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Calibrating copyright for creators and consumers: Promoting distributive justice and Ubuntu

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Introduction

Current copyright law fails to adequately incentivise the creation of books in certain markets and languages. After examining some of the reasons for that failure, this chapter considers ways in which a reimagined copyright law might do a better job of creating the literature, particularly children's literature, which is so sorely lacking in disadvantaged communities around the world. It does so by envisaging a copyright law that furthers the public interest by applying principles of distributive justice, and with reference to the African concept of 'Ubuntu', a metanorm in favour of 'humaneness, social justice and fairness'.¹

1 *S v Makwanyane* [1995] 3 SA 391 (Constitutional Court), [236]. Also see Moeketsi Letseka 'Ubuntu and justice as Fairness' (2014) 5(9) *Mediterranean Journal of Social Sciences* 544, 549.

The problem – neglected languages and neglected markets

Shortages of literature occur in neglected languages across both the developed and developing worlds. In the developing world, South Africa provides a good example of such shortages. The last census, conducted in 2011, found that the population stood at 51,770,560.² 13.5 per cent of the population's first or home language was Afrikaans, while 9.6 per cent spoke English, 74.9 per cent spoke African languages,³ 0.5 per cent used sign language and 1.6 per cent spoke 'other' languages.⁴ The most widely spoken African language was IsiZulu, spoken by 22.7 per cent of the population. (This explains the use of the phrase 'neglected languages' rather than 'minority languages' – some neglected languages are actually spoken by the majority of a given state's population.)

Despite the large number of individuals speaking African languages, existing and potential consumers of literary works struggle to access literary texts in languages other than English and Afrikaans.

The situation is particularly dire when it comes to local general trade publishing. In 2012 only 24 new children's fiction titles were published in African languages, and those were probably 'readers for use in classrooms'.⁵ If this is indeed the case, then to all intents and purposes there were no general trade fiction publications for children in African languages in 2012. In contrast, 61 and 299 new titles were produced in children's fiction in English and Afrikaans respectively.⁶ No children's non-fiction titles were produced in African languages, while 43 and 67 new titles were produced in English and Afrikaans respectively.⁷ In 2013, only 15 new children's titles were produced locally in African languages, again primarily as classroom readers.⁸ This is a decrease from 2012, which is unexplained by the report.

2 Statistics SA (2011) *Census 2011: Key Results – The South Africa I Know, The Home I Understand*, 3.

3 IsiNdebele, IsiXhosa, IsiZulu, Sepedi, Sesotho, Setswana, SiSwati, Tshivenda and Xitsonga.

4 Statistics SA, above n 2, 6.

5 Publishers' Association of South Africa (PASA), *Annual Book Publishing Industry Survey 2012* (2013) 61.

6 PASA (2013), above n 5, 61.

7 PASA (2013), above n 5, 61.

8 PASA, *Annual Book Publishing Industry Survey 2013* (2014), 26.

34 and 174 new titles were produced in children's fiction in English and Afrikaans respectively, with the decrease in English titles being attributed to the 'availability of imported English fiction titles'.⁹ As in 2012, no children's non-fiction titles were produced in African languages, while 231 and 161 new titles were produced in English and Afrikaans respectively.¹⁰ There was an exponential growth in children's non-fiction titles in both English and Afrikaans while African language titles remained non-existent.

The situation is somewhat brighter when it comes to school text books. The Publishers' Association of South Africa (PASA) reports that in 2012 a total of 2,303 new schoolbooks were published, largely stimulated by the new national curricula implemented that year.¹¹ Of these '604 were English titles, 388 Afrikaans titles and 1,311 African language titles. [Isi]Zulu accounted for 277 of the African language titles and [Isi]Xhosa 199'.¹² In 2013, there was further growth driven by the new curricula as it continued to be incrementally implemented. In total, 4,527 new school books were published, of which '1,734 were English titles, 1,078 Afrikaans titles and 1,699 African language titles. [Isi]Zulu accounted for 235 of the African language titles and [Isi]Xhosa 295'.¹³ These statistics substantiate Shaver's assertion that African language textbooks are plentiful because they constitute 56.9 per cent and 37.5 per cent of schoolbooks produced locally in 2012 and 2013 respectively.

Being school books, the books were purchased mostly by schools; books in government schools are paid for from government funds. In percentage terms, in 2012 'English language books accounted for 68.1 per cent of all schoolbook turnover, followed by African languages contributing 19.8 per cent and Afrikaans schoolbooks 12.0 per cent'.¹⁴ In 2013, 'English language books accounted for 74.8 per cent of all schoolbook turnover, followed by Afrikaans contributing 12.7 per cent and African languages schoolbooks 12.4 per cent'.¹⁵ African language books' turnover decreased by

9 PASA (2014), above n 8, 26.

10 PASA (2014), above n 8, 26.

11 PASA (2013), above n 5, 114.

12 PASA (2013), above n 5, 114.

13 PASA (2013), above n 5, 55.

14 PASA (2013), above n 5, 123.

15 PASA (2014), above n 8, 61.

7.4 per cent. It is not clear from the annual reports what caused this decrease. However, it would be accurate to say that English and Afrikaans publications generate the most revenue.

Works in African languages include those that have been originally written in them and those that have been translated from another language. The proportion of children's literature which is translated into an African language, rather than being initially authored in that language, is difficult to ascertain. However some research has found translated works to be more prevalent than natively African works.¹⁶

The above statistics show that there is very limited production and distribution of children's literature in African languages in both the educational and general trade categories. The following section considers the factors which affect authors and translators of such texts, in a bid to explain the low levels of production.

Possible explanations for the lack of books in neglected languages

In the case of South African languages, certain kinds of text-based material, such as textbooks, religious titles and newspapers, are abundant. This is attributable to the 'relative efficiency of production models based on alternative incentive systems'. That is, they are produced because of government procurement policies, evangelism and 'high-volume sales of time-sensitive content and advertising revenue'.¹⁷ Where those factors are absent however, production tends not to occur, leaving other authors with few or no avenues to publish their works.

An oft-cited reason for the limited literature in African languages is that there are only a few authors who choose to write in African languages. Various reasons are cited for this, such as colonial and current national language policies that favour literature in dominant

16 Viv Edwards and Jacob Marriote Ngwaru, 'African language publishing for children in South Africa: Challenges for translators' (2011) 14(5) *International Journal of Bilingual Education and Bilingualism* 590, 593.

