

### Whither CAB and PPB?

The copyright Amendment Bill (CAB), together with the Performers' Protection Amendment Bill (PPAB) have been in the making for more than a decade now. While the overall purpose of the two pieces of legislation, ie promoting the economic interests of creators in a context of changing technology is welcome to all stakeholders, the process and some of the provisions have created a huge chasm both in terms of understanding and goodwill, between those that support the bill and those that are opposed to it, including publishers, performers, academics, government officials and different associations.

The concern for many in the industry is that its fair use provision and exceptions for educational purposes will turn copyright in South Africa on its head: a user can essentially access and re-use a work unless the copyright holder proves that a use is unfair. This 180 degree reversal of current law has the potential to create an environment where copyright infringement and the use of copyright materials without compensation may increase in an industry that is already on the precipice due to unauthorised access. There is a further concern that deep-pocketed big tech companies will use copyright content on their platforms to generate advertising revenue without compensating rights holders, claiming to be covered by the presumed fair use by their users.

The concern of this being a sell-out to or of being massively short-changed by big tech is shared not only by other creative sectors that depend on copyright but by holders of rights in indigenous and traditional knowledge, who are lumped together with all kinds of rights holders for purposes of this notion of an expansive fair use. In an environment with very little precedent, many such companies and users will want to push the law to the limit and place as much as possible under fair use, thereby making it onerous for rights holders to litigate on each account and uphill. Many will just let it go because they will not be able to afford the litigation costs.

As if the foregoing were not enough, the defective Bills also propose interfering with contracts and limiting copyright assignments to 25 years. While perhaps well-intentioned, this measure will open a huge window for the same tech companies to canvass and take authors and content that publishers will have worked with and developed over the years.

To illustrate: Broken Monsters by Lauren Beukes, one of the internationally most successful novelists from South Africa, was published in 2014 by Umuzi – it's therefore been around for only one-third of its potential life with the publisher to be on its catalogue.

Limiting the assignment period also means that publishers will be reluctant to invest in authors and projects that they can lose so quickly and easily exactly when investments would start to be recouped in the form of bestsellers and “long-sellers”. Instead of re-investing in the long tail, local publishers will be left telling another “short tale” of disempowerment by mostly international companies. Overall, investment in local content and authors will become far less attractive for both local and international entities. This has the potential to take the industry, the knowledge and the education sector back to an era of extreme dependency on international content and very little local contribution.

South Africa risks being misaligned with global statutes on copyright. There is concern among rightsholders globally, that South Africa will be used as a lobbying example by anti-copyright organisations that have so far failed to undermine or further limited copyright protection in other jurisdictions.

While we stand fully for the right of greater access for the public to information and education materials, we feel that a careful balance should be created between enhancing access to information and for education on one hand, and, on the other hand, providing adequate protection for rights holders and creating an environment that incentivises creators to produce more and for publishers to invest more in knowledge development and dissemination. Further exceptions for education will place a disproportionate burden of education and public funding on authors and businesses – disproportionate, because authors and publishers will be carrying portions of production and distribution costs that are the duty of government to carry. We believe that the current fair dealing provisions as provided for in global statutes and instruments like the Marrakesh Treaty, which South Africa still has to ratify, can play a huge role in enhancing access to designated communities, without stifling publishing financially.

### **More recent developments**

After extensive lobbying and legal engagement by the industry, the presidency referred back the bills to the portfolio committee for further work, more than two years ago. This was after parliament had approved the bills, despite years of protest from rights holders. The following were cited by the presidency as issues that needed further work:

- Wrong tagging of the bills – The bills were tagged as Section 75 bills, implying that they do not affect provinces. The bills certainly have implications for cultural affairs and knowledge and trade in copyright materials, matters that are of huge concern to provinces. The bills should

have been tagged as section 76 bills. This had to be rectified and the bills had to be taken through the National council of provinces (NCOP).

- That sections of the Copyright Amendment Bill constitute retrospective and arbitrary deprivation of property in the sense that rights holders would earn less from their rights.

- That the fair use provision and other crucial sections of the Copyright Amendment Bill had not been subjected to requisite public comment before the publication of the final version of the bill.

