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Mr Hlupheka Mtileni, Secretary
Select Committee on Trade and International Relations
National Council of Provinces
3rd floor, W/S 3/083, 90 Plein Street, Cape Town 8001
By email <hmtileni@parliament.gov.za>

20 February 2019

Call for Comments: Copyright Amendment Bill [B13B - 2017]

Dear Mr. Mtileni,

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 Pacific, Europe and Latin America. In South Africa, EIFL has supported the work of academic and public libraries¹.

EIFL welcomes the opportunity to provide written comments on the Copyright Amendment Bill [B13B - 2017]². EIFL wishes to express its strong support for the Bill and urges the National Council of Provinces to support its timely adoption.

Our comments focus on four key sections concerning copyright exceptions (Section 12A, 19C, 19D, 38B). Our comments are made in the interests of libraries and the people who use libraries for education, research, culture and community development.

We hope that the National Council of Provinces will approve the Bill to adopt a copyright law for the digital age for the benefit of future generations in South Africa.

Please do not hesitate to ask if you have any questions.

Yours sincerely

Teresa Hackett
EIFL Copyright and Libraries Programme Manager
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¹ <http://www.eifl.net/country/south-africa>

² EIFL would not likely be in a position to make a verbal representation to the Committee.

Background: Copyright and libraries

EIFL commends the stated purpose of the Copyright Bill to increase access to knowledge, education and learning materials, and for persons with disabilities.

The delivery of high-quality library and information services helps guarantee universal and equitable access to information and ideas that people, communities and organizations need for their social, educational, cultural, democratic, and economic advancement.

Digital technologies have transformed how people create, access and use information for education, research and leisure, and in their professional lives. Technological developments, such as mobile devices and cloud computing have changed how libraries operate, providing libraries everywhere with opportunities to develop innovative new services³, especially for those underserved by print resources or who live in rural or remote regions.

To fulfil the promise of the digital age, libraries need the support of a copyright law that enables improved services to our communities, such as online distance education, and other activities that facilitate the public service mission of libraries.

A copyright law fit for the digital age

EIFL commends legislators for taking in charge the task of amending the Copyright Act, 1978 (as amended), originally adopted over 40 years ago.

The extensive and transparent consultation process since the Bill was introduced to the National Assembly in 2017, including specific engagement with stakeholders and three days of public hearings, has ensured that the views of all interested parties have been heard.

The Copyright Bill, 2017 addresses the challenges and opportunities of the ‘Fourth Industrial Revolution’ in several ways. It creates a legal framework that carefully balances the rights of creators to fair reward for use of their works, with rights of users to fairly access copyright-protected material for socially beneficial, public interest purposes.

Many of the Bill’s provisions are drawn from international copyright treaties, proposals for treaties, or provisions with similar effect found in copyright laws in other countries. They are compliant with South Africa’s international treaty obligations.

Copyright law developments in South Africa are an important exemplar for libraries in other countries, in particular the developing and transition economy countries in which EIFL works⁴.

We also value the leadership role of South Africa at intergovernmental level. We especially appreciate proposals by the African Group at the World Intellectual Property Organization (WIPO) on limitations and exceptions for libraries and archives⁵.

³ For example, setting young people on secure career paths in Masiphumelele Public Library near Cape Town, the only place providing free access to computers, the internet and training support: www.eifl.net/eifl-in-action/setting-young-people-secure-career-path

⁴ <http://www.eifl.net/where-we-work>

⁵ http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=242388

EIFL would like to highlight four key sections of the Bill.

1. General exceptions regarding protection of copyright work for libraries, archives, museums and galleries - new section 19C (p. 16).

Section 19C helps to facilitate a range of modern library activities and services, such as digital preservation (a key institutional responsibility), use of audio-visual material for educational purposes (in support of online learning), and managed resource-sharing among libraries (as no library can own every book or published journal).

But it is not a free-for-all. Section 19C is carefully crafted to include clear safeguards for copyright owners. All uses are restricted to non-commercial purposes, and for digital material there are additional specific safeguards e.g. streaming of content must be over a secure network, a receiving institution must delete any digital files upon receipt.

2. General exceptions regarding protection of copyright work for persons with disability - new section 19D (p. 17).

Section 19D is a welcome provision for libraries that serve people with disabilities. It facilitates the right to read for people with disabilities by enabling a copy of a work to be made in an accessible format such as braille, audio, large print and digital accessible formats.

It also puts in place a legal framework to enable the exchange of accessible formats across borders, as provided for in the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled⁶. We hope that South Africa can soon join the Marrakesh Treaty, WIPO's fastest-moving and most popular treaty⁷. The Marrakesh Treaty aims to the end the 'book famine'⁸ that is partly due to barriers created by copyright law, barriers that the global treaty seeks to remove.

In addition, Section 19D supports implementation of the UN Convention on the Rights of Persons with Disabilities (to which South Africa is party), especially Article 9 Accessibility, Article 21 Freedom of access to information, and Article 30 Participation in cultural life, recreation, leisure and sport.

⁶ <https://www.wipo.int/treaties/en/ip/marrakesh/>

⁷ Now covering 78 countries, including the EU and US.

⁸ The book famine is used to describe the fact that only about 7% of published works are made available globally in accessible formats, like braille, audio, large print and digital accessible formats. In the developing world, where 90% of blind and visually impaired people live, the figure is less than 1%.

3. Unenforceable contractual term - insertion of section 39B in Act 98 of 1978 (p. 31).

Section 39B helps to ensure public access to knowledge in the digital environment. The need for such a provision is a direct consequence of the digital environment whereby access to electronic content (e.g. journal databases) is governed by licence (or contract), and copyright exceptions can be unilaterally taken away by terms in the contract.

When a licence term in a contract takes away uses permitted by national copyright law, the legislator has effectively no role in how access to electronic information for education, research and innovation is determined. Yet the future is digital. It would be a pity if the intention of the legislator to update access for the digital environment in the Copyright Bill could be thwarted by imposed terms in contracts.

Recognizing that copyright exceptions for digital content need to be protected, countries such as Belgium, Ireland, Portugal, UK and the EU (database, software and Marrakesh Treaty Directives) also have such a provision, and Singapore intends to introduce one.

4. General exceptions from copyright protection - new section 12A (p. 12).

Section 12A builds on the concept of fair dealing⁹. As governments around the world seek to reform their laws so that they are fit for the digital age, the need for a flexible exception (also known as an open norm) is stimulating wide interest among academics and policy-makers¹⁰.

For legislators, the strategic benefit of a flexible exception is that law stays relevant for longer as it can accommodate uses not foreseen when the law was developed. For citizens and institutions, it supports innovation, new ways of creating and learning, and the development of new business models because the law can adapt more quickly to the fast pace of technological change.

A good example is text and data mining (TDM), the process of deriving information from datasets ('big data'). TDM is described as the 'new frontier for science and research', and a building block for machine learning and artificial intelligence (AI). In the US, TDM is permitted under the fair use doctrine, while other countries have to amend their law just to catch-up with TDM technology.

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⁹ Section 12(1) of the Copyright Act, 1978.

¹⁰ More than 40 countries with over one-third of the world's population already have a flexible exception in their copyright law. These countries are in all regions of the world and at all levels of development. See The Fair Use/Fair Dealing Handbook, <http://infojustice.org/archives/29136>