The musings of a copyright scholar working in South Africa: is Copyright Law supportive of emergency remote teaching?

By:

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May 13, 2020

Introduction - copyright and learning

As we were reminded on twitter recently, The Statute of Anne, the world's first copyright law, came into effect on April 10, 1710, three centuries and a decade ago. Its title reads in part, "An Act for the Encouragement of Learning...". The veritable links between copyright and the right to education have been established by several scholars (for example, Helfer & Austin (2011) The Right to Education and Copyright in Learning Materials in *Human Rights and Intellectual Property: Mapping the Global Interface* pp. 316-363). The Statute of Anne is a forebear of South African copyright law which has its roots in English copyright law (T Pistorius 'The Imperial Copyright Act 1911s role in shaping South African copyright law' in Suthersanen & Gendreau (ed.s) (2012) *A*

Shifting Empire: 100 Years of the Copyright Act 1911 pp. 204 - 225). Against this background, this post asks 'is copyright still true to its original intent and is it supportive of emergency remote teaching in alignment with the right to education?'

Context is everything - proceed with caution

I will focus on the higher educational (HE) sector in South Africa, in which I work, and will jettison all academic performance by writing briefly, simply and in the first person. This is appropriate because our encounter with COVID-19 is personal - every person has been affected, either through illness or its impact on our daily lives. Professionally, the impact is as hard-hitting, and the entire sector is striving to meet the challenge. The HE sector has many stakeholders including students, academics, professional, administrative and support staff working in libraries, laboratories, faculties, residences and other parts of university infrastructure. Each constituency faces unique challenges.

This post focuses only on HE institutions' teaching role. Much of what I say below applies to other levels of the educational sector because during South Africa's lockdown, all teaching and learning, from primary to tertiary level has swiftly switched to an emergency remote system. However, for each level there are pedagogical nuances that would impact the types of learning materials and activities resorted to. To avoid erring through generalising across the entire spectrum of the educational sector, I will limit my remarks to HE. The HE sector finds itself pressed to provide quick alternatives to face to face teaching. There is so much at stake that we dare not get it wrong but our circumstances require us to be responsive and responsible. Many students and lecturers alike, have serious challenges ranging from living arrangements and family responsibilities that are not conducive to remote learning; to device and connectivity challenges that hinder participation; many face various health challenges and all of us are witness to illness, suffering and death daily in our homes, communities and on media platforms. Social media is awash with personal accounts of these challenges from the university communities to which we belong. The Mail and Guardian has published various articles that detail this context including coverage of what universities are doing in the fight against COVID-19, how women in HE are coping with working from home; and

on how students are finding online learning far from ideal.

Discussions are ongoing in all HE institutions about what to do, how to do it and what to call it. It is not real online teaching and learning because the sector has been pressed by the pandemic into it and we cannot prepare and present proper online courses. “Emergency remote teaching” has gained currency but is also contested. I use it here mindful of this. Language, labels and technology are powerful and political, as noted by Czerniewicz in her piece on what we learnt about online teaching during university shutdowns in South Africa during 2015 - 2017. It is important to note this complexity at the outset, even if I will not be engaging fully with it. Many universities have prepared plans for how to roll out emergency remote teaching. At my own institution, the University of Cape Town, the Centre for Innovation in Learning & Teaching (CILT) has published Low Tech Remote Teaching Principles. I fully subscribe to these principles that realise that learning contexts are varied and low-tech approaches are the most socially equitable right now. Michael Rowe’s post Universal principles of learning task design. Crisis edition rightfully casts this as an ethical matter. As he says, ‘our students don’t need more resources that are high-bandwidth, expensive, and inherently worse than simple solutions.’ And of course, many academics do not have the mental and emotional capacity to create high tech course content to be delivered live online.

