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Bifurcated worlds and copyright norms: a literary reflection on inclusive copyright, normative pluralism and the spectre of anarchy¹

Abstract

This article draws on AJ van der Walt's insights into the legal transformation of society regarding the property law norms inherited at the dawn of constitutional democracy, and proceeds to develop and apply them in the context of contemporary

¹ The content of this article was first delivered at the Law, Literature and Interpretation colloquium jointly organised by the Research Unit of Law and Constitutional Interpretation and the Chair in Gender, Transformation and Worldmaking, held at the University of the Western Cape from 18-19 July 2024, as part of a panel on "(Intellectual) Property Law and Literature". I would like to thank the organisers of this event for the invitation to take part in this panel, and to my fellow panellists, Tanveer Jeewa and Ntando Sindane, for their camaraderie and helpful provocations during the formulation of the topic and thereafter, as well as during the panel itself. I would further like to thank Coenraad Visser and Timothy Mulvaney for engaging the argument, and offer my apologies for the extent to which I was not able to do justice to their thoughtful insights in the text. I would also like to thank the two anonymous reviewers for their comments and contributions to this piece. All errors and oversights are undoubtedly my own.

South African copyright law. Specifically, this article reflects on the state of copyright law in South Africa by undertaking a literary analysis of two novels, namely, Kingsley Amis's *You can't do both* and Zakes Mda's *The Madonna of Excelsior*. The novels are introduced as glimpses into two very different societies around the same time in history that are both governed by the same proprietary copyright norms. The roles of copyright works in the cultural and knowledge hierarchies within each society are explored, as well as how the characters in the respective novels engage with various forms of art, music and literature. Reflecting on Van der Walt's utilisation of Amis's novel to frame the tension between the purported stability anchored in social fundamentalism and the allure of change (and the spectre of anarchy that change presents to some) evident in a spate of Constitutional Court decisions during its 2007 term, this article outlines the same tension in the contemporary popular media rhetoric around the reform of copyright law. The portrayal of post-war England morality in Amis's semi-autobiographical novel is contrasted to the Apartheid-era South African society depicted in Mda's work, in which the white population of 1970s South Africa viewed normative pluralism as represented by the inclusion of black people's interests – the very recognition of their dignity – with profound distrust, as such empowerment posed a direct threat to the socio-economic and political power they enjoyed in the country. This same fear of normative pluralism encroaching upon the entrenched power relations under the contemporary status quo is evident in the apologist rhetoric published in popular media that decries all attempts at copyright reform as simultaneously ignorant, malicious and corrupt. In this regard, the narrative styles of each novel are shown to be an apt illustration of moral agency as reflected in the competing exclusionary (self-interested) and inclusionary (other-regarding) approaches to copyright's bedrock ideology and operative norms. Finally, the article considers the themes of sex and property as encountered in each novel as proxies for power over others and a means of enforcing normative modalities of self-interest against others, and the implications of the respective copyright norms for the broader political community and individuals' place in their society are contemplated.

Keywords: copyright law; coloniality; law and literature; private property; constitutional transformation; inclusive copyright; democratic inclusion; copyright reform; Copyright Amendment Bill; rhetoric

Introduction

Copyright jurisprudence is strangely devoid of literature.

Of course, literary works are one of nine categories of creation granted copyright protection.² Yet, ironically for the field of law that regulates literature most intimately, South African courts have never drawn from literature to supplement their understanding of copyright or how it affects the citizens of South Africa. This could be the result of the formalism that clings to South African legal culture, especially in matters concerning commercial property (as copyright is predominantly seen), or otherwise a general lack of willingness and inclination to engage with, and understanding of the place and value of, literature. This leaves copyright jurisprudence somewhat drab – without any touchpoints in the lived reality of South African citizens and, consequently, out of touch with the ways they interact with these norms.³

This article, which makes up part of a panel discussion on the theme “(Intellectual) property and literature”, posits literature as a key source of learning about the world in which law operates. Literature provides insight into the lives of everyday people who interact with each other through the structure provided by legal norms, which compel and permit behaviour to varying degrees and are observed or ignored according to the cultural authority that the given norms assume in the society portrayed. In light of this, this article undertakes the explorative work of literary analysis in the context of legal scholarship, posing two novels as reflections of different worlds at around the same time in history. Kingsley Amis’s *You can’t do both*⁴ presents a largely autobiographical retelling of the author’s time growing up in mid-twentieth century England, following the protagonist through his childhood and early adulthood in a classist society still dealing with the legacies of the Second World War. AJ van der Walt introduces this novel as a literary framing device for an argument that he develops in relation to the systematic transformation

2 Section 2(1) of the Copyright Act 98 of 1978.

3 Of course, it goes without saying that litigating copyright disputes is within the practical purview of only a tiny fraction of South African citizens, and it has long been clear that commercial entities are primarily involved in bringing disputes to court. Yet, the issues that arise in these disputes touch the lives of ordinary citizens, both everyday authors and users, even if they are not the ones approaching the courts.

4 Amis K *You can’t do both* (1994) Random House: London.

of private law through constitutional methodologies,⁵ which argument has exerted immense influence over my thinking about law and transformation since I initially encountered it. I revisit this novel to renew the point he makes about the apprehension of anarchy, should the fundamentalist normative underpinnings be abandoned for the allure of freedom from the constraints they impose.

Secondly, Zakes Mda's *The Madonna of Excelsior*⁶ presents a type of nonfiction novel, giving literary expression to the untold stories within the "Excelsior 19" scandal of 1971 and thereby offers a similarly biographical account of the people depicted.⁷ I consider *The Madonna of Excelsior* as a poignant counterpoint to *You can't do both*, positing a juxtaposition of two worldviews, one as old school (English) thinking and the other as a less puritanical, uniquely South African understanding of the realities of sex and power. In discussing these works, I analyse the place of copyright works in the lives of the characters, how each one deals with the proprietary power that copyright norms construct and how this influences the development of the characters respectively. I relate this theme to the setting of South African copyright law, which currently stands at the precipice of the most ambitious reform of the Copyright Act 98 of 1978 since its promulgation.

While van der Walt speaks specifically to judicial duty in balancing stability and change – the tug of war between rights and reform – his analysis provides a useful lens through which to consider the current moment in copyright law, occupied in large part by the ongoing attempt at amending the Copyright Act. Emulating van der Walt's example in his seminal article on constitutional reform of private law in 2008,⁸ I pose the Copyright Amendment Bill [B13-F 2017] as introducing a form of normative pluralism into the proprietary realm of copyright, and consider how this looming incursion threatens the established hegemony as evident in the many popular media publications anticipating anarchy should the amendments come to pass. This fear of normative anarchy belies a proprietary fundamentalism in thinking about copyright law – much like

5 Van der Walt AJ "Normative pluralism and anarchy: reflections on the 2007 term" (2008) 1 *Constitutional Court Review* 77.

6 Mda Z *The Madonna of Excelsior* (2002) Oxford University Press: Cape Town.

7 Many of the similarities between the fictionalised characters in the novel and the real-life counterparts can be gleamed from the author's reporting on his visits to the town of Excelsior in the Free State to meet the people embroiled in the scandal and to hear their stories firsthand.

8 See Van der Walt (2008).

how the puritanical social fundamentalism animating the protagonist's father in *You can't do both* caused him to suppress the new normative pluralism that was emerging in his son, symbolised by a one-dimensional pursuit of sex as his primary motivating force. I contemplate the role of sex as both power and its legal corollary – freedom – in the two novels, and argue that property is similarly a proxy for either power or freedom in the copyright setting. Finally, I reflect on the possibility of inclusive copyright norms that go beyond a protection of the pecuniary interests that copyright embodies, enabling a more complete account of the roles that copyright works and norms play in the lives of owners, authors, and users, respectively.

Normative pluralism and anarchy

You can't do both as framing narrative

AJ van der Walt's scholarship is foundational to understanding the proper relation between the supreme Constitution and the sources of private law that pose as the operative legal norms which direct the course of everyday life for South African citizens, particularly those that have been inherited from the pre-democratic legal regime in the form of legislation and common law.⁹ As part of his contributions to the body of progressive scholarship aimed at enabling the systematic transformation of South African property law, Van der Walt often had cause to rethink this relationship and the enduring legacy of exclusion from the objects of property law that the common law perpetuated.¹⁰ Discussing the state of constitutional jurisprudence in 2007, Van der Walt addresses the (then) looming moral rejuvenation of the single-system-of-law that the constitutional project was said to bring about, specifically how it was perceived as portending normative anarchy in the legal systems of private law.¹¹ Van der Walt shows how contemporary scholarship and case law of the time decried the normative

9 As Van der Walt (2008) at 84 explains, "the issue for debate is the direction, scope and pace of constitutional reform and, particularly, the effect of the Constitution on existing law".

