protected along with policy considerations, to ensure that we increase access to people who previously were denied access.

I haven’t seen the [publishing industry’s] socio-economic study. [The DTI impact study says] what the actual economic implications are for authors and publishers ... the stats are available from the DTI and the Department of Planning, Monitoring and Evaluation. I don’t think there has been any secrecy around it, I think anyone can request it.

A comment was made that the Bill will decimate indigenous language publishers; I think it would be interesting to find out how because the DTI have indicated that there is a positive development for indigenous language publishers, so I’m interested in hearing more from you about that.¹ There was a comment regarding uncertainty and how it will lead to an increase in legislation, but from what we have seen, copyright cases in the US courts are about 1 per cent, and of that the fair use cases brought before the courts are a tiny percentage. So I’m not sure the argument that fair use will lead to increased litigation holds, because like any new legislation it has to be tested by the courts to establish precedents.

There was another comment that the fair dealing provision is a closed list of exceptions that would not take into account any digital uses ... I would contend that the fair use clause provides greater clarity ... it is an open list. There is no definition of fair dealing, whereas I think in [section]12B we are given direction in terms of the four factors and the amount of the work that is affected by the use, the purpose of such use (for a commercial or corporate library, or research, or education) and the potential effect of substitution on the market. So the question is who are the users ... the Copyright Amendment Bill doesn’t say that fair use is a free for all. I have heard people talking about making 2000 copies of a book; I think there are exceptions to what can be used for educational or scholarly purposes, very clear guidelines. I know it’s a very controversial topic. We do have a few more days to make further submissions in terms of the NCOP process and I would encourage people in the room to make use of that process for further submissions, particularly people who feel that the Bill is one-sided or has ignored certain views.

**Moderator**

Actually, you have two days to make the submissions. At this point I invite a legal opinion because of these contrasting ideas with regard to fair dealing and fair use.

**Speaker from the floor (lawyer)**

[We are not talking about] fair use as it is understood in the US. The purposes of South African fair use are not even alluded to in section 107 of the US Copyright Act – for example, use of a lawful copy of the work at a different time on a different device does not appear. In the Bill, the list of the kinds of actions allowed under fair use – and especially the recent addition of the term “such as” – extends way beyond. With fair dealing there are no other general exceptions, and very few specific exceptions. And the South African version of fair

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¹ Comment from ANFASA: there are no provisions in the CAB to the advantage of publishers of works in indigenous languages.
use does not include mandatory statutory damages. In the US you don’t take fair use lightly because if you get it wrong you are liable for damages. I’m simply pointing out that there is a massive difference between the South African and US versions of fair use. Also, in South African law there will be the contract overrides at the end of Section 39B; US law does not have that at all (the US is very much into freedom of contract). We are not talking about fair use like any country in the world has ever introduced.

Tusi Fokane

Some people think that South Africa is importing American legislation wholesale into South African law, and that it is unworkable. Mine is a different sort of argument, a different perspective ... I think it is an acceptable principle that every country is allowed jurisdiction over its own legislation. I think that if South Africa as a sovereign state wants to go further, and introduce educational research ...

Speaker from the floor

But South Africa is not above international treaties. No country is ...

Speaker from the floor

I’m the executive director of the Publishers Association of South Africa. Yes, we are among those who are extremely aggrieved ... as the Bill stands now authors and publishers will certainly lose. We are extremely concerned that in this country, which has one of the most viable publishing industries, the picture will change after the Bill ...

I tell you, mam [in response to the panellist from ReCreate], that your sources on authors and publishers come from the DTI and the DTI has never engaged with us, never investigated how copyright operates in the publishing industry. In book publishing around the world you don’t have a 25-year limit on assignment. [Publishers] now have to adopt something that was [intended for] musicians. In this country, [academics] are not full-time writers; they write at night or at the weekend. We have to provide incentives to write ... and increase output. If their material is used for free, publishers will no longer be able to attract authors. Ask yourself, if we were to ask you to write for nothing would you write for nothing?

Has the DTI genuinely consulted with the stakeholders?

