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To: Mr. D Nkosi, Chairperson: Portfolio Committee on Trade and Industry, Parliament
For attention: Mr A. Hermans, Ms M. Sheldon, Ms. Y. Manakaza, Mr. T. Madima,

Dear Honourable Member Duma M. Nkosi,

Re: **SUBMISSION: COPYRIGHT AMENDMENT BILL [B-13B, 2017]**

The National Council for Library and Information Services (NCLIS) thank-you for the invitation to make submissions on the Copyright Amendment Bill [B-13B, 2017] in particular, Sections 12A, 12B, 12C and 12D, 19B and 19C, and to make comments on the compliance of the Bill with international Intellectual Property Treaties.

NCLIS – VISION AND MISSION

The National Council for Library and Information Services (NCLIS) was established in terms of the National Council for Library and Information Services Act, 2001 (Act No. 6, 2001) and was inaugurated on 11 March 2004 in Cape Town.

The establishment of the NCLIS resulted from a long history of library and information services (LIS) policy initiatives in South Africa. These initiatives gained momentum during the 1990s to address the continuous challenge of improving access to information for all South African communities. The vision of the NCLIS is “to position South Africa as the best-informed nation”. Its mission is to “provide strategic leadership and advocacy for literacy, a culture of reading and writing, innovation and open access to information”. Key strategic concerns are to raise government and public awareness of LIS matters; encourage synergy among stakeholders and strategic partners; address legislative deficiencies in the current LIS sector;

improve funding of the LIS sector; and provide education, training, and skills development of LIS human resources.

NCLIS – ADVISORY COUNCIL TO MINISTERS

The NCLIS is an advisory Council to the Minister of Sport, Arts and Culture, the Minister of Higher Education and Training and Minister of Basic Education.

The NCLIS Act 6 of 2001 prescribes that the NCLIS must inform the Ministers on the following:

- the development and coordination of library and information services;
- the promotion of cooperation among LIS;
- legislation affecting LIS;
- policies, principles and criteria that should govern the allocation of public funds for LIS;
- existing adequacies and deficiencies of library and information resources, including literature in African languages and services;
- the effectiveness of education and training in library and information science;
- service priorities, after consultation with any organ of state responsible for LIS and other interested parties;
- the promotion of basic and functional literacy, information literacy and a culture of reading;
- ways in which new information and communication technologies should be harnessed to achieve improved integration, equity, cost-effectiveness and quality in LIS; and
- any other matter relating to LIS which the Council deems necessary, or which any of the Ministers may refer to the Council.

In addition, the Act stipulates that the NCLIS must:

- coordinate the response of the LIS sector to LIS matters;
- liaise and develop synergy with other bodies and councils regarding LIS matters;
- play an advocacy role in LIS matters; and investigate incentives for donations to libraries.



- support and stimulate the socio-economic, educational, cultural, recreational, scientific research, technological and information development of all communities in the country; and
- provide optimal access to relevant information to every person in an economic and cost-effective manner.

MINISTERIAL COMMITMENTS TO LIBRARIES AND INFORMATION SERVICES AND BALANCED COPYRIGHT LAWS

The Minister of Arts and Culture (together with Ministers from 12 other African countries) signed the Cape Town Declaration¹ in August 2015, which, amongst other important issues relating to library and information services, includes the following important sentences:

- Encourage the implementation of fair and balanced copyright laws to facilitate access to information for all;
- Encourage the use of e-books and virtual libraries more effectively to facilitate cultural and scientific exchange and encourage a culture of reading in the continent;
- Promote library policies on access to information as part of a universal human rights approach as well as rights of people to knowledge.

In July 2018, the Minister of Sport, Arts and Culture with 34 other African Ministers of Culture signed the Durban Communique², reiterating their full commitment to the support, resources, and development of libraries to enable them to drive the African Union Agenda 2063 and United Nations 2030 Sustainable Development Goals. The Communique recognises the crucial role that libraries play in the socio-economic development of countries in Africa. It also confirms the commitment to ensure and protect intellectual property rights including copyright and neighbouring rights laws and balanced implementation.

¹ <https://www.ifla.org/node/9767>

² https://cdn.ymaws.com/www.liasa.org.za/resource/resmgr/documents/2018_ministerial_roundtable.pdf



Library and information services (LIS) and the citizens they serve all need fair and balanced copyright laws to enable them to carry out the above commitments and their statutory mandates in the interests of all South Africans and all other users of their print and digital resources, including historical documentary records and cultural heritage.

