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what has COPYRIGHT got to do with NEWSPAPERS?

A South African perspective

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International commitments

South Africa is a signatory to two international copyright agreements, namely, the Berne Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights, known as the TRIPS Agreement. It is also a signatory to the World Intellectual Property Organisation (WIPO) Treaties, namely, the Copyright Treaty and the Performances and Phonograms Treaty, which came into effect during 2002. However, South Africa can only accede to them when its copyright legislation has been amended to address digital technology and related issues.

Regional situation

South Africa is the most developed country in the Southern African Development Community (SADC), which consists of 14 developing countries (Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe).

With regard to industrial property (that is, intellectual property excluding copyright), there is cooperation amongst SADC members, as well as with the various African countries belonging to the African Regional Industrial Property Organisation (ARIPO). South Africa also cooperates closely with the United Kingdom Patents Office, the European Union Patents Office and several Middle East countries with regard to industrial property.

However, with regard to copyright, there are no cooperative copyright treaties amongst the SADC countries, nor is there any harmonisation of copyright laws in the Southern African region. Member countries have some form of copyright protection and legislation, but in many cases the laws are very outdated. South Africa's copyright legislation is the most up-to-date in relation to other SADC countries, having been amended in 2002. As a result, the importance, application and interpretation of copyright principles in this region differ from one member country to the next.

Domestic situation

South Africa has its Copyright Act No 98 of 1978 (as amended) and Copyright Regulations, which have limited exceptions for education. Foreign works, including newspapers, published by signatories to the Berne Convention also have full copyright protection in South Africa.

Since 1999 the educational sector has presented a number of copyright position papers and has made various recommendations to the South African Government, with regard to issues affecting education, for example, electronic copyright, provisions for the disabled, the distance learner and the illiterate. However, to date the copyright legislation has not been amended accordingly.

Also, initiatives by the educational sector to discuss copyright issues with the Publishing Association of South Africa (PASA), as well as with the International Publishing Association (IPA), have unfortunately not been successful (meeting held with IPA, together with PASA, in Cape Town, South Africa, in October 2001). The main reason is that there are major differences of opinion with regard to fair use and multiple copying for non-profit educational purposes. The educational sector is currently drafting proposals addressing these issues and in due course, will present this document to Government and other stakeholders, for further discussion and debate. It is hoped that this will lead to amendment and updating of the copyright legislation in due course.

Fair use

Regarding 'fair use', South Africa modelled its 'fair dealing' provisions on the United Kingdom's copyright laws. Fair dealing is permitted in Section 12 of our Copyright Act. 'Fair dealing' permits the reproduction of literary or musical works (as well as works in some other categories), for the purposes of research or private study, or for personal or private use, or for criticism or review, or for reporting current events in a newspaper or similar periodical, or by means of broadcasting, or in a cinematograph film.

Section 12 (7) of the Copyright Act provides that the copyright in an article published in a newspaper or periodical, or in a broadcast, on any current economic, political or religious topic, shall not be infringed by reproducing it in the press or broadcasting it, if such reproduction or broadcast has not been expressly reserved, and the source is clearly mentioned.

Section 13 of the Act provides limited exceptions for reproduction by libraries and archives depots, and also by teachers at educational institutions, but these do not extend to electronic media. These include limited copies for handouts for students in a classroom situation, but do not make provision for distance learners or for conversions to other formats for persons with disabilities.

Regarding 'fair use' in the electronic environment, and in the absence of appropriate legislation, cognisance is taken of the statements made by the World Intellectual Property Organisation (WIPO) and International Federation of Library Associations (IFLA) that 'digital is not different' *www.wipo.int/treaties/en/ip/wct/statements.htm* and *www.ifla.org/V/press/copydig.htm.*

In the absence of appropriate legislation for electronic media, the educational sector and libraries find the following useful:

- *Guidelines on fair dealing in the electronic environment* by the

Joint Information Systems Committee and the UK Publishers' Association

- *Publishers and librarians promote common principles on copyright in the electronic environment* by IFLA and the International Publishers' Association
- *Fair use guidelines for educational multimedia* by the American Distance Education Consortium.