10 For some of his early contributions to this fundamental aspect of constitutional property jurisprudence, see Van der Walt AJ "Tradition on trial: A critical analysis of the civil-law tradition in South African property law" (1995) SAJHR 169; Van der Walt AJ "Un-doing things with words: The colonisation of the public sphere by private-property discourse" (1998) 1998 *Acta Juridica* 235; Van der Walt AJ "Dancing with codes: Protecting, developing and deconstructing property rights in a constitutional state" (2001) 118 SALJ 258; Van der Walt AJ "Legal history, legal culture and transformation in a constitutional democracy" (2006) 12 *Fundamina* 1 at 1.

11 See Van der Walt (2008).

influence of the Bill of Rights on existing (common law) legal arrangements as an “anything goes” attitude towards the moral foundation and praxis of South African law, especially the Roman-Dutch common law.¹² As he explains:

The Constitution is founded on a set of values and normative commitments related to democracy, human dignity, equality and freedom and on the replacement of an immoral and discredited social and political system by a new, constitutional and democratic system. The shift from exclusivity to inclusivity that it presupposes is possible only if the existing legal order can be both purified of its exclusivist and authoritarian legacy and adapted to accommodate the normative diversity of its reformist purposes.¹³

Van der Walt recounts Kingsley Amis’s novel *You can’t do both*¹⁴ as a literary framing of his own constitutional law argument. Van der Walt uses the novel “to consider the Constitutional Court’s response, during the 2007 term, to the compromise-based, patchwork relationship between existing law (particularly the common law) and the Constitution.”¹⁵ He does this by relaying the undercurrent of moral unrest in England during the mid-twentieth century, at a time when the pre-war morality appeared to no longer hold sway in contemporary society and a new emergent value system – perceived by some as freedom manifest, and by others as a harbinger of moral anarchy – seemed to beckon. A brief synopsis of the novel should help clarify the argument and enable a discussion of its message in the context of contemporary copyright law.

You can’t do both is a largely autobiographical reflection on the author’s life growing up in post-war England. The reader follows the protagonist, Robin Davies, periodically through his life, from his schoolboy days through university and into his mid-thirties. Throughout, the young Mr Davies is confronted with the moral teachings of his father, which he shirks at every convenience and instead follows his own path, driven in large part by his overwhelming need for sexual gratification. This leads him into frequent conflict with his father’s wisdoms, which are anchored in the fundamentalism of English society. Throughout the tale, the young Mr Davies tries time and again to shirk the social fundamentalism that his father, Mr Davies Snr, does his best to impart on him.¹⁶ This social fundamentalism presents a string of puritanical and arbitrary

12 Van der Walt (2008) at 103.

13 Van der Walt (2008) at 84.

14 See Amis (1994).

15 Van der Walt (2008) at 88.

16 This term stems from Van der Walt’s description of the antebellum morality in English society: Van der Walt (2008) at 78–79.

commands in the mind of young Robin, who muses that each dictate seems contrived exclusively to cause a diminishment of his pleasure and enjoyment, whether in the form of preventing a social engagement with a classmate, making it implausibly difficult to turn on the radio for musical enjoyment, or forbidding a passionate tryst with a willing partner of consenting age. While ultimately exaggerated – as the elder(ly) Mr Davies self-admonishes on his deathbed – the basic values at the heart of Mr Davies's counsel are largely representative of social conservatism of the time regarding family and class combined with a puritanical approach to sex.

Robin's pursuit of objectives outside of this conservative triumvirate puts him at odds with every other character in the novel at some point. Almost all his actions and thoughts can be traced back to the rebellion against the social fundamentalism that exhorts his behaviour towards conformity with the pre-war morality.¹⁷ This takes many forms throughout the novel, each demonstrating the self-absorption and steadfastness of self-directed purpose that attaches to the protagonist.¹⁸ His preoccupation with sex as a primary motivating force betrays the conservatism that the demure class-minded patriarch intones (exemplified by Robin's hedonistic infatuation with his female Welsh cousin) and overrides the fleeting concerns he has for others, whether his father, wife, brother, or mother. This leads to massive conflict with first his father and later his wife, each time over his obstinate pursuit of this gratification despite the other party's contrary wishes or interests. Even his choice of partner is an act of rebellion against the classist ideals that his father foists upon him.¹⁹

17 Yet, this is not without exception: while at university, he opts for the route of social fundamentalism in a moment of moral courage, yanking his pregnant girlfriend, Nancy, out of the abortion clinic to which he has paid a veritable (non-refundable) fortune and committing to marrying her for reason of her pregnancy, apparently despite his enduring polyamorous desires. Ultimately, the motive of sexual hedonism is primary to all of Robin's endeavours, with secondary motivations like family and friendship filling in when there is no opportunity for such or as an infrequent exception to his own desires.

18 The many illustrations of this theme include Robin's calculated interactions with school mates, the objectified role of women (including his own cousin) in his life, his relationship with his brother George only ever displaying a concern for his own immediate needs, and, importantly, the minimal regard he pays his wife throughout their marriage until she presents him with a wake-up call in the form of a backhand slap and an ultimatum to choose between their marriage and child, and his philandering ways.

19 His girlfriend, Nancy, who later becomes his wife is of a lower social class and, consequently, not well educated (or is it *vice versa*?), which seemingly entitles Robin to treat her as an instrument in his pursuit of self-gratification.

Copyright norms and culture in *You can't do both*

The way that copyright works feature in the literature is worth considering for what it says about the role of creative works in the society portrayed, and how the “users” engage with the works in the course of their own development and finding their place in the world, as well as their place in the knowledge creation system. The cultural structures in place determine the ways in which the works are made accessible (or inaccessible) to a certain class or demographic, and the space allowed for the user’s participation in the system into which they are thrust.²⁰ The novel being set in the mid-twentieth century, the only way to participate in the creation of knowledge goods and cultural artefacts was by access to industrial grade machinery that allows mass scale production (whether printing in respect of literature, pressing of musical records, production of cinematograph films, or broadcasting equipment to disseminate audio content over the radio), thereby ensuring a considerable degree of homogeneity in culture and consequently social morality. Therefore, control of industrial production assets ensures a large degree of control over popular culture, and with it the ability to partake in the creation of one’s culture.²¹ These means of creation are not accessible to all, which effects a top-down sharing of cultural objects where those with the ability (capital infrastructure) to produce and distribute copyright works have a legal and de facto cultural monopoly over how the reading/listening public engage with the world.

20 Mendis S “Re-thinking intellectual property law’s promise of democratic inclusion” in Sappa C (ed) *Research Handbook on Intellectual Property and Inclusivity* (2024) 10 at 10 provides the following incisive critique of the cultural function of copyright:

[B]oth in scholarly as well as popular discourse, IP law is perceived as an instrument of exclusion which serves to reserve the benefits of intellectual innovation to economically, socially, and politically privileged segments of society, and thereby prevents less powerful or privileged segments from participating in the intellectual innovation process and benefitting from the fruits of innovation in an equitable manner. In doing so, IP law propagates social, political, economic, and cultural inequality, weakens self-determination and threatens diversity in ways that can undermine the democratic process.

This sentiment is aptly illustrated by the portrayal of copyright works in Amis’s novel, read as a reflection of the norms of copyright and the creation of or engagement with cultural objects.

21 Performance of the works of others is arguably one of the most potent creators and forms of sharing culture; yet, because copyright law hands the rights to authorise or prohibit public performance of a work to its author, it effectively stifles the public’s ability to participate in culture in a meaningful sense.

Robin is set on a course of studying classical literature from an early age and learns to derive insight from the teachings of seminal authors. There is a cultural system at play that depends on the hierarchical handing down of culture in the form of literary works (in copyright parlance), only a selection of which could hold sway at once (comprising a canon of sorts) and which are not easily displaced, at least not in the case of the protagonist. In this didactic model, all literary wisdom is passed down from the greats in a unidirectional flow of knowledge that the pupil assimilates from the master. The dons of literary and musical culture are held in reverence and any idea or moral inclination that Robin has must pass the test of cultural validity – i.e., it must be traceable to, or at least loosely supported by, literary authority for it to be valid. There is no attempt at original thinking, no creative interaction with the cultural objects (whether literature or music) that are available to him, and no independent critical engagement with the social fundamentalist orthodoxy that ensconced itself as the hegemonic culture in his youth. Copyright works are not treated as an engaged form of interaction between members of a community; instead, one receives culture and transmits it onward, whether by playing records²² or teaching Classics (as Robin goes on to do after graduating from university).²³ Throughout the novel, no live performances are ever attended, and no performative craft is mentioned as a viable career path. In Amis's world, cinema visits are merely a form of cheap entertainment without any lasting meaning or impact – without the name of the film being specified, even. In this sense, even though the LPs and books provide Robin with a way of making sense of himself and the world and play an important role in his self-discovery, there is a comparative lack of constructive (rather than passive) engagement with art or music when considered next to the characters in *The Madonna of Excelsior*.

22 The musical stylings of Fats Waller and Louis Armstrong are portrayed as heralding the new sound (and consequently the nascent morality) that operates on an affective level rather than following cultural expectation. The most vivid sentiment expressed in this respect (in the most English manner possible) is when Robin is exposed to the music of Louis Armstrong for the first time:

At an early point one of the trumpet men produced a ferocious, clearly intentional discord that made Robin draw his breath and also acted on him as a tremendous encouragement, as if thousands of good chaps were telling him they understood exactly how he felt about life and that he was right and would win: Amis (1994) at 34.