Someone says we are being reactionary, that we want things to stay the way they are [in the current Act] but it is nothing like that. We are all South Africans, we all want transformation, we all want to compete globally, but if you differ with fair use you are declared reactionary. Tomorrow they will be asking: why are the books that used to be produced no longer produced?

Speaker from the floor (professor of IP law)

One US writer has said that fair use in America simply means the right to hire a lawyer to defend your right to create ... it is a system that may be tolerable for the very rich ... at the
last count only five countries in the world had [adopted] fair use, and at least three of those were recent adoptions because of lobbying by the likes of Google. Google for example had commissioned the Lloyd’s report to get New Zealand to adopt fair use. I was in Hong Kong in July, they were lobbying the Hong Kong government to adopt fair use. We are told there’s certainty in fair use, but no American lawyer will give you a legal opinion of whether a particular use is fair use because of the statutory damages. This is my real concern when it comes to scholarship; there’s a real danger that once we deal off all commercial packages the only source for academic publishing is through the government paying for it. And as you know that is the shortest road to censorship.

**Speaker from the floor (lawyer)**

ReCreate as an organisation has an interesting argument, wanting to be able to use works to recreate more works.

Now, reading is not using, but reproducing for the purpose of making another copyright work is using … ReCreate’s argument is to say, “We would like to have fair use to enable us to create new, original works” [but the solution the Bill] is offering to achieve that end is this massively long Section 12, plus a contract override. Why does ReCreate not make a petition for the kind of fair use rules that would support the creation of third copyright works?

At this point a video is shown. The speaker in the video is John Degen, a Canadian poet and a novelist with three published books. He is executive director of the Writers Union of Canada, and chair of the International Authors Forum (IAF) in the UK. As the South African member of the IAF, ANFASA had requested an international opinion, to be voiced at the symposium. What follows is a slightly edited version of that opinion.

**John Degen**

*I am Executive Director of the Writers Union in Canada. I represent over 2100 authors of books ... I’m also the chair of the International Authors Forum which is an umbrella group of about 750 000 writers ... I am speaking today from a long and professional experience of copyright, and especially of the chaos poorly designed copyright reform can bring into a domestic market for a writer.*

*I understand that proposed changes to South African copyright laws may adversely affect domestic writing and publishing.*

*We in Canada are now almost seven years out of an expansive change in copyright ... and so I can perhaps help you look into your future. I understand you are asked to adopt a very broad exception, similar to the US fair use model. That suggestion arises in Canada from time to time as well, and has been rejected every time by the government, but they have nonetheless expanded our traditional fair dealing provision, simply to make it painfully broad and undefinable.*

*How long has copyright reform being going on in Canada? I would date it from the widespread adoption of the photocopier in schools. As soon as these machines*
became commonplace in libraries and school administrations, the writing and publishing sector in Canada began to bleed revenue. Widespread copying of books, in part or in whole, had an immediate impact on book sales, especially institutional book sales, class sets for instance – and therefore on authors’ royalties. Canada’s writers and publishers addressed this problem by asking for, and getting, our own copyright collective [licensing body] … creating that collective was not easy, we had to fight, and we fought with the educational and library sectors, strangely, who were against the very idea of licences for photocopy use. This was, for most Canadian writers, the first time we were confronted with the strange idea that our rights as authors are somehow viewed as in conflict with education and public sharing.

Fast-forward, and our collective has been issuing licenses for copy use for governments, corporations and most importantly, educational institutions in Canada for 23 years. Its royalty distribution to authors and publishers had grown to almost 31 million dollars – a huge contribution to the health and strength of our domestic writing and publishing industry. After copyright reform was introduced in 2012, the drop is steep and sudden.

Let me first just put those numbers into perspective for you: measured in terms of land mass, Canada is the second-largest country in the world, right after Russia, but our population is relatively small. What that means is that our domestic market is spread out, and distributing books in the Canadian market is not an easy task. Our market for Canadian literature, is so much smaller than the US market and even Britain’s, plus we have an historical connection to the UK, and the US is right next door. We are flooded with work from the other, larger markets, with American and British books, and that means that any disruption to the Canadian market for Canadian books has a negative multiplying effect on success rates and income for Canada’s authors – and one of the biggest markets for Canadian books is our education system. Disrupt the education market, and you endanger Canadian writing. Surely the same is true for South Africa.

