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Ms Noziphiwo Dinizulu, Ms Mahdiyah Koff  
Select Committee on Trade and Industry, Economic Development, Small Business  
Development, Tourism, Employment and Labour  
National Council of Provinces, Parliament of South Africa  
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13 January 2023

**Call for Comments: Copyright Amendment Bill [B 13D – 2017]**

Dear Ms Dinizulu, dear Ms Koff,

Electronic Information for Libraries (EIFL) 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 comment on the Copyright Amendment Bill [B 13D – 2017]. EIFL has commented on previous versions of the bill, including for a consultation in 2019 by the NCOP Select Committee on Trade and International Relations. Then, as now, EIFL supports enactment of the Copyright Amendment Bill (CAB) as soon as possible. The bill represents a fair balance between the interests of rights holders and the public, and it complies with the international instruments to which South Africa is a party.

Our comments are in two parts. Section A explains in greater detail the basis for EIFL's support of the CAB. Section B then addresses some of the issues raised during the Workshop on Copyright Amendment Bill, organized by the Committee on October 18, 2022.

We hope that the National Council of Provinces will approve the bill. The CAB is a long overdue reform that brings copyright law in South Africa into the digital age.

We are happy to answer any questions the Committee may have concerning our views.

Yours sincerely

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## SECTION A. SUPPORT FOR THE CAB

### 1. Copyright and libraries

EIFL commends the stated purpose of the Copyright Amendment Bill to increase access to knowledge, education and learning materials, and to support 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 services, especially for those underserved by print resources or who live in rural or remote regions<sup>1</sup>.

To fulfil the promise of the digital age, libraries need the support of a copyright law that enables online education, use of digital research tools, modern services to people with disabilities, and other activities that facilitate the public service mission of libraries.

### 2. The CAB supports culture, online education and persons with disabilities

The CAB will enable libraries and other cultural heritage institutions in South Africa to preserve South Africa's rich creative expression, in all its forms, for future generations. In particular it will spur efforts to safeguard South African cultural heritage against threats posed by fires, increased risk of flooding due to climate change, and other natural and manmade disasters that can befall at any time.

The CAB will support education and teaching in the digital age. The COVID-19 pandemic highlighted the need for appropriate exceptions to enable online access to digital resources, as libraries shifted their operations online to provide vital support for education, research and local communities<sup>2</sup>. Countries with clear exceptions that enable the use of digital technologies were better equipped and more resilient in responding to the challenges of lockdowns. The CAB will enable libraries and educational institutions in South Africa to continue to serve the public when future pandemics or other emergency situations strike.

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<sup>1</sup> For example, setting young people on secure career paths: Masiphumelele Public Library near Cape Town, the only place that provided free access to computers, the internet and training support [www.eifl.net/eifl-in-action/setting-young-people-secure-career-paths](http://www.eifl.net/eifl-in-action/setting-young-people-secure-career-paths)

<sup>2</sup> How South Africa's copyright bill would benefit citizens during COVID <https://www.eifl.net/blogs/how-sas-copyright-bill-would-benefit-citizens-during-covid>

Further, by implementing the Marrakesh Treaty for persons with print disabilities, the CAB upholds the human rights of people who are blind and visually impaired. Due to the long delays in adoption of the CAB, in 2022 the Constitutional Court stepped in to uphold this ‘right to read’. In a landmark decision<sup>3</sup>, the Court declared certain sections of the Copyright Act, 1978 unconstitutional and granted temporary relief allowing accessible format copies to be without having to seek permission from copyright holders. It now behoves legislators to permanently right this wrong in the 1978 Act. The amendments in the CAB will boost library services to persons with disabilities in support of education, employment opportunities and participation in society.

### **3. The CAB supports copyright compliance and South Africa’s international obligations**

Significantly, the exceptions to copyright set forth in the CAB, including the updated fair dealing provision in Section 12A(a), are consistent with South Africa’s international treaty obligations and are comparable to exceptions contained in the copyright laws of countries with successful publishing industries, including the United States, Canada, the United Kingdom, EU Member States, and Singapore.

Additionally, the balanced limitations and exceptions in the CAB will enhance the credibility of the copyright system in the eyes of the general public, and lead to greater compliance with the copyright laws. Especially in the digital age, effective copyright protection relies more on voluntary compliance than legal enforcement. Citizens are more likely to comply with a copyright system they believe is fair to all stakeholders, including new creators and users, as well as established artists and international multimedia corporations.

