

The expected impact of
the 'fair use' provisions
and exceptions for
education in the Copyright
Amendment Bill on the
South African publishing
industry

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Abstract

The South African government's intention to amend the Copyright Act, 1978, has resulted in the introduction of the Copyright Amendment Bill, no. 13 of 2017 ("the Bill").

PwC was engaged by the Publishers' Association of South Africa (PASA) to conduct an objective and independent assessment of the impact of the provisions relating to 'fair use' and exceptions for educational and academic activities.

Under these new exceptions, no remuneration will be payable for reproductions and other acts which would otherwise have been limited by copyright. This economic impact assessment investigates whether harm will be caused to the publishing industry by the free-of-charge uses that will be permitted by these new exceptions. Overbroad exceptions mean the absence of adequate copyright protection, which in turn results in a 'free rider' problem, leading to a production level of educational works below the socially desirable level. Ultimately, this will exert a negative impact on the economy via lower output levels in the strategically important domain of human capital formation and the development of a knowledge-economy.

In quantifying the anticipated economic impact of the proposed exceptions in the Bill, it was found that it would impose significant negative consequences on the South African publishing industry. Eighty-nine per cent of the publishers surveyed believe that the promulgation of these exceptions as currently worded would impact negatively on their operations, with a weighted 33% decrease in sales expected. In many cases the response to these negative impacts would be significant restructuring, retrenchments and – in some cases – business closure. On a weighted basis, a 30% decline in employment is expected in the event that the Bill is promulgated. It is also likely that the volume of imported publications will increase and exports will decrease. South Africa would become more dependent on imported knowledge production.

These findings are largely consistent with a review of available literature on the impact of copyright reforms in Canada and the potential impact of similar reforms once contemplated in the United Kingdom.

Executive summary

An economic impact assessment (EIA) provides a quantitative method to estimate the economic effects of a particular project, policy measure or even entire industry on society. The objective of this EIA is to quantify the possible impact of the ‘fair use’ provisions and exceptions for education contained in the Copyright Amendment Bill, no. 13 of 2017 (“the Bill”) on the publishing industry in South Africa.

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 as regards access to 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 existing knowledge base.

Under these new exceptions, no remuneration will be payable for reproductions and other acts which would otherwise have been limited by copyright. This EIA investigates whether harm will be caused to the publishing industry by the free-of-charge uses that will be permitted by these new exceptions. Overbroad exceptions mean the absence of adequate copyright protection, which in turn results in a ‘free rider’ problem. Some users benefit from the consumption of goods without paying a market-related price. The resulting market failure leads to a production level of educational works below the socially desirable level.

In order to establish a ‘baseline’ against which the impact of the ‘fair use’ provisions and the new exceptions in the Bill can be assessed, PwC first constructed an estimated economic value chain for the book publishing sector in South Africa, drawing on available national accounts, supply and use, and other data. Based on this, it determined that in 2015 the book publishing sector accounted for domestic production valued at approximately R5.3 billion, and had sales (including net imports) of R6.4 billion.

We then used the results of a survey of a representative sample of publishing companies in South Africa to estimate what the impact of the proposed introduction of ‘fair use’ and exceptions for educational use would be on various indicators for the sector, including turnover, employment, exports and imports, and revenue earned from secondary licensing of content. Collectively, respondents to the survey had total sales in the latest financial year of more than R3.5 billion – equivalent to 55% of the estimated total for book publishing in 2015 – and indicated full-time and part-time employment of 7,657 people.

Based on our analysis, we found that the publishing industry would experience significant negative consequences, should the proposed exceptions be introduced. These include:

- A weighted average decline in sales of 33%. To the extent that respondents are representative of the entire book publishing sector, it implies a decrease in sales revenue of approximately R2.1 billion on the baseline, and concomitant reductions in GDP, and VAT and corporate tax revenue collections;
- An increase in the relative share of imports of domestic sales;
- A reduction in the relative share of exports of total sales of the sector; and
- A weighted decline in employment of 30%, equating to around 1,250 full-time equivalent jobs.

Eighty-nine per cent of the publishers surveyed believe that the promulgation of the Bill, as currently worded will impact negatively on their operations. In many cases the response to these negative impacts would be significant restructuring, retrenchments and – in some cases – business closure.

Ultimately, this would exert a negative impact on the economy via lower output levels in the strategically important domain of human capital

formation and the development of a knowledge-based economy.

The proposed amendments would result in declining revenue from sales of educational publications, a sharp reduction in licensing income via collective management organisations and an erosion of the incentive for the creation of educational works.

These findings correlate with studies of the impact of recent copyright law amendments in other countries.

A review of available literature reflecting the impact of the adoption of a 'fair dealing' exception for education in Canada in 2012, indicates the following:

- Collective licensing income in respect of public works have been substantially reduced.
- More than 50% of the publishers surveyed indicated that they would, in future, limit the number and variety of works they publish, particularly for the education sector.
- The majority of surveyed publishers indicated that their financial ability to invest in the latest technological advancements in the publishing industry has been curtailed.
- 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 educational publishing industry, which is now threatening the existence of large and small publishers alike.
- Between 2012 and 2015, large educational publishers 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.

- 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%.

Available literature on the proposals in the United Kingdom to expand the scope of the exception to education and to restrict collective licensing indicated that:

- A total of 90% of the Copyright Licensing Agency (CLA) members in the United Kingdom who receive the most revenue from CLA licences suggested that this income was 'essential' or '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, the member of CLA representing authors, whilst a 20% decline in secondary licensing income would result in a 29% decline in output.
- Whilst licensed works are a highly valued educational input in the United Kingdom (and elsewhere), the licensing costs borne by educational establishments for copying from those works are less than 0.1% of their total costs. The United Kingdom government's proposed changes to education exceptions would therefore have traded off the longer-term provision of educational materials and the continued growth of an innovative exporting industry in favour of minor short-term cost savings.

Glossary of key terms and definitions (alphabetical)

Broadly defined education sector

The broadly defined education sector consists of all primary, secondary and tertiary education activities.

Collective Management Organisation (CMO)

A CMO is a licensing body which grants rights on behalf of multiple rights holders in a single licence for a single payment. The CMO charges an administrative fee for the licence, which it deducts before distributing the remainder as royalties. CMOs are typically not-for-profit organisations that are owned and controlled by their members, the rights holders. Their services allow members to spend more time on their areas of creative production of works by taking over the administrative tasks involved with royalty payments. As such, CMOs fulfil an important role in the realm of the publishing and printing industry via an indirect positive impact on value added.

Copyright

Copyright grants authors, and their successors, exclusive rights to reproduce their works or to carry out other specified acts with their works. Copyright only subsists in works that are original and which are in material form.

The Dramatic, Artistic and Literary Rights Organisation (Pty) Ltd (DALRO)

DALRO is a multi-purpose copyright collective management agency and rights broker, established in 1967, which administers various aspects of copyright on behalf of authors, artists and publishers. DALRO's main areas of administration are reprographic reproduction rights (from published editions), public performance rights (including stage rights for book musicals and dramas), management of film rights granted by authors, and reproduction rights (for both publishing and copying) in works of visual art.

DALRO is a member of the International Federation of Reproduction Rights Organisations (IFRRO), as are CMOs from many other countries

in the world which license reprographic rights for published works.

Economic impact assessment (EIA)

The educational publishing industry value chain, incorporating a range of primary inputs by creators of works, generates significant economic benefits for communities that may not be well understood by all of the key stakeholders in the industry (including regulatory bodies).

Economic impact assessments provide a quantitative method to estimate the economic effects of a particular project, policy measure or even entire industry on society. Typically, economic impact studies use financial and economic data to generate estimates of output, GDP (value added), employment, salaries and wages, imports and tax revenues that are associated with changes in the level of economic activity resulting from the project, policy measure or industry being analysed.

An amendment to the regulatory environment will inevitably induce an exogenous change to demand for a particular industry or the whole economy, which will affect the turnover of companies, value added, employment and income (both for labour and for the providers of other factors of production). Where a regulation effectively translates into a disincentive for productivity within a particular industry, the logical outcome will be a decrease in demand for the industry's output. It is important to note that this is only one element of an EIA, as decreased production in one sector will give rise to a lower level of demand for the output of upstream sectors (suppliers of primary and intermediate inputs), as well as a decrease in downstream industries that use the products of the given sector as inputs. Such activities will, in turn, also impact negatively on the incomes of all the employees in the industry's total value chain.

In general, economic impacts can be estimated at the direct, indirect and induced levels.

- The *direct impact* results from expenditures associated with the creation and publication of an educational work, which includes labour remuneration, materials and economic capital (such as a printing press, office buildings and computers).
- The *indirect impact* results from various suppliers of products and services encountered in the publication industry supply chain responding to the demand for their inputs, which also requires some element of labour remuneration and expenditure on their own industry-specific intermediate inputs. These so-called second-round impacts would not occur but for publishing operations.
- The *induced impact* results from the increase in household incomes of employees and recipients of other factor incomes (interest, rent and profits) in the publishing supply chain, of which a substantial portion is spent on purchasing goods and services at a household level.

The total economic impact comprises of the above three impacts.

Educational publishing

This includes publishing works for purchase by schools, higher education institutions, further education institutions (collectively referred to as ‘educational establishments’) and students, for educational purposes.

Fair dealing

Definition: A legal doctrine that allows for certain uses of copyrighted material without permission of the copyright owner.

Fair dealing therefore represents an exception to copyright infringement, as laid out in the copyright laws of a number of countries, including South Africa, the United Kingdom and Canada. It is therefore not open-ended, but the fair dealing purposes are specifically stated by the relevant regulations. However, if a work is copied without authorisation for a purpose other than a fair dealing purpose, it cannot be a fair dealing regardless of whether the copier is pursuing a meritorious objective or not.

Fair use:

Definition: A limitation on exclusive rights in works of authorship granted under United States copyright law.

‘Fair use’ is a statutorily codified defence to copyright infringement, but it is different from fair dealing due to its open-ended nature. The United States copyright laws do not have a finite list of purposes that define exceptions to copyright infringement, but they include purposes such as criticism, comment, news reporting and teaching (including multiple copies for classroom use).

The fair use provision in United States copyright law prescribes four factors that must be included in assessing whether the defence applies:

- Purpose and character of the use;
- Nature of the copyrighted work;
- Amount and substantiality of the portion of the work used; and
- Effect of the use on the potential market or value of the work.