How copyright protects newspapers

Newspapers are protected under the category of *Literary works* in our Copyright Act, but they also contain *Artistic works* such as cartoons, photographs, graphics, images and advertisements. When reproducing newspapers or information in newspapers, the term of copyright term has to be considered. In case of literary or musical or artistic works, other than photographs, the term is the life of the author and fifty years from the end of the year in which the author dies, with certain provisos. The term of copyright in the case of photographs is fifty years from the end of the year in which the work is made available to the public with the consent of the copyright owner, or is first published, whichever term is the longer; or failing such an event within fifty years of the making of the work, fifty years from the end of the year in which the work is made.

This means that very old newspapers are already in the public domain and are not subject to copyright.

Copyright ownership

Although the copyright law provides that works created within the course and scope of one's employment belong to the employer, newspapers do not always hold copyright in the works that they publish. They generally own copyright in articles written by their own staff, for example, full-time reporters and journalists. This is seldom the case with regard to works by freelancers or artists, unless the relevant copyright owners assign their rights to the newspapers.

Copyright in artistic works usually belongs to the artists. With regard to photographs, the copyright holder is the person who is responsible for the composition of the photograph, and not the person who physically presses the camera button. The person who undertakes the arrangements necessary for the creation of a computer-generated literary or artistic work, is the copyright holder.

Copyright in readers' letters remains with the writer as author, but the editor can alter or shorten it as long as these amendments do no affect the credit or literary reputation of the writer.

There is no copyright in 'news of the day' nor in speeches of a political nature, although the author of the speech has the exclusive right of making a collection of his/her speeches.

In the course of sub-editing, a sub-editor may change a work considerably or he/she may impart to the work a quality or character which it previously did not possess. This would result in copyright in the amended article being vested in the sub-editor, whilst copyright in the original article would remain with the journalist. Where the contributions are both substantial in the resultant work, it will be one of joint authorship with copyright vesting in the co-authors.

A copyright holder may grant non-exclusive licences to another party, by verbal or written agreement. However, an exclusive licence must be reduced to writing and must be signed by or on behalf of the licensor.

Assignment of copyright must be reduced to writing and signed by or on behalf of the copyright holder/assignor. Copyright may also be bequeathed by will, and in circumstances where ownership in property devolves through operation of law, as on death or insolvency, ownership of copyright will likewise devolve.

Copyright clearance

South Africa does not have a Newspaper Licensing Agency to clear copyright for newspapers. Also, the Johannesburg-based Dramatic, Artistic and Literary Rights Organisation (DALRO), which clears copyright for reprographic reproductions, has no mandate to clear copyright for newspapers.

Under legal regimes such as South Africa's (that is, voluntary collective licensing), newspapers customarily do not entrust their rights to collective administration in view of the complexities involved. As newspapers feature material from various external sources, copyright in each article, image, artistic work or photograph needs to be researched individually to establish the copyright clearance source.

Newspaper publishers themselves need to obtain permission to publish material in their publications. In the absence of a Licensing Agency, they have to apply directly to rights-owners. In the case of international media, they often have to enter into individual licence agreements before the material can be used. They cannot reproduce, re-format or digitise material unless they hold the copyright or have been mandated to do so.

Only if a newspaper holds copyright, can it grant permission and charge copyright royalties.
Some newspapers in South Africa do charge, but the majority of them waive fees for non-commercial or educational purposes

Internationally, the controversial case of Tasini vs **New York Times** is an example where the newspaper was sued for publishing freelancers' works electronically, when it only had the rights to publish them in print (Tasini v **New York Times** - *www.jmls.edu/cyber/cases/tasini1.html*).

Sometimes newspapers do not permit other newspapers to reproduce or re-format full-text versions, but they may allow links to their web sites. Newspapers also have to be very prudent when using material from other sources. A local newspaper editor gave me the following example. A newspaper once slightly altered an item in a picture from another newspaper to suit the context of its story. There was no malicious intent to infringe and was done quite innocently by the artist concerned. The other newspaper took exception and threatened legal action on the grounds of intentional copyright violation. The matter was resolved without litigation, but a formal apology was demanded and further editions containing the 'infringement' had to be withdrawn.