23 Indeed, even the choice of studying Classics is a commitment to looking backwards, a unidirectional transmission channel from the past to the present.

Narrative style, moral agency, and self-interest in *You can't do both*

The protagonist's self-interest is undeniably at the heart of *You can't do both*, and the central theme of the novel revolves around the protagonist asserting this self-interest in every possible encounter, framing everyone else's conduct as important only to the extent that it impacts him. Appropriately, the narrative technique of *You can't do both* situates the self at the centre of narrative gravity, where every encounter happens between the protagonist and another character, providing a limited and rather obtuse view of the interactions that occur and giving only the faintest insight into the workings of anyone else's thoughts, drives or ambitions as seen from Robin's point of view. Moreover, there is virtually no character development, dooming the protagonist to much the same personality at the end of the novel as at the beginning,²⁴ with the same unidimensional motives and trappings, with little to show in terms of maturation for the intervening decades. Perhaps sensing this, Robin's father recognises the myopia of his behaviour and tries to lead Robin towards the conservative values that he espouses. While limited (and limiting) in its own ways, this social conservatism has a consideration (if not empathy) for others that is entirely lacking from Robin's moral *modus operandi*,²⁵ and which ends up costing him the respect of everyone in his life at one point or another.

While it may be true that sex sells, it does not always make for the best character motives; when every interaction is traced back to an alluring sexual impulse, the resulting interactions make for a tedious read. Yet, as the apocryphal saying holds, "Everything in the world is about sex, except sex. Sex is about power."²⁶ Sex is the surface-level substitute for power – or perhaps more accurately stated, freedom from the coercive powers of others exercised through social morality – much like property rights are a surface-level signifier of same in the legal setting. Just so in *You can't do both*; Amis pits the overtly

24 Perhaps better described as imbuing the protagonist (closely resembling the author) with the same character in the beginning as the end, considering this is the perspective from which Amis wrote.

25 That is, aside from perhaps his only redeeming act throughout the entire novel of rescuing his pregnant girlfriend from the verge of an abortion when she breaks down in tears at the prospect of going through with the illegal procedure, and instead decides to marry her forthwith to avoid the embarrassment of having a child out of wedlock.

26 Often attributed to Oscar Wilde, this saying does not appear in any of Wilde's published works and was seemingly first attributed to him by author Michael Cunningham in an interview with Paul Lisicky: "Conversations: A talk with Michael Cunningham by Paul Lisicky" (1995) 11 *Provincetown Arts* 36 at 39; see the investigation of said saying by Quote Investigator: <https://quoteinvestigator.com/2018/06/05/sex-power/>.

cognisable dynamic of sexual drive (as representation of freedom from the constraints of social fundamentalism) against his father's power over him. Property rights in the family home are Mr. Davies Senior's method of enforcing his brand of social fundamentalism within the family dynamic, with the ultimate threat of exclusion (from family life in the novel, or from international trade in the copyright sense) lingering over the terse interactions that typically revolve around Robin's pursuit of things that fall outside of the conservative canon – which threat comes to fruition after it emerges that fornication has taken place within the family home.

On one reading, *You can't do both* is a cautionary tale of the challenges that moral pluralism presents when it brings into question the axiomatic assumptions and fundamental tenets of a particular model of doing things.²⁷ On another, it tells of the hold that moral fundamentalism has over the development of young minds, and the need to break out of its grasp to explore the world on your own and impose your own agenda on the course of your development. This fundamentalism rebukes all opacity, insisting that things are a certain way – black and white – without any room for them being another way. Likewise, in many ways Mr. Davies Senior's social fundamentalism represents the English morality at the time that crucial normative decisions were made to English (and international) copyright law.²⁸

Proprietary fundamentalism and exclusionary copyright

The equivalent to this conservatism in copyright law adheres to a certain orthodoxy that sees the rights in the copyright owner's bundle as fundamentally property rights deriving from the natural law arrangement, and which cannot be reconsidered or reframed without collapsing the entire edifice of the creative industries (and the corporations that built them). When considering *You can't do both* from a comparative Law-and-Literature perspective, the industrial practices of the time are captured in the normative framework and implicit (neo-)classical economic thinking around value reflected in the proprietary

27 Van der Walt proffers this reading of the novel: see Van der Walt (2008).

28 Mr Davies Senior's temperament reflects the attitude that proposed amendments have been met with in popular discourse. In the case of Mr. Davies Senior, any challenge to his edict would be met with scornful rebuke in a way that made it clear that the terms of debate are not up for discussion, which same tone is evident in much of the popular media rhetoric discussed below in section 2.5.

copyright model and the rhetoric that its apologists employ in its defence.²⁹ Throughout the novel one is reminded of the singular motive of profit in copyright law, reflected in the exclusionary model of copyright as inherently individualistic, capitalistic, and solipsistic. On the exclusionary model of copyright, the author-centric claim for property rights makes the essentially Lockean natural rights argument that that which a person creates by mixing their labour with unowned resources held in common is their property;³⁰ it uses the author as the basis for building a natural law argument, and then builds an industry up to exploit the property rights – ostensibly for the author's primary benefit.³¹ Alternatively, the necessity of the current configuration of property entitlements as both an economic incentive and reward for the labour of authorship, combined with the supposed benefit to society once the works fall into the public domain, is conjured as an all-moral-intuitions-covered story that explains and justifies the way the market for creative works functions.³² Any way you look at it – whether as a recognition of natural entitlements or an instrumentality in service of the public utility (and thus an implement of policy) – property rights are the mechanism deployed,³³ and authorship is deemed individualistic (Romantic authorship, in copyright terms, implying a

29 Netanel NW "Copyright and a democratic civil society" (1996) 106 *Yale LJ* 283 at 286–288. While some of the democratic values of the liberal state are indeed reflected in extant doctrine (primarily freedom of expression, which finds doctrinal expression in limitations and exceptions like the idea/expression dichotomy and fair dealing for criticism and review and for reporting current events: section 12(1)(b)–(c)), none of the substantive features of democratic constitutionalism as embodied in the South African Bill of Rights are recognisable in this model.

30 Hughes J "The philosophy of intellectual property" (1988) 77 *Georgetown Law Journal* 287 at 296–314; Hettinger EC "Justifying intellectual property" (1989) 18 *Philosophy & Public Affairs* 31 at 36–45.

31 In these constructions of the tale of perfect proprietary copyright, the free market is usually not justified as the sole appropriate setting in which to consider the operation of this legally constructed monopoly, even though it is treated that way. Similarly, nowhere is the corporate actor mentioned, even though it is incontestable that corporations are the primary benefactors of the current copyright scheme.

32 Gray K "Property in thin air" (1991) 50 *Cambridge Law Journal* 252 at 305: "The value-laden mystique generated by appeals to 'property' exerts a powerful and yet wholly spurious moral leverage."

33 Excluded from this conventional narrative are the moral entitlements of authors and users, the developmental capabilities that stem from engagement (active and passive) with the subject matter of copyright, the democratic implications of the present configuration of property rights, and the privileged position that the free market is granted in this rendition of the way the world (legitimately) works.

kind of creation *ex nihilo* which produces a property object that can be neatly demarcated and utilised in trade)³⁴ and self-interested in the economic sense.

This proprietary template was duly transplanted to South African law during the height of Apartheid (from the home of one colonial master – the English – by another – the Afrikaners), where it now awaits amendment by a Bill³⁵ that is a decade in the passing. It is fair to say that this Bill is as much vaunted for introducing much-needed reform to the antiquated and exclusionary model of copyright law as it is maligned by those who wish the proprietary model to remain unperturbed. Accordingly, it makes an interesting site for studying the battle between copyright's proprietary fundamentalism and the spectre of normative pluralism that threatens its enduring legacy of exclusion, especially for how it betrays the fear of anarchy should the proprietary fundamentalism be abandoned.

The CAB as a post-war moment and the rhetoric of anarchy

Reframing Van der Walt's argument, the fear of anarchy that normative pluralism presents is evident in how the proposed copyright amendments have been received in various corners. In this context, anarchy is equated to the (potential) disturbance of the status quo that debases the commercial proprietary edifice that has been constructed in the image of neoliberal corporate capitalism. The Second World War caused a jolting transition from the moral fundamentalism of the puritanical society that England had become, which change presented a moment of panic for those who clung to social fundamentalism as the lifeblood of society, aptly demonstrated by Mr. Davies Senior in *You can't do both*. Likewise, many successive events have had the cumulative effect of producing a sort of post-war rebounding against traditionalism or fundamental sociology in the South African situation; these include the overcoming of the Apartheid government, the digital revolution, the decolonisation movement, the global pandemic, and the restructuring of economic and social activities caused by the emergent technologies of the Fourth Industrial Revolution. As a collective result, South African society now increasingly demands the direct confrontation of the consequences of each of

34 See generally Rose M *Authors and Owners: The invention of copyright* (1993) Harvard University Press; Jaszi J & Woodmansee M "Introduction" in Jaszi P & Woodmansee M (eds) *The construction of authorship: Textual appropriation in law and literature* (1994) 1.