SUPPORT FOR SECTIONS 12A, 12B, 12C and 12D, 19B and 19C

On 16 May 2017, at the Parliamentary briefing meeting, Ms Newton, Deputy Director General: Arts and Culture Promotion and Development, DAC, stated that the Department was pleased with the planned copyright amendments and that it had also been involved as a strategic partner. She stated that DAC regarded IP *“as a cross-cutting issue that impacted largely on arts and culture. This policy should not just understand IP in the narrow confines of copyright regulation but should also understand that culture has as dual character of being an economic commodity as well as a public good and social asset that defined the cultural expression of being South African. DAC believed that the copyright legislation should be part of investment measures to support the growth of South African cultural industries. The use of copyrights to achieve development goals should be at the centre of the legislation. This therefore raised the importance of balancing the needs of content creators and of content using the applicable limitations and exceptions as informed by international frameworks. IP should be an asset that was safeguarded to largely benefit local people who are empowered to fully exploit these assets for economic, social and cultural benefit, and whose rights are effectively protected”*.

The long delay in copyright reform in South Africa to bring more balance to the copyright law has been very frustrating for the library and information services (LIS) and education sectors. They have been calling for amendment to the current Copyright Act since 1978, so the NCLIS cannot stress enough how urgent the Bill is for libraries and archives, education and research, galleries and museums, creators, artists - in fact, all stakeholders.

It is unfortunate that text and data mining provisions that were recommended by the library and educational sectors, were not included in the Bill. It is positive though that such activities would be covered by the fair use provisions. Text and data mining is imperative for research, education, scientific analysis, libraries, forensics, provisions are included in proposals for a



Treaty on Limitations and Exceptions for Libraries and Archives at WIPO, which SA, as part of the Africa Group, has supported for many years. The COVID-19 virus was first discovered through text and data mining activities.

The fair dealing provisions in the current copyright law are limited and very restrictive, and difficult to apply in the digital environment. They do not allow text and data mining, digitisation and digital curation and other activities in the digital space, including A1, 3D printing, robotics, augmented reality, resource-sharing, etc., Many of our libraries are involved in these activities, or would like to be, but their work is hampered by the outdated copyright law.

The NCLIS strongly supports the fair use provisions in the Bill. It has noted the benefits of fair use in the US economy in the “Fair Use Report” by the Computer and Communications Industry Association (2017)³, and many other documents, and that fair use has not caused catastrophic damage to creative industries in any of the other 10 countries that have adopted fair use in their copyright laws. The NCLIS has also read the pragmatic speech about Fair use by Ms Karen Chester, Deputy Chair, Productivity Commission, Australia,⁴ which busts many of the myths circulated by opponents of fair use, including a PWC report, which is along the same lines as the PWC report submitted to the SA Parliament by opponents of the Bill.

NEGATIVE IMPLICATIONS DUE TO ONGOING DELAY OF BILL

Without the exceptions in the Bill, the statutory mandates of all libraries, archives and museums are rendered virtually ineffective in the digital space. The collection, preservation and digital curation of our cultural heritage and historical record are at serious risk. The statutory functions of NCLIS will also continue to be hampered. In addition, until the Bill is enacted, ratification of the Marrakesh Treaty for Visually Impaired people will be delayed, subjecting people with disabilities to an ongoing ‘book famine’.

³ <https://www.cciinet.org/wp-content/uploads/2017/06/Fair-Use-in-the-U.S.-Economy-2017>

⁴ <https://www.pc.gov.au/news-media/speeches/fair>



The National Digitisation Policy cannot be finalised until the Copyright Amendment Bill is passed. Phase 2 amendments of the Third Cultural Amendments Act 2008 under the portfolio of the Department of Sports, Arts and Culture will be further delayed. These include the National Library of South Africa Act, the Legal Deposit Act and eight other pieces of legislation related to cultural matters⁵. The laws cannot be updated until the Copyright Amendment Bill has been enacted.

The COVID-19 pandemic highlighted the long-known omissions, inadequacies, and restrictions in the current copyright law, that continue to negatively affect access to information and educational resources, and hamper knowledge-sharing and the provision of relevant teaching and research materials, particularly in the digital space. Restrictive copyright laws, prohibitive e-licences and high pricing of e-books created many challenges for educators, learners, libraries and archives and other information services during the lockdown. Although lockdown restrictions have eased somewhat, these challenges will continue until the copyright law is finally updated.

CONCERNS FOR OUR HISTORICAL RECORDS AND CULTURAL HERITAGE

The above-mentioned Sections of the Bill will give libraries and archives more progressive limitations and exceptions in the digital world. They also introduce improved exceptions for education and research, and new exceptions for museums and galleries. They will enable libraries and archives and museums and galleries, as custodians, of our cultural heritage and historical memory to embrace digital curation fully. They will be able to collect, replace, make accessible, share, digitise, preserve, format-shift, convert material from old technologies to new ones as they evolve in the 21st century and help meet the needs of the Third and Fourth Revolutions. Digital curation guarantees that their collections and our cultural heritage will be preserved and be accessible for future generations.