As part of the 2012 Copyright Modernisation Act, new categories were added to our established fair dealing provision, expanding it radically. One of these new categories was education. The Canadian education sector had been lobbying for this change for a very long time. They claimed it was only needed to allow them to incorporate new ways of teaching in the digital age, to use publicly available online materials to project images in the classroom for illustration. These claims sounded reasonable, and yet the authors and publishers were worried for our established licensing market. We wanted to make sure that no changes to fair dealing were going to disrupt that established and extremely necessary market. So, educational representatives then went to parliament and explicitly promised that they would not use the new education category to avoid licensing arrangements. Parliament accepted those assurances and this, as it turns out, was a terrible and damaging
mistake. As soon as 2012’s Copyright Modernisation Act was passed, the Canadian educational sector began to radically and unilaterally expand their definition of fair dealing. Almost as soon as the Copyright Modernisation Act was passed into law, the Council of Ministers of Education (CMEC) was ready with this new advice right away, and this advice flew in the face of their promises not to abandon licensing—and it had an immediate impact. Elementary school boards and post-secondary institutions across Canada excused themselves from collective licensing agreements, and then they self-defined what they could take under this new fair dealing category. Importantly, there was when these new lines were adopted. They claimed up to 10% of a published work, entire short stories, entire chapters, etc., all free for reproduction. Essentially, what Canada’s education sector did was to take the previous licence terms under which they had operated and turn them into a fair dealing definition. They claimed the ability to become their own publishers, printing course packs without ever having to pay the original authors. That is a direct loss to the authors of those works who previously were paid for this use—and course packs are used by thousands of students across the country.

It’s an ongoing and growing loss for our sector. The Writers Union of Canada has just completed an income survey of the writing sector in Canada, and we see those royalty losses directly reflected in author incomes—78% loss over the last 20 years. Importantly, 28% of that drop was over the last three years directly tied to educational copying without payment. It cannot be a coincidence. The sectorial losses since 2012 are calculated at between 30 and 40 million dollars per year. That is simply unsustainable and Canadian authors are leaving the business as a result. And yet somehow, student material costs have gone up. Their money for all this copying has stopped going to us but it has somehow not manifest as savings for students.

Free copying naturally has an impact on primary sales as well. Recently research has shown a dramatic decline in the recent book sales in the Canadian educational institutions and, importantly, a rise in single book orders. Why buy class-sets of books when you can buy one book and copy from it for free? This is happening in Canada. The result of this trend? Canadian publishers are moving away from publishing books for the Canadian market. This means more US and international material in Canadian classrooms that are crying out for Canadian material.

No one wins when education does not pay a reasonable copyright licence. We tested the interpretations of the education sector by challenging them at Canada’s Copyright Board, and we won again and again. Our big test case was against one of Canada’s largest universities, York University, all the way to Federal Court, and they lost. I predict in South Africa you’ll see the same level of activity and misinterpretation of court rulings by those who wish to copy for free. US fair use is little more than the right to hire a lawyer, and this is a description that comes from some of its greatest proponents, in fact. Judging by Canada’s expansion of fair
dealing, it does not provide clarity or certainty; only confusion and disagreement which leads to court action. York’s own fair dealing guidelines are not fair in either their terms of their application, and it’s evident that York created the guidelines and operated under them primarily to obtain for free that which they had previously paid for.

The education sector has now taken us to court. Canada’s Ministers of Education launched a lawsuit to claim a refund on past tariff payments, for tariffs they now refuse to recognise themselves. These cases will undoubtedly drag on for another couple of years, so we are just going to stay in court. Finally, the statutory review of our Copyright Act (a measure that was ordered with the passage of the Copyright Modernisation Act in 2012) ran with hearings all last year, and we in the writing and publishing sector are now anxiously awaiting recommendations from the parliamentary committees that were running the review about how to make the law better. The payments office is asking for the law to be changed in such a way as to bring large scale educational copying back under mandatory licensing.