Permission is sometimes denied for reproduction of a whole item (especially images) or portions of it (for example, the text may be used but not the images), or the usage conditions may be impractical, which means that the desired information cannot be reproduced. This can cause serious gaps in a digital collection, for instance.

Only if a newspaper holds copyright, can it grant

permission and charge copyright royalties. Some newspapers in South Africa do charge, but the majority of them waive fees for non-commercial or educational purposes. They naturally require full acknowledgement. However, international newspapers charge high copyright royalties, which are obviously payable in foreign currency.

If a newspaper does not hold copyright and has no mandate to grant permission for reproduction of works, it has to refer users to rights holders/owners directly. This is time-consuming and problematic, especially if the rights holder's whereabouts are unknown, or where there is more than one author/artist. Also, where rights holders/owners are deceased, their heirs have to be contacted. Establishing who the heirs are and their whereabouts presents many problems. It is also difficult to trace rights holders/owners if, for example, they are defunct entities or have merged with other entities, or have assigned their rights to third parties.

> Newspapers are an important part of a country's heritage and history and are used by consumers from all walks of life, for different purposes. They should not be allowed to deteriorate to the extent that the information contained in them is lost forever

Copyright and news-clipping services

In South Africa, there are many media monitoring services or news-clipping services provided by libraries and commercial firms. I visited two firms in Johannesburg namely, News clip Media Monitoring and SA Press Group, to find out how copyright affected them.

News clip subscribes to over 800 periodical and newspaper titles and provides mainly original clippings to their clients. Copyright is not a problem, except in cases where it is necessary to photocopy an article. A representative of this firm confirmed that the provision of original clippings to their clients was in accordance with fair dealing, as provided for in Section 12 of the Copyright Act.

SA Press Group also subscribes to a large number of journals and newspapers, but provides photocopied clippings to its clients. It finds copyright fees very expensive and the clearance process slow and problematic. In recent years, the group has entered into many formal licence agreements with rights holders/owners, to enable it to provide an efficient service to clients. It also provides an online article service, which is licensed. A representative of this firm said that he would like to see the establishment of a Newspaper Licensing Agency in South Africa, as this would be a solution to the copyright problems. The process could then be streamlined and the collection of royalties would be centralised.

I also spoke to a Johannesburg-based corporate librarian of a large international firm. She provides a clipping service for staff only, via the Intranet. She confirmed that copyright clearance is problematic and very slow and that royalties are excessive. Users require information virtually immediately and cannot wait for weeks to obtain permission. She suggested that newspapers should rather include a copyright fee in their subscription fee to allow for copying and scanning of articles, particularly for in-house or Intranet purposes. Alternatively, she felt that a Newspaper Licensing Agency might resolve the problems, but only if the fees were reasonable and requests could be submitted retrospectively and not prior to reproduction.

Copyright and digitisation projects

Our copyright law does not permit multiple copying (other than in the limited exceptions in Section 13 of the Act). It does not permit adaptations or conversions, without prior permission. In most digitisation projects, the goal is to provide better access to more users. This involves multiple copying, which is not permitted in the legislation. Also, the technical process of digitisation automatically creates more than one copy, so for digitising a whole or large portion of a newspaper collection, copyright clearance is necessary. Rights holders/owners are reluctant to give permission for digitisation projects, especially since they can be accessed by millions of people all over the world.

There are also practical problems involved in obtaining permission for such projects. For example, the Digital Imaging Project of South Africa (DISA) experienced problems with copyright when digitising a previously-banned collection of anti-Apartheid periodicals for the period 1960 to 1990 (DISA web site: *disa.nu.ac.za*). The clearance process was exceptionally slow. Some rights holders/owners did not respond to requests for permission. Others could not be traced, so some works could not be cleared for copyright. These works had to be excluded from the project, thus leaving gaps in the collection. Copyright fees were waived for this project, because of the nature of the material, but for other projects, copyright clearance could become an expensive budgetary item. One of the problems facing librarians, when seeking digitisation rights, is the very considerable variation in pricing, which they experience from different sources. Many smaller publishers appear willing to grant permission without charge, while large publishers' methods and rates of payment vary considerably.