Input-output methodology

The input/output (I/O) model of economics uses a matrix representation of a country’s economy to predict the effect of changes in one industry on others, and by consumers, government and foreign suppliers on the economy. It may furthermore be applied to a particular exogenous occurrence that induces measurable economic consequences (e.g. a transaction involving foreign direct investment or a major event such as the hosting of a conference or international sports event).

It is often utilised in economic impact assessments (EIAs) of particular government policies that may entail either an incentive to stimulate a specific economic activity or a proposed new regulation that may introduce an effective disincentive for economic activity.

I/O analysis considers inter-industry relations in an economy, depicting how the output of one industry flows to another industry where it serves as an input, thereby making one industry dependent on another (both as customer of output and as supplier of inputs).

The Publishers' Association of South Africa (PASA)

PASA is the largest publishing industry body in South Africa. It represents book and journal publishers in South Africa in the field of non-fiction, fiction, educational, academic and trade publishing. PASA's membership comprises the vast majority of South African publishing houses, for profit and not-for-profit; university presses; small and medium-sized companies; and multinational publishing enterprises. PASA is committed to creativity, the development of literacy and the exchange of ideas. It encourages a culture of reading and promotes the contribution of literature in all its forms to the social and economic development of both communities and individuals through the contribution of intellectual property. PASA is a full member of the International Publishers' Association (IPA), as are approximately 70 other publishers' organisations from 60 countries.

World Intellectual Property Organisation (WIPO)

WIPO is the global forum for intellectual property services, policy, information and

cooperation. It is a self-funding agency of the United Nations, with 189 member states, established in 1967. The organisation's mission is to lead the development of a balanced and effective international intellectual property (IP) system that enables innovation and creativity for the benefit of all. Its services include:

- A policy forum to shape balanced international IP rules for a changing world;
- Global services to protect IP across borders and to resolve disputes;
- Technical infrastructure to connect IP systems and share knowledge;
- Cooperation and capacity-building programmes to enable all countries to use IP for economic, social and cultural development; and
- A world reference source for IP information.

List of abbreviations

ABET	Adult Basic Education and Training
the Act	Copyright Act, no. 98 of 1978
ALRC	Australian Law Reform Commission
CLA	Copyright Licensing Agency Ltd (UK)
the Bill	Copyright Amendment Bill, no. 13 of 2017
CMO	collective management organisation
DALRO	Dramatic, Artistic and Literary Rights Organisation (Pty) Ltd
the dti	Department of Trade & Industry
EBITDA	earnings before interest, tax, depreciation and amortisation
EIA	economic impact assessment
GDP	gross domestic product
GFCF	gross fixed capital formation
GVA	gross value added
I/O	input/output (as part of the matrix of value added)
PASA	Publishers' Association of South Africa
R&D	research and development
SME	small and medium-sized enterprises
TVET	technical and vocational education and training
United States	United States of America
VAT	value-added tax
WIPO	World Intellectual Property Organization

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1. Introduction

Government's approach towards a stated need for copyright law reforms was made public in July 2015 with the publication of a draft Copyright Amendment Bill, followed by the introduction of the Copyright Amendment Bill, no. 13 of 2017 (the "Bill") in May 2017.

The Bill addresses several issues that are regarded as crucial to publishers, authors and other organisations and individuals that depend upon copyright law for protection of their productive work effort, investments and livelihoods.

The Publishers' Association of South Africa (PASA), with the support of the Dramatic, Artistic and Literary Rights Organisation (Pty) Ltd (DALRO), decided to commission a research study aimed at quantifying the anticipated impact of some of the proposals contained in the Bill. These organisations accepted a proposal by PwC to conduct this study due to factors such as the firm's demonstrated understanding of the issues at stake, its long-standing international reputation for best practice economic impact assessments and its association with local economists with extensive experience in this field.

In designing the scope of the study, it was made clear to the research team that it would eventually be distributed to a fairly broad spectrum of readers, some of whom may not possess an intimate knowledge of the background to copyright law reform in South Africa and elsewhere. As a consequence, the study begins with a concise overview of the nature of copyright in the current age of exponential technological advancement, as well as recent global developments in the area of statutory copyright protection.

The analysis of the economic impact of the Bill has two elements: First, PwC estimated the economic value chain for book publishing in South Africa in 2015. This provides a baseline against which the possible impact of the Bill can be assessed. Then – with the assistance of PASA – the research team conducted a survey of a representative sample of publishers in South Africa and also obtained responses from some authors who have been active in writing material for the broadly defined education sector.

In order to determine whether the impacts identified in the quantification exercise were consistent with experiences in other countries, the research team then conducted a literature study of relevant and recent global developments in the field of copyright reform. Case studies relating to the introduction of a fair dealing exception for education in Canada and consideration in the United Kingdom to extend the scope of its education exception form the crux of this section.

2. *The nature of copyright in the age of exponential technological advancement*

2.1 *Origin and legal basis of copyright protection*

The importance of protecting intellectual property through copyright was first recognised as early as the nineteenth century in the Paris Convention for the Protection of Industrial Property (1883) and the Berne Convention for the Protection of Literary and Artistic Works (1886). Both treaties are administered by the World Intellectual Property Organisation (WIPO).

Two activities underpin the legal basis for the statutory prevention of exploitation of intellectual property in educational works:

- The right to control the act of *reproduction* (such as the reproduction of books by a publisher); and
- A right for the author to authorise the *distribution* of copies of works, included in most laws. In the absence of the latter, the right of reproduction would be of little economic value. The right of distribution terminates upon first sale or transfer of ownership of a particular physical manuscript.

The scope of copyright protection has since been expanded worldwide to accommodate distribution of copyright works through new technologies, with the WIPO Copyright Treaty (1996), which South Africa signed in 1997, but has not yet ratified.

2.2 *The rationale for statutory copyright protection*

Countries generally have laws to protect intellectual property through copyright for two main reasons, namely:

- 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
- 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.

The economic rationale for granting copyright is a recognised branch of public sector economics, both in theory and in practice. In a 1989 article published in the *Journal for Legal Studies*, William Landes and Richard Posner note that:

“Copyright protection—the right of the copyright’s owner to prevent others from making copies—trades off the costs of limiting access to a work against the benefits of providing incentives to create the work in the first place. Striking the correct balance between access and incentives is the central problem in copyright law. For copyright law to promote economic efficiency, its principal legal doctrines must, at least approximately, maximize the benefits from creating additional works minus both the losses from limiting access and the costs of administering copyright protection.”

Landes & Posner, 1989, p.326

Limiting the protection afforded to the authors, creators and innovators of creative works acts as a disincentive to such activities and risks robbing society of the benefits of such creativity. At the same time, unduly restricting the access of society to such works limits the public good that can be derived from sharing their contents. Society's well-being is optimised when the collective value of the private returns (returns to creators) and social returns (benefits to society) are maximised over time. If legislative protections are adopted that favour the social interest over the private interest, the production of creative works will decline (qualitatively and/or quantitatively) to the longer-term detriment of society. Conversely, legislative provisions that allow creators to severely limit access to their works (principally by charging a high price) means that large parts of society will not be able to benefit from the knowledge and ideas embodied in such works.

The absence of adequate copyright protection in the educational publishing industry results in a 'free-rider' problem: some users benefit from the consumption of goods without paying a market-related price, while other parties may unfairly derive income or benefits from a work they made no contribution to the creation of. The resulting market failure leads to a production of educational works below the socially desirable level. In the South African context, this under-production could find expression in a reduction of educational works that are published in some of the less widely spoken official languages, in fields of study that have a limited audience, in delays in the up-dating of course material (to the detriment of learners and students), and in an increased unwillingness of knowledge producers (academics, authors, creators) to disseminate and share their knowledge. In the era of the knowledge economy, the longer-term implications of this for South Africa's economic competitiveness are likely to be profound.

From a value chain perspective, insufficient copyright protection of the output of educational works not only affects activities directly associated with such publishing (authors, artists, creators, graphic designers) negatively, it also has the potential to negatively affect upstream suppliers of intermediate inputs to those publishing activities (paper, electricity, ink, finance, marketing, communication etc.) and downstream activities (primarily booksellers).

The following table summarises the rationale for statutory copyright protection:

The purpose of statutory copyright protection of original content in educational works and publications

1. Corrects a form of ‘market failure’ caused by the so-called ‘free rider’ problem, whereby users of publications do not pay for the consumption thereof (this is because copyright-protected works possess some characteristics comparable to those of public goods).
2. Assists with the creation of a market for original works, which becomes differentiated in terms of the perceived quality and relevance of a particular publication.
3. Protects learners from ultimately being confined to studying limited and sub-standard reference works.
4. Reduces the burden on the teaching profession in that specialist creators supply learning material based on up-to-date theoretical premises and empirical analysis.
5. The sales income and copyright licensing fees that are paid to creators and publishers for the reproduction of content provide the fundamental incentive for creative research and writing, which is related to the principle of just financial reward for sacrificing time and intellectual effort.
6. Strikes a balance between encouraging the creation of appropriate educational content whilst allowing for a measure of dissemination by students and peer reviewers.
7. Contributes to a strong intellectual property framework that serves to encourage private sector investment in a thriving knowledge-based economy.

Ultimately, a country with an inappropriate system of copyright protection may also experience 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.

2.3 The impact of digital technology

It is also important to recognise the huge impact of digital technology, which represents a paradigm shift in the relations between copyright owners and the public at large.

Globally, the educational publishing industry is engaged in a structural transition from traditional business models, based largely on printed books, to the development of digital tools and content. This transition is still taking place and requires substantial new investments to be made which many small and medium-sized

publishing and related enterprises may not be able to afford, placing them at a disadvantage relative to the larger publishing houses.

Legal theories surrounding copyright protection will have to adapt to the dramatically new and different landscape for the spreading and diffusion of original works, be they in the field of education or that of the arts and music. The advent of digital technology has transformed some of the characteristics of the works of authorship, especially with regard to distribution and copying becoming substantially easier, faster and less costly.

The legal landscape of copyright is now also in the process of transformation, essentially in pursuit of a new and equitable balance between the interests of copyright owners and users. Efforts have been made by individual countries and international copyright organisations alike to find such a balance. In some cases, this has already been embodied in new sets of statutes and international conventions.

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 fail to adhere to global norms and international treaties may find themselves increasingly marginalised and disadvantaged. The position of developing countries in the new era of digital publication is particularly relevant, as they may also be deprived of creative works that accurately capture local conditions and relevant case studies.