- That some of the provisions, including copyright exceptions may be in conflict with the World Intellectual Property Organisation (WIPO) Treaty and the WIPO Performance and Phonograms Treaty, statutes that South Africa is a signatory to.

These matters had also been raised by rights holders in their engagement with the portfolio committee. The concern of the presidency was that some of these clauses would not pass constitutional muster if challenged.

The Bills were taken through the process again, including public hearings and submissions. They were also retagged as Section 76 bills and will be sent to the NCOP, should the National Assembly give its blessing to the cosmetically re-worked Bills by the Portfolio Committee for Trade and Industry. As PASA and as part of the Copyright Coalition of South Africa (CCSA), we did a lot of work and lobbying to ensure that these and other concerns that we have, including that the Copyright Amendment Bill was not backed and to this day has not been vetted by a proper Socio-Economic Impact Assessment Study, are addressed. Further submissions and engagement with the Portfolio Committee were made. The chair of the Portfolio Committee acknowledged that the written submissions from the interested parties and the public had been considerable and required particular attention. On the 10th of June 2022, the Portfolio Committee adopted both the report on the Copyright Amendment Bill and the two bills, opening the way for them to be debated by the National Assembly and sent to the NCOP. Several opposition political parties indicated their disagreement with several clauses of the Copyright Amendment Bill and wanted to have the bill rescinded but their motion was defeated by the majority, driven mainly by the ruling party. These minority views were captured in the Portfolio Committee report to the National Assembly.

## So, where to from here?

There are three intervention points that remain before the bills are passed as law. We can try and have our position and concerns considered during the parliament debate and hope that the bills are not passed by the National Assembly on to the NCOP. The likelihood of the bills being passed by parliament is high. If the bills remain sold to the ruling party law makers, as we have seen in earlier sessions, the chances are that their majority will carry in parliament as well, in spite of the shortcomings and detrimental impact to authors, creators and holders of traditional knowledge. The second intervention point is when the bills are heard in the NCOP. We can work to let the provincial lawmakers appreciate how the bills affect the people in their constituencies and hope that they do not pass them. At the same time we may alert the National House of Traditional Leaders that the promises of the IPLAA and IKS legislation are about to be taken for a ride under the banner of so-called “fair use”. However, the voting patterns of provinces and traditional leaders tend to mirror the national outcomes. It is very likely that if the ruling party’s lawmakers at national assembly vote for the bills, their provincial counterparts will do likewise. After this the next and last stop is when the bill gets to the presidency to be signed into law. Perhaps this is where our chances are strongest, as the presidency indicated some concerns around the bills before sending it back to parliament in June 2021, concerns that have largely remained unresolved. The bills have only undergone cosmetic superficial changes, and the concerns by the Presidency remain unresolved, bar the retrospectivity of the bill: the bill no longer offers unconstitutional compensation for past injustices. Arguably deleting retrospectivity is not what the Presidency had in mind: for past injustices could be addressed legally, yet the simple deletion of the relevant provisions now makes the bill go backward even on the state objective of righting past wrongs.

While as rights holders we are most and immediately affected by the bill, it is of crucial significance to society. Beyond the enhanced access that it promises for education and society through various provisions, the CAB has many potential harmful unintended consequences. Investment in the sector will suffer and as per PwC report (<https://publishsa.co.za/pwc-report-the-expected-impact-of-the-fair-use-provisions-and-exceptions-for-education-in-the-copyright-amendment-bill-on-the-south-african-publishing-industry/>), output will go down and many jobs will be lost. Due to the high illegal use of copyright materials, we have seen significant scaling down in areas like higher education and academic publishing. Some authors no longer seem to see the point of working on new editions when the sell through of their publications has been slashed to as low as 30% by piracy and illegal copying. As per the same PWC report, exports of IP work from South Africa will go down and we will have to rely more on imports and probably slide back to the years when our contribution to global knowledge production through publications was much lower than it is now.

Investment in digital technology in publishing and education is crucial to South Africa leveraging the Fourth Industrial Revolution to improve education outcomes and all its other benefits. Contrary to the claims of big tech companies, such progress cannot be made without a strong content production and learning systems development base.