Digital preservation is a vital part of the creation and management of any digital collection. Invariably, any preservation strategy will require the occasional re-mastering of the digital images (possibly onto new storage media) or re-formatting (to accommodate new technological changes). This will also require permission from the copyright holders/owners. It is therefore good practice to negotiate rights to move and change file formats 'in perpetuity' where possible, so that the project does not have to seek permission each time such a change is made as part of the preservation strategy.

When negotiating contracts for copyright clearance and usage of material, provisions must be made for fair use, inter-library loans, archiving, hyper linking, and multiple copying, if possible. Indemnities against litigation or prosecution should also be secured. It is important that any digitisation project (and its host institution) considers issues such as ethics, data protection, the intellectual property of the works in the collection, as well as the intellectual property of the project itself. This includes providing simple, concise copyright notices on the project's web page, stating how and for what purposes the material can be used.

Barriers to accessing information

Unfortunately, copyright creates problems for news-clipping services, but more so, it creates barriers for libraries and

archival services, especially with regard to preservation projects, including microfilming and digitisation. Most libraries or archives depots have newspaper collections and many are in a poor condition caused by various factors, for example, brittle or inferior paper, damage by worms and other pests, poor atmospheric conditions, constant usage or inadequate storage space, et cetera. Many are too fragile to be handled any more and unless they are preserved properly, they will not be accessible at all.

Newspapers are an important part of a country's heritage and history and are used by consumers from all walks of life, for different purposes. They should not be allowed to deteriorate to the extent that the information contained in them is lost forever.

Although most libraries in South Africa, as well as in other developing countries, do not have the resources to convert newspapers or other collections to other formats, for example, microfilm or digital formats, some have been fortunate to receive donations from international donors to address special collections.

Because of the many problems associated with copyright, libraries needing to microfilm or digitise newspaper collections can only include very old material, which is already in the public domain. If the collection is split into different formats, based on which sections have been cleared for copyright, there will be problems with storage, preservation and maintenance of the split collections. Moreover, access to the information contained in the collections will be hampered.

For preservation purposes and accessibility purposes, newspapers need to be microfilmed and digitised. However, libraries and archives depots are faced with copyright clearance and associated problems with regard to material that is not yet in the public domain. Very often, there is a lack of funds for copyright clearance too. This means that part of or whole collections of newspapers will eventually be lost to everyone.

Newspaper publishers themselves do not keep back-runs of their publications for any length of time and have effectively transferred the responsibility and financial burden of maintenance and preservation of newspapers to libraries and archival services. In fact, many newspapers refer users to libraries when they receive requests for their earlier publications. Libraries are expected to maintain, preserve and make these publications available to users, but receive little or no resources or assistance from newspaper publishers. This problem needs to be addressed. Newspaper publishers need to play a more responsible role if they want their publications to serve the citizens of South Africa, as well as other interested users around the world, for more than one generation.

Conclusion

Copyright has various practical implications and complications for newspaper publishers themselves, as well as for consumers and collectors of newspapers. Although copyright has its positive aspects for creators and authors, it is often a barrier to accessing information for users. It retards the dissemination of information, for example, in libraries, as well as in archival and news-clipping services. It definitely creates a barrier to microfilming and digitisation projects and in the process, it affects access to information in newspaper collections.

It is clear that a more streamlined copyright clearance system is necessary in South Africa, but newspaper publishers should still be allowed to waive copyright fees for non-commercial and educational purposes.

Newspaper publishers also need to work closely with libraries and archival services to ensure that newspaper collections are maintained, preserved and stored in the best possible way to serve all users, for this generation and for future generations.

Libraries are expected to maintain, preserve and make these publications available to users, but receive little or no resources or assistance from newspaper publishers

I believe that appropriate provisions for the microfilming and digitisation of information for archival and library preservation purposes should be included in our legislation, either in the Legal Deposit Act or in the Copyright Act. Apart from libraries and archival services, the government itself has a responsibility to preserve the country's heritage and historical treasures, including newspapers, for future generations. I have therefore suggested to our National Library that formal proposals should be submitted to the government to amend the relevant legislation accordingly.

Newspapers give us yesterday's stories, today's news and tomorrow's wealth of information. Copyright laws need to facilitate, not restrict, access to these treasures.

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