Furthermore, the time lag between investments in new digital technology hardware and populating the new systems for learning material access with appropriate and relevant content may force teaching staff to fill the void by increased copying of analogue publications. In the absence of adequate copyright protection for both analogue and digital works, the quality of educational content will be jeopardised, especially with regard to the need for continuous updating of relevant theories and the latest available data for empirical analysis.

2.4 Human capital formation and import substitution

An issue that should be considered in any attempt to amend copyright laws that will directly or indirectly affect educational institutions is the fact that such institutions have an impact on the future output and income of a society through human capital formation as well as a regional impact via the phenomenon of import substitution.

Adequate investment in human capital formation has become a policy imperative of governments that are committed to increasing the welfare of society in general.

2.5 Threat to creative skills and SMEs

Book publishers have traditionally operated as companies employing staff with a variety of skills sets. Publishers are responsible for overseeing the selection, production, marketing and distribution processes involved with new and existing works of writing for which a demand exists in the marketplace.

E-commerce has, however, opened up new business models whereby an individual can become a book publisher, authors can now publish their own works, and people that are able to find marketable educational material can open up their own e-book publishing firms.

Currently, the publishing process around educational and academic books is quite time consuming and exacting. The publisher commissions authors, artists, typesetters, editors and proof readers; drafts or approves a book plan and sets timelines; oversees quality based on the technical accuracy and relevance of content, appropriate and correct usage of language, and correct design and layout of the copy to suit the content and target market, often to very exacting requirements; has the publication either printed or electronically distributed, the latter of which entails a further conversion process; and, finally, has marketers introduce and explain the merits of the publication to the target audience.

A threat posed by easier access to the publishing domain is the maintenance of acceptable standards for the content, language and relevance of the learning material. Attempts to accommodate cheaper access by users via exceptions to copyright hold the danger of diminishing such standards.

Publishers that command a critical mass of output are in a better position to maintain acceptable standards than many SMEs due to the variety of skills at their disposal and also because they are sufficiently capitalised to afford personnel with these skills. They also possess the necessary supporting enterprise and technology infrastructure, including content management systems (as indicated in the table below). These elements are fairly generic and will adapt in future as digital technologies develop further. This table has been informed by the work of Kartchner (1998); Rockley (2002); Brewer, R. L (2015) and the publishing experience of the co-author of this study.

Elements of a content management system in the educational publishing industry value chain

Formulation of content goals
Design of a framework for a content management system
Research of the relevant discipline
Drafting and writing the original manuscript
Ensuring a balance between text and illustrations/photos/maps
Proper formatting of headers, tables, etc.
Peer review by authoritative academics
Maintaining standards of language use
Reviewing work to ensure technical accuracy
Avoidance of outdated data sets
Liaison with content editor

2.6 The phenomenon of lifelong learning

In papers researched by, *inter alia*, Fischer (2000), Brookfield (2005), Sinnott-Armstrong (1999) and Basseches (1984), it is suggested that lifelong learning has much to offer in terms of sharing specialist knowledge gained over the lifetimes of mature professionals.

Learning is increasingly being conceived as a lifelong process with important connections between schooling, tertiary education, workplace learning, and universities. In the British model of peer learning, it is acknowledged that retired people have a lifetime of experience and, collectively, a vast amount of knowledge. The emphasis has been on sharing knowledge by incorporating the authoring and publication of educational works that include case studies in a cross-section of vocational disciplines.

Consensus exists amongst researchers on this topic that the ability to create and author educational works that combine theoretical knowledge, authoritative empirical analysis and proven practical application is essentially a craft that is mastered only during relatively mature adulthood.

The idea that continuous learning is necessary for economic survival in the information age has, in a relatively short space of time, gained widespread support, as demonstrated by the numerous chairs and institutes that have been established at respected higher education bodies around the globe.

Due to the relatively high degree of financial security that is enjoyed by successful professionals and academics that have reached retirement age, adequate incentives are required for a society to fully benefit from this key element of lifelong learning.

Part of the institutionalisation of lifelong learning has been the contribution made to educational works that embed knowledge that can only be attained through extensive experience. Inadequate copyright protection will almost certainly lead to a disincentive in this relatively new and significant field of human intellectual endeavour.

2.7 Knowledge and international competitiveness

The technology information revolution of the past two decades has provided humankind with the instruments to acquire, adapt and apply knowledge at a significantly faster rate than ever before. This phenomenon is assisting the quest for increased international competitiveness as well as the attainment of development goals in emerging market economies.

The so-called green revolution is an example of the role of knowledge in development. Once governments realised that improvements to the knowledge base of plant genetics exhibited classic public good features, associated with positive externalities, large amounts of public funds were channelled towards research and development efforts in agriculture and associated fields.

Another example is the statutory protection afforded to intellectual property such as copyright, which is aimed at incentivising creativity in the domain of educational publications.

In the context of international competitiveness, South Africa is faced with a paradox. It enjoys a remarkably high ranking for six of the 12 indicators of global competitiveness that are directly or indirectly associated with the topics of education, skills development and intellectual property protection, but a low ranking for the other half.

A key task confronting policy makers in the broad domain of economic development (such as the dti, National Treasury and all of the public sector educational institutions) is to narrow this extraordinarily large gap without compromising the high rankings that the country can be rightly proud of.

Changes to statutory copyright protection that act as a disincentive for the creation of educational works could erode South Africa's global competitiveness for the best-ranked indicators and do little to improve those areas where the country currently fares poorly.

South Africa's six best and six worst rankings for global competitiveness indicators relevant to a knowledge-based economy – 2017

Note: Overall rank 47 (out of 138 countries)

Best	Rank
Efficiency of legal framework in challenging regulations	10
Strength of investor protection	14
Quality of management schools	21
Intellectual property protection	21

Capacity for innovation	25
Property rights	29
<hr/>	
Worst	Rank
<hr/>	
Quality of math and science education	138
Quality of the education system	134
Time to start a business	125
Burden of government regulation	106
Labour market efficiency	97
Country's capacity to retain talent	69
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Source of data: World Economic Forum (2016)

2.8 Recent global developments in relation to statutory protection of copyright that are relevant to this study

A landmark 'fair dealing' copyright case in Canada

In 2004, a group of Canadian publishers sued the Law Society of Upper Canada for providing photocopy services to researchers. They regarded this as an infringement of their copyright. In a unanimous decision, the Court found that a library or its patrons making single photocopies of decisions, statutes and regulations or similar material fell within the bounds of fair dealing and did not infringe any copyright (D'Agostino -2008).

The Court then examined the meaning of 'fair' in the context of 'dealings' and cited a previous case where fair dealing was described as being a 'question of degree' that cannot be defined concretely. The judgement emphasised the importance of balancing 'the public interest in promoting the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator'. The Court also clarified that 'fair dealing' does not merely provide a defence which removes liability, but instead defines the outer boundaries of copyright and grants a right to the user.

Subsequent to this legal interpretation of the different rights afforded to creators of works and users, the Canadian Government implemented amendments to its copyright laws. It is important to note that the Canadian guidelines on copyright exceptions were drafted without adequate consultation with key stakeholders in the educational publication supply chain.

In 2012, the Supreme Court of Canada issued rulings on copyright cases that represented a major shift in the country's copyright law, with the Court determining that copyright exceptions such as fair dealing should be treated as users' rights, whilst also emphasising the need for a technology-neutral approach to copyright law. The Canadian Court's decisions included that copying materials for instructional purposes may qualify as fair dealing. Ever since, the Canadian copyright community has been placed under severe pressure to retain its position as a viable industry with a focus on quality and diversity in the supply of educational publications.

While this EIA was being compiled, the Federal Court held on 12 July 2017 in a case brought by Access Copyright against York University that the fair dealing guidelines of York University overstepped the limits of the fair dealing exception. This case is too recent for its impact to be assessed and was, at the time of writing, still open to being appealed.

One way of improving fairness in the area of copyright would be to develop solutions that attempt to strike a balance between the interests of creators and users without ignoring the fundamental tenets that underpin a sustainable publishing industry. In the case of Canada, research by D'Agostino suggests that copyright best practices that take account of the perspective of users have already contributed to findings of fairness in this country's courts of law.

Granting extensive rights to users of works that embody someone else's intellectual property constitutes a threat to the advancement of creative educational works. The disincentive for producing creative works in education that is inherent in the different legal interpretations of 'fair dealing' that have resulted from copyright reform in Canada represents a key reason for the decline of the educational publishing sector in that country.

'Fair use' provision in the United States

United States copyright law provides important exceptions to the rights of copyright holders that are specifically aimed at non-profit educational institutions and libraries. In terms of code no. 107 of the United States Copyright Act of 1976, the 'fair use' of a copyrighted work, including such use by reproduction in copies or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research, is not an infringement of copyright.

The 'fair use' provision in United States copyright law prescribes four factors that must be included in a fairness determination, namely (Cornell Law School 2012):

- Purpose and character of the use;
- Nature of the copyrighted work;
- Amount and substantiality of the portion of the work used; and
- Effect of the use on the potential market or value of the work.

Some examples of activities that courts have regarded as 'fair use' include (Stanford University Libraries 2017):

- i. Quotation of excerpts in a review for purposes of illustration, criticism or comment;
- ii. Quotation of short passages in a scholarly or technical work, for illustration or clarification;
- iii. Parody of the content of the work;
- iv. A summary of an article, with brief quotations;
- v. Reproduction of a small part of a work by a teacher or student to illustrate a lesson; and
- vi. Reproduction of a legislative report or judicial proceeding.

Other considerations include that it is not permissible to copy works intended to be 'consumable' in the course of study or teaching. These include workbooks, exercises, standardised tests and test booklets, and answer sheets. Copying should not substitute for the purchase of books or periodicals. However, case studies confirm divergences from these guidelines.

The 'fair use' exception in the United States is purposefully broad and flexible, which may make some members of the creative works community uncomfortable relying on it. The experience of litigation around copyright infringement in the United States confirms one of the fundamental disadvantages 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.

Transaction costs inherent in the 'fair use' model

In 2013, the Australian Law Reform Commission (ALRC) published a Discussion Paper titled *Copyright and the Digital Economy*.

This paper proposed that a 'fair use' exception should be applied when determining whether an educational use infringes copyright. In effectively acknowledging that such a step would be a dramatic one, the ALRC proposed the alternative option of introducing a new 'fair dealing' exception for education.