Members of Parliament are no doubt aware of the horrendous fire in April 2021, that tore through the Jagger Reading Room at the University of Cape Town. This world-renowned

⁵ https://www.gov.za/sites/default/files/gcis_document/201409/gg31082nn652dpe3-61.pdf



research centre suffered serious structural damage, but more concerning is the devastating loss of some 73,500 valuable items in the African Studies Collection, which included the vast majority of the African Studies Published Print Collection (approximately 70 000 items) and rare 19th century dictionaries from around the continent. All the UCT university calendars and history of UCT Libraries were burned, as well as some of the heavily used Government publication documents from South Africa and across the continent. It also included manuscripts and archives kept in the Reading Room for processing or digitisation or awaiting transfer after digitisation, the original card catalogues for the Manuscripts and Archives repositories, as well as the Special Collections Archive Office and administrative records. Ujala Satgoor, Executive Director of Libraries at UCT told Reuters *“It was horrifying. It was a deep-seated sadness that this had to happen because some things are irreplaceable”*. The entire African Studies Film Collection on DVD (about 3,500 items) was destroyed. *“We were very fortunate to digitise the VHS and had them stored as DVDs, but because of copyright we could not replicate”*, said Satgoor. She added that the process of digitisation had helped preserve other manuscripts. *“Very special rare and antiquarian materials are housed elsewhere”*, she said.⁶

This tragic event should be a clear message to Parliament and the President that all libraries (including Legal Deposit libraries) and archives (including the National Archives of South Africa), galleries and museums, and educational institutions and research institutes, urgently need the limitations and exceptions in the Bill, so that our priceless collections and cultural heritage can be collected, catalogued, digitised, preserved and made accessible for generations.

NCLIS SUPPORTS ALL THE ABOVEMENTIONED SECTIONS OF THE BILL

The NCLIS commends the Department of Trade and Industry for including fair and balanced limitations and exceptions in the Bill, especially in the context of a country in transformation in the digital world. NCLIS strongly supports all the provisions for libraries, archives, museums

⁶ <https://scholarlyhorizons.co.za/blog/libraries-and-archives-and-our-documentary-heritage-why-copyright-amendment-bill-is-so-crucial/>



and galleries, as well as research, education, civic and many other purposes that are enabled in the abovementioned sections of the Bill. The NCLIS therefore urges Parliament to expedite the passage of the Bill, so that it can be sent back to the President for assent before the end of 2021.

COMPLIANCE WITH INTERNATIONAL TREATIES

The NCLIS is aware that the Bill was informed by many international and domestic policies, treaties, treaty proposals, research findings, WIPO studies on limitations and exceptions for libraries, archives, research and education, the Electronic Information for Libraries (EIFL) model copyright law and copyright laws from many developed countries, including the US, EU, Germany, and others, and other documents. In addition, many international and regional organisations, educational institutions, and library associations have strongly supported the Bill, some claiming it would serve as a model for other countries. If there was any question of non-compliance with international Treaties, the NCLIS is sure that these entities would not be so supportive of the Bill. The copyright laws in the countries that have fair use and other similar provisions have never been found to be in conflict with the Berne 3-step test through any WIPO or other international dispute mechanisms, and these countries continue to benefit from such provisions. Contrary to being unconstitutional, the provisions in the Bill are in fact fully endorsed by our Bill of Rights and are compliant with international human rights agreements and other international obligations.

In light of the above, the NCLIS is certain that the Bill was indeed drafted within a legally accepted international framework and that it is compliant with international Treaties, such as the WIPO Internet Treaties, i.e. WCT and WPPT, and the 2013 Marrakesh Treaty for the Visually Impaired. South Africa (through the Africa Group) fully supported the Marrakesh Treaty, and the Bill has included provisions from it and extended them to include other disabilities, which is highly commended. The NCLIS looks forward to South Africa ratifying the Marrakesh Treaty to enable cross-border exchange of accessible formats to increase access for people with disabilities. People with disabilities also need the exceptions in the Bill for fair use, teaching and learning, research, and to be able to access information and materials through the services of libraries, archives, museums and galleries.



SOUTH AFRICA AND INDIA'S TRIPS WAIVER PROPOSAL

South Africa, with India, has proposed a TRIPS Waiver at the World Trade Organization to enable research to be enhanced and restrictions on patents to be waived to enable treatment and vaccines to be developed to resolve the pandemic crisis. The waiver will not only apply to patents but will also have to extend to copyright. Without text and data mining and access to printed and online research resources, data, e-databases, clinical trials, and software that is used for ventilators and other medical equipment, researchers will continue to be hampered in their research endeavours. For these reasons the fair use provisions and exceptions in Sections 12A, 12B, 12C and 12D, 19B and 19C are particularly urgent in the COVID-19 pandemic.

REQUEST TO PRESENT AT ONLINE HEARINGS IN AUGUST 2021

The NCLIS would like to be considered for a presentation slot at the public hearings to be held online on 4 and 5 August 2021.

Thank you

Regards



Dr. Naresh Sentoon

Chairperson: NCLIS