Specifically, we would like to see the word ‘education’ removed from the fair-dealing provision. It has caused nothing but damage. We believe that the categories of research in private study, which has been in fair dealing forever, provide more than enough use for educational materials. We would like it made explicit that fair dealing does not apply in instances when a licence is available at a reasonable fee. This is a measure that is practised throughout much of Europe, and I believe that it is the best way to handle this situation.

Let Canada be a warning to South Africa. Please, do not weaken your domestic copyright protection. That is what we did and it has not worked out.

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Keyan Tomaselli

I myself edit two international boards of three university presses, in Canada, the US and South Africa. I am speaking from my own experience. I am going to explain what I think is going to happen at universities.

This piece of legislation lacks precision, it lacks focus, and it lacks inter-articulation between sectors.

The South African academic publishing terrain is characterised by state research incentives paid to universities to which published authors are affiliated, distributed differently within different universities. But now, through the Bill, the national research economy has been disrupted because the Bill broadens and extends the exceptions to the exclusive right of the author in respect of her work, and I think the knock-on effect has been indicated already – universities themselves may benefit but also lose from the Bill’s provisions.

The Bill’s exception for scholarship, research, teaching and education is of course what is of concern to ANFASA. Publishers, through the DHET subsidy, enabled the transfer of huge financial incentives, while they largely absorbed the cost of editing production, distribution
and marketing. The editors themselves get nothing. The publishers get nothing. The universities get everything.

Different universities disperse the funds differently, totally unique to South Africa. It is a perversion of the academic process if we take the rest of the world as the norm.

The Bill’s provisions will require universities firstly to re-examine the composition of the research and publication of the value chain and its reward systems. How does this affect performance management? It requires universities to assess the consequences related to the national functioning and internal administration of the uniquely structured research and publication economy.

Licensing is a mutually beneficial operation in that the user pays a fraction of the price of a book. The authors of the books might receive a small royalty. Now, it looks like publishers will lose control of how publications would be reproduced, placed on internal websites, packaged, disseminated and used. Violations of the exceptions for fair use (however it is defined), expose locally produced scholarship to expropriation, reuse and misappropriation. This is in turn would downgrade South African public scholarship to junk status. Senior authors would relocate their research work from the South African space to international publishing environments. As one scientist commented in an article in the *South African Journal of Science*, when South Africans publish overseas, their work gets lost, especially to the South African market.

Finally, international publishers might refuse to partner with South African publishers. As the publishing consultant Brian Wafawarowa observed, the only stakeholders full of praise for the Bill are technology companies and activists who seek to weaken copyright. It is quite telling that the same technology companies that are against the imminent implementation of Article 13 of the copyright directive of the European Union parliament (which requires technology companies to monetise usage and pay fair compensation to creators and right holders) are celebrating the South African situation. Their intentions have nothing to do with the viable sourcing of creative content from a developing country.

At the public hearings of the Bill, arguments were made that authors are restricting access by opposing further limitations on their economic rights. Contrary to such claims, copyright does not hamper them in carrying out their duties. I have never experienced any resistance to obtaining an article or a book that I need. I use the Library, go through Research Gate, I contact the editors, I contact the publisher. So, we do not restrict our readership. We want people to read. It’s not in our interest to prevent people from reading and citing our work.

The writing of textbooks is already discouraged by universities, notwithstanding their value in the classroom, because DHET does not recognise textbooks as a bona fide research outputs that qualifies for publication incentives. But South African textbooks are very different, quite often, to the international textbooks because the international textbooks are written in a sanitised, decontextualised, ahistorical, unspecific set of general principles that will speak to readers across the world. South African textbooks deal with the nitty gritty of what’s going on in southern Africa and Africa. The ones that appeared in the last couple of years deal with decolonisation debates.
[The new copyright regime] will change both the research economy and the ways that academic performance will be measured. [It] will impede public ability to produce books and journals locally, maintain competitive prices, and ensure the widest market reach. The subsequent risk is the degrading of locally evidence-based research, knowledge production author and citation. An exception allowing portions of works to be cut-and-pasted into theses and scholarly outputs (only having to acknowledge the author of the original work if practicable) will remove plagiarism from the scope of copyright infringement.