17 Ibid.

languages.¹⁸ Another reason is societal attitudes that consider African languages to be inferior to other languages, which may be partially caused by colonial and current educational policies and practices.¹⁹ Several publishing industry related constraints have been highlighted consistently in the literature.²⁰ These include government procurement policies, poor distribution systems and 'lack of inter-African book trade'.²¹ Another key constraint is the perceived lack of a market or readership for works in African languages.²² I label this constraint as a perception, rather than as a fact, because it has been persuasively challenged. Ngulube asks:

when we talk of the lack of a reading culture being inimical to publishing especially in the indigenous languages, what epistemologies are we using to come to such a conclusion? Are we not running the danger of reinforcing the already entrenched stereotypes that Africans do not read ... The suitability of materials may be one of the major reasons for creating an unfavourable reading environment. Again, we may ask: is the reading environment rooted in local realities? Are the books suitable for the readers? Do we know our readers? Or do we paint them all with one brush that sees things in terms of illiteracy and literacy? By means of whose language is literacy provided, and by using what methods?²³

18 Enna Sukutai Gudhlanga and Godwin Makaudze, 'Writing and publishing in indigenous languages is a mere waste of time: A critical appraisal of the challenges faced by writers and publishers of Shona literature in Zimbabwe' (PRAESA Occasional Papers No 26), 4–5.

19 Gudhlanga and Makaudze, above n 18, 8; Bernard Naledzani Rasila and MJ Mudau, 'Challenges of writing and publishing in indigenous languages and impact on rural development' (2013) *Journal of Education, Psychology and Social Sciences* 1339.

20 For a literature survey see Hans Zell, *Publishing, Books & Reading in Sub-Saharan Africa: A Critical Bibliography* (Hans Zell Publishing, 2nd ed, 2008).

21 Peter Lor, 'Preserving, developing and promoting indigenous languages: Things South African librarians can do' (2012) 45 *Innovation* 28, 31. Also see Solani Ngobeni, 'Scholarly Publishing in South Africa' in Solani Ngobeni (ed), *Scholarly Publishing in Africa: Opportunities & Impediments* (Africa Institute of South Africa, 2010) 69, 78.

22 Cynthia Daphne Ntuli, *From oral performance to picture book: A perspective on Zulum children's literature* (Doctor of Literature and Philosophy, University of South Africa, 2011) 1.

23 Patrick Ngulube, 'Revitalising and preserving endangered indigenous languages in South Africa through writing and publishing' (2012) 78(1) *South African Journal of Libraries & Information Science* 11, 17–18.

Valid or not, the perception of a limited market for literature in African languages makes publishers reluctant to publish and promote this literature. Therefore, they focus mostly on publishing for the educational sector, which has a guaranteed market courtesy of government procurement.²⁴

Self-publishing has recently become more popular but it has not taken real root among African language authors in South Africa.²⁵ This hints at the existence of 'entrepreneurial barriers [which] include psychological barriers, barriers in relation to the business environment, barriers relating to external ability and barriers in relation to the influence of demographics'.²⁶

Translators face additional challenges. From a copyright perspective, licences will be required to authorise the translation before it can occur. Professional and publishing concerns 'include the high level of specialism required for working with children's literature and issues around standardisation'.²⁷ Variations in the same languages as they are spoken in different parts of the country also create the need for highly nuanced translation practices.²⁸

Under-production in the field also means that authors who are offered publication contracts may receive disadvantageous terms. Authors may not be in a position to bargain equally with third parties due to limited legal or technical knowledge, information asymmetries and resource constraints.

It is unsurprising that under-production of creative and informational works occurs where potential markets are resource-poor and profit margins thin or non-existent. Copyright encourages investment in informational and creative works by entitling investors to charge a monopoly price that exceeds the marginal cost of production, thus enabling them to recoup their initial fixed costs of investment.

24 Jana Moller, 'The state of multilingual publishing in South Africa' *E-rea* 2013 <erea.revues.org/3507>.

25 Aphwe Ngcai, 'Challenges in writing and publishing in indigenous languages' Academic and Non-fiction Authors Association of South Africa (ANFASA), April 2013 <www.anfasa.org.za/Newsletter/jit_default_1117.Newsletter_April_2013.html> (site discontinued).

26 Joel Baloyi 'Demystifying the Role of Copyright as a Tool for Economic Development in Africa: Tackling the Harsh Effects of the Transferability Principle in Copyright Law' (2014) 17(1) *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 85, 91.

27 Edwards and Ngwaru, above n 16, 593.

28 Edwards and Ngwaru, above n 16, 596–597.

Thus, where a market cannot or will not pay the monopoly price necessary to justify investment, it may result in unmet demand. That is, the inability of some markets to pay that monopoly price means that works to satisfy their needs simply not be created. This imposes a great deal of deadweight loss upon society in the form of benefits forsaken by those who could have afforded at least the marginal cost of production, but who are unable to afford monopoly pricing.

In such cases the traditional copyright structure fails to achieve its primary utilitarian goal of encouraging the production of creative and informational works. How might it be reimagined to do a better job of encouraging the creation and distribution of works in currently neglected languages?

What should a reimagined law be seeking to achieve? The public interest, Ubuntu and distributive justice

In assisting the reimagination exercise, this book project utilises the unifying principle of ‘the public interest’. The concept of the public interest serves as ‘a rhetorical device’, ‘a statement of current policy’ and as ‘a normative standard’.²⁹ Most of the discontent around its usefulness is a result of its frequent use as a rhetorical device without much thought being given to its normative content.³⁰ Many scholars have lamented the lack of clarity about the definition of the public interest, and therefore question its value.³¹ As noted in Chapter 1, the public interest is an amorphous concept that has been appropriated by different agendas over time. It has been identified with a number of different constituencies. For example, Tang notes that the public interest in copyright is multidimensional and consists of authorship

29 Geoffrey Edwards, *Defining the Public Interest* (PhD thesis, Griffith University, 2007) 1.

30 Isabella Alexander, *Copyright Law and the Public Interest in the Nineteenth Century* (Hart Publishing, 2010) 16.

31 RC Box, ‘Redescribing the public interest’, (2007) 44 (4) *The Social Science Journal* 585, 586; V Held, *The Public Interest and Individual Interests* (Basic Books, 1970) 1; HJ Storing, ‘Review: The Crucial Link: Public Administration, Responsibility, and the Public Interest’ (1964) 24 (1) *Public Administration Review* 39–46; CJ Friedrich (ed), *Nomos V: The Public Interest. Yearbook of the American Society for Political and Legal Philosophy* (Atherton Press, 1962); Schubert *The Public Interest: A Critique of the Theory of a Political Concept* (The Free Press, 1960) 224; F Sorauf, ‘The Public Interest Reconsidered’ (1957) 19 *Journal of Politics* 616.

and access public interest.³² Granting authors economic monopolies and protecting their moral rights would be in the public interest because it would ‘promote creativity and learning and provide a framework for investment by the creative industries’ (authorship public interest).³³ Granting user access to copyright-protected works through devices such as exceptions and limitations would also be in the public interest as it facilitates access to educational information, culture and entertainment (access public interest).