In sum, we believe that the Copyright Amendment Bill successfully meets key criteria to ensure just rewards for authors in recognition of their intellectual efforts, to provide appropriate limitations and exceptions to guarantee access to creative works for education and learning, and to facilitate South Africa’s compliance with international copyright treaty obligations.

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<sup>3</sup> [https://www.groundup.org.za/media/uploads/documents/judgment\\_cct\\_320-21\\_blind\\_sa.pdf](https://www.groundup.org.za/media/uploads/documents/judgment_cct_320-21_blind_sa.pdf)

## SECTION B. ISSUES RAISED DURING CAB WORKSHOP, OCTOBER 18, 2022

As a general matter, EIFL agrees with the points made by Dr Schonwetter during the Workshop on the Copyright Amendment Bill, organized by the Select Committee on Trade and Industry, Economic Development, Small Business Development, Tourism, Employment and Labour on October 18, 2022. We respectfully disagree with Dr Owen Dean, particularly on the issue of fair use. According to the Committee’s summary of the workshop<sup>4</sup>, Dr Dean stated that:

Fair dealing involves listing a closed number of defined exceptions;

Fair use entails giving the court the discretion to determine that a particular activity should be exempted;

The former creates certainty but is rigid;

The latter creates uncertainty but is flexible.

1. We believe that Dr Dean overstates the difference between fair dealing and fair use. As a general matter, in jurisdictions with a fair dealing provision and jurisdictions with a fair use provision, the copyright statute contains a set of defined exceptions, for example for quotation or illustration for teaching purposes. Both fair dealing and fair use supplement these defined exceptions by granting courts the flexibility to allow a use when it is fair as an equitable matter, advancing the ultimate purposes of copyright. In other words, courts in both fair dealing and fair use jurisdictions have the discretion to determine whether a particular use is fair, or not, and should be excused or not. Because courts in both types of regimes ultimately apply the same flexible standard—fairness— we believe that it is incorrect to posit that one approach is more “rigid” than the other.

2. The primary difference between fair dealing provisions and fair use provisions is that fair dealing provisions identify a specific list of permitted purposes that fall within the scope of the provision e.g. research, private study, criticism, review, and news reporting, while in fair use provisions, the list of permitted purposes is exemplary. Thus, section 29 of the Canadian Copyright Act provides that “fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright;” while section 107 of the U.S. Copyright Act provides that “fair use of a copyrighted work...for purposes *such as* criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.” (Emphasis added.)

In other words, the primary difference between fair dealing provisions and fair use provisions is the phrase “such as.” According to conventional wisdom this is a fundamental difference, because while fair use could apply potentially to any purpose, fair dealing could only apply to the explicit purposes enumerated in the statute. Under this view, fair dealing could not apply to dealings for unenumerated purposes no matter how fair they might be. Professor Ariel Katz of the University of Toronto Law School, however, has conclusively demonstrated that “this

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<sup>4</sup> <https://pmg.org.za/committee-meeting/35773/>

conventional wisdom is flawed.”<sup>5</sup> He explains that when the UK Parliament first codified the doctrine of fair dealing more than a century ago, “there was no intention to restrict or limit its application, adaptation and adjustment by the courts. Parliament sought to codify a principle, a flexible *standard*, not precise rules.”<sup>6</sup> That is, Parliament had no intention to prevent the application of fair dealing to purposes beyond those specifically mentioned in the statute.

The Supreme Court of Canada has confirmed this understanding that fair dealing applies to a wider range of purposes than those enumerated in the statute.<sup>7</sup> Of course, in a given fair dealing jurisdiction, a court might attach significance to the absence of the words “such as,” and interpret the list of permissible purposes as closed.<sup>8</sup> For this reason, EIFL supports the inclusion of the words “such as” in section 12A(a) of the CAB: to eliminate any suggestion that the list of permissible purposes for fair dealing might be closed.

3. Dr. Dean erroneously, in our view, asserts that fair use “creates uncertainty.” As support, Dr Dean cites Harvard Law School Professor Lawrence Lessig, who once stated that fair use merely “is the right to hire a lawyer.” However, Professor Lessig subsequently recanted this statement in 2010.<sup>9</sup> More importantly, over the past decade, numerous empirical studies of U.S. fair use case law have found significant alignment among courts on both analysis of the specific fair use factors as well as overall outcomes of clusters of similar cases.<sup>10</sup> Accordingly, if a person seeks

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<sup>5</sup> Ariel Katz, “Debunking the Fair Use vs. Fair Dealing Myth: Have We Had Fair Use All Along?” in Balganes, S, Wee Loon, N, & Sun, H (eds) *The Cambridge Handbook of Copyright Limitations and Exceptions* 113 (Cambridge, UK: Cambridge University Press, 2021), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3813524](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3813524).

