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Mr. Andre Hermans, Secretary
Portfolio Committee on Trade and Industry
Parliament of the Republic of South Africa
By email: ahermans@parliament.gov.za; tmadima@parliament.gov.za;
msheldon@parliament.gov.za; ymanakaza@parliament.gov.za

27 January 2022

Re: Copyright Amendment Bill [B13B-2017] Call for Public Submissions and Comments

Dear Mr. Hermans,

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 wishes to express its sincere condolences on the untimely passing of Mr. D. Nkosi, M.P., Chairperson of the Portfolio Committee and our appreciation for Mr. Nkosi’s work in steering the Copyright Amendment Bill through the parliamentary review process.

EIFL welcomes the opportunity to submit comments on additional definitions and clauses in relation to the Copyright Amendment Bill [B13B-2017]. EIFL has commented on previous versions of the bill. Our comments today focus on Section 19C of the Bill, that is, the exception for libraries, archives, museums and galleries (“GLAMs”), but the concerns raised apply to many of the other amendments relating to exceptions as well.

Yours sincerely

Teresa Hackett
EIFL Copyright and Library Programme Manager

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1. The introduction of multiple and overlapping conditions to specific exceptions risks rendering these exceptions unusable

Section 19C Libraries, archives, museums and galleries (GLAMs)

EIFL's primary concern relating to section 19C is that the draft bill proposes to condition its availability on the new fair use provision, section 12A.

EIFL fully supports a fair use provision. But the key benefit of a fair use provision is that it *supports* the specific exceptions by enabling certain other legitimate uses not foreseen by the legislator when the law was developed, rather acting as a constraint on those specific activities that the legislator has deemed, under the exception, to be in the public interest.

Under section 12A(d), section 19C is "subject to the principle of fair use, determined by the factors contemplated in paragraph (b)". Conditioning the specific exception for libraries, archives, museums, and galleries on the fair use factors therefore significantly undermines the utility of section 19C for the institutions it is designed to benefit.

Section 19C provides GLAM institutions with specific rules concerning particular permissible activities: - lending (section 19C(2)); providing temporary access to digital copies (section 19C(3)); viewing of audio-visual works and listening to sound recordings (section 19C(4)); making preservation copies (section 19C(5) and (11)); making replacement copies (section 19C(6)); format-shifting from obsolete formats (section 19C(7)); making copies of out-of-commerce works (section 19C(9)); importing works from other countries (section 19C(10)); making copies for public exhibitions (section 19C(12)); and providing copies of works to users of other libraries (section 19C(13)).

The high degree of clarity provided to GLAMs under section 19C to undertake these fundamental activities is taken away by subjecting all these activities to a fair use test.

Significantly, the copyright laws of other countries with flexible fair use or fair dealing provisions do not subject their specific GLAM exception to a fair use or fair dealing test. For example, 17 U.S.C. 108 provides a specific exception for U.S. libraries and archives for preservation, replacement, and supplying copies to users. This exception is unambiguous and is not subject to the fair use factors set forth in 17 U.S.C. 107. Additionally, section 108(f)(4) specifically provides that the section 108 is supplemented by fair use. In other words, activities that do not fall within the scope of the specific section 108 provision, may nonetheless be permitted by fair use under section 107. Similarly, Singapore's exception for libraries and archives (Division 6) is not subject to the fair use provision at Division 2.

The entire point of a specific GLAM exception is to provide institutions with confidence that they can engage in certain specific uses without fear of infringing copyright. Requiring GLAMs to

perform a fair use calculus before making these specific uses renders the exception far less effective.

Sections 12B and 12C Quotations, current events, translation, personal use, temporary reproduction

Unfortunately, the draft bill adopts this same flawed approach with many other specific exceptions that previously were absolute. Thus, the exceptions in section 12B for quotations, reporting of current events or information, translation for educational or research purposes, or personal use would be subject to a “compatible with fair practice” test. These provisions, as well as the other exceptions in section 12B, would also be subject to the section 12A fair use test. In other words, the exceptions for quotations, news reporting, and personal use would be subject to both the fair practice and fair use tests. This layering of tests will have a chilling effect on free expression in South Africa.

The layering of tests is even worse for the temporary reproduction exception, section 12C. According to the draft Bill, this exception can be exercised only in accordance with the (1) Section 12A fair use test, and (2) two of the three steps of Berne Three Step Test: the temporary copy does not conflict with the normal exploitation of the copyrighted work (section 12C(2)(b)) and does not unreasonably prejudice the legitimate interest of the copyright owner flowing from their copyright in that work (section 12C(2)(3)). In contrast, Article 5(1) of the European Union Information Society Directive does not apply either of these tests to its exception for temporary reproduction; it contains a straightforward exception that has been adopted in all EU member states and in many other jurisdictions.

The worst layering of tests, however, occurs in the section 12D exception for educational and academic activities. A teacher, student, or education institution can exercise this exception only in accordance with the section 12A fair use test, fair practice (applied twice, in section 12D(1)(a) and section 12D(8)(b)), and two the three steps of the Berne Three Step Test (section 12D(1)(c) and (d)). All these additional tests completely defeat the purpose of section 12D: promoting education in South Africa.

The net effect of applying the fair use, fair practice, or Berne Three Step tests (either separately or together) to the CAB’s specific exceptions makes the provisions confusing and difficult to understand even, we would suggest, for trained legal professionals. The net result is that the intended beneficiaries – librarians, archivists, teachers, researchers, journalists and citizens in South Africa, most of whom do not benefit from formal legal training – will find it nigh on impossible to actually use the exceptions. Consequently, the new law will not achieve a key policy objective: to ensure access to information for research, education, libraries and archives and developmental goals.

To summarize, we fully support a flexible and open fair use provision. But that provision should *supplement* the specific exceptions, rather than be *superimposed* upon them. Section 12A(d)

should be deleted, as should section 12C(2), section 12D(1)-(4), section 12D(8)(b), and the references to fair practice in section 12B.

2. A library user should be permitted to copy excerpts of audio-visual works

Section 19C(4) permits a user in a library, archive, museum, or gallery (GLAM) to view an audiovisual work or listen to a sound recording on the premises of the GLAM or via a secure computer network.

EIFL opposes the addition of the clause “but may not permit a user to make a copy or recording of the work” at the end of section 19C(4). This proposed new clause would prohibit the GLAM or a user from making a copy or recording of the work. However, there are many circumstances in which a user should be permitted to make a copy of a portion of an audiovisual work or sound recording. For example, a student should be allowed to use her mobile phone to copy an excerpt of the work for a school assignment. The lawfulness of the user’s copy should be determined in accordance with exceptions that apply to the user e.g. fair use under section 12A. Additionally, GLAMs do not have the staffing to patrol individual users’ activities.

Alternatively, the crossed-out phrase “for commercial purposes” could be restored. This would enable students to make fair use copies of audiovisual works and sound recordings for educational purposes.

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