It could be argued that copyright law is truly in the public interest when it balances these two types of interests appropriately. However, this argument would raise at least three concerns. First, pigeonholing the stakeholders into the two listed categories would be overlooking the highly nuanced positions and interests of each stakeholder.³⁴ Indeed, Tang is at pains to highlight the contours of these interests throughout her text. Secondly, once stakeholders are categorised in this manner, the arguments for the public interest tend to conflate the public interest with one set of stakeholders. This is problematic because, as argued in Chapter 1, the public interest ‘must comprehend a range of goals.’ Thirdly, by resorting to the much-used metaphor of balance, it raises the vexing question of what measure one is to use to gauge such balance.³⁵ Therefore, other conceptualisations of the public interest have to be sought. It is necessary to seek to define the concept because, despite the difficulties in doing so, it retains an allure due to its evocation of ‘justice and fairness for the common good.’³⁶

As noted in Chapter 1, Held articulated a threefold categorisation of theories that may be used to elucidate the public interest concept, namely preponderance, common interest and unitary theories.³⁷ This chapter adopts the first of these, the preponderance theories. These theories posit that an outcome or policy position will be in

32 Guan H Tang, *Copyright and the Public Interest in China* (Edward Elgar, 2011) 50.

33 Ibid.

34 Teresa Scassa, ‘Interests in the Balance’ in Michael Geist (ed), *In the Public Interest: The Future of Canadian Copyright Law* (Irwin Law Publishers, 2005) 41–65, 41.

35 Carys J Craig, ‘The Evolution of Originality in Canadian Copyright Law: Authorship, Reward and the Public Interest’ (2005) 2(2) *University of Ottawa Law and Technology Journal* 425, 441.

36 Caroline B Ncube, ‘Fair is as fair does: Contractual normative regulation of copyright user contracts in South Africa’ in G Dinwoodie (ed), *Intellectual Property and General Legal Principles: Is IP a Lex Specialis?* (Edward Elgar, 2015) 49, 55–56; Gillian Davies, *Copyright and the Public Interest* (PhD thesis, Aberystwyth University, 1997) 1.

37 Held, above n 31, 42–46.

the public interest where it serves majority of interests. Arriving at such a majoritarian position will require a settled and fair process in which participants engage impartially in good faith. As Lippman wrote, 'the public interest may be presumed to be what men would choose if they saw clearly, thought rationally, acted disinterestedly and benevolently.'³⁸ Similarly, Down notes that:

the concept of public interest is closely related to the universal consensus necessary for the operation of a democratic society. This consists of an impartial agreement amongst people concerning two main areas: the basic rules of conduct and decision-making that should be followed in the society; and general principles regarding the fundamental social policies that the government ought to carry out.³⁹

These preponderance theories have been critiqued for their perceived 'artificiality' which resulted from their undemocratic 'assumptions about ... aggregated individual interests and the arbitrary rejection of other subjective legitimate preferences'.⁴⁰

However, if the national legislative or administrative process through which the majoritarian position is reached is fair, then democratic demands are adequately met.⁴¹ Another difficulty with this conception is that the literature leaves it unsettled how the majority will be determined. In this work I will rely on majority of numbers, rather than weight of political strength or any other measure.

The normative content of the public interest will be directed by each state's socioeconomic context and its national priorities. Such a process and its outcome is an inevitable outcome of Rousseau's conceptualisation of the social contract⁴² or Down's social consensus.

38 W Lippman, *The Public Philosophy* (Hamish Hamilton, 1955) 44, quoted in J Morison and G Anthony 'The Place of Public Interest' in G Anthony et al (eds), *Values in Global Administrative Law* (Hart Publishing, 2011) 215, 217

39 Anthony Downs, 'The Public Interest: Its Meaning in a Democracy' (1962) 29(1) *Social Research* 1, 5.

40 Morison and Anthony, above n 38, 218. Also see William Fisher, 'Theories of IP' in Stephen Munzer (ed), *New Essays in the Legal and Political Theory of Property* (Cambridge University Press 2001) 168.

41 Caroline B Ncube, 'Harnessing Intellectual Property for Development: Some Thoughts on an Appropriate Theoretical Framework' (2013) 16(4) *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 375; Anupam Chander and Madhavi Sunder, 'Is Nozick kicking Rawls's ass? Intellectual property and social justice' (2007) 40 *UC Davis Law Review* 563, 577.

42 Jean-Jacques Rousseau, *The Social Contract* (1762).

As stated in the introduction, this chapter reimagines a copyright law that would seek and achieve distributive justice. Such a law would stimulate the production of literature in neglected languages in order to improve education and cultural participation; creating necessary and appropriate mechanisms for the remuneration of authors to spur and reward such production; and ensuring access to those works in order to facilitate their beneficial educational or cultural use.

In Sub-Saharan Africa these ideals of the public interest find expression in the metanorm⁴³ or concept of Ubuntu,⁴⁴ which exists in Botswana, Lesotho, Malawi, Mozambique, Namibia, South Africa, Swaziland, Zambia and Zimbabwe.⁴⁵ In Zimbabwe and South Africa, it was critical in the transition to democracy.⁴⁶ The South African Interim Constitution of 1993 expressly mentioned Ubuntu and, although it does not appear in the final Constitution of 1996, it has received judicial endorsement through a number of Constitutional Court (CC) judgments. It is applicable to all areas of law⁴⁷ and has found application in constitutional, criminal, delictual, contractual and defamation matters.⁴⁸ Therefore, it is an accepted part of the legal canon.

Ubuntu's meaning is somewhat elusive,⁴⁹ but it generally denotes 'humaneness, social justice and fairness'.⁵⁰ It is based on an appreciation of each individual's duty and right to participate in the communal endeavour. It focuses simultaneously on individuality and interdependence. One's individuality is constituted through one's relationships with others, expressed in the Nguni languages as 'umuntu ngumuntu ngabantu' ('a person is a person through others').⁵¹ It also

43 Thomas W Bennet, 'Ubuntu: An African Equity' (2011) *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 30, 35.

44 Letseka above n 1, 547.

45 Ibid.

46 Christian BN Gade, 'The Historical Development of the Written Discourses on Ubuntu', (2011) 30(3) *South African Journal of Philosophy* 303, 309–315; S Samkange and TM Samkange. *Hunhuism or Ubuntuism: A Zimbabwe Indigenous Political Philosophy* (Graham Publishing, 1980).

47 Chuma Himonga, Max Taylor and Anne Pope, 'Reflections on judicial views of Ubuntu' (2013) 16(5) *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 370, 376.

48 Ibid 396–405; Bennet, above n 43, 32–46.

49 Bennett, above n 43, 30–31.

50 *S v Makwanyane*, above n 1, [236]. Also see Letseka, above n 1, 549.

51 Letseka, above n 1, 548; Desmond M Tutu, *No future without forgiveness* (Doubleday, 1999) 36. Also see *MEC for Education: KwaZulu-Natal v Pillay* [2008] 1 SA 474 (Constitutional Court) [53].

loosely translates to 'I am because you are'⁵² or 'I am because we are'.⁵³ Ubuntu encompasses notions of both restorative⁵⁴ and distributive⁵⁵ justice. Most pertinent to this discussion, is its potential to 'illuminate the always thorny problem revealed when individual interests collide with public interests'.⁵⁶ In such cases, it adopts a preponderance perspective and seeks a communally beneficial outcome.