There will be a decrease in the relative share of exports of local titles, and an increase in the share of imports of foreign titles, and as the rand crashes the cost of imported titles goes up. And a decline in employment of 30 per cent, or the equivalent of 1 250 jobs.

So, to conclude, my impression of the potential impact of the legislation is that it will fundamentally disrupt university performance management systems and research budgets which rely almost totally on publication and DHET-accredited journals and books.

Moderator

Let me allow [a lawyer] to come in here and open up to the practical solutions.

Speaker from the floor (lawyer)

I’m afraid I don’t have any solutions. Maybe we can have a discussion around the room, to see to what extent the authors among us have any ideas of how they will progress under the new law. Bear in mind that the authors in this room are authors of books that have some form of educational purpose, whether tertiary or school, and those purposes are the very purposes specifically mentioned in the copyright exceptions.

Copyright law gives authors exclusive rights over their works, so people who would like to reproduce these works or communicate them or perform them have to approach the author. A lot of people don’t like that, but the general principle of authors being entitled to remuneration is a starting point for the authors in this room to work on.

An exception is a defence to copyright infringement. The reproduction has been made, the right that is normally reserved exclusively to the author has been undertaken by another person and that other person must have an agreement to do it – or must be operating under an exception. There have been some misconceptions that the exceptions change the balance of the burden of proof. That is not so, but it does create the type of situation that John Degen mentioned. He was referring to universities in Canada that just said, ‘Oh, great we’ve got education for fair dealing so therefore we are now going to stop paying royalties.’ That is incorrect, but it is going to take 10 years of litigation to sort it out. There is the case of York university, now under review, and it’s going to take another four or five years before you get a judgement from the supreme court of Canada. I earlier referred to the case of Cambridge University Press vs Georgia State University. We would hope that South African universities are not going to be as antipathetic to the needs of authors.

CEO of DALRO
I just want to pick up on the last point about what to expect in terms of how many users will respond. You know, cannabis was allowed for medicinal use, in the privacy of your space...but we know what has happened – free smoking everywhere. That’s essentially what is going to happen in this instance. I’ve heard arguments that this not a free for all, but a number of universities have delayed paying this year’s [blanket licence fees] in the hope that the Bill will soon come into force and they will not have to pay. Their attitude is that once this becomes law they will stop paying for copying. That is what’s going to happen, wholesale copying.

So we do have a problem. The purpose of the Bill was to improve the lives of creative people. Someone has asked: who are the losers? Professor Ngubane, the Zulu academic writer [turns to the moderator], nobody else in the world is going to use your work, it is used in South Africa but you’re not going to get paid. You are going to lose.

**Speaker from the floor**

I represent LIASA, the Library and Information Association of South Africa. However I’m a public librarian and listening to the discussion it’s a bit overwhelming for me. I’m actually trying to translate this into my own environment. We are trying to promote reading and we encourage people to read. At the same time, we are faced with a situation where books have become very expensive for us over the years. The number of books that we used to buy with our budget has reduced significantly. And now, listening to this discussion, I begin to ask myself whether writers will be affected to the extent that there would be less and less that is actually published. Does the Bill look at a situation like mine? The issue of reading is basically an issue of development, so how will development be affected?

**Participant from the floor**

I’m not an ANFASA member, and am not here to help with your intervention...but of course we are all concerned about education. The paradox is that the government promotes ‘access to education’, by riding roughshod over authors’ rights, undermining the very values that you want to encourage. You want people to write and grow a pool of knowledge and intellect in South Africa but at the same breath you are saying that the products of that type of activity will be expropriated, disregarded. So you know what, I’m better off selling fried chicken on the road then spending my intellectual efforts writing a book. That is effectively what we will come to. It’s a dumbing down of our culture and our intellectual capacity. That is it, in short. So, yes, we want people to read, but your library budget will be sufficient in years to come because there won’t be any books to buy.

The second point I want to make is that those who are so happy about all this great educational freedom and fair use policies, they must be honest with themselves. Did they get their victory for a proper purpose or were they at the beck and call of some other entity, doing its bidding and compromising our democracy to achieve those goals? Because the process of how this Bill came to be, before it came to the National Council of Provinces does
not pass muster. It should never have gone this far in light in light of the lack of transparency.