### What are we doing?

We are engaging prominent authors and influential social commentators to make this a public issue at the time when parliament will be debating the bill. We are planning to have the topic covered on radio, television, newspapers and social media around the time. We are also planning to have conversations with policy makers and alert them to the limitations and implications of the bill.

The above campaigns will also apply when the bills are heard in the NCOP. We are planning to have influencers and people in the provinces lobbying their provincial lawmakers in the same way that we will run the national campaign, highlighting the implications of the bill on local communities and their creativity.

If these fail we will petition the presidency as the last and probably most promising prospect. We have already indicated in earlier engagements that the issues that the presidency raised have overwhelmingly not been addressed, and those that have been addressed have simply eliminated the chance to right past wrongs. One of our legal officials, and recognised copyright and IP experts, André Myburgh, has done a comparative analysis of the C-Bill that was sent back by the president with his concerns with the D-Bill that is now before parliament. His analysis shows that these concerns were mostly ignored or addressed very superficially, where such attempts were made, leaving us with a bill that is fundamentally the same as the one the president sent back. We do not see how the president can proceed to sign a bill that is still saddled with the same issues that he wanted addressed.

In addition to these steps that are defined by the next stages in the Bills' march to becoming law, we are also continuing with our lobbying and highlighting the outstanding issues and also warning that if these are ignored there is real potential for a court challenge, particularly on the issues that were also raised by the presidency and a number of procedural issues. One of the key issues is the fact that there was no socio-economic impact assessment study accompanying the development of the CAB. The claims that are made by all stakeholders in this process can only be validated by such an impact assessment. The impact assessment is a standard requirement for legislation that is likely to have the envisaged type of impact on society.

This becomes particularly important with laws that are as highly contested and are likely to have the level of impact that we think the CAB will have. We can only dismiss or accept the impact claims that different stakeholders make if these claims are confirmed by a socio-economic impact assessment. In the absence of such an assessment, the claims only make sense or are raised for the interests of the sectors concerned.

We have also flagged the defects of the bills in the inter-departmental Creative Industries Masterplan, which parliament has just passed. This is an initiative of several government departments and industry, aimed at growing the creative sector economy. We have argued that the efforts of the plan will come to very little if the CAB is passed as is. Provisions like fair use and broader exceptions for education and interference with contracts, including the reduction of the contract term to 25 years, will all go against the intentions of the masterplan, ie growing the industry. The partners on the plan have agreed that the bill will be one of the issues that needs to be addressed in order to make sure that the masterplan leads to further growth of the sector, as intended.

Though not desirable, we cannot rule out the possibility of court action by the industry and authors if the bill is passed as is nor can we still imagine an industry without the bill in one form or another. As an industry, we need to prepare for such a court challenge and a trading environment under the bill in the current form or any other form that we may be able to persuade the law makers to compromise on. Many people have put a lot of time and resources into the bill process, including getting the presidency to refer the bills back to the portfolio committee. There is a lot of work that still has to be done. The process will be demanding of our time and resources. Our first effort is to avoid a costly and litigious court process through a concerted lobbying process. We hope that all of us will make an effort to make this one of the top public issues in the coming months, through our networks of authors and professionals. This will create the requisite attention to the topic and hopefully persuade law makers to apply themselves diligently when the bill is before them again. Our experience of working on the bill is that below the slogans and popular sentiment, there is very little technical understanding of copyright and the bill. Public discussion and information sessions on the bill will hopefully shed some more light on the concerns.

I would like to thank the chair and members of the CCSA, the chair and members of the LAC of PASA, the executive director, members of our legal team, the executive director of DALRO and his team, the late Monica Seeber and ANFASA and members of PASA and companies who contributed financially and in terms of time to the engagement so far.

I would like to encourage all of us to do everything we can to make sure that we change the course of the bill towards something that will establish an ideal equilibrium between interests of rights holders, continued creativity and investment in the sector and ensure optimal and sustainable access for society and education.

Thank you.

**Brian Wafawarowa**

PASA Chairperson

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