This alignment of preponderance public interest theories with the Ubuntu metanorm creates a lens through which to view ground-up copyright reform that has resonance with both western and African philosophies. That resonance is important because the focal point of this chapter's reimagination exercise is Africa. Intellectual property (IP) laws and principles have failed to gain traction in Africa because they are based upon western ideas of an individual's rights to intangible property that fail to factor in widespread communitarian perspectives. Highlighting the distributive justice aspects of Ubuntu goes some way in better relating copyright to African philosophy and thus garners some 'cultural legitimacy'⁵⁷ for it. Similar arguments have been made in relation to human rights in Africa.⁵⁸

In the IP context, cultural legitimacy concerns have been raised with respect to the protection of traditional knowledge, which remains a challenge for conventional IP protection.⁵⁹ This is because, in its communities of origin, traditional knowledge is created by, maintained and exploited for the benefit of the collective, rather than for the

52 As translated by Jacob Lief and Andrea Thompson, *I Am Because You Are: How the Spirit of Ubuntu Inspired an Unlikely Friendship and Transformed a Community* (Rodale Inc, 2015).

53 As used in Fred L Hord and Jonathan Scott Lee, *I Am Because We Are: Readings in Black Philosophy* (University of Massachusetts Press, 1995).

54 Bennett, above n 43, 35; Himonga, Taylor and Pope, above n 47, 396–405.

55 DJ Louw, 'The African concept of ubuntu and restorative justice' in D Sullivan and L Tiff (eds), *Handbook of Restorative Justice* (Routledge, 2008) 161,165; O Schachter, 'Human dignity as a normative concept' (1983) 77 *American Journal of International Law* 848, 851.

56 Himonga, Taylor and Pope, above n 47, 422.

57 A term used by Chuma Himonga in making a case for relating Ubuntu to human rights in order to legitimate it, in Chuma Himonga, 'The right to health in African Cultural Context: The role of Ubuntu in the realization of the right to health with special reference to South Africa' (2013) 57 *Journal of African Law* 165–195, 165.

58 Ibid; Josiah AM Cobbah, 'African Values and the Human Rights Debate: An African Perspective' (1987) 9(3) *Human Rights Quarterly* 309.

59 JT Cross, 'Property rights and traditional knowledge' (2010) 13(4) *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 12.

individual.⁶⁰ They have been the foundation for calls for a *sui generis* system of protection for traditional knowledge or for more carefully considered IP protection. These claims can be extended to copyright protection in general. If part of copyright's aim is to stimulate the production and dissemination of cultural works, should it not have cultural legitimacy? This chapter proceeds on the assumption that this legitimacy could be derived from copyright's service of the public interest via a focus on distributive justice and close alignment with the Ubuntu metanorm.

In reimagining copyright, it's important to note that the interests of a preponderance of persons will vary in relation to the type of work at issue. For example, there may be a national policy to promote literacy and a constitutional obligation for the state to provide access to a basic education.⁶¹ Such imperatives may mean that the public interest in relation to copyright-protected works, which are used in educational contexts, is different from that which pertains to other copyright-protected works that are not central to the acquisition of a basic education and literacy.

This following section considers some ways in which a copyright law might further the interests of a preponderance of individuals in accordance with principles of Ubuntu and distributive justice. That is, it considers how the law might better:

1. Stimulate the production of literature in neglected languages in order to improve education and cultural participation;
2. Remunerate authors to spur and reward such production; and
3. Ensure access to those works in order to facilitate their beneficial educational or cultural use.

60 Dijms Milius, 'Justifying Intellectual Property in Traditional Knowledge' (2009) 2 *Intellectual Property Quarterly* 185, 190.

61 For example, see Enynna S Nwauche, 'The public interest in Namibian copyright law' (2009) 1 *Namibia Law Journal* 43, 66; L Arendse, 'The Obligation To Provide Free Basic Education In South Africa: An International Law Perspective' (2011) 14(6) *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 97; Shireen Motala, 'Educational Access In South Africa' (2011) *Journal of Educational Studies Special Issue Social Justice* 84.

Reimagining copyright

This section suggests a number of different ways in which the existing law might be amended to better further the interests of a preponderance of individuals and the public interest aims outlined above. These span the acquisition of rights; their duration and content; exceptions and limitations; assignment; licences and remedies. The proposals aim to do a better job of identifying the public interest aims identified above, by promoting the creation of new works in African languages, facilitating translations of existing works into those languages, helping authors get a better deal and improving access.

Currently translating works is hampered by the need to obtain licences and its attendant difficulties. There are at least four ways of ameliorating this, namely providing for:

1. constitutive copyright registration;
2. a two-tier copyright system;
3. a limited translation right for copyright-protected works; and
4. introducing local language limitations.

The following pages consider each of these possibilities in turn.

Constitutive registration

Requiring constitutive registration provides authors with the option of opting out of the copyright system and in so doing would ensure that more public domain works are available, which can then be translated without the need to obtain licences. An additional benefit of registration would be the enhancement of legal certainty due to the availability of information about which works are protected.⁶² Such information would then be available to enable potential licensees to seek out copyright holders in order to obtain licences.⁶³

62 Niva Elkin-Koren, 'Can formalities save the public domain? Reconsidering formalities for the 2010s' (2013) 28 *Berkeley Technology Law Journal* 1537, 1541.

63 Ibid; Christopher Sprigman, 'Reform(aliz)ing Copyright' (2004) 57 *Stanford Law Reform* 485, 501.

Any such registration system ought to be implemented both on and offline. Sole reliance on an online system would be inappropriate for a developing country where internet access remains unaffordable for some. Simple registration systems can be achieved as shown by Kenya's voluntary copyright registration system that entail the completion of a simple administrative form, payment of a small fee and the deposit of a copy of the work.⁶⁴

Taking such an approach would better serve the public interest by treating works differently based on commerciality (see section below on tiers) or creative motivation. So for example, a work created for religious ends, such as a papal decree, would be protected differently from a movie or other work created for entertainment purposes and motivated by profit-making. Some creators of works are not motivated by copyright or commercial concerns but find that copyright law automatically foists an economic monopoly upon them. As noted by Tushnet:

Creativity is messy in ways that copyright law and theory have often ignored to their detriment. Creators speak of compulsion, joy, and other emotions and impulses that have little to do with monetary incentives.⁶⁵

Copyright law's current approach of granting all authors the same rights is the result of its undue focus on the author's creative output, rather than the reason why she created the work in the first place.⁶⁶ Heymann notes that, considering this focus on the product, it is odd that copyright law is often justified in relation to the motivation of the creator.⁶⁷ The utilitarian justification for copyright posits that people create because of the incentives provided by the exclusivity afforded them by copyright law. However, reality forces one to accept that creators are not always motivated by such incentives. Examples of such creators include those who are religiously motivated to disseminate certain information; those who write for business and personal communication purposes; those who author model legal codes; those

64 Section 8 of the *Kenya Copyright Act 2001*; Kenya Copyright Board (KECOBO) (2014) *Requirements for Registration of a Copyright Work and Application for Anti-Piracy Security Device*.