35 Copyright Amendment Bill [B-13 F 2017].

these component paradigm shifts: the legacy of inequality that still obtains in society (and the law's role in protecting the status quo ante), how copyright norms inhibit the culture of online sharing and collaboration, and the wisdom of protecting life-saving (and, in the same breath, life-building and -transforming) knowledge goods through mechanisms of exclusion, to name a few. These social recalibrations have arguably dethroned the dominant worldview that pointedly includes neoliberal capitalism and Western ideologies of exclusionary control, which is steadfastly disregarded by those who wish to retain the extant system of proprietary control over copyright works.

The vocal opposition of the Copyright Amendment Bill is seemingly ignorant of (or, worse, apathetic towards) these realities that South African citizens face every day. The primary target of the Bill's opponents is the fair use provision,³⁶ with practically all other new users' entitlements contained in the Bill³⁷ also making out a discernible target for their vitriol, demonstrating an acute fear of users' rights and those provisions that seek to secure for authors a share in the fruits of their previous toils that have been signed away under dubious parity of power.³⁸ In making the emotive case that the fate of law and order as we know it is contingent on the continued protection of copyright owners' rights in precisely the way it has always been done, opponents paint all supporters of the Bill as political bad actors guilty of "coming up with convenient but false arguments that somehow apartheid is responsible for all of this (*sic*)".³⁹ This summary dismissal of the division in South African society that Apartheid caused by deliberate design helps sustain the fiction that the laws governing access to knowledge products in an otherwise overtly racist society remained devoid of political content or import, and had negligible effect in matters of

36 Section 12A.

37 Sections 12D, 19C-19D.

38 Sections 6A, 7A-7B, 7D-7F, 8A & 9A.

39 Myburgh A "Intrigue Behind Ramaphosa's Rejection of the Copyright Bill" (26 June 2020) *SA People News* available at <https://www.sapeople.com/business/intrigue-behind-ramaphosas-rejection-of-the-copyright-bill/>. Notably, Myburgh never specifies what "all of this" signifies, i.e., what the actual injustices in the extant copyright system are, and how they should be fixed, contenting himself with being the most insistent voice in the rhetorical camp of what Peter Yu calls the "Oh, my, the sky is falling" crowd, warning against the impending collapse of the creative economy attending the Amendment Bill's eventual promulgation: Yu PK "Digital copyright and confuzzling rhetoric" (2011) 13 *Vanderbilt Journal of Entertainment and Technology Law* 881 at 887-891.

distribution of and access to knowledge that can be adequately addressed by copyright's extant doctrinal mechanisms.⁴⁰

While the copyright regime adopted during the twentieth century is not the obvious result of Apartheid policies (i.e., deliberately designed to discriminate against non-whites and consequently accord economic, social or political privilege to the white population), it is undeniable that this English system of corporate proprietary control of cultural industries was statutorily enacted with scant regard for the impact it may have on the black population of South Africa. Certainly, copyright law did not explicitly forbid the creation of copyright works by black people, nor withhold the rights from such authors, nor did it posit any formal barriers to black people who owned the copyright in the works so created. But, given the prevailing reality of oppression of the entire black population throughout the country, it would have been very difficult to assert – never mind enforce – rights over the copyright object, a systemic trait that was not erased with the dawn of democracy. “And”, as Robin Davies learns from a young age, “it [i]s remarkable how little difference there turn[s] out to be in practice between something being forbidden and its being merely very difficult.”⁴¹

More pointedly, the workings of the Apartheid government become more apparent when considering that the 1978 Copyright Act is based on the Berne Convention for the Protection of Literary and Artistic Works⁴² and would have enabled the ratification of the 1971 Paris text,⁴³ which provided various revisions to the 1967 Stockholm text⁴⁴ to which South Africa was already (and is still) party. The Paris text contains broader exceptions, including an Appendix (titled “Special provisions regarding developing countries”) with wide-ranging reproduction⁴⁵ and translation rights.⁴⁶ The implementation of these rights in the Copyright Act would have allowed for the availability of teaching materials

40 Van der Walt identifies this exact line of argument in respect of the Roman-Dutch common law from those anxious about the normative legal revolution that the Constitution was intended to bring about, pleading their case for exclusion from such rejuvenation of the moral precepts and praxis of their particular enclave of private law: see the sources and excerpts at Van der Walt (2008) at 94 n 65.

41 Amis (1994) at 19.

42 1161 UNTS 3 (adopted 9 September 1886).

43 Revised 24 July 1971.

44 Revised 14 July 1967.

45 Art III of the Appendix.

46 Art II of the Appendix.

for mother tongue education, strengthening perpetual ties to a tribal social and political structure, which is one of the cornerstone requirements for Apartheid to succeed (on its own terms). Yet the Apartheid government chose not to facilitate mother tongue teaching, severely belying the “separate development” claims that underpinned Apartheid political rhetoric. In this light, not ratifying the Paris text is a political act, aimed at disadvantaging the black learners on a national level. The exceptions contained in the Appendix are still lacking from the Copyright Act, thus comprising a blatant Apartheid legacy, which fact is never addressed in the apologist publications decrying the Amendment Bill.

Yet, the Bill’s numerous supporters are presented variously as ignorant,⁴⁷ ideologically bankrupt, or as foot soldiers in the struggle for political enfranchisement by huge multinational corporations (not the same huge multinational corporations that prop up the proprietary copyright regime that has existed for the better part of the past century).⁴⁸ An insurgence agenda – overthrow everything and think not of what thereafter – is attributed to the Bill’s proponents, which marginalises and disregards all such advocacy as spurious political activism driven by ulterior motives (ascribed to the topical state capture narrative), and explicitly labelled a fringe movement sometimes in cahoots with Big Tech.⁴⁹ In the same breath, the representative body for

47 Karjiker S & Wessels C “The Copyright Amendment Bill: an interview with Sadulla Karjiker” (30 June 2017) *Litnet* available at <https://www.litnet.co.za/copyright-amendment-bill-interview-sadulla-karjiker/>: “[T]he Bill presents an attack on intellectual property law from a basis of ignorance. [...] It comes down to abolishment of property rights and the depreciation of intellectual property as an economic driver.”

48 If one were informed solely by the rhetorical warfare waged in popular media, you would be forgiven for thinking that these corporations owned no intellectual property at all and owed their entire net worth to a morally wayward modus operandi of appropriating the hard work of others. Ironically, it is arguable that the fair use exception enables lucrative access to data for Big Tech companies more than it enables the piracy of copyright works, as alleged, pointing to the receding relevance of intellectual property rights in the Fourth Industrial Revolution compared to their prominence in the Third Industrial Revolution.

49 Karjiker S “Shambolic Copyright Amendment Bill will favour Google and its ilk” (19 October 2018) *Business Day* available at <https://www.businesslive.co.za/bd/opinion/2018-10-19-shambolic-copyright-amendmentbill-will-favour-google-and-its-ilk/>; Myburgh A “Fringe views replace universities’ position on the Copyright Amendment Bill” (29 November 2019) *Mail & Guardian* available at <https://mg.co.za/article/2019-11-29-00-fringe-views-replace-universities-positionon-the-copyright-amendment-bill/>; Tomaselli KG & Pieterse H “Threatening copyright and livelihoods: The South African Copyright Amendment Bill” (16 June 2023) *International Authors Forum* available at <https://internationalauthors.org/news/copyright-law/threatening-copyright-and-livelihoods-the-south-african-copyright-amendment-bill/>; Tomaselli KG “Copyright Bill feeds into Big Tech’s agenda to grab creative content: (16 August 2024) *Mail & Guardian* available at <https://mg.co.za/thought-leader/>

the blind community is accused of being used as a pawn in the politics of the insurgence, summarily denied agency and painted as a group incapable of determining their own agenda.⁵⁰ This ragtag movement of pirates, pawns and pyromaniacs represents normative anarchy towards the proprietary edifice that contemporary copyright law comprises.

Much like Robin Davies, copyright apologists never consider the situation from any perspective other than their own – namely, existing copyright owners who operate an international scheme of knowledge exploitation – and never consider the users who bump up against their touted model in everyday life, who need to organise their lives around the archaic norms that are forced upon them. In this sense, rather than showing understanding for the plight of the disenfranchised authors and users that are at the heart of the proposals contained in the Copyright Amendment Bill, these commentators' moral myopia exacerbates their evident fear of anarchy. These self-centred proprietary norms are the legal equivalent of social fundamentalism, which are inherently limiting of the users' freedoms and authors' claims to further empowerment. In the rhetorical onslaught on the CAB, the only entity worthy of recognition is the author, and authorship is only relevant for purposes of determining trade implications. In this scheme, authorship (as proxy for the corporations that will benefit from their rights far more than the authors)⁵¹ is locked into one world view of mercantilist thinking, resulting in a solipsistic model of the world rendered in purely instrumental terms that point either towards or away from the author's purported interests.

opinion/2024-08-16-copyright-bill-feeds-into-big-techs-agenda-to-grab-creative-content/; Tomaselli KG & Pieterse H "Copyright Amendment Bill 'bad news' for South Africa" (08 February 2024) *University World News* available at <https://www.universityworldnews.com/post.php?story=20240207111202900>.