Having been invited to comment on these proposals, the Association of American Publishers (AAP) pointed out the following (inter alia):

- Published materials are used within formal and informal educational institutions at all levels (primary to post-tertiary), and in a variety of other settings involving training.
- In order to provide strong incentives for investment in the development and distribution of copyright works that can be used for educational purposes, it is critical that any copyright reforms ensure that publishers can control, through the exercise of exclusive rights, the terms and conditions under which their works may be exploited for such purposes, or at a minimum provide consistent, predictable and adequate compensation for such uses.
- Whether as an illustrative ‘fair use’, or as a specified use subject to ‘fair dealing’ under essentially identical criteria, either of the ALRC’s proposals would replace educational statutory licensing with broadly phrased and highly uncertain new exceptions for educational uses.
- Adoption of the recommendation for the dramatic expansion of ‘fair use’ exceptions for educational uses of works will threaten the viability of the desired voluntary licensing regime.
- The ALRC may have overstated the benefits of ‘fair use’, and may also have understated the transaction costs that would flow from the dramatic shift in copyright jurisprudence.
- The most troubling transaction cost is uncertainty, which can be debilitating to the educational publishing industry. Unless this uncertainty can be mitigated or managed by other features of the fair use system, it would be very difficult to maintain an orderly marketplace in which works of authorship are created, published, disseminated and used in a predictable fashion.

These observations are highly relevant to the current proposals for copyright reform, particularly against the background of the manner in which ‘fair use’ has been implemented in the United States. Counsel to a publisher in the United States reads the relevant statute only as a starting point in analysing whether a particular use of a copyright work is or is not likely to be considered fair. It is far more important to consult the precedents that have been compiled over the course of nearly two centuries, during most of which there was no ‘fair use’ statute whatsoever.

Only the case law gives meaningful content to the broad principles stated in the statute, thereby mitigating the transaction costs inherent in the uncertainty of the ‘fair use’ model.

2.9 Comparison with South Africa’s proposed introduction of ‘fair use’

The ‘fair use’ provision in the South African Bill differs in material respects from the ‘fair use’ provision in the United States. Whereas the cases qualifying for the ‘fair use’ defence in the United States are listed as examples, the South African provision (proposed as Section 12 (1) (a) of the Act by Clause 10 of the Bill) is a closed list. That closed list is far more extensive than the list of examples in the United States provision, including, amongst many others, “education.” “Education” is not a case for the ‘fair use’ defence in the United States.

The proposed application of ‘fair use’ to education in the Bill means that the experience in Canada of its fair dealing exception for education is highly relevant.

3. The publishing sector in South Africa

3.1 The structure of the publishing sector in South Africa

Assessing the potential economic impact of the adoption of the Bill's provisions for 'fair use' and exceptions for educational and academic activities (the proposed exceptions) needs to begin with a broad understanding of the current structure of the publishing industry in South Africa and its linkages with other sectors of the South African economy. This is illustrated in the estimated economic value chain for the book publishing sector in 2015 in the figure below¹.

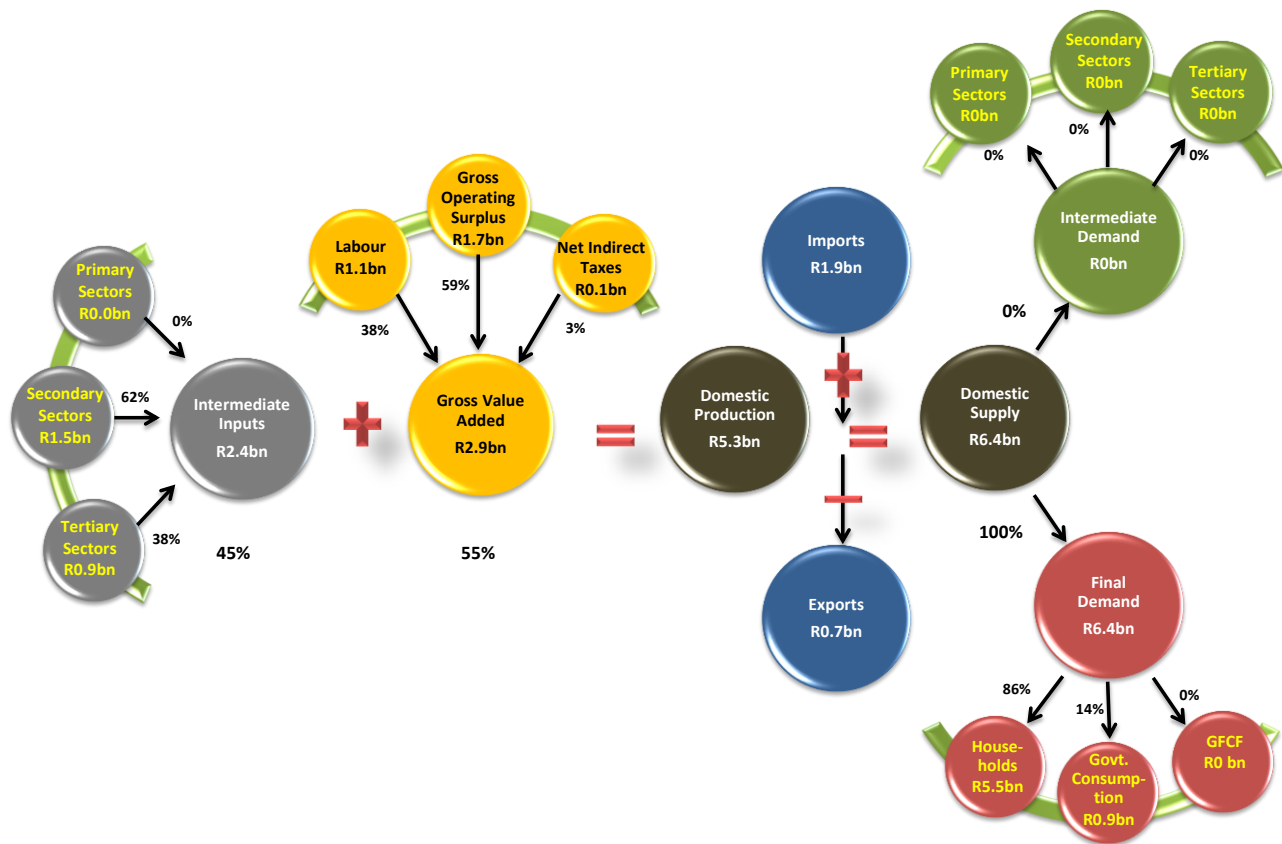
It indicates a sector that had domestic production valued at around R5.3 billion – consisting of gross value added of R2.9 billion and purchases from upstream suppliers (intermediate inputs) of R2.4 billion. These intermediate inputs originated primarily from the secondary sectors (62%), with the tertiary sectors making up the balance (38%). There were no material inputs from the primary sectors of the economy. Domestic production was supplemented by imports valued at R1.9 billion in 2015, and reduced by exports of R0.7 billion – resulting in domestic supply of R6.4 billion. This supply was used almost exclusively to satisfy final demand by households and general government, with an estimated 86% going to households and 14% to general government.

The following points are relevant to this value chain:

- Although comparatively small in terms of its direct contribution to the total South African economy, the sector has a comparatively high value-added component, with gross value added accounting for more than half (55%) of the sales value.
- Employees of the sector – both permanent and temporary – earned around R1.1 billion. Employment in the broader printing, publishing and recorded media sector stood at almost 55,000 in 2015 and was comparatively skilled, with 20% categorised as highly skilled, 56% with mid-level skills, and 19% with relatively low-level skills. Almost 5% of total employment was informal. Based on its share of labour remuneration, it is estimated that book publishing in South Africa employed around 4,200 full-time-equivalent people in 2015. However, respondents to the survey conducted as part of this study indicated significant part-time involvement as well, resulting in a substantially higher number of people that are involved in, and dependent on, book publishing activities for some or all of their income.
- Research carried out by the South African Book Development Council (2007) indicated “little evidence of excess profit-taking at any points in the book value chain.”

¹ These estimates are derived from data reflecting the input and output data for the printing, publishing and recorded media sector – of which book publishing is a component part – provided by Quantec. In order to construct this industry-level data, Quantec draws on a range of data from Statistics South Africa, the South African Revenue Service and others. In order to apportion aggregates for the printing, publishing and recorded media sector to book publishing only, the research team made use of detailed disaggregated data contained in Statistics South Africa's PO021 Annual Financial Statistics 2015 published on 24 November 2016.

Figure 1: Estimated economic value chain for the book publishing sector in 2015



Sources of data: Quantec Standardised Industry Database, Statistics South Africa Annual Financial Statement Analysis

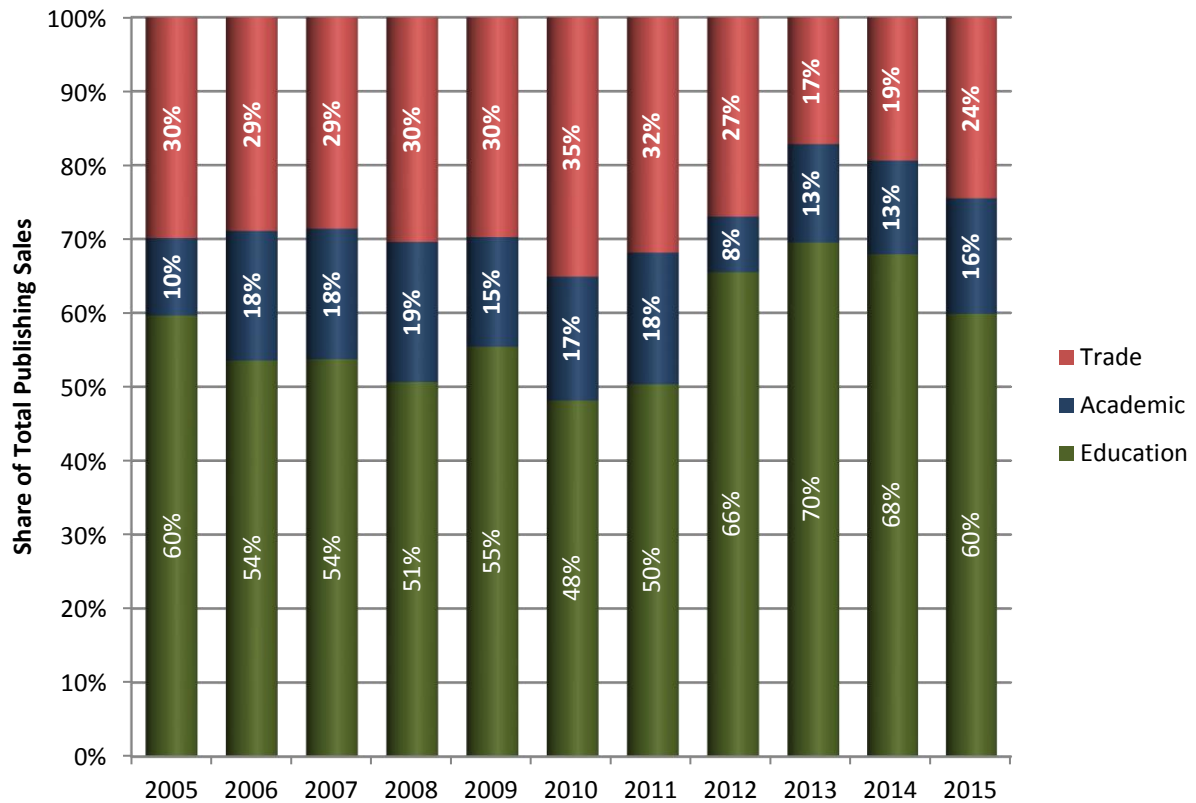
The value chain above provides a baseline against which the potential impact of the can be assessed.