65 Rebecca Tushnet, 'Economies of Desire: Fair Use and Marketplace Assumptions' (2009) 51 *William & Mary Law Review* 513, 546.

66 Laura A Heymann, 'A Tale of (At Least) Two Authors: Focusing Copyright Law on Process Over Product' (2009) 34(4) *The Journal of Corporation Law* 1009, 1009.

67 Ibid.

who take amateur and home photos and videos to archive memories and those who create merely to express their creative talent.⁶⁸ Granting the same rights to this diverse body of authors creates a 'uniformity cost'⁶⁹ in that creators or authors are saddled with more rights than they want or less than they need.

Those copyright holders who wish to permit others to use their works currently have to take positive action to enable this to happen. This is palatable for commercially driven copyright holders. Indeed, their aim is to be in a position to negotiate and license the use of their protected works. But it presents a barrier to copyright holders who do not set out to commercially exploit their works in this manner but who simply want to disseminate their works and perhaps to also allow others to use them in further creative efforts. To achieve this goal, they have to license users of their works, even where they do not wish to levy licence fees. They could choose not to do this and simply 'put their work out there' for use by whoever wanted to and then desist from suing these users for infringement. This would work for some users, but the risk-averse user is likely to avoid using the work at all, due to the risk of being sued for infringement. Such a scenario thwarts the intention of the creator of the work. The way out of this quandary is for such creators to openly license their works upfront so that any potential user who is willing to abide by the licence terms, may use the work without seeking out the right holder or entering into negotiations with her. Copyright holders who wish to take this approach have to draft the requisite licences which requires some copyright law knowledge or the retention of attorneys, invariably at significant expense. These attendant knowledge and expense difficulties may cause some copyright holders to decide not to license their works in this manner and thus leave society bereft of the benefits of their works.

Non-profit organisations such as Creative Commons have stepped into the gap by providing copyright holders with a simple online mechanism to source such open licences. While these licences work well the law can be criticised for foisting rights upon persons who neither want nor need them thereby forcing them to take action to

68 Ibid 1010; Jessica Litman, 'The Public Domain' (1990) 39 *Emory Law Journal* 965, 974.

69 See Michael W Carroll, 'One for All: The Problem of Uniformity Cost in Intellectual Property Law' (2006) 55 *American University Law Review*, 845.

exercise their licensing rights in order to enable use of the copyright-protected works that is not catered for by existing exceptions and limitations. An open licence does not divest a copyright holder of her rights. Rather it short-circuits what might otherwise be a lengthy and complicated licence negotiation and conclusion process by allowing the right holder to license works upfront and present them to users on a 'take it or leave it' basis.

The necessity for open licences is the consequence of copyright laws that do not take cognisance of creator's motivations or intentions. It would be better to create a copyright system that gives economic monopolies, through registration and renewal, to those who want or need them. That would protect authors' interests, while at the same time opening up access to a greater range of works.

A two-tier copyright system

Another possible option might be to create a two-tier copyright system structured to facilitate the entry of works into the public domain earlier than current copyright law allows. Such a system would not grant the same rights in the same way to all creators. The model suggested in this chapter would allow creators, informed by their personal motivation and commercial aspirations, to select a tier under which to protect their work. The proposed tiers are set out below.

Tier 1 works would get copyright protection for a non-renewable prescribed duration of 10–14 years.⁷⁰ Tier 2 works would obtain initial protection for one year which would be renewable for a prescribed maximum term upon the payment of renewal fees, provided that the work meets a set revenue threshold.⁷¹ If the system imposes relatively high registration and renewal fees, it is likely that a significant number of copyright holders would not renew their copyright.⁷² Only those works which achieve significant commercial success are likely to have their copyright renewed. The system could be further nuanced to set revenue thresholds that must be met by works to render them eligible for renewal. This would enable blockbusters, such a hit Nollywood

70 Martin Skaldany, 'Unchaining Richelieu's Monster: A Tiered Revenue-Based Copyright Regime' (2012) 16:1 *Stanford Technology Law Review* 131, 141.

71 *Ibid* 142.

72 Richard A Posner and William M Landes, 'Indefinitely Renewable Copyright' (2003) 70 *University of Chicago Law Review* 471, 517–518.

or Bollywood films, to secure and maintain copyright for maximum prescribed term of copyright. Some proposals for copyright reform have suggested an indefinite term of copyright,⁷³ but such an approach would not serve the aims of distributive justice. The determination of an appropriate maximum term would have to be determined either through a new international agreement or nationally. Socially valuable works such as documentaries or literary works in neglected languages may not attain sufficient commercial success to pass the renewal threshold. To promote the production and dissemination of such works, it is proposed that provision be made for the waiver of renewal fees, upon application by the copyright holder. Criterion for determining the social value of a work could include its contribution to the cultural and educational needs of neglected markets.

The benefits of implementing this proposal would be manifold. First, many non-commercial works could be dedicated to the public domain by an author's choice to not seek protection. Secondly, those non-commercial works which would be protected under tier 1 would enter the public domain much quicker than is the case under current copyright law. Thirdly, commercial works that are protected in tier 2 would also enter the public domain in a relatively shorter time than is currently the case due to the revenue thresholds that must be met to sustain protection. A work would only continue to meet these thresholds if consumers continued to spend money to access the work. In that sense, the consumer would be the 'final arbiter' of which works are protected. Fourth, this proposal would eliminate orphan works as only those works which are registered would secure copyright protection, opening up still more works for public use.

Translation rights, limitations and compulsory licences

Under current copyright law, a copyright holder has exclusivity over translations of the protected works for the full term of copyright protection. The Berne Appendix and the Universal Copyright Convention⁷⁴ contain substantively equivalent provisions on

73 Skaldany, above n 70.

74 *Universal Copyright Convention*, United Nations Educational, Scientific and Cultural Organization, Art V.

compulsory licences for translation and reproduction.⁷⁵ This section focuses on the Berne Convention, which has more currency due to its entrenchment in the TRIPS Agreement⁷⁶ and the WIPO Copyright Treaty.⁷⁷

The Berne Appendix provides for a non-exclusive and non-transferable compulsory licensing scheme which developing countries can use to enable or facilitate the production of neglected works. These licences can only be issued in relation to 'printed or analogous forms of reproduction.'⁷⁸ While there has been some controversy as to the meaning of this phrase and whether it includes digital works, the more pervasive view is that it does.⁷⁹ These compulsory licences are available only for (i) translation 'into a language of general use in the country'⁸⁰ for 'teaching, scholarship or research purposes'⁸¹ and/or (ii) 'reproduction for use in connection with systematic instructional activities'.⁸² These uses are very restrictive and exclude the translation of texts for other purposes such as cultural enrichment or literacy enhancing initiatives that fall outside formal education. For instance, a local library or community centre may run read-a-thons or holiday reading programs which would benefit from the availability of books in local languages. Translation compulsory licences are of particular interest to this chapter, which seeks to find ways of stimulating the

75 Alberto J Cerda Silva, 'Beyond the Unrealistic Solution for Development Provided by the Appendix of the Berne Convention on Copyright' (PIJIP Research Paper no 2012-08, American University Washington College of Law, 2012), 7.