- 50 Karjiker S "Supporters of the Copyright Bill should avoid resorting to political expediency to achieve their aims" (08 June 2020) *Daily Maverick* available at <https://www.dailymaverick.co.za/opinionista/2020-06-08-supporters-of-the-copyright-bill-should-avoid-resorting-to-political-expediency-to-achieve-their-aims/>. See the retorts by the organisation itself (Nair J "Blind SA rejects with contempt the insinuations by Professor Sadulla Karjiker in his article published on 8th June 2020" (16 June 2020) *BlindSA* available at <https://blindsa.org.za/2020/06/16/blind-sa-rejects-with-contempt-the-insinuations-by-professor-sadulla-karjiker-in-his-article-published-on-8th-june-2020/>) and by the former Constitutional Court Justice, himself blind, Zak Yacoob (Yacoob Z "You have hurt and insulted visually impaired people, Professor Karjiker" (09 June 2020) *Daily Maverick* available at <https://www.dailymaverick.co.za/article/2020-06-09-you-have-hurt-and-insulted-visually-impaired-people-professor-karjiker/>).
- 51 Authorship is merely an initial bargaining chip that is subject to unequal power relations in the contractual negotiations that are aimed at depriving the author of the full economic benefit of the object of the entire bargaining process – the copyright work.

Normative pluralism and inclusive copyright

The Madonna of Excelsior as an allegory of normative pluralism in South Africa

Zakes Mda's nonfiction novel (in that it fictionalises a true story and narrates it through the minds of many characters) poses a jarring contrast to *You can't do both*. The novel explores small town living during the late 1960s and early 1970s with Apartheid brutalities and paradoxes, telling the tale of two worlds (black and white) that collide in the Excelsior 19 debacle, wherein 14 black women and 5 white men were charged with miscegenation under the Immorality Act⁵² after mixed race children were born to black mothers residing in Mahlatswetsa, the black settlement adjacent to the white Afrikaner town of Excelsior in the Free State province of South Africa with a total population of around 700.⁵³

Focusing on the experience of one of the black women involved in the ordeal, Niki, the author recounts her experiences leading up to and following the aborted trial. Niki relives the trauma of being a black woman during the height of Apartheid for the reader, starting with the first time she was sexually assaulted by a white man in a field,⁵⁴ and how she gradually learned to deal with the experience as it kept recurring while starting to rely on the money that the rapist would give her after each assault. She began traveling to the nearby town of Thaba 'Nchu to pose nude for the renowned artist Frans Claerhout, who would pay her for the privilege of studying her naked form. During this time, she starts working at the local town butchery to earn her living; the butchery is owned by the town's mayor, Stephanus Cronje, and run by his wife Cornelia.⁵⁵ Before

52 23 of 1957.

53 Anonymous "A South African court drops miscegenation case against 19" (27 January 1971) *New York Times* (available at <https://www.nytimes.com/1971/01/27/archives/a-south-african-court-drops-miscegenation-case-against-19.html>) at 2.

54 Crous M "A battle between lust and loathing: the interplay between masculinity and femininity in Zakes Mda's *The Madonna of Excelsior*" (2010) 47 *Tydskrif vir Letterkunde* 79 at 90 explains:

"The ideological message posited by the text is that white men during the apartheid era (as in the case of [Niki's rapist] Johannes Smit) abuse young black women for their own sexual gratification. The abuse is regarded as a rite of passage among white men in the rural areas to be sexually initiated by black women, an attitude similar to that held by the slave owners in the past." (citations omitted)

55 This character is based on the true story of Excelsior's local councilor, who was also the town's butcher, who committed suicide shortly after being charged: Anonymous "A South African court drops miscegenation case against 19" (27 January 1971) *New York Times* (available at <https://www.nytimes.com/1971/01/27/archives/a-south-african-court-drops-miscegenation-case-against-19.html>) at 2.

long she's subjected to an utterly degrading abuse of racial superiority, wherein the white madam, Cornelia, makes her strip naked in the butchery in full view of her colleagues and the butchery's customers after she weighed slightly more than she did that morning, meaning that she had to be concealing stolen meat somewhere. Niki exacts revenge against the uncaring wife by starting an extra-marital affair with her husband, who soon tells her to stop working at the butchery and just gives her money instead. Niki considers her sexual relationship with Stephanus Cronje to be an empowering act of vengeance against Cornelia for the humiliating incident in the butchery, which allows her to reclaim a sense of moral agency in the world.⁵⁶

Interracial affairs were evidently so common during those times that they were well-known in the community.⁵⁷ Stephanus introduces Niki to sex parties that a group of white men host in which black women are invited to participate in drunken orgies. These debauched parties continue for many months, even after the pregnancy of multiple black women and the resultant births of mixed-race children, until a group of 21 people (which figure later reduced to 19, hence the reference to the *Excelsior* 19)⁵⁸ are arrested and charged under a key piece of Apartheid legislation, the Immorality Act. The 14 black women are imprisoned for long periods while awaiting trial, while their white co-copulators enjoy a status that ensures their dignity is protected to a far greater degree throughout the criminal proceedings. The black women are detained until it occurs to the white men – who were released shortly after their arrest – that it may be better

56 Crous (2010) at 91 clarifies that “one of the ways of undermining the power of the white madam is to seduce her husband sexually”.

57 Indeed, Mda reports that such affairs continued many years after the events of *Excelsior* 19, evidently still causing a moral dissonance in the white men perpetrating them as some eight years later another alleged father committed suicide as a result of the birth of a mixed-race child to his black mistress. Following his frequent visits to the town while writing the novel in 2000, Mda quotes a resident and town councillor of *Excelsior* with knowledge of such matters: “These things have been happening ever since [...] They did not stop with that Immorality Act case. They continue to happen even today.”: Mda Z “The steamy past of a Free State town” (9 June 2000) *Mail & Guardian* available at <https://mg.co.za/article/2000-06-09-the-steamy-past-of-a-free-state-town/>.

58 According to a newspaper report published at the time, seven men were initially charged but one of the men charged “was acquitted at a preliminary hearing” and the councillor-cum-butcher committed suicide before proceedings could commence. Indeed, in an intriguing twist of perspective representative of the thinking at the time, it was reported that “[m]uch of the opposition to the Immorality Act, passed in 1950, stems from the number of pretrial suicides associated with it.”: Anonymous “A South African court drops miscegenation case against 19” (27 January 1971) *New York Times* (available at <https://www.nytimes.com/1971/01/27/archives/a-south-african-court-drops-miscegenation-case-against-19.html>) at 2.

to anonymously assist the legal defence of the powerless black culprits than to merely plead ignorance of all charges and allow their female counterparts to reveal all. Ironically, the town's only attorney, Adam de Vries, who represents the white co-accused was a frequent participant in the orgies that precipitated the charges against which he is defending his clients.

When the entire group appears in court to answer the charges by denying the validity of the state's case against them, and in the presence of international media who have picked up on the story and started covering it early on,⁵⁹ the judge is informed that the state wishes to withdraw the charges against all accused.⁶⁰ It seems instruction was received from on high that the charges should be dropped to avoid embarrassment to the puritanical sensibilities of the Nationalist government's racist policies.⁶¹ After the charges are dropped, Niki returns to her ransacked home and finds that she is shunned in every corner of her world. She starts posing for Claerhout again after she is unceremoniously left without any means of subsistence owing to her former lover, Stephanus Cronje, committing suicide shortly after being criminally charged. However, Claerhout soon takes to painting Popi, her mixed-race daughter born of the incidents for which she was charged, instead, and then stops commissioning their modelling altogether. Niki resorts to waiting outside parties and church services for the white folk to grace her with a small donation of money or food on their way home.

59 Original footage from the day of the planned commencement of the trial can still be viewed: Reuters "South Africa: Sex-and-colour trial town tries to settle back into obscurity" (27-01-1971) available at <https://www.britishpathe.com/asset/224272/>

60 The Attorney-General of the time is quoted as saying that it became "clear that State witnesses were no longer willing to give evidence", although the state decided not to threaten them with the same lengthy prison sentences that were employed in other cases to compel testimony: Anonymous "Twisting the law" (1971) 45 *The African Communist* 13 at 14-15.

61 The international news media bringing attention to the debacle is almost certainly the reason for this decision to quash the charges, pointing to the role of freedom of expression in the news industry (something not well developed at the time in South Africa, with state censorship rampant during this era). Moreover, an attorney involved in the defence of the accused in 1971:

The whole place was crawling with reporters. I even appeared on television in England. When [prime minister] John Vorster saw all this he got scared. The image of the country was at stake. He instructed [attorney general of the Orange Free State] Percy Yutar to withdraw the case. I know all this because not only was I the lawyer defending the white men, I was also the National Party chair of the district. We talked about these things." : Mda Z "The steamy past of a Free State town" (9 June 2000) *Mail & Guardian* available at <https://mg.co.za/article/2000-06-09-the-steam-past-of-a-free-state-town/>.