We have a past and, hopefully, a future

The HE sector has an unequal past, about which much has been written. For readers unfamiliar with this history, I recommend Gray and Czerniewicz’s overview of HE under Apartheid as well as their insightful discussion of publishing for HE in their chapter ‘Access to Learning Resources in Post-apartheid South Africa’ in Karaganis (ed.) *Shadow Libraries: Access to Knowledge in Global Higher Education* (2018) (open access) pp 107 - 143. In more recent times HE has faced significant challenges that culminated in #FeesMustFall protests, the aftermath of which the sector is still engaging with. This distant and recent past means that HE institutions went into the pandemic with different resource capabilities and existing problems. This means that their responses to the pandemic started off on the back foot. Prior to the pandemic, the future of HE institutions was predicted to be under threat as set out in

Jansen's address at UCT on 'Seven threats to the future of the academy'. So, we are at an unprecedented moment, affected by our past, and which, in turn, will affect our future which is now more precarious than ever.

Learning materials and copyright

Copyright Law is relevant to this move to emergency remote teaching because it protects most of the learning materials that are used. Beiter expounds on this link in his article 'Extraterritorial human rights obligations to "civilize" intellectual property law: Access to textbooks in Africa, copyright, and the right to education.' *J World Intellect Prop*. 2020; 1– 35 (open access). Also see Armstrong, de Beer, Kawooya, Prabhala and Schonwetter (ed.s) *Access to Knowledge in Africa: The Role of Copyright* (2010) (open access) and Isiko Štrba *International copyright law and access to education in developing countries: Exploring multilateral legal and quasi-legal solutions*(2012). During this pandemic, HE institutions need access to vast amounts of learning materials which they can lawfully digitise and distribute electronically to students across the country for emergency remote learning to work. This is because students and staff alike are not on campus, so access to physical copies held in libraries is not possible. Turning to distance library loans with books couriered to readers is currently not possible during hard lockdown, although it may become possible later either when the lockdown conditions are eased, or a special dispensation is extended.

The first and easiest source to turn to are open educational resources (OER) that are already openly licensed for such use. Whilst there are significant amounts of OER, the reality is that there are not enough such resources specifically relevant for emergency remote learning across all subjects and fields taught in HE in South Africa. It is possible that institutions could hunt for, and find them, from other parts of the world, but they need resources that are appropriate to their specific global south context. So, this means that there is an urgent need to create more OER from scratch or to adapt existing OER for South Africa. Engaging in the creation or adaptation of such OER within a short period of time to meet the need is difficult as those who would be creating such materials are themselves caught in the vortex of the pandemic and busy transitioning to remote teaching at the same time. In addition, many academics

are not familiar with open licensing and have to educate themselves on this. To meet this need, HE institutions are issuing guidelines on this aspect (e.g. CILT & Schonwetter).

With insufficient OER, HE institutions then have to look to existing copyright protected materials and seek to use those. Such use has to be lawful, in terms of an existing license or in terms of a limitation or exception in the copyright law. A few thoughts on these two aspects follow.

(a) Licensing

Most, if not all, HE institutions in SA have concluded a blanket licensing agreement with the Dramatic, Artistic and Literary Rights Organisation (DALRO). For example, see UCT's blanket license. An examination of the license terms will show that they do not permit digitisation and distribution of learning materials to the extent that is necessary in an emergency remote teaching scenario. Consequently, many publishers have made content available electronically to HE institutions (see the Publishers' Association of South Africa (PASA)'s list of available resources). Such contributions are both appreciated and welcome but relying on goodwill and accommodations availed by copyright-holders should be backed by sound statutory provisions which limit the need to call upon such goodwill. In addition, DALRO and PASA have introduced emergency measures for copyright clearance to enable access to essential teaching and learning materials. These measures include "case-by-case emergency licenses" to extend the availability of digital works that were previously limited by a university-wide licence to an institution's learning management system for remote access. The emergency transactional license is only available for "works that are not available in online or distance education products or services offered by publishers" (for a full statement of the measures see Cape Higher Education Consortium, COVID19 Communication, 14 April 2020 and DALROPublishers' assistance to universities during the COVID-19 national disaster period, 26 March 2020). Clearly, the standard existing licensing terms are inadequate to meet emergency remote teaching needs.