76 Art 9.1 of the TRIPS Agreement (*Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex IC (*Agreement on Trade-Related Aspects of Intellectual Property Rights*)) obligates Contracting Parties to comply with Articles 1 to 21 and the Appendix of the Berne Convention (*Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886 (amended in 1914, 1928, 1948, 1967, 1971, and 1979) 25 UST 1341, 828 UNTS 221, entered into force 5 December 1887). However it excludes provisions on moral rights.

77 Art 1(4) of the WIPO Copyright Treaty (*World Intellectual Property Organization Copyright Treaty*, opened for signature 20 December 1996, 36 ILM 65, entered into force 6 March 2002) obligates Contracting Parties to comply with Articles 1 to 21 and the Appendix of the Berne Convention.

78 Berne Convention, Appendix, Arts II (1), II (2)(a), and III.7.

79 Silva, above n 75, 27–31.

80 Berne Convention, Art II (3)(a).

81 Berne Convention, Art II (3)(5).

82 Silva, above n 75, 8.

production of children's literature in African languages. The scope of the translation compulsory licences is very ambiguous, because of the uncertainty of the meaning of the phrase 'a language in general use'.⁸³

The licences are to be granted by a competent authority in the relevant state if certain conditions are met and subject to the payment of fair compensation to the copyright holder.⁸⁴ The conditions applicable to the issuance of translation licences include waiting periods of three years,⁸⁵ which may be reduced to one year in the following two scenarios:

- i. if the language the work is being translated into is 'not in general use in one or more developed countries which are members of the Union';⁸⁶ or
- ii. developed country member states of the Union have given their unanimous consent and duly notified this consent to the Director-General of WIPO. In addition the relevant language must be in general use in the consenting countries. However such consent cannot be given where the language in question is English, French or Spanish.⁸⁷

Further, there are additional applicable grace periods of six or nine months which must be waited out before a translation licence is issued.⁸⁸ The grace period is six months when the full three-year waiting period is obtained, and nine months when a shortened waiting period of one year is obtained. The purpose of these grace periods is to afford the copyright holder an opportunity to translate the work. If the right holder translates the work during the grace period, a compulsory licence will not be issued.⁸⁹ There are waiting periods that are applicable only to reproduction licences,⁹⁰ which shall not be enunciated here because of the chapter's focus on translation licences.

83 Silva, above n 75, 24, n117 citing WIPO Diplomatic Conference for the Revision of the Berne Convention Paris, July 5–24, 1971, General Report of Paris Conference § 34, which defined this phrase to mean that 'a language could be one of general use in a given geographic region of the country, an ethnic group, and even a language generally use[d] for particular purposes'.

84 Berne Convention, Art IV (6).

85 Berne Convention, Art II (2)(a)–(b).

86 Berne Convention, Art II (3)(a).

87 Berne Convention, Art II (3)(b).

88 Berne Convention, Art II (4)(a).

89 Berne Convention, Art II (4)(b).

90 Berne Convention, Art III (4)–(5).

As noted by Štrba these grace periods serve to ‘shield’ copyright holders after they have failed to provide, or licence someone else to produce, a translation in a manner that is not provided for in patent law compulsory licence provisions.⁹¹

Finally, there are further conditions that are applicable to both translation and reproduction licences.⁹² One of these is the provision of proof by the applicant that:

- a. he was denied a licence by the right holder or
- b. that the original work in question is an orphan work and despite a diligent search he was unable to identify the copyright holder.⁹³

Operationalisation of the compulsory licensing regime provided for in the Berne Appendix is two-staged. The first stage is the filing of notifications with the Director-General of WIPO together with the requisite renewal notice after the passage of the prescribed period. The second stage is the enactment of domestic statutory provisions in copyright legislation as supplemented by the necessary implementing regulations. Some developing countries that have domesticated the Appendix’s compulsory licence provisions have failed to operationalise the licensing regime due to their omission of promulgating implementing regulations.⁹⁴

The merits of the Berne Appendix’s regime of compulsory licences for translation and reproduction have been canvassed at length by several scholars.⁹⁵ It is clear from this scholarship that the Berne Appendix is inadequate as it is ‘an obsolete, inappropriate, bureaucratic, and extremely limited attempt to provide an air valve for developing countries’.⁹⁶ The main reasons for the ‘market failure’⁹⁷ of the

91 SI Štrba, *International Copyright Law and Access to Education in Developing Countries: Exploring Multilateral Legal and Quasi-Legal Solutions* (Brill, 2012), 93.

92 Berne Convention, Art IV (1)–(6).

93 Berne Convention, Art IV (1).

94 Štrba, above n 91, 100.

95 For example see Štrba, above n 91, 89–109; Salah Basalamah ‘Compulsory Licensing For Translation: An Instrument Of Development?’ (2000) 40 *IDEA – The Journal of Law and Technology* 503; Silva, above n 75, 25; and Ruth L Okediji ‘Sustainable access to copyright digital information works in developing countries’ in Keith E Maskus and Jerome H Reichman (eds), *International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime* (Cambridge University Press, 2008) 143–187.

96 Silva, above n 75, 11.

97 Okediji, above n 95, 162.

Appendix are the myriad of complex conditions and lengthy waiting periods which often frustrate developing nations who wish to use the Appendix for their citizenry's benefit.

To illustrate these difficulties, it is useful to work out an example in a country (X) that has acceded to the Berne Appendix as follows. A book on natural sciences has been published in English in X by Y publishers. Y denies local publisher Z a licence to translate the work into a local language for teaching in primary schools. Country X would be unable to grant a compulsory licence to Z until the full three-year waiting period has lapsed because it is unlikely that unanimous consent could be obtained from all developed country member states of the Berne Convention. In addition, X would have to wait for the lapse of an additional six months' grace period before issuing the licence to Z. A total of three and a half years is an inordinately lengthy period of time and in some fields this would render the knowledge held in the book in question obsolete. In such instances a translation delayed is, in fact, a translation denied.