Popi is raised by Niki in the town where she was born from a disgraced and downright illegal rendezvous, facing the scorn of the community for being a “boesman” (bushman) due to her comparatively light skin tone. Her coming of age coincides with the transition to democracy and she and her younger black half-brother, Viliki, ascend the ranks of local political structures to lead the community through the transition to a democratic South Africa amid opposition from the white side of town. However, after Viliki ascends to and is then kicked out of the office of mayor, he abandons this vocation and opts instead for a life of traveling the neighbouring regions with his newfound love, The Seller of Songs, who was born some years after the events of the Excelsior 19 fiasco to a black mother in Niki’s community, bearing clear mixed-race heritage, specifically thought to resemble the likeness of Francois Bornman, the town’s Reverend.⁶² Popi seeks connection in her community, despite the ostracism that she faced from birth, and continues to serve both the black and white communities in various ways. She bears the brunt of the stigma stemming from the black community as well as the anger and indignation of the white community post-democracy, carrying the blame for the purported sins of her mother as the scapegoat in her community.

By the end of the novel, when she reaches her late twenties during the mid-nineties, she gets the opportunity to partially resolve the internal struggle between the two worlds, black and white, that play out through her very existence. She is summoned to pay a visit to her white half-brother, Tjaart Cronje, who has been her biggest nemesis throughout her entire life, on what appears to be his premature deathbed. The anger that Tjaart holds for Popi, knowing that she is his half-sister and yet resenting her involvement in the town’s politics as a representation of blackness overcoming the racist ideology that he clings to so dearly, has brought him to a crossroads between life and death. Popi, graciously, comes to his bedside – on which bed she was likely conceived when Niki and Stephanus engaged in their passionate affair on the latter’s marital bed – and appears to accept his lame attempt at reconciling with her after years of hating her as a “boesman” or “coloured” despite knowing the truth of their relation. This symbolic act of acceptance of the torrid treatment

62 Like Niki, “Maria willingly slept with Bornman in order to acquire money to support her family and by so doing she subverts the system that does not approve any sexual contact between a white man and a black woman.”: Kgoshiadira PR “Female subversion in Zakes Mda’s novel, *The Madonna of Excelsior*” (Unpublished MA dissertation University of Limpopo 2015) at 94 available at http://ulspace.ul.ac.za/bitstream/handle/10386/1659/kgoshiadira_pr_2015.pdf.

she suffered at his hands allows her to make peace with the oppositional and adversarial dynamic of race relations that characterised the transitional period in South Africa's democratic transition.

Moral agency and the communal narrator

Throughout the novel, Mda retells the stories he encountered in the town of Excelsior⁶³ in a way that emphasises the interconnectedness of the two worlds while playing on the duality of the moral prohibitions of the time, which are both championed and broken by the white men depicted. In stark contrast to *You can't do both*, the relationship with others is at the heart of *The Madonna of Excelsior*, portrayed by the narrative gravity not being centred around the self but rather on the community. This narrative voice breaks from the literary tradition of self-styled worldviews and remakes the self as a collective. The narrator represents a collective entity, a "we" that satirically muses at the peculiarities of past and present behaviour and draws out the absurdities of humanity at war with itself. The apparent omniscience and omnipresence of the narrative voice suggests a timelessness that is not bound by mortal constraints but is still present as an experiencing member of the community and speaks in the personal capacity (adopting the internal world of the protagonists, for example, to explore their individual experience) as well as the collective.

The device of a communal narrator, which is employed to give an all-things-taken-into-account perspective as against the typical first-person perspective (which is alternately employed throughout when adopting the perspective of Niki or Popi), may well be seen as an ancestral eye being cast over the three decades recounted. This ties in with the belief of many African cultures in the continued presence and influence of ancestors through the present generation.⁶⁴ Employed as a narrative technique in this novel, this ancestral narration provides a view to both the whole and the particular; the intergenerational collective voice situates the reader as both privy to the internal worlds of many of the members of the community as well as what is said about them within the communal entity to which they belong. This breadth of insight suggests more than a typical individual narrator could hope to

63 These stories are concisely reported in Mda Z "The steamy past of a Free State town" (9 June 2000) *Mail & Guardian* available at <https://mg.co.za/article/2000-06-09-the-steamy-past-of-a-free-state-town/>.

64 See Sindane N "Abezimu/Badimo (ancestors) and copyright law: a decolonial exploration of the literary exception" in *Acta Academica: critical views on society, culture and politics*, 58(1), 2026.

achieve and conveys a timelessness that can stand back from the happenings and smile at the absurdities, teasing the characters in self-critical ways. This gives a reliable account of communal morality as well, speaking in the plural to convey the prevailing attitudes of the black community living in the township of Excelsior. However, the collective narrator has an omniscience that the black community itself would not, often reporting on the events, feelings and desires of the white characters, showing a true awareness beyond the boundaries of the community itself.

Interestingly, Mda dedicates the novel to a painting of a golden bird that Frans Claerhout sketched for the author when they met a few years before the novel was published. This dedication suggests that the author sees the artwork as a living subject, or that he means for his audience to consider this possibility, or perhaps simply wishes to dispute the subject/object dichotomy – something that the novel can be read as addressing throughout. The flux between empowerment and disempowerment, between being capable of exercising moral agency and demanding respect in one situation and then being subjected to the dehumanising behaviour of objectification in the next, is a prominent theme through the novel, and the dedication can be seen as disrupting the complacent orthodoxy of considering the creations of artistic efforts as mere objects susceptible to commodification and exploitation. This thought-provoking act transgresses the boundaries between subject and object and challenges the embedded assumptions that we harbour about the value of works of art generally and how they feature in the everyday lives of those who interact with them. Likewise, when we consider the ways in which copyright objects feature in the lives of the characters of the novel, we find a very different picture to that revealed in *You can't do both*.

Copyright norms and culture in *The Madonna of Excelsior*

Perhaps the most striking juxtaposition of the novels for purposes of considering them in the context of copyright law concerns how copyright works feature in the respective tales. Novels like *The Madonna of Excelsior* can help contextualise the realities of South Africa for many of its citizens and thereby allow them to better understand the ways in which people are excluded by the dominant commercial norms and how democratic and constitutional values are frequently flouted. Indeed, the ways in which copyright works are treated in *The Madonna of Excelsior* is emblematic of how culture shapes the lives of South African citizens every day.

Quite the contrary to Robin Davies in *You can't do both*, the characters in *The Madonna of Excelsior* engage with the subject matter that comprise copyright works on a more personal, expressive level. However, nowhere does copyright law (or normativity) feature in influencing the characters' behaviour or discovery: there is no indication that the laws of copyright – or the associated industrialist norms – feature in the motives behind anyone's conduct.⁶⁵ Even more tellingly, the market paradigm never features in the way copyright works are used in the novel. Instead, in the absence of protectionist mechanisms like the right to prevent reproduction, there is a much richer tradition of dynamic interaction and creation within the black community, and in many ways the objects of creation serve as the lifeblood of the polity – that which connects them to each other.

The copyright objects that feature most prominently in the novel are artistic works and music (comprising literary works in the lyrics and musical works in the musical composition, although nowhere is the industrial property right that vests in the sound recording relevant as the performances are never recorded). Starting with artistic works as a narrative device, each chapter opens with a vivid description of an artwork in the style that Claerhout is known for, an interesting visual metaphor for the time and setting of the chapter that follows. Indeed, the artwork described at the beginning of each chapter tells its own tale of morality, reflecting the state of society from one decade to another in art.⁶⁶ Claerhout's work also features centrally in the plot of the novel: despite being entirely unaware of the nuances of copyright law and the protection of likeness in paintings, Niki manages to make a small subsistence by posing for Claerhout's paintings.

65 The closest representation of copyright norms is arguably the actions of Sekatle, a contemporary of Viliki and brother of Maria, who is suspected of being complicit with the Apartheid government by feeding information relating to the birth of the mixed race children in the Mahlatsetsa community. In his younger days, Sekatle would roam the township trying to sell his services as a photographer with an old camera that a white person gave him. This is the only indication of copyright norms featuring in the black community, by someone who is depicted as "a lackey of the apartheid system" who later "appropriate[s] the discourse of the Movement for his own ends" and deposes Viliki from his mayorship: Goodman R "De-scribing the centre: satiric and postcolonial strategies in *The Madonna of Excelsior*" (2004) 20 *JLS/TLW* 62 at 65.

66 Wenzel M "Zakes Mda's representation of South African Reality in *Ways of dying, The Madonna of Excelsior*, and *The whale caller*" in M Meyer (ed) *Word & Image in Colonial and Postcolonial Literatures and Cultures* (2009) 139: "Whereas Claerhout's paintings at first represented distorted figures, the advent of a new dispensation encouraged him to 'correct' his figures to indicate normal human beings". (reference omitted).