In light of what we hear, is the DTI squeaky clean? They have organised events to discuss the Bill, co-hosted by Google. Why do we just ignore it and allow this process to continue? It really speaks about the integrity of our constitutional values and our institutions. And that’s the real problem. I don’t say the law must be the way I want it to be, but what I do expect is a process that’s transparent and has integrity, and I don’t believe the process of the Bill came anywhere close to that.

**Speaker from the floor**

To add to that: and as has been said, who benefits, really? When came to light that the fundamental nature of our Copyright Act was to be changed, it came to light to me – as a person who follows this process very closely – in Google’s offices, at the DTI in Pretoria at a workshop called by Google. My colleagues will confirm that many times the following phases were used with abandon: ‘my colleague at Google’, ‘my counterpart at Google’... we have arrangements and commitments to the technology sector’...I could not believe what I was hearing!

**Speaker from the floor**

We have been persuaded into a user-access oriented system.

**Speaker from the floor**

We thought after the CIPC report, the copyright commission, the CRC report, that the DTI’s mission was to make lives better for creators. Something happened in the interim to change that. Something happened in the interim to create an input driven by the biggest user in the world. In other words, the technology sector has been selected and it’s interests have been prioritised over the interest of the creative sector – at the behest of those users through government. This is the only conclusion one can draw.

Looking at the Copyright Amendment Bill, both wearing my industry hat and wearing my author’s hat, who benefits? Nobody but technology.

**Keyan Tomaselli**

I’d just like to extend the argument to the cost of education. If authors make the fruits of their labour available at no charge to education institutions, then we must extend the analogy to precisely companies like Google and the technology companies from where we buy our equipment, and the software companies that sell the licences. The amount of money that has spend by universities on software licenses and technology, constant upgrading of computers – in comparison to not paying for written materials. Then we can take it further. Every academic, every administrator, every manager and VC should take a cut in salary in order for that money can be allocated to free education for the undergraduate sector. Despite the fact that we’ve got bonds to pay off and medical bills to
pay and children to raise and school fees to cover, because the principle is that authors must pay for other people’s education. Publishers must pay for other people’s education. The entire industry will collapse overnight if that is the situation. But once the technology companies are required to make their technology available, I can guarantee you this, you’ll get obsolete equipment once and then that will ensure court cases against universities for pirating software. I remember going through this kind of process in the early 90s when we were no longer allowed to use pirated software. Government instructions. We were no longer allowed to just photostat at will. Government instructions. We had to standardise everything in terms of international law and international conventions, to bring us back into the community of nations. Government is not thinking holistically it’s meeting one particular political agenda and the rest of us are going to pay. And eventually the musicians will pay as well, because I’m sure that the big companies will find loopholes in a Bill that is so badly written that there are thousands of loopholes. Those of us who are going to be affected don’t have the finances to go to court. The Googles of the world can afford to buy off the courts. There are certain kinds of agreements with government that the public does not know about. So, if we want to make education free it’s quite simple. We all work for nothing. And then expect the suppliers to provide nothing and to provide maintenance for nothing and upgrades for nothing.

**Speaker from the floor**

I am from a national organisation of blind and visually disabled persons. Early during the proceedings, mention was made of the Marrakesh Treaty. It was mentioned in passing but nothing more was said about it. It came into existence almost six years ago and still our government has not ratified it even though some of our neighbours have. We do not hold a brief either for or against the Bill, we just want our people to have access, and I would appeal to those opposing the Bill to keep this in mind. What I’ve been calling the ‘bickering’ about the Bill, has been delaying the process. So we appeal to you and especially the publishing industry we say you have a duty, an obligation, to make sure that no body is excluded from publications. We have been fighting this battle for a long time and you know we are in a situation where we have access to a fraction, something like even less than 1% of what is published.