(b) Limitations and Exceptions

Ideally there should be Limitations and Exceptions that enable use of copyright protected materials in such emergencies. However, the situation is not ideal and several copyright scholars have written about whether the law allows or permits HE institutions the flexibility to switch to emergency remote teaching with extensive digitisation and distribution of content. See, for example, Okorie's post on Fair dealing and online learning in the time of coronavirus in South Africa. In a nutshell, existing teaching-related limitations and exceptions were conceived of at a time when online learning was not even contemplated and are not able to cater for the current emergency.

Pending South African copyright reforms, in the Copyright Amendment Bill (CAB), would have gone some way in alleviating the situation through modernised limitations and exceptions, more suited to online contexts. The CAB has been awaiting presidential signature since March 2019. Its reforms are highly contested, and debate has been raging for a long time. Providing an overview of the CAB's reforms and engaging with the debate around is beyond the scope of this post, so I will provide readers who are unfamiliar with these aspects with links to some materials. A good starting point is the sponsoring government department's position, the Department of Trade and Industry's summary of submissions received during the consultation process, its responses thereto. There is agreement that copyright reform is necessary and overdue but there is disagreement on the nature and extent of the reforms. To illustrate the divergence of views see Afro-IP 'Resources on The CAB Debate: All The Links You Need!' (20 August 2019). Debate has continued beyond the date of this compilation and three further examples will suffice to illustrate the continued contestation. Rens and Prabal argue that many of the reforms are essential and that presidential assent should be given (5 December 2019) whilst Jacobs argues that the Bill should be scrapped (15 March 2020), an option which is not possible because the relevant constitutional provisions do not permit it (see de Vos 'No sir, the president does not have the power to veto the Copyright Bill', 21 November 2019).

In October 2019, the United States Office of the United States Trade Representative (USTR) opened a Generalized System of Preferences (GSP) review of South Africa which hinges on the CAB's reforms following its acceptance of a complaint (See TRALAC 'South Africa under GSP country

review: what implications for preferential exports to the United States?' 18 January 2020; Docket No. USTR-2019-0020 for all the submissions made at the January 2020 hearings; Flynn and Jaszi - South Africa 2020 GSP Review Post Hearing Statement 26 February 2020). After its hearings in the US, The USTR visited South Africa in March 2020 on a consultative and fact-finding mission during which it met with a wide range of stakeholders. Its review remains open, and is likely to remain so, for at least the medium term. A separate post is necessary to fully discuss the merits of the arguments made during the review hearings. (For a recent update, see Knowledge Ecology International 2020: USTR takes aim at South Africa over copyright limitations and exceptions 22 April 2020). Based on the developments and arguments shared above, it is clear that debate will continue to rage until the President moves on the CAB.

Internationally, it is accepted that copyright limitations and exceptions are in need of reform and the World Intellectual Property Organisation (WIPO)'s S tanding Committee on Copyright and Related Rights (SCCR) has devoted much attention to this matter including the changes that are required for contemporary digital contexts (see e.g. SCCR Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment (2003)). Likewise, other UN agencies such as the United Nations Conference on Trade and Development (UNCTAD) have also considered this matter (see e.g. Okediji The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries in the Digital Environment (2006)). The need to revise copyright law to meet digital contexts has been exacerbated by the pandemic which has forced libraries and HE institutions to shut down and switch to remote delivery of their services. However, current copyright law does not fully enable this. It is for this reason that some IP scholars (myself included) and library associations around the world have written an open letter to the Director-General of WIPO asking the organisation to spearhead the necessary international IP law reforms (see IFLA Leads Open Letter on Intellectual Property and COVID-19)

It is clear that at both national and international level there is work being done to revise copyright law for digital contexts and that the pandemic has impressed upon us how important such work is. There are no suitable limitations and exceptions in South Africa's copyright law to meet emergency

demands and existing licensing agreements were not equal to the task either. Hence the need for the emergency measures outlined above. So, to bring my musings to a close, in my view Copyright Law is not supportive of emergency remote teaching in its current form and reform is urgently needed.

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