Clærhout's work also takes on a venerated status in the lives of the people who are engaged therewith, like Popi who treasures the artwork depicted on a postcard he gave her more than any other possession.⁶⁷ Popi treats these artworks as symbolic of people and events in her life and uses them as a catalyst for self-exploration in expansive moments and seeks refuge in them in moments of contraction. In other words, the postcards are the most valued possessions that Popi owns, for the effects they produce in her, as snippets into a different world and a different time, not the monetary value that they have long since lost if they ever even had such value. Such simple access to art represents inclusion in the world around her despite the isolation and marginalisation that she experiences growing up, allowing her to share in the nonrivalrous enjoyment of cultural artefacts that enable us to live richer, fuller lives through mere access.

Turning to the role of music in the novel, Popi and her brother Viliki both perform music. Music is a form of expression and an outlet for Popi, and she offers her voice as a funeral singer for all in Excelsior, once even being invited to sing at a white funeral (this being a few years after desegregation). Interestingly, she never accepts compensation for these services, emphasising the unconventionality of selling one's performance of other people's songs. Music also features in the political resistance to white supremacy, as struggle songs sung in hushed voices in the homes of the politically active members of the community. The struggle politics wear down Viliki and he is ready to throw it all in by the time the inspiration for music strikes. He learns to play the accordion after abandoning the comparative financial security that his previous role as the town's mayor afforded him and adopts a nomadic life where he roams the surrounding regions in concert with his newfound love obsession enigmatically called The Seller of Songs, living from any compensation offered by the audiences. The name, The Seller of Songs, demonstrates a particular perception of the person so called: that she is seen as unusual – eccentric, even – for selling songs (even just selling her performance of such songs, a far cry from the way in which songs are sold in copyright law).

The novel depicts how some forms of access to copyright objects are themselves steeped in cultural hierarchy (Niki listening to the radio and getting all her information about the world from there while she remains cloistered

67 It is apt that this postcard is a secondary or derivative work (the artwork itself being the primary or original work), which could be seen as representing her lower status in society.

in her home), and others are by their nature disruptive to it (political song being the best example, which, illustratively, would not serve its purpose of widespread distribution and unification among performers and listeners alike if it were to abide by copyright norms).⁶⁸ Popi discovers herself through the books contained in the town library, using these works as catalysts for the personal development that she was denied by her community's marginalisation for being of mixed race. However, she does so on the terms set by the reigning copyright regime, through limited access to pre-determined works that are made available to her.⁶⁹ This is further exemplified by the fact that the black community is included in the Western system of cultural exploitation only on the terms set by the norms of whiteness, illustrated by the way the vast repository of copyright works contained in the town library was made available to the black community post democracy. The town library was the exclusive preserve of the white inhabitants until a second one was set up in the mid-90s. However, instead of sharing the library's catalogue between the two libraries, the second library had to make do with what it could scrounge from donations and a minute budget and was seen by the townsfolk as the black library, leaving the established one as the white library. This exemplifies the nature of the inclusion of the black community in this scheme; second-rate, subject to available means, and always suffering from budgetary constraints the likes of which were never felt by the white community. Further, the fact that the second library, being built in Mahlatswetsa, was always seen as being for black people (with the implicit expectation that the black community will exclusively use their library, leaving the existing, well-resourced library primarily for the use of the white community and the few black or mixed-race individuals like Popi who have adequately assimilated white culture) shows how its existence allows white privilege to remain unperturbed through the operation of soft norms that perpetuate the erstwhile discriminatory laws and policies. Thus, even when repositories of knowledge are built for the benefit of the black community (following the cultural structures set by white models of normativity), they suffer from marginalisation and are treated as a second-tier priority relative to the correlative interests of the white community.

68 Indeed, struggle songs were often not recorded or notated, meaning that they would be protected by neighbouring rights as live performances instead of as fully-fledged copyright works.

69 In this instance, she engages with primary works but always on terms set by the white institutional powers such as the library's selection of titles and the rules of access they impose.

This inclusion in the cultural practices built around the set of proprietary norms undergirding copyright is done in an effort at extending the market-based structure of cultural economy to those who were previously ignored entirely once democratic norms started to demand equality in the social realms that were previously the preserve of whiteness. As Margaret Chon points out in this regard, equality is ultimately also a matter of bringing authors and the general public into the heady mix of economic power, not just about extending the proprietary monolith of copyright to include them in a consumptive capacity.⁷⁰ In this vein, it is fair to say that whether by design (copyright is, after all, about excluding others from certain conduct) or simply manifest in practice, these proprietary norms are inherently exclusionary of a certain class of person who have no feasible means of including themselves in the system of cultural exchange on the terms set by copyright law, and are therefore discriminatory.

To explain the ways in which proprietary exclusion disenfranchises its subjects (authors and users) and marginalises various sectors of the community, Sunimal Mendis proposes two simple questions: “by whom is innovation carried out?” and “for whom is innovation carried out?”⁷¹ The author offers a compelling view of the empowering function that an inclusive copyright system would entail that is absent under the current exclusionary model of copyright. Most pointedly:

[t]he ability to participate in and to enjoy the benefits of the fruit of innovation is enfranchising. It constitutes an important means of empowering citizens to participate in determining how the intellectual innovation process can be harnessed for creating social and economic value and benefitting from that value in an equitable manner.⁷²

This is remarkably similar to the sentiment driving Van der Walt's critique of exclusionary private law systems and his argument for participatory democratic norms. As he cautions, democratic inclusion faces many private law obstacles, none more pressing than the fundamental normative alignment with a system of default exclusion which remains problematic in every sphere of its existence.⁷³ Not only are the basic norms that animate the body

70 Chon M “Intellectual property equality” (2010) 9 *Seattle Journal for Social Equality* 259 at 265–267.

71 Mendis S “Re-thinking intellectual property law's promise of democratic inclusion” in Sappa C (ed) *Research Handbook on Intellectual Property and Inclusivity* (2024) 12 (emphasis added).

72 Mendis (2024) at 12.

73 Van der Walt (2008) at 84.

of copyright law relevant to answering this question, but also the identity of those whose interests are encapsulated in the legislative scheme that regulates the communal lives of the South African citizenry.⁷⁴ Seeing copyright as instrumental to democratic participation requires a substantive rendering of the fundamental values of dignity, equality and freedom, and further feeds into the democratic values of diversity of views being incorporated into the democratic process and, consequently, greater effect being given to the value of self-determination.⁷⁵ Any attempt at inclusivity of diverse interests or persons outside of those that feed into the industry of commercial enterprises that rely on a particular construction of central concepts in copyright doctrine, has long been outstanding from the reigning copyright system and is likewise absent from the rhetorical onslaught against the CAB. And like Van der Walt is sure to point out, “[t]he shift from exclusivity to inclusivity [...] is possible only if the existing legal order can be both purified of its exclusivist and authoritarian legacy and adapted to accommodate the normative diversity of its reformist purposes.”⁷⁶

Realigning our understanding of basic copyright concepts to the notion of democratic participation can assist in the empowerment of the South African citizenry. Standing in contrast to the Romantic author implicit in the proprietary copyright model is the embedded, relational author; the author who creates through others, from others, in concert with others in a process of mutual exploration and self-development. On this model, “the entire point of the social practice of authorship is precisely this discursive participation in the dialogic process of human interaction and the mutually constitutive creation

74 In the context of the Copyright Amendment Bill’s belaboured progress through the legislative process, democratic inclusion asks whose voices are recognisable in the successive draft bills that emerge. Of course, a chief gripe of the reactionary rhetoricians that defend the status quo is that their participation is “politely heard but ignored”, lamenting that

even a privately commissioned impact assessment [commissioned, it bears noting, by a publishing collective whose interests have dominated the legislative scheme since the beginning of copyright] indicating the Bill’s expected near-destruction of educational publishing and a knock-on impact on the local publishing industry” was not treated as dispositive fact of superior normative weight: Myburgh A Intrigue Behind Ramaphosa’s Rejection of the Copyright Bill” (26 June 2020) *SA People News* available at <https://www.sapeople.com/business/intrigue-behind-ramaphosas-rejection-of-the-copyright-bill/>.

Indeed, when entrenched interests no longer enjoy the same privilege to which they are accustomed, equality begins to feel like discrimination.

75 Mendis (2024) at 12–13.

76 Van der Walt (2008) at 84.

and exchange of text, meaning, and identity."⁷⁷ This view acknowledges the importance of democratic inclusion and proceeds from the point of departure that the copyright system is too important to be concerned solely with the pecuniary interests of copyright owners;⁷⁸ it must be inclusive not only of others' positive rights, but also their ways of living in the world as connected, relational beings that do not necessarily accord with the legacy assumptions embedded within copyright's theoretical basis and doctrinal structure. This model of inclusive recognition is admirably if unwittingly portrayed in *The Madonna of Excelsior*, showing the role of creative works in the constitution, reconstitution, and constant evolution of the self as part of the community.