3.2 The composition of publishing industry sales by sub-sector in South Africa

It is worth noting that sales to the broadly defined education sector have consistently made up a very significant portion of total industry sales in South Africa. The trend in the contribution of academic, trade and education publications to total sales between 2005 and 2015 is reflected in Figure 2 below. While there was some variation in the share of education sales, it consistently accounted for 48% or more of total sales². In 2013, education publications accounted for 70% of industry sales. The addition of academic publications results in a combined share for the broadly defined education sector that has ranged from a low of 65% in 2010 to 83% in 2013. Over the past ten years, sales to the broadly defined education sector averaged 72% of total sales. By contrast, general trade sales – which accounted for 35% of total sales in 2010 – have contributed a declining share in recent years, hitting a low of 17% in 2013 and averaging 28% over the past decade.

² 60% and higher in recent years.

Figure 2: The composition of publishing industry sales by sub-sector - 2005 to 2015



Source of basic data: PASA Annual Publishing Industry Report researched by the University of Pretoria, 2005 to 2015 editions

The dependency of the South African publishing industry on the broadly defined education sector (reflected in Figure 2) is more pronounced than in many advanced economies, but roughly in line with its contribution in emerging and developing economies.

For example, data from the American Association of Publishers indicates that trade sales accounted for between 55% and 57% of total sales in the United States between 2013 and 2015 (meaning that broadly defined education sales accounted for between 43% and 45% of total sales). In the United Kingdom, combined education and academic sales accounted for 57% of total sales in 2016. Data for Nigeria indicates that broadly defined educational sector sales account for 80% of total turnover.

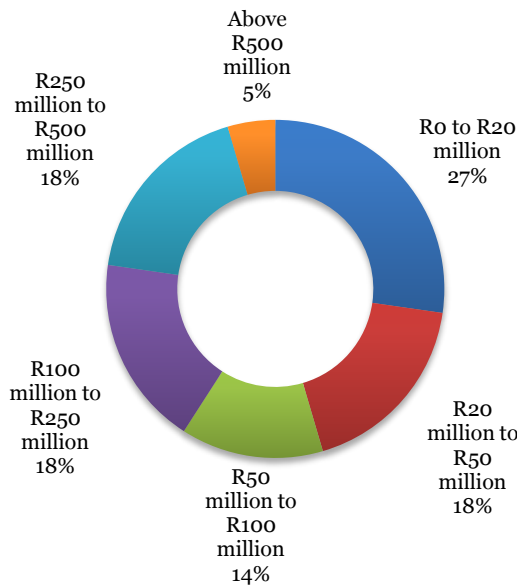
4. The economic impact of the proposed exceptions on the publishing industry in South Africa

In order to assess the potential impact of the Bill’s provisions for ‘fair use’ and exceptions for educational and academic activities (the proposed exceptions), a survey was conducted of publishers in South Africa. Responses were received from 31 publishers. The focus of this survey was mainly on publishing for the education sector (basic and higher), as well as academic and scholarly publishing, which could include trade books sold into the education market. Based on the information gathered from the survey, the following descriptive characteristics of the respondents are evident.

4.1 The characteristics of survey respondents

The size composition of respondents

Figure 3: Composition of survey respondents by sales value – latest financial year



Source: PwC Survey, 2017

The analysis of survey responses used the sales revenue of respondents in the latest financial year as a basis for weighting some of the other responses. The sales revenue ranged from very small (R80 000) to very large (in excess of R900 million), with a median value of around R60 million. The combined sales of respondents were R3.5 billion in the latest financial year.

The chart on the left indicates the relative size distribution of respondents in terms of their sales. Twenty-seven per cent of respondents had sales of less than R20 million, and there were similar shares (18%) in the R20 million to R50 million, R100 million to R250 million and R250 million to R500 million categories. Only 5% of respondents had sales above R500 million in the latest financial year.

When combined with responses to other questions in the survey it is evident that the proposed exception would impact a broad cross-section of the publishing industry – negatively affecting publishers of all sizes.

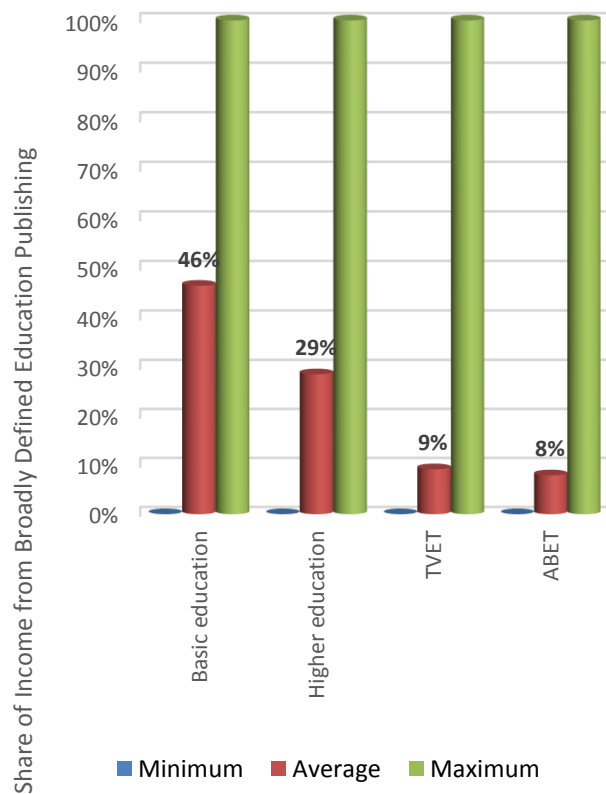
Publication of material for the broadly defined education sector

Over the past three years, 24 of the 31 respondents published material specifically for this market. The percentage of respondents that are active in the broadly defined education market (77%) correlates quite well with the share of sales derived from this market, as reflected in Figure 2 above (an average of 72% over the past decade and 76% in 2015) .

While the vast majority of respondents are active in publishing imprints in the education sector, there appears to be a tendency to specialise in certain categories of education publication (basic education, higher education, TVET or ABET). Figure 4 indicates the range (minimum and maximum) as well as the average contribution that the different categories of education markets contribute to the total broadly defined education income of respondents. There is at least one respondent in each category that derives their total education income from that category. There is also at least one respondent that derives none of their education-based income from that category.

On average, 46% of income from education is derived from publications in the basic education space; 29% from higher education publications; 9% from TVET publications; and 8% from ABET publications.

Figure 4: Composition of income from broadly defined education publication in respect individual respondents



Source: PwC Survey, 2017

Secondary uses of material in the broadly defined education sector

Thirteen of the 31 survey respondents currently have arrangements in place with copyright management organisations or collecting societies (such as DALRO) to license secondary uses (e.g. photocopying and scanning) of their material to institutions in the broadly defined education sector. Of those respondents that do not contract copyright management organisations or collecting societies, a further three have other arrangements in place to collect fees for secondary uses of their material.

Table 1: Contribution of secondary licensing arrangements to income derived from the broadly defined education sector

Type of arrangement for licensing secondary uses of education material	Share of income from the broadly defined education sector that is contributed by these arrangements		
	Minimum	Average	Maximum
Arrangements with copyright management organisations or collecting societies	1%	5%	15%
Other arrangements	1%	17%	100%

Source: PwC Survey, 2017

Figures provided by DALRO indicate that aggregate disbursements to publishers that had provided it with a mandate to collect secondary license fees on their behalf amounted to some R28 million (after deduction of administration fees and VAT) in the 2016 financial year³. While this only represents 0.4% of the total estimated revenue of the book publishing industry reflected in the baseline, it is clear from the table above that the importance of this income can vary quite substantially from publisher to publisher. This revenue stream would be threatened by the adoption of the proposed exceptions.

It is also appropriate to put the amounts collected by CMOs or other secondary licensing arrangements into the broader context of education costs. According to Statistics South Africa the average South African household spent R2, 531 on all forms of education in 2015 and there were just under 2.4 million students registered at tertiary education institutions in 2016. The amount disbursed by DALRO equates to around R12 per registered tertiary student⁴

Value added by and purchases from intermediate suppliers

Using responses to a question regarding the net amount of VAT paid (output VAT less input VAT) to the South African Revenue Service in the latest financial year, it is possible to estimate the value added by respondents. In total, this amounted to R1.71 billion (or 49% of sales). The balance represents purchases from intermediate suppliers, which totalled R1.79 billion in the latest financial year.

It is evident that, as a share of aggregate sales revenue, the value-added component is lower (49% versus 55%) and the intermediate input share correspondingly higher than reflected in the estimated value chain for book publishing in Figure 1. Possible reasons for this shift could include:

³ For largely practical reasons these licensing fees are collected almost exclusively from tertiary education institutions – primarily universities.

⁴ Statistics South Africa indicates total enrolment at South Africa’s universities of 982,212 and full-time equivalent enrolment of 678,845 in 2015. The cost of DALRO distributions per full-time equivalent student would be under R45.

- There were changes in the market for book publishing in the latest (2016) financial year that resulted in the sector being less profitable and/or employing fewer people.
- The respondents to this survey are not completely representative of the broader publishing industry, and generally reflect a bias towards products with a lower value-add. This may be a consequence of the fact that the publishing of products for the broadly defined education sector delivers lower profit margins and revenue streams for participants.
- The costs associated with publications for the broadly defined education sector are proportionately higher than for other types of publishing. This could be the result of more rigorous and time-consuming publishing and procurement processes.