**Speaker from the floor**

It was not objections to the Copyright Amendment Bill which delayed the government’s decision to ratify the Marrakesh Treaty. I myself heard a senior official from the Department of Trade and Industry insist that they would not ratify Marrakesh until it was expanded to include every single type of disability that could possibly be included in the law and would not sign anything that benefited the visually impaired alone.
**Speaker from the floor**

I want to concur with what the previous speaker said. I actually heard it too, was it the DG? I’m standing up really to assure Christo and the entire community of the blind and visually impaired learners that the publishing industry has fought to ensure that its materials are accessed by each and every one of the people in that community. In fact before the Marrakesh Treaty we inserted a clause in a number of the publishing companies that belong to PASA that enabled all publishers to provide their PDF copies to the library for the blind or any other schools converted into brail or any other format that is accessible. We will continue ensuring that we’ve done before that each and everyone of your submissions request for the ratification of the Marrakesh Treaty is advanced.

**Speaker from the floor (lawyer)**

I think I can respond insofar as the legislative processes is concerned in response to Christo’s point. The new DDG made a proposal to the national assembly portfolio committee to do the bill in two phases because it very quickly became apparent that there were a lot of things that were not controversial, and one point that certainly got support across the board was accession to the Marrakesh Treaty and an exception for the visually impaired. A suggestion of two phases was in fact made by the DTI but I’m afraid the politicians turned that down. It was soundly rejected.

**Speaker from the floor**

I just wanted to thank ANFASA for organising this but also to say I don’t know where things go forward from here, what levels of involvement and commitment people are willing to express.

**Introducer**

We have been recording the proceedings today. They going to be transcribed tomorrow and then we will put together a report. At the start of this meeting when I said that ‘the deed has been done’, there were murmurs of dissent, and perhaps the deed hasn’t quite been done but I said it because ANFASA has worked very very hard over a long time. We have written what seems to me like endless submissions, and I am pessimistic about about the effect of yet another submission even accompanied by a report because in all the work we’ve done and in all the things we’ve said and all the consultative meetings we’ve been part of, and all the submissions that we’ve writtent, the letters, e-mails, not a single word of what we have said, not a single suggestion we ever made has ever been taken into account. However, we are still putting together that report and everybody who is present here today and signed the register will receive a copy. It will also go to the National Council of Provinces (which set the deadline very unrealistically as Friday) and I hope that your voices will be heard. I can only say that I hope they will.

**Speaker from the floor (lawyer)**
The brief comment that I want to make is in relation to journal publication and the massive changes in way journal publishing is going to take place. There needs to be an urgent discussion between the various players involved in scholarly publication, the DST, the universities and the science councils because if they don’t do that it’s very likely, as Keyan mentioned earlier, that the number of journals published locally will decline drastically.

**Keyan Tomaselli**

Yes, we have already agreed that this item should be on the next agenda, later in the year. New ministers come in, new DGs are appointed, so democracy and policy are not fixed, carved in stone forever. So we need to see the quality as kind of dynamic organism that can be shaped.

But it’s not going to be easy. Lobbying is something that takes time, over number of years. I think most people in this room seem to be sympathetic to the need for the Bill to be modified, to be re written and to be made much more representative. Perhaps separate bills because music and authorship are completely different activities with different regimes and different values chains. We must educate our public representatives about these kind of things, but the problem is that doing it in election year is always very difficult. The national scholarly editors forum on which 323 editors are represented is a very good place to continue the discussion, and also with regard to the lead that had been taken by ANFASA.

**Tusi Fokane**

We need to ensure that we get legislation and policy that’s going to work in the best interest of all South Africans. I think that the DTI faced a particular challenge, trying to balance the many diverse competing interests. There has been intense lobbying. If we look at it from the perspective of who benefits and who loses we will hopefully be able to make better policy decisions. At ReCreate we really want to see a Copyright Amendment Bill that will provide better access to information.

**Moderator**

Can you give our speakers a big round of applause? I must say that we are grateful that you’ve honoured our invitations and we are humbled by your presence and your contributions to this discussion. And finally I just want to take this opportunity to thank all of you who are very busy but stayed on – we have been here for the past three hours. I think this event was a success, and not only for the benefit of ANFASA. Others have also gained from the kind of platform that we created here. I thank you and wish you a safe journey from here. We will need to have another workshop to deal with the consequences and the after-effects if the bill has been passed.