<sup>6</sup> *Id.* at 139. (Emphasis in original.)

<sup>7</sup> *Soc’y of Composers v. Bell Can.*, [2012] 2 S.C.R. 326 (Can.); *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, [2012] 2 S.C.R. 345 (Can.).

<sup>8</sup> Professor Katz states that courts in the UK and other Commonwealth countries misinterpreted the Imperial Copyright Act of 1911 and adopted “a narrow and restrictive view of fair dealing.” Katz at 111.

<sup>9</sup> See Lawrence Lessig, “The ‘Imbecile’ and the ‘Moron’ Responds: On the Freedoms of Remix Creators,” *Lessig Blog Archives* (Oct. 15, 2010), [archives.lessig.org/index7b09.html?p=2029](http://archives.lessig.org/index7b09.html?p=2029)

<sup>10</sup> See Matthew Sag, Predicting Fair Use, 73 *Ohio St. L.J.* 47, 47 (2012) (“[T]he fair use doctrine is more rational and consistent than is commonly assumed.”); Pamela Samuelson, Unbundling Fair Uses, 77 *Fordham L. Rev.* 2537, 2541 (2009) (“This Article argues that fair use law is both more coherent and more predictable than many commentators have perceived once one recognizes that fair use cases tend to fall into common patterns . . . .”); Barton Beebe, An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005, 156 *U. Penn. L. Rev.* 549, 621 (2008) (“In practice, judges appear to apply section 107 in the form of a cognitively more familiar two-sided balancing test in which they weigh the strength of the defendant’s justification for its use, as that justification has been developed in the first three factors, against the impact of that use on the incentives of the plaintiff.”); Neil Netanel, Making Sense of Fair Use, 15 *Lewis & Clark L. Rev.* 715, 719 (2011) (“Looking at fair use’s recent historical development, on top of Beebe’s and Sag’s statistical analyses and Samuelson’s taxonomy of uses, reveals greater consistency and determinacy in fair use doctrine than many previously believed was the case.”); Clark Asay, Is Transformative Use Eating the World?, 61 *Boston Col.*

to make a use that is similar to a use that a court previously found to be fair, the person can proceed with a high degree of certainty that if challenged, her use also would be considered by a court to be fair. Uncertainty only exists with respect to a fact pattern for which there is no adjudicated analogue. But from the user's perspective, uncertainty whether a court would permit an unprecedented use is far preferable to the certainty that the use is unquestionably infringing because a court does not have the discretion to allow it.

4. The need for the flexibility provided by a fair use provision is made manifest by the legislative odyssey of the CAB, which has already been under consideration for over a decade. We live in a time of rapid technological change that directly implicates copyright law. No legislature can possibly keep pace with this rate of development. The courts should have the ability to evaluate the fairness of new uses when they occur. How is South Africa to compete with the United States or Singapore or Korea or Nigeria in software development and artificial intelligence if its copyright law is perpetually obsolete? Significantly, as Professor Forere correctly indicated at the workshop, by authorizing the courts to apply codified criteria to determine whether a particular use is fair, Parliament would not be abdicating its responsibility to make law.

5. Dr Dean also noted that the parliament in Australia opted to ignore the recommendation of the Australian Law Reform Commission to adopt a fair use provision. The implication was that the Australian parliament made a wise public policy decision in the best interests of the Australian public, rather than follow the technical advice of IP experts. But such is the nature of debates in this area of law, the decision may simply have been more a reflection of the lobbying power of deeply entrenched rights holders, and less a reasoned determination of the national interest.

6. Mr. Brauteseth asked the presenters how the Committee could reconcile the Copyright Act, 1978 with the developmental state of the country where access to information was vitally important. This is the critical question. In a developing country such as South Africa, with a youthful population that strives for education and a bright future, it simply makes no sense to have a copyright law that is more restrictive of educational uses and digital research activities than industrialized countries with successful copyright industries, such as the United States, Singapore, or Korea. As the copyright laws in these countries demonstrate, it is perfectly possible to grant reasonable and fair rights to users while affording sufficient protections to copyright owners.

END

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*L. Rev.* 905, 912 (2020) (“[O]ver time there has been a steady progression of both appellate and district courts adopting the transformative use paradigm, with modern courts relying on it nearly ninety percent of the time.”).