The value added by survey respondents in the latest financial year totalled R1.71 billion (or 49% of sales). Total purchases from intermediate suppliers amounted to R1.79 billion.

4.2 The anticipated impact of the proposed exceptions on publishers

Perceptions of benefits to publishers, customers and other interested parties

The two principal areas of concern in the Bill relate to the introduction of ‘fair use’ and exceptions for education that would reduce the ability of publishers to recover license fees from secondary uses of their material in the education space. Amongst other things, the survey conducted as part of this study attempts to quantify the potential economic impact of these proposed amendments.

Respondents were asked whether they anticipated any possible benefits accruing to themselves, their customers and any other parties. The table below summarises these responses.

Table 2: Perceived beneficiaries of the proposed legislative changes and the nature of the benefits that may accrue to different interests

	Perceptions of respondents relating to benefits accruing from proposed ‘fair use’ and exceptions for education		
	Publishers	Customers of publishers	Other interested parties
Proportion of respondents anticipating benefits	21%	50%	40%
Proportion of respondents not anticipating benefits	79%	50%	60%
Nature of benefits	<ul style="list-style-type: none"> • Potential sales through increased exposure of 	<ul style="list-style-type: none"> • Access to educational material without incurring 	<ul style="list-style-type: none"> • People other than customers might now

	Perceptions of respondents relating to benefits accruing from proposed ‘fair use’ and exceptions for education		
	Publishers	Customers of publishers	Other interested parties
anticipated	<p>published material</p> <ul style="list-style-type: none"> • Brand building and publicity • Expanded reading population 	<p>costs</p> <ul style="list-style-type: none"> • Increased citation and dissemination of knowledge for public purposes • Allows material to be included in course packs without charge • Possible increases in literacy rates • Customers gain access to authoritative, curated content • Learners have greater exposure to scholarly research, the latest ideas and developed arguments 	<p>choose to access more than one publication for their needs as there will not be a cost implication for them.</p> <ul style="list-style-type: none"> • Secondary suppliers of content – who are neither invested in, nor discerning about, publications (e.g. large tech- and internet-based organisations such as Libgen or Google) – would benefit. Legal firms and organisations involved in actions around this will benefit tremendously. • People engaged in informal educational activities may benefit. • Activities of copy shops, currently operating illegally, would be legalised, bringing a greater income stream to such shops. The digital transmission of copies would be legalised. This would benefit advertisers, who would be able to make use of the traffic on websites; and internet service providers, which would benefit from the data usage.

Source: PwC Survey, 2017

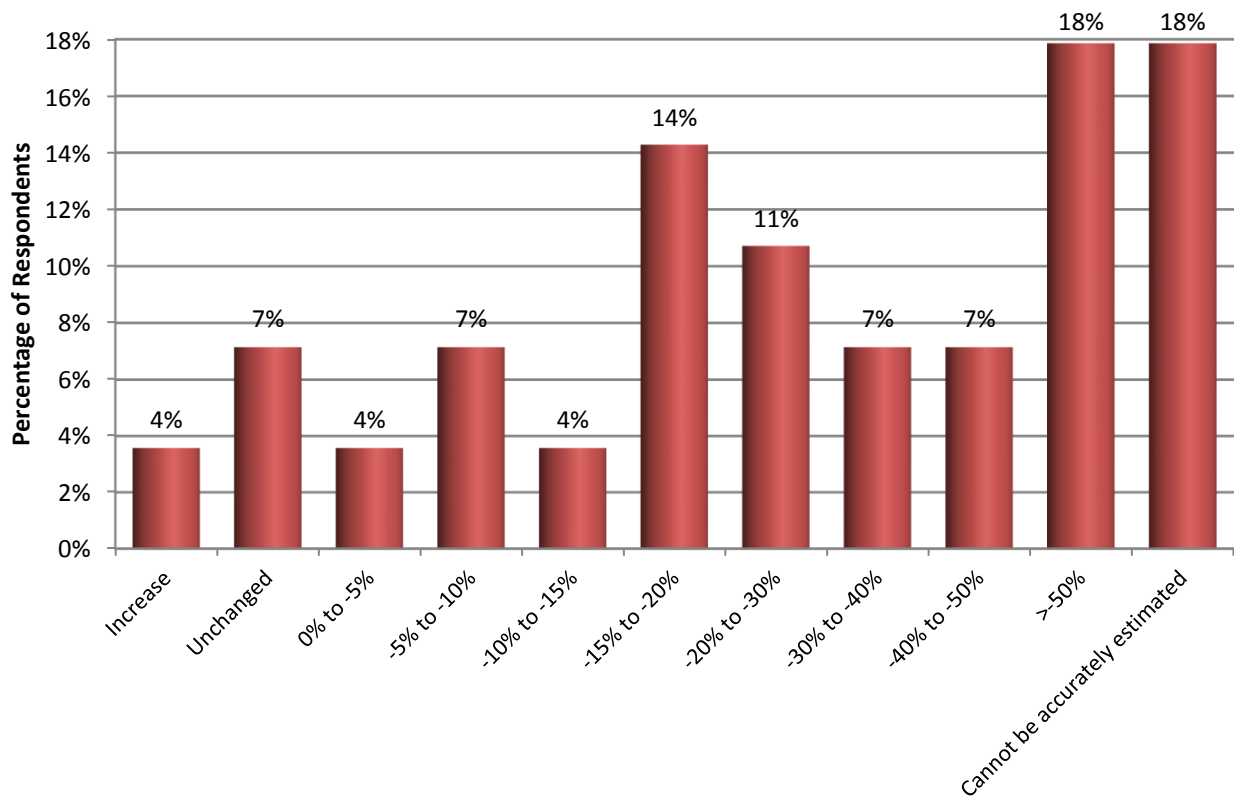
Estimated impact on the sales revenue of the publishing sector

Survey respondents were asked to estimate what impact the adoption of the proposed exceptions would have on their sales revenue. The figure 5 below indicates the distribution of responses. Eleven per cent of respondents anticipate that the impact on sales will be either positive (4%) or neutral (7%). These respondents have not been publishing material for the broadly defined education sector in recent years. Seventy-one per cent expect that the adoption of the proposed exceptions will have a negative impact on their sales – ranging from a drop of between 0% and 5% (4% of respondents) to a decline of more than 50% (18% of respondents).

The remaining 18% of respondents indicated that they were unable to quantify the likely impact of the proposed exceptions accurately.

The estimated weighted average change in sales following the adoption of the proposed exceptions is a decline of 33%. If this were representative of the entire book publishing sector it would imply a decline in sales revenue of approximately R2.1 billion on the baseline reflected in the economic value chain in Figure 1. This would include a drop of R946 million in gross value added by the sector and a decrease of R789 million in intermediate purchases from third-party suppliers.

Figure 5: Estimated impact of the proposed exceptions on the sales revenue of respondents

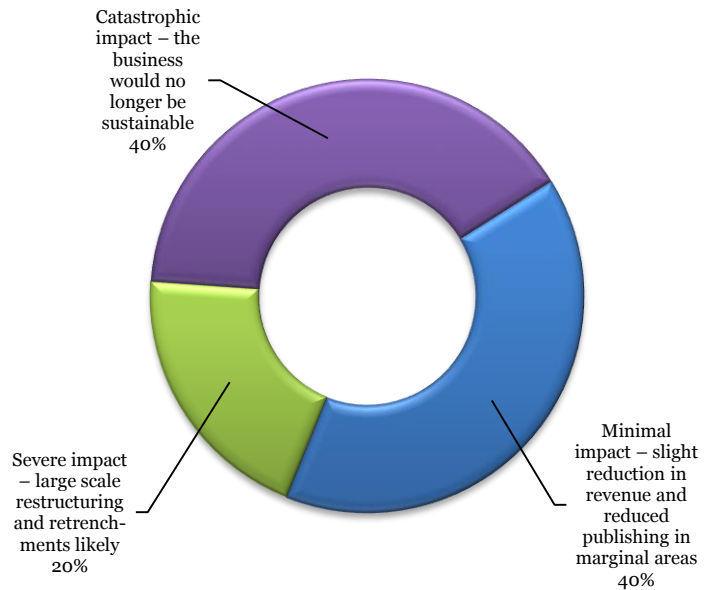


Figures may not add up to 100 due to rounding.

Source: PWC Survey, 2017

Figure 6 reflects the perceptions of the 18% of respondents who were unable to accurately estimate the likely impact of the proposed exceptions on their sales revenue. 40% believe that it will have a minimal impact on their operations – characterised by a slight reduction in revenue and reduced publishing in marginal areas. 20% believe that it will have a severe impact, with large-scale restructuring and retrenchments likely. The remaining 40% believe that it will have a catastrophic impact on their operations, ultimately resulting in the closure of their businesses.

Figure 6: Perceived impact of the proposed exceptions by those respondents that were unable to quantify the impact on their sales



When combining these responses, it is fair to say that 89% of the publishers surveyed believe that the promulgation of the proposed exceptions as currently worded would impact negatively on their operations. Their share of total revenue is more than 93%. In many cases the response to these negative impacts will be significant restructuring, retrenchments, and – in some cases – business closure.

In many cases the response to these negative impacts will be significant restructuring, retrenchments, and – in some cases – business closure.