Sex, property, and power in *The Madonna of Excelsior*

In the context of *The Madonna of Excelsior*, anarchy is manifold in the threats to white supremacy: it is the threat of the black temptresses and the blemishing of the white bloodlines that they bring; it is the challenges levelled against the discriminatory and hateful norms that are lived out; it is the prospect of democracy creeping over the political horizon. Much like the copyright debate fronted in popular media, the white townsfolk in *The Madonna of Excelsior* attribute an insurgence agenda to the black townshipfolk at every opportunity. Not only is almost every action of a black person inherently distrusted for the ideological spirit that it may carry, but the looming anarchy that is imputed to the calculated agenda of the black women (despite the sexual contact being initiated by the white men against vestal black bodies) is also seen as an existential threat to the white supremacist identity and most likely the work of Satan himself trying to undermine the godly sensibilities of the civilised world. Black women are deemed incapable of the type of moral agency that white women possess,⁷⁹ and even in the eyes of white women are seen as bereft of dignity as a moral being, unworthy of the smallest bit of respect. Stephanus Cronje's wife Cornelia never even considers that having Niki strip naked in front

77 Craig C & Kerr I "The death of the AI author" (2021) 52 *Ottawa Law Review* 31 at 55 (citations omitted).

78 Even the moral rights that authors are awarded in s20 of the Copyright Act are frequently trumped by commercial considerations and are, in any event, of little use in securing participation in the creative process for those who are excluded.

79 Reformulating the insights of Frantz Fanon, Crous (2010) at 91 explains the warped mentality of white men in this novel: "White men only want black women for sex and not to marry them: one's nanny remains one's servant and will never be one's wife."

of a group of people in the butchery is humiliating, perhaps because she sees black women as animals, a different species entirely, and why would one care if civilised white folk (including children) saw animals naked, there being no possible sexualisation of beings so utterly different? This clearly demonstrates the attitude of rendering black women subhuman, or possibly even non-human, not worthy of the same basic respect you pay a child. According to the white sensibilities, black people are there to be employed as cheap labour, used as pleasure objects, and mistrusted in political matters; demanding recognition of their dignity is anathema to these axioms of white supremacy.

The bifurcation of society operates at many levels. Construing sex as a surrogate for property rights, as suggested in the discussion of property as a proxy for power in *You can't do both*, also provides an interesting link between the two novels. In *The Madonna of Excelsior*, Mda artfully portrays both sex and property rights as tools of power, each a means for the powerful to exercise their will over the downtrodden. The white males in *The Madonna of Excelsior* enjoy all the power to decide which black women to fornicate with in their own crop fields, all the while preaching a vile racist hatred against them in public, while the black women are first traumatised by the sexual assault then gradually come to bear it with a sullen acceptance. The sex parties quite aptly portray the way in which authors are brought into the fold: purportedly to share in the ecstasy of the orgy, but, in reality, to feed the desires of the privileged class, which the authors in turn see as a way of leveraging some form of power over them.

This is the way Niki's motives are portrayed: as an opportunity to leverage the power of sex against those who have tried to degrade her dignity. Likewise, a few of her contemporaries begin to see the white men's pursuit of black women as an opportunity to make life somewhat easier by acquiescing to the advances and satisfying the lust that causes the white men to pursue them so doggedly. This is the only way open to them to assimilate to the white world in a limited way (of course, always on the terms set by the more powerful actors in this relationship) while appearing to retain a semblance of agency (the alternative being to be raped by the same men participating in the orgies).⁸⁰ It is

80 This metaphor could be considered quite apt – even literal – in light of recent revelations around chief executives of some of the biggest companies dealing in copyright works being suspected in Sean Combs's (aka P Diddy's) infamous sex parties in which the recreational rape of drugged women and minors – many of whom were authors and performers in copyright terms – was one preferred method of exercising power over the comparatively powerless artists under their control.

easier to go along with their schemes and exercise one's (coerced) will than to be crushed and brutalised under the might of their power. For the downtrodden, this, in effect, is a way to attain relative freedom from the adversity that private power can cause them. Just so in the sphere of copyright law, where two worlds continuously collide: the powerful copyright owners and their popular media mouthpieces, and the comparatively powerless authors and users who must play by the rules that the capitally endowed have set.

But at what point does this apparent agency dissipate in the face of force; when does coercion make it illogical to talk about the exercise of free will?

Conclusions

The two novels ultimately represent two very different ways of seeing things and doing things, each reflecting two opposing normative systems that cleave the world apart, and the apprehension that plays out around whether one can, indeed, do both – that is, cling to the social fundamentalism that underpins all legal positions and relationships while also embracing a new normative system aimed at reform and inclusion of previously disenfranchised classes of persons. The ways in which copyright works are portrayed in *You can't do both* is instructive as regards the practices and hierarchies of cultural participation that are at the heart of the English model of copyright. The proprietary norms that constitute the copyright model, drawn from a time where the industrial practices of the age required significant capital to be able to produce and distribute any kind of creative work or performance, constructs culture as largely hegemonic and hierarchical. Likewise, the attendant copyright norms determine a great deal about cultural authorities and the hierarchies and practices that they engender – one needs to find authority for doing something, thinking something or feeling something, else it is liable to being rendered nonsensical, childish, or even dangerous. Consequently, Robin's entire life is lived as if he can only find pleasure in the gratification of sexual pursuit, taking no part in producing, performing or sharing anything that constitutes creative expression, and which could lend meaning to his life or allow him to connect with or contribute to the lives of others.

Meanwhile, the richness of colour in the African novel and the relative drabness of mid-twentieth century England stand in stark contrast, making all characters in *The Madonna of Excelsior* feel more alive and their lives more lived than even the protagonist in *You can't do both*, who approaches events with

a sense of passive and somewhat resentful acceptance of his (privileged) lot in life. *The Madonna of Excelsior* shows normative pluralism in a society where there is one dominant ethos that suppresses all others and continues to harbour resentment against the “other” normative system long after power sharing has been brokered, distrusting it throughout but begrudgingly going along after it becomes apparent that there is no alternative. Much like the white characters in *The Madonna of Excelsior*, there is a fear of looming anarchy accompanying any reform of the social fundamentalism inhering in the system that serves the entrenched interests. Rather than embrace the normative pluralism, those with much to lose resist its advance in every conceivable way, followed by minor concessions to placate the most vocal factions of reformists.

Perhaps, then, the future that looms for South African copyright law will be similar to how the reform has been received over the years following democratic transition in Mda’s novel: small indulgences, incrementally increased, eventually co-opting them into the system in a way that the white farmers can benefit from their quotas in exchange for mentoring. This is reminiscent of the private law purists that Van der Walt describes who argue against tainting the common law with reformist agendas, allowing it to work itself pure through incremental iteration by appropriately trained judicial officers instead of permitting largescale overhaul that is liable to uproot the fundamentals of the Roman-Dutch common law for political reasons. Similarly in the context of copyright reform after democratic constitutionalism: the normative structure of the interactions never changes, just the faces that are held out as authors being supported by this inherently unequal system to distract from the invariable function of wholesale exclusion.

It bears repeating that inclusive copyright is concerned with both who is included in the creation of works – and, by extension, whose interests are protected by doctrine – and who benefits from (is included in, by default) the fruits of such creation, broadly construed. The copyright system must make allowance for the many ways in which these works feature in everyday life and the ways in which they are used, and especially the ways in which they contribute to constitutional or democratic ideals. Inclusive copyright demands reform so that no segment of society is excluded by default, either by reconfiguring the system of disenfranchising entitlements that keeps the objects of protection beyond the access of those who cannot afford to pay the price levied, or by empowering the masses to participate in the

creation of cultural objects themselves.⁸¹ In this way, authorship and usership are intertwined in the process of self-knowledge and self-development, constituting the self-expression of the individual in the communal context.

As much as this is a tussle between two seemingly opposed ideologies, it is not merely a matter of choosing one set of norms over the other; it is also a struggle for inclusion in a system that has always been exclusionary by design, which struggle is supported by the demands of participatory democracy. Having it both ways – a system that is both preservative of the current legal rules regulating copyright around which multiple industries have been built, yet also inclusive of all that are excluded from meaningful participation in society by these same norms and industries – may be a stretch, but not everything from the antebellum will be lost in the embrace of the newfound freedom and flexibility – and inclusion – that a transformative copyright system represents. Ultimately the point is not to avoid the conflict between the two camps or to deny it, but to bring it out into the open and to set about finding common purpose.

If the foundational tenets of the extant system of exclusionary copyright is found to be at odds with the project of constitutional transformation, then that must be made clear and dealt with appropriately. But Van der Walt counsels that “abandoning foundation does not necessarily end in nihilism: normative anarchy can be avoided as long as contradictions are restricted by common purpose”.⁸² This common purpose, of course, should be derived from and directed by the constitutional vision for South African society. That is ultimately the question to ask of any reformist legislation that seems to threaten the normative foundation of the law: does the common purpose of a constitutional society based on human dignity, equality and freedom unite its seemingly disparate provisions? In this case, does the CAB point in the direction of an inclusive system of copyright that starts to undo the regime of exclusionary entitlements that keeps most of South African society without access to the cultural cache? And how does – or could – the extant copyright regime function once stripped of this authoritarian and exclusivist legacy?

81 Conspicuous in its absence is any suggestion from copyright apologists about how to make copyright law more inclusive of those who do not abide by the classical copyright archetypes of authors or users.

82 Van der Walt (2008) at 80.

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