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Mr. D. Nkosi
Chairperson, Portfolio Committee on Trade and Industry
Parliament of the Republic of South Africa
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7 July 2021

Re: Copyright Amendment Bill B13B–2017
Call for comments in response to the President’s Letter on various sections in the Bill

Dear Mr. Nkosi, MP,

EIFL (“Electronic Information for Libraries”) is an international NGO that works with libraries to enable access to knowledge in over 50 developing and transition economy countries in Africa, Asia, Europe and Latin America. In South Africa, EIFL has engaged with academic libraries to support teaching, learning and research, and with public libraries to develop ICT skills and create employment opportunities in disadvantaged communities.

EIFL welcomes the opportunity to express to the Portfolio Committee its position that the exceptions in the Copyright Amendment Bill B13B–2017 (“CAB”) relating to libraries, educational institutions and persons with disabilities align with South Africa’s international treaty obligations.

In the letter of 16th June 2020 referring the CAB back to the National Assembly, Honourable President Ramaphosa expressed concern that these exceptions may be inconsistent with South Africa’s obligations under international copyright treaties, particularly the “three-step test.” The concerns are misplaced. Other submissions to the Committee will discuss the legal nuances in great detail, and will show that there is no inconsistency with South Africa’s international obligations. Here we will highlight some high-level points.

Libraries and educational institutions in South Africa, and the millions of South Africans citizens they serve, will benefit greatly from the fair use provision (section 12A); the specific exceptions for educational institutions (section 12D); the specific exceptions for libraries, archives, museums, and galleries (section 19C); and the exceptions for people with disabilities (section 19D).

**KNOWLEDGE WITHOUT
BOUNDARIES**

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These exceptions are modelled on provisions in the copyright laws of developed countries with strong creative sectors, including Australia, Canada, Israel, Singapore, the United Kingdom, and the United States. The CAB seeks merely to ensure that libraries and educational institutions in South Africa have the same rights, and are no worse off, than their counterparts in these countries. Just as these countries' exceptions are three-step test compliant, so too are the similar provisions in the CAB.

Here are some examples that prove this point:

- A U.S. Court of Appeals found that fair use permitted a consortium of research libraries to digitize works in their collections for the purpose of preservation and text and data-mining. The Court also found that fair use permitted the consortium to provide people with print disabilities full-text access to all these works. Further, this consortium is relying on fair use to provide students and faculty with remote access to the full-text of these works while library buildings are closed due to the Covid-19 pandemic.
- The recently adopted EU Digital Single Market Directive (2019) permits cultural heritage institutions to digitize their collections for the purpose of text and data mining and preservation. The EU Orphan Works Directive (2012) permits cultural heritage organization to digitize and provide access to works after determining their orphan status.
- The implementation of the Marrakesh Treaty in Australia, Israel, the United Kingdom, among others, apply to people with any disability, not just people with print disabilities.

Significantly, the International Intellectual Property Alliance, in its petition to the U.S. Trade Representative seeking review of South Africa's eligibility for U.S. trade preferences, did not raise any objections to section 19C relating to libraries. Likewise, Michele Woods, the Director of the Copyright Law Division of the World Intellectual Property Organization, did not raise any objections to the fair use provision in her 2018 comments to the Portfolio Committee. Nor did she criticize the CAB's "hybrid" approach of combining a flexible fair use provision with specific exceptions.

In the letter of 16th June 2020, President Ramaphosa noted being mindful of the noble objectives of the amendments, and expressed the intention that these objectives may yet be achieved in a manner that accommodates the visually impaired, educators, students and others who are meant to benefit from their provisions.

We hope that the public consultation on the relevant provisions, as amended, will duly address the concerns expressed in the President's letter on this issue.

The CAB is a long overdue reform that brings copyright law in South Africa into the digital age.

Yours sincerely

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