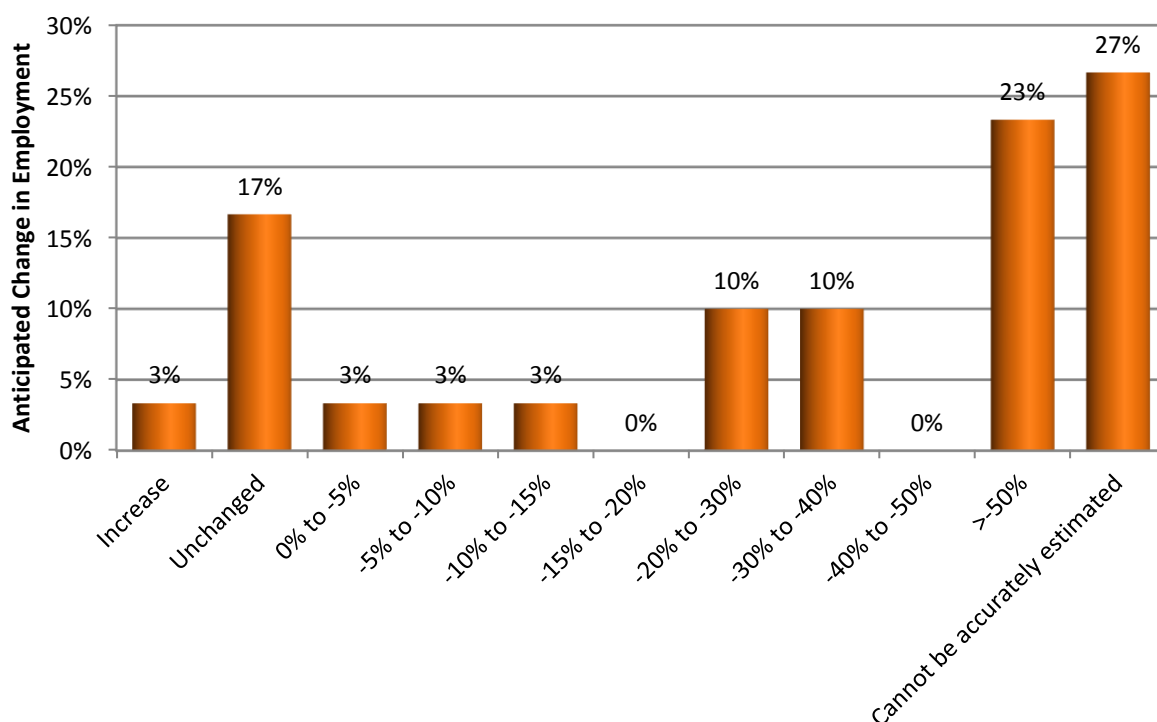
Estimated impact on employment in the publishing sector

In addition to their perceptions of the likely impact on their sales revenue, respondents were also asked to estimate the likely impact of the proposed exceptions on employment. The figure 7 below indicates the range of anticipated impacts expected.

A total of 20% of respondents anticipate a neutral (17%) or positive (3%) impact on employment levels in the sector. These respondents are not currently active in publishing material for the broadly defined education sector. 53% of respondents expect that there will be a decline in employment, ranging from 0% to 5% (3% of respondents) to more than 50% (23% of respondents). The balance of respondents (27%) are unable to accurately estimate the likely impact on employment. However, 63% of this group believe that the impact of the proposed exceptions will be either severe or catastrophic, 13% believe its impact on employment will be moderate, and 25% believe that it will have a minimal impact.

The weighted expected change in employment of those that provided estimates is a 30% decline. If this response is representative of the whole book publishing sector, it implies that around 1,250 full-time equivalent jobs would be lost in the sector. Since a significant proportion of workers in the sector are employed on a temporary or part-time basis, the actual number of people directly affected is likely to be significantly higher than this.

Figure 7: Estimated impact of the proposed exceptions on employment by respondents



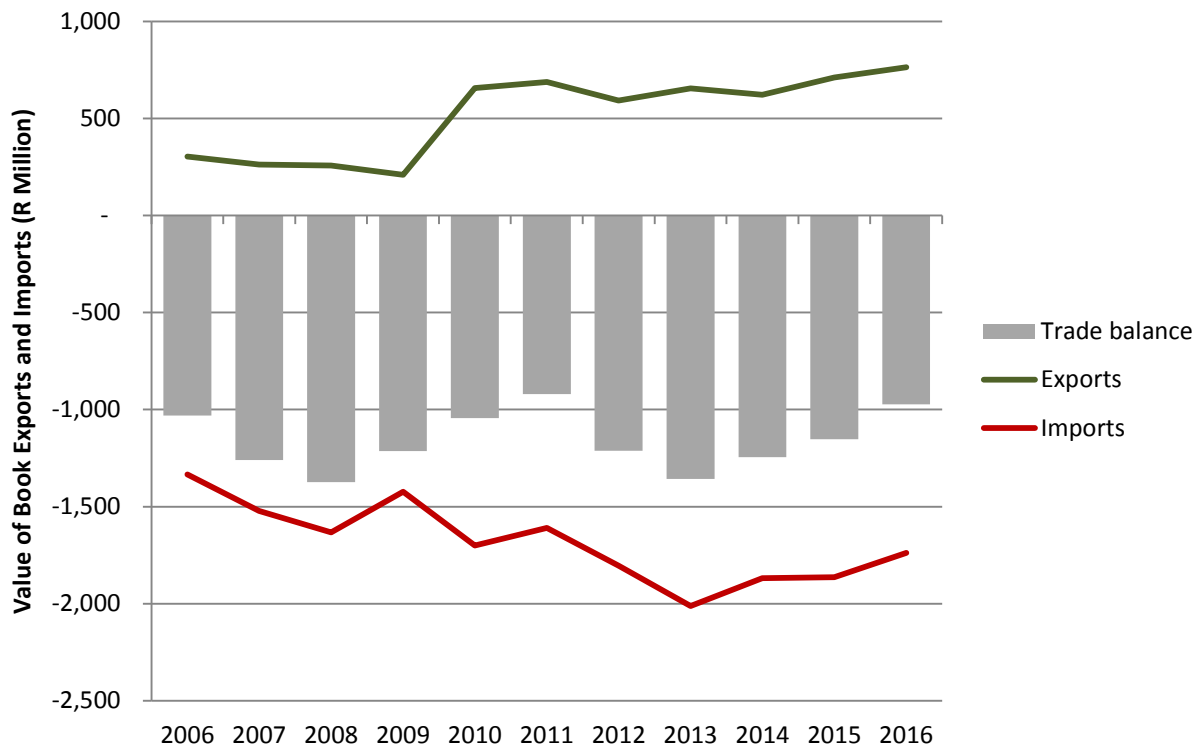
Figures may not add up to 100 due to rounding.

Source: PwC Survey, 2017

4.3 Anticipated impact of the proposed exceptions on imports and exports of published material

Figure 8 reflects South Africa’s international trade in books from 2006 to 2016. Although the country has been a net importer of books, the value of exports has risen fairly steadily in recent years, while the value of imports declined after 2013. As a result, the trade balance in respect of this product category has narrowed from approximately R1.36 billion in 2013 to R972 million in 2016.

Figure 8: Exports, imports and trade balance of South Africa's international trade in books



Source of basic data: South African Revenue Service (via Quantec)

In response to questions aimed at assessing the likely impact of the proposed exceptions on imports and exports, 40% of respondents indicated that they sell imported works in the South African market, and on a weighted basis, imports accounted for 14% of the total sales of all respondents. In the event that the proposed exceptions were adopted, 30% of respondents indicated that their imports of published works would increase. At the level of individual respondents, the scale of this increase could range from as little as 1% to a doubling. The anticipated increase in imports can be ascribed to reduced sales and associated returns on educational publishing in general, resulting in a rationalisation of the offering of local publishers – particularly in relation to niche publication areas.

Sixty per cent of the publishers surveyed currently export published material to other countries, with exports accounting for around 3% of total sales on a weighted basis. Twenty per cent of respondents expected their exports of published material to decrease in the event that the proposed exceptions were adopted.

The expectation of lower sales, higher imports and reduced exports runs counter to the dti's re-industrialisation and localisation objectives. In addition to making South Africa more reliant on imported knowledge, it also increases the exposure of the broadly defined education sector to imported inflation – especially in cases of rand depreciation.

4.4 Anticipated impact of the proposed exceptions on authors of material for the broadly defined education sector

In addition to the survey of publishers, PwC also conducted a survey of authors who are currently developing, or have in the recent past developed, material for the broadly defined education sector. Nine responses were received. Eight of the nine respondents had authored or co-authored works for the broadly defined education sector in the past three years. The remaining respondent last authored a work for this sector four years ago, but continues to receive royalty income.

In response to questions requesting that they identify possible beneficiaries of the proposed exceptions:

- All nine respondents indicated that there would be no benefits to authors.
- Seven respondents perceived that there would be benefits to their customers (students and teachers) due to savings on payments for books. However, the other two respondents cautioned that any benefits would be short-lived because in future students and teachers would have less access to up-to-date and relevant material.
- Six respondents believed there would be benefits to interests apart from their customers. In most cases government was identified as the beneficiary. In this context, one author likened the intent of the proposed legislation to the ‘nationalisation’ of educational content.

On average, the authors surveyed obtained 26% of their income from writing works for the broadly defined education sector. Individual responses ranged from 2.5% to 90%.

None of the authors surveyed self-publish their works. Only two were aware of arrangements with copyright management organisations to collect fees for secondary use of their material. Four respondents were unsure whether such arrangements were in place and the remaining three indicated that there were no such arrangements.

On average, the amount of income going to authors in respect of fees collected for secondary use was under 2% of total income from authoring works for the broadly defined education sector. Responses ranged from 0% (six respondents) to 13% (one respondent).

On average, the six respondents that provided detailed estimates of the likely impact of the proposed exceptions on their income derived from authoring works for the broadly defined education sector, expected a 45% reduction. Of the remaining three respondents, two indicated that the impact would be severe (a large decline in income and significantly reduced willingness to write material for the education sector) and one indicated that he would no longer be willing to author or co-author works for the education sector.

4.5 Summary of the expected economic impact of the 'fair use' and exceptions for education on the publishing industry

The results of PwC's analysis indicate that the proposed exceptions would have a significantly negative impact on the local publishing industry.

- Sales revenue could drop by up to 33%, resulting in a corresponding reduction in the purchase of intermediate inputs from up-stream suppliers. When applied to the baseline data for the sector, this would amount to a decline in sales of around R2.1 billion a year;
- A decrease in the value added by the sector of around R946 million annually;
- A decrease in purchases of intermediate inputs from upstream suppliers of R789 million annually;
- A decrease in employment in the sector of 30%, implying a reduction of 1,250 full-time equivalent jobs;
- An increase in the importation of material for the broadly defined education sector and a reduction in exports of such material from South Africa; and
- An average reduction in the income of authors of works for the broadly defined education sector of more than 25% and a resulting disincentive to produce works for this market.

These anticipated impacts are not inconsistent with those of other countries where similar provisions were either introduced or contemplated. The following section summarises key aspects of these impacts in Canada (which introduced new 'fair dealing' provisions in 2012) and in the United Kingdom (which contemplated their adoption).

However, because of its added reliance on sales to the broadly defined education sector, the negative economic impacts on South African publishing could be more extensive than in these two countries.

5. The impact of proposed and promulgated ‘fair use’ and ‘fair dealing’ reforms in Canada and the United Kingdom

5.1 Impact of copyright law amendments in Canada

The study of the economic impacts of ‘fair dealing’ guidelines that have been implemented in Canada has been chosen as one of the key components of the literature study on copyright law reforms for a number of reasons.