Finally, Z would have to pay fair compensation to Y, as determined by the relevant national authority. In resource-poor nations, there may very well be few, if any, local publishers or other entities that are able to pay such compensation, especially if the target market cannot sustain highly priced translated texts so that the translators are unable to recoup their expenses through profit.

In order to facilitate the grant of compulsory licences under the Berne Appendix, countries have to enact specific regulations and set up an elaborate administrative system to implement these provisions. This requires expertise and resources which are already spread quite thinly in most countries, so the cost to the state is high. In addition, fair compensation has to be paid to the copyright holder, so there is also a cost to the translating entity. Where the translated books are sold to readers or consumers, there is also a cost to individuals. Where translation initiatives are state driven, for example by an education department, there will be an indirect cost to society through its funding of the national fiscus via taxes. On the other hand, the benefits do not appear to be commensurate because of the very restrictive scope of the conditions under which compulsory licences may be granted.

Consequently, only a few developing countries have filed notifications under the Berne Appendix, many of whom have failed to renew these notifications.⁹⁸ In some cases, developing countries have introduced provisions for compulsory licences in their domestic copyright legislation, without bothering to file a notification. In other instances, developing countries have crafted their own national legislative solutions that are not informed by the Berne Appendix at all, an approach that Silva has characterised as ‘idiosyncratic’.⁹⁹

Some suggestions have been made to overcome the inadequacies of the Berne Appendix. These range from amending the Appendix to crafting a new international instrument to replace it.¹⁰⁰ Since this chapter is in search of national solutions, it will not engage with international reforms of this nature. Rather, it suggests the reduction of the term of the translation right, the introduction of local language limitations and compulsory licences under national law.

Reducing the duration of the translation right

Eliminating this right or reducing its scope and duration would facilitate translations of existing works and may be an appropriate amendment to a copyright law seeking to further the interests of a preponderance of individuals. India’s *1914 Copyright Act* provided for a translation right of 10 years’ duration for works first published in India.¹⁰¹ If the author published a translation or authorised another person to do so, within those 10 years, the term of the translation right would be extended to the full duration of the relevant copyright in respect of that particular language into which the work had been translated.¹⁰² The work could still be translated into other languages, if an authorised translation into those languages was not produced in the 10 years. Translation of the work after the expiry of 10 years would be deemed to be non-infringing. Prior to this statutory provision Indian courts had held that translation of works was non-

98 Štrba, above n 91, 100.

99 Silva, above n 75, 3, 11. See Silva, above n 75, 18–24 and Štrba, above n 91, 100–109 for a description of these approaches.

100 See Silva, above n 75, 40–52 for detailed proposals on the content of such a new instrument.

101 Lionel Bently, ‘Copyright, Translations, and Relations between Britain and India in the Nineteenth and Early Twentieth Centuries’ (2007) 82(3) *Chicago-Kent Law Review* 1181, 1181.

102 Ibid.

infringing¹⁰³ and its legislature had mooted the idea of a translation right of three years' duration.¹⁰⁴ Translation of the work after the three-year translation right term would be deemed non-infringing.¹⁰⁵

However, pressure from British publishers and then the position taken at Berne (resulting in the Berne Appendix), left India with no choice but to limit the translation right only in respect of Indian works or works first published in India. The 1914 provision was therefore a 'symbolic gesture' by India of its desire to 'limit the translation right for all works, wherever they were published.'¹⁰⁶ It also showed 'a genuine attempt to improve dissemination of learning in India, by maximizing the translation of *Indian* works within India'.¹⁰⁷ Had India implemented its proposal for a three-year translation right in relation to all works, it would have provided a useful model for other developing countries to consider.¹⁰⁸ Nonetheless, its 1914 provision evidences hope of what can be achieved in the absence of legal and political constraints.

Local language limitations

The purpose of this chapter is to imagine what an ideal copyright law might look like. With that in mind, it proposes the enactment of 'local language limitations' that would enable permission-free translations to help address the problem of neglected languages and markets.¹⁰⁹ The limitations would apply to all works and provide that text-based works in specific, local, neglected languages that have been translated or adapted from works in more readily available languages be deemed to be non-infringing. This would create room to translate or adapt works into neglected languages, in circumstances where copyright owners have declined to do so, without fear of infringement proceedings. This provision ought to be coupled with copyright eligibility exclusions

103 Ibid 1205, citing *Munshi Shaik Abdurruhma'n v Mirza' Mahomed* (1890) 14 ILR (Bombay) 586 and *Macmillan v Shamsul Ulama M Zaka Shira'zi* (1895) 19 ILR (Bombay) 557.

104 Ibid 1226, citing the 1885 Copyright Bill.

105 Ibid, 1885 Copyright Bill, Clause 8.

106 Bently, above n 101, 1237.

107 Ibid.

108 Rochelle C Dreyfuss, 'Creative Lawmaking: A Comment On Lionel Bently, Copyright, Translations, and Relations Between Britain and India in the Nineteenth and Early Twentieth Centuries' (2007) 82(3) *Chicago-Kent Law Review* 1243–1250, 1243.

109 Lea Shaver, 'Local Language Limitations: Copyright and the Commons' (2014), unpublished paper on file with the author.

for the resultant translated works, which will enable the creation of a commons. For instance, unauthorised translated works which are deemed non-infringing under local language limitations would be excluded from protection and thus form part of the commons. This would facilitate further translation into other local languages, which would be beneficial in South Africa which has nine official African languages, other than Afrikaans.

Compulsory licences

Since the *1914 Copyright Act*, India has significantly changed its translation rights regime with the enactment of the *1957 Copyright Act*. This Act also provides for the bifurcated treatment of Indian¹¹⁰ and other works. Section 31A of the *1957 Copyright Act* provides for compulsory licences to publish or translate unpublished 'Indian works', authored by a person who is 'dead or unknown or cannot be traced, or the owner of the copyright in such work cannot be found'. Prior to filing a compulsory licence application, the would-be translator is required to publish his proposal in an English language and the Indian language into which the work is to be translated.¹¹¹

Section 32(1) provides the right to apply for compulsory licences to translate any literary or dramatic works into any language, seven years after the first publication of the work. Where the work is an Indian work and the translation is required for teaching,¹¹² scholarship or research,¹¹³ the waiting period is reduced to three years.¹¹⁴ If the language of translation is 'not in general use in any developed country' the waiting period is further reduced to one year. These provisions are inspired by the Berne Appendix¹¹⁵ and are consequently blighted by

110 *1957 Copyright Act* (India), section 31 defines 'Indian work' as including:

- (i) an artistic work, the author of which is a citizen of India; and
- (ii) a cinematograph film or a sound recording made or manufactured in India.

111 *1957 Copyright Act* (India), section 31A(2).

112 Section 32's explanatory note defines teaching as including 'instructional activity at all levels in educational institutions, including Schools, Colleges, Universities and tutorial institutions' and 'all other types of organised educational activity'; *1957 Copyright Act* (India), section 32.