First and foremost, the background to the Canadian impact assessment (conducted by PwC) is quite similar to that of South Africa and it is also fairly recent, having been published in June 2015.

To a large extent, the negative trends that resulted from the adoption of ‘fair dealing’ guidelines in Canada mirror several of the concerns raised in this study and also serve as a caution to the South African authorities of the dangers inherent in inadequate protection of copyright.

The Canadian copyright reforms are fairly similar to some of the intended regulatory changes currently being mooted by the dti and these have, by and large, significantly compromised the ability of educational publishers in Canada to publish original material and meet varied academic needs.

Regarding the important role of a CMO, licensing income in Canada was substantially reduced as a result of the reforms, which were perceived as ill-timed by some because of the transition from printed textbooks to innovative digital products being experienced by the publishing industry globally.

These changes have necessitated a switch to new business models, which involve more comprehensive services, including interactive materials, assessment tools and practice questions to learners at secondary and tertiary levels. These changes come at a significant cost, which means that the profitability (and viability) of the educational publishing sector is being threatened from both the demand side and the supply side.

As is the case in many countries, including South Africa, the lingering after-effects of the global financial crisis and economic recession of 2008/09 have resulted in more constrained fiscal environments which, in turn, have led to limitations on government spending on educational content.

The relevance to South Africa of the Canadian experience with copyright reform is also underscored by a similar fundamental premise upon which an economic assessment of such regulations should be based, namely the balance between encouraging the works of the arts and intellect through just rewards for their creators, on the one hand, and allowing for the dissemination of such works, on the other hand, i.e. arriving at a socially optimal level of copyright protection.

The adoption of ‘fair dealing’ provisions in Canadian copyright law reform has contributed to the shrinking of the educational publishing industry in that country. It is expected to decline further in coming years as the incomes of creators of educational works are likely to continue to decrease. The reforms also serve to discourage innovation in Canada’s knowledge-based economy.

The table below summarises the findings of an *ex post* impact assessment of copyright law amendments implemented in Canada, providing a clear indication of the harm that has been done to the educational publishing industry in Canada:

Summary of key negative impacts of the fair dealing exception for education in Canada that are regarded as relevant for pending statutory copyright reform in South Africa

1. *Significant loss of licensing income*

Royalties on the copying of content that had traditionally been paid over to Access Copyright, a non-profit organisation acting on behalf of authors, visual artists and publishers, have virtually been eliminated.

2. *Discrimination against SMEs*

For many smaller publishers, revenues obtained from licensing (as compensation for administering the reproduction of educational works) represent the difference between profit and loss. The earnings of SME educational publishers before interest, tax, depreciation and amortisation (EBITDA) declined by 81% between 2008 and 2012.

3. *Lower levels of competition*

Without licensing income, many Canadian publishers may be forced to exit the market for educational works, leading to lower levels of competition.

4. *Reduction in content output*

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. This is expected to result in a decline in the quantity and quality of educational content.

5. *Decline in relevant research and development (R&D)*

Based on the logical flow of the supply chain encountered in education publishing, authors and creators will reduce their work effort, mainly in the area of specialised R&D, effectively acting as a brake on the expansion of the knowledge economy. More than one-third of the creators affiliated with Access Copyright indicated that the loss of licensing income which has occurred would reduce the number of works created and the time spent on creating content for the educational publishing market.

6. *Lower levels of investment in the production of digital products and content*

The majority of surveyed publishers indicated that their financial ability to invest in the latest technological advancements in the publishing industry has been curtailed.

7. *Lower sales levels*

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 educational publishing industry, which has started to threaten the existence of large and small publishers alike. This was a significant factor in the decision of Oxford University Press to exit the Canadian secondary school market and Nelson Education, another of the top educational publishers, filing for bankruptcy.

8. *A shift away from Canadian content to importing United States content*

The fair dealing exception for education in Canada, combined with a weakening market, is expected to lead to increased reliance on the importation and distribution of material from the United States.

Summary of key negative impacts of the fair dealing exception for education in Canada that are regarded as relevant for pending statutory copyright reform in South Africa

9. *Reduced headcount*

Between 2012 and 2015, large educational publishers 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.

10. *Title and product rationalisation will lead to divergence in content quality between subject areas*

As a logical response to lower revenues and profitability, publishers have already begun to reduce the number and variety of titles produced, with a discriminatory effect on disciplines with high distribution costs (usually due to low enrolment). In the tertiary market, the regime of copyright exceptions is likely to lead to a focus on the scientific, technical and medical (STM) areas, with less attention to subject areas such as history, arts, language and culture.

11. *Declining contribution to GDP and taxation revenues*

In the space of only two years, 2011 and 2013, the contribution made by the educational publishing industry to Canada's GDP shrank by more than 16%, resulting in a roughly equivalent decline in employment and taxation revenues generated.

12. *Higher prices for quality learning material*

The gains received by the public education sector through lower publication costs may be short-lived as students who are prepared to continue using updated quality learning material will ultimately pay more due to a combination of reduced economies of scale and less competition amongst publishers.

13. *Heavier workloads for teaching staff*

The copyright exemptions in Canada effectively increase the workload of teachers and lecturers by forcing them to prepare course material in addition to the copying of portions of original works.

14. *Regional disparities in the quality of learning material*

Due to the new obligation on teaching staff to create their own resources, greater disparity will necessarily ensue between regions, with those schools and universities that are recognised as possessing relatively higher-quality material ultimately attracting more student applications than they can cope with.

5.2 An economic analysis of education exceptions in copyright in the United Kingdom

In 2012, PwC prepared a report for the United Kingdom Copyright Licensing Agency Ltd. The purpose of the report was to provide an economic analysis of the issues relevant to proposed changes to education exceptions in existing copyright legislation. The PwC analysis considered the impact on innovation and economic growth in the United Kingdom.

Three of the key findings of the PwC analysis of proposed education exceptions in the United Kingdom were:

1. The economic contribution of educational publishing in the United Kingdom, which includes all works purchased by educational institutions and students, is significant, directly and indirectly employing more than 31 600 people. Nearly 43 000 authors receive secondary licensing income from the Copyright Licensing Agency (CLA).
2. The economic rationale for collective licensing and the role of CMOs is to provide access to extracts from copyright works for the benefit of education, business and government and to substantially reduce transaction costs.
3. Whilst licensed works are a highly valued educational input, the licensing costs borne by educational establishments for copying from those works are less than 0.1% of their total costs. The United Kingdom government's proposed changes to education exceptions therefore trade off the longer-term provision of educational materials and continued growth of an innovative exporting industry in favour of minor short-term cost savings.

Summary of key negative impacts identified in an economic analysis of education exceptions in copyright in the United Kingdom that are regarded as relevant to South Africa

1. *Significant increase in transaction costs*
Without the CMOs, the transaction costs of licensing would be prohibitive. PwC estimated that this increase could amount to between 200% and 1000%.
2. *Threat to the economic viability of CMOs*
The loss of income from secondary licensing from the educational publishing market would threaten the survival of CMOs.
3. *Reduction in the creation of new works*
A total of 90% of the CLA members who benefit 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.
4. *Lower levels of investment in new products*
Surveyed publishers indicated that a reduction in CLA income would equate to a loss of funds available for investment in new products.

Summary of key negative impacts identified in an economic analysis of education exceptions in copyright in the United Kingdom that are regarded as relevant to South Africa

5. *Lower exports*

The ability of United Kingdom-based academics to be published and thus to promote United Kingdom research and scholarship on the world stage would be curtailed in the event of a significant loss of licensing income (including exports).

6. *Relatively small cost saving for educational establishments*

Copyright licensing payments make up less than 0.1% of an educational establishment's expenditure. In comparison, the losses borne by educational authors and publishers would be significant: 18% of writing income is earned through CLA fees (for the core market of educational authors).

7. *Job losses*

Several of the surveyed publishers noted that the loss of a significant proportion of profit of businesses in the industry would almost certainly lead to job losses as well.

8. *Declining contribution to GDP and taxation revenues*

The low ratio between cost savings for educational institutions and the creative/publishing sector dictates that broad-based copyright exceptions in education would necessarily lead to a decline in the United Kingdom's total output and also impact negatively on taxation revenues.

9. *Disincentive for the development of digital-based learning resources*

Quoting research conducted in Australia, the analysis shows that an exception for digital copying would stunt the growth of the digital publishing industry.

10. *Threat to the orderly monitoring of copyright compliance*

In the event that CMOs are removed from the market, the useful collaborative dialogue that it enables would disappear with it. This would lead to an increase in scanning, which may substitute for core sales and ultimately diminish the economic viability of publishing text books.

6. Conclusion

At the start of the new millennium, publishers around the world were confronted with the question of what would become of the print industry. Book publishers were forced to embrace digital technology and its many implications in order to remain relevant and solvent. The printing and publishing industries were in the throes of significant changes to their business environment, driven by rapid technological advancement, which had started to provide consumers at large with greater 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 had to ensure that it has an appropriate technology infrastructure in place that is 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, other parts 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. The task of bringing books and articles into existence and of purveying them to their readers is, however, a commercial one that requires resources and skills.

The proposed exceptions for educational use and distance education pose a threat to the financial viability of publishers, authors and existing collective management organisations. 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.

This is confirmed by our study, which found that 89% of the publishers surveyed believe that the promulgation of the proposed exceptions would impact negatively on their operations. In many cases the response to these negative impacts would be significant restructuring, retrenchments and – in some cases – business closure. On a weighted average basis, the publishers surveyed expect their sales to decline by 33% as a consequence of the adoption of the ‘fair use’ and overbroad exceptions for education in the Bill. If this were representative of the entire book publishing sector, it would imply a decrease in sales revenue of around R2.1 billion on the 2015 baseline. Similarly, respondents anticipate a 30% decline in employment in the event that the proposed exceptions are promulgated.

However, the more significant economic impacts of the proposed exceptions arise from the disincentives that they hold for the production and dissemination of knowledge – especially knowledge which is relevant to South African developmental and other challenges. In addition to making South Africa more dependent on imported knowledge (and the associated cost risks that are associated with exchange rate movements), the proposed exceptions also threaten exports of books and associated material.

Ultimately, this will exert a negative impact on the economy via lower output levels in the domain of human capital formation and the development of a knowledge-based economy. Viewed from a longer-term perspective, the real danger of overly broad copyright exceptions is that all the users of educational content may experience a limited availability and reduced quality of 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.

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