113 Ibid: Section 32's explanatory note defines research as being exclusive of 'industrial research, or purposes of research by bodies corporate (not being bodies corporate owned or controlled by Government) or other associations or body of persons for commercial purposes'.

114 *1957 Copyright Act* (India), section 32(1A).

115 Berne Convention, Art II (2)(a)–(b) and Art II (3)(a).

the interpretative difficulties that apply to their source, which have been highlighted above. A copyright law which furthers the interests of a preponderance of individuals would facilitate the making of translations in appropriate cases, not stymie them with bureaucracy.

In addition to the above proposals, principles of distributive justice and Ubuntu would suggest that more needs to be done to protect the interests of authors. The following pages consider possible ways of doing so.

Author reforms: Non-assignable copyright, standard licences and pro-author interpretative rules, or assignable copyrights plus reversion?

As explained above, authors in disadvantaged contexts are often not in a position to bargain equally with third parties due to financial and other constraints. There are a number of ways in which the current copyright law might be amended to ameliorate this problem.

One way of doing so might be to limit the transfer or assignment of copyrights, perhaps by allowing licensing only.¹¹⁶ This would ensure that the creator always retains a proprietary interest in the work in issue. In order to prevent further difficulties that maybe created by the need to negotiate and conclude licensing contracts, a responsive copyright law would be supported by the provision of standard form contracts. This would be necessary because reliance on contracts would place creators at a disadvantage due to their probable lack of knowledge of copyright and other relevant laws. Another answer to this vulnerability would be the government's provision of technical assistance with the drafting of contractual clauses, where the parties wish to depart from standard clauses.

The downside of providing for non-assignable copyright is that it deprives creators of an opportunity to sell their works even in circumstances where it would be beneficial for them to do so. To avoid such a situation, it would be more prudent to simply enact a provision

¹¹⁶ Baloyi, above n 26, 131.

that would set aside inequitable contracts. This of course then raises the question of the determination of inequity. If it is left unregulated by legislation, it will be necessary for courts to rule on inequity. This means that a disgruntled creator would have to find resources to mount the required litigation, which in disadvantaged contexts will often be beyond her reach. Copyright legislation could prevent or limit the need to seek recourse from courts through provisions setting out the types of terms that would be deemed unfair or inequitable. Consumer protection legislation employs this approach through its black and grey lists. Black lists prohibit specified clauses and render them *void ab initio*, and grey lists create a rebuttable presumption that other clauses are unfair, unreasonable or unjust.¹¹⁷ This model could easily be adapted to suit the creator-intermediary or creator-publisher context. Alternatively, reliance can be placed on consumer protection legislation in terms of which the creator would be treated as a consumer of an intermediary or publisher's services.

It may also be prudent to include a pro-author default rule¹¹⁸ in the copyright legislation. The gist of this provision would be that all intended exploitation of a work must be expressly enumerated in an author-publisher contract and that where there is any ambiguity in contractual terms, the ambiguous term should be interpreted in favour of the author.

The alternative to non-assignable copyright is assignable copyright coupled with reversionary rights.¹¹⁹ Such provisions would allow copyrights that had been assigned to a third party to revert to the creator of the work after a certain period of time. This would afford the creator a second opportunity to exploit the work economically. Such a second opportunity could be valuable where, perhaps due to a lack of resources, legal knowledge, or bargaining powers, creators have assigned their copyrights to third parties on terms that are not favourable. This is a malaise that affects creators everywhere but is exacerbated by the socioeconomic conditions in developing countries. It is hoped that by the time copyright reverts to the creator he would

117 Ncube, above n 36, 66; Tjakie Naudé, 'The use of black and grey lists in unfair contract terms legislation in comparative perspective' (2007) 124 *South African Law Journal* 128.

118 Giuseppina D'Agostino, *Copyright, Contracts, Creators: New Media, New Rules* (Edward Elgar, 2010) 261–267.

119 D'Agostino, above n 118, 263.

have acquired some resources and sufficient legal and industry knowledge to enable him to better exploit the work on his own account.

Past iterations of imperial copyright law, including section 5 of South Africa's 1911 *Copyright Act*, included a reversionary right.¹²⁰ In South Africa this right is still applicable to works made before 11 September 1965 by authors and composers who died between 25 to 50 years ago.¹²¹ It was relied upon by the heirs of Solomon Linda (the composer of *imbube*, a song made famous by Disney's *Lion King*) who secured a settlement of their litigation against Disney and are reported to be now earning royalties on his work.¹²² Although there are 'competing narratives', this incident is viewed as a triumph of copyright protection of authors by some.¹²³ Linda died destitute and his heirs found themselves in the same situation a generation later, while the song continued to earn royalties. The use of the reversionary right to secure equitable treatment for them has been much celebrated. Recognising the value of the reversionary right, the Copyright Review Commission recommended that efforts must be made 'to collect royalties on behalf of heirs of other South African composers to whom section 5 of the 1911 Act applies'.¹²⁴

Conclusion

This chapter argues that the public interest is not served by a one-size-fits-all approach and that, if copyright were designed to further the interests of a preponderance of individuals, it would be better calibrated to satisfy both creators and users. It suggests that, in order to achieve this, more consideration be given to ways in which authors' and users' shares of the copyright bargain can both be increased.

120 Tana Pistorius, 'The Imperial Copyright Act 1911's role in Shaping South African law' in Uma Suthersanen and Ysode Genfreau (eds), *A Shifting Empire 100 years of the Copyright Act of 1911* (Edward Elgar, 2013) 204, 216.

121 *Ibid.*

122 *Ibid* 216–217; For an account by the heirs' lawyer see Owen Dean, *Awakening the Lion* (Tafelberg, 2013).

123 Colin Darch, 'The Political Economy of Traditional Knowledge, Trademarks and Copyright in South Africa' in *The Sage Handbook of Intellectual Property* 263, 272. For a competing narrative see Håvard Ovesen and Adam Haupt, 'Vindicating capital: Heroes and villains in *A Lion's Trail*' (2011) 61 *Ilha do Desterro* 73.

124 Copyright Review Commission Report (2012), 14 [3.1.7].

WHAT IF WE COULD REIMAGINE COPYRIGHT?

This might involve making copyright non-assignable, encouraging greater use of standard copyright licences, pro-author interpretation rules, or coupling assignable copyright with rights of reversion. In relation to stimulating the production of original neglected works or translations of existing works into neglected languages, it suggests that consideration be given to constitutive registration of copyright, a two-tier copyright system, the reduction of the duration of the translation right and the greater use of compulsory licences coupled with local language limitations.

The above suggestions are proffered as individual proposals and not as components of a complete copyright system. For the most part, it would be possible to combine them into a composite system. However, some proposals are mutually exclusive. For example authors' protections pertaining to non-assignment copyright coupled with standard licences and a pro-author interpretation rule cannot be combined with the proposal for assignable copyright with reversionary rights.

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