

Submission by Teresa Nobre, Vice-President, COMMUNIA International Association, in the United States Trade Representative regarding South Africa Country Practice Review

**January 17, 2020, via regulations.gov**

I hereby request to testify, on behalf of COMMUNIA International Association, at the USTR public hearing on January 30, 2020, on the GSP country practice review of South Africa. A summary of my testimony follows. I will submit additional comments as warranted in the post-hearing process.

**1. Statement of Interest**

COMMUNIA is an international association incorporated under Belgian law whose mission is to foster, strengthen and enrich the Public Domain. We adopt a broad definition of the public domain that includes works that are not protected by copyright (because they have never been protected or because copyright protection has expired), as well as use rights created by open licensing practices and limitations and exceptions to copyright<sup>1</sup>.

COMMUNIA aims at maintaining and reinforcing a network of European and international activists, researchers and practitioners from non-governmental organizations that work to inform policy discussions and strategic action on all issues related to the public domain, namely open copyright rules.

COMMUNIA has been actively involved in copyright reform advocacy. Since COMMUNIA is comprised of mainly European members, our primary focus has been to advocate for improvements to the EU copyright framework, while at the same time building broader, global awareness and support for the cause. Our international advocacy work in this area has been conducted mainly through participation, as permanent observers, in the Standing Committee on Copyright and Related Rights of the World Intellectual Property Organization, including in its recent regional meetings on exceptions and limitations to copyright.

Our activities include publications, meetings, conferences, projects, consultations, studies, research, representation towards institutions, collaboration with other associations and entities in Brussels, in Europe and worldwide.

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<sup>1</sup> Our definition of the public domain has been codified in the Public Domain Manifesto that we authored and published in 2011 and that has been signed by more than 1500 organisations and individuals. See <https://publicdomainmanifesto.org/>

Teresa Nobre is currently the Vice-President of COMMUNIA. Teresa is an attorney-at-law based in Lisbon, Portugal. She holds a university degree in Law from the University of Lisbon Faculty of Law and a Master of Laws in Intellectual Property from the Munich Intellectual Property Law Center. At COMMUNIA, Teresa works across the spectrum of user rights, with a special focus on education. She is part of COMMUNIA “Copyright for Education” team and led several research projects on the area of copyright exceptions, educational licenses, and contractual and technological overrides of exceptions. She can, therefore, testify about the comparative research she has done on existing exceptions for educational activities (including quotation, translation, reproductions, compilations, communication to the public, etc) in all the European countries, and also in selected countries in Asia-Pacific, in Africa and Latin America and the Caribbean. In addition, since she is an European copyright expert and was actively involved, on behalf of COMMUNIA, in the recent EU copyright reform, she can discuss in detail all the major provisions of the main EU Copyright Laws (namely the 2001 Information Society Directive and the 2019 Directive on Copyright in the Digital Single Market), some of which inspired the South Africa Copyright Amendment Bill.

## **2. South Africa Copyright Amendment Bill exceptions are compatible with international and EU standards**

We believe that there are no ground on which USTR could conclude that the proposed exceptions to copyright, contained in the South Africa Copyright Amendment Bill, if enacted into law, would be incompatible with the international standards.

The various exceptions that the South Africa Copyright Amendment Bill proposes to introduce are similar or compatible to those contained in various legal instruments, namely the Berne Convention, the EU Copyright Directives and many national laws.

For example, the Bill’s quotation exception is said to be incompatible with international standards because it does not list the permitted purposes. However, the quotation exception in Article 10(2) of the Berne Convention also does not specify for which purposes can the quotations be made. The same approach is followed in the Nordic countries, where the quotation exception is presented as a “relatively open rule of reason”, whose only requirement is that the quotation is made “in accordance with proper usage”, without enumerating the purposes for which it can be made<sup>2</sup>.

Another example where South Africa proposed exceptions seem to draw inspiration from different national and international laws is with regards to education. For instance, uses taking place on online environments are limited to secured networks accessible only by the educators

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<sup>2</sup> See Teresa Nobre, Best Case Scenarios for Copyright: Quotations in Finland (COMMUNIA, 2016) (pages 2-4), available at <https://www.communia-association.org/wp-content/uploads/2016/07/report-4-quotations.pdf>

and learners at or from an educational establishment, similarly to what is prescribed by the new EU educational exception.

### **3. South Africa Copyright Amendment Bill exceptions in respect of technological protection measures are compatible with international standards and consistent with those in other countries**

We believe that there are no ground on which USTR could conclude that the proposed exceptions in respect of technological protection measures (“TPM”), contained in the South Africa Copyright Amendment Bill, if enacted into law, would be incompatible with international standards.

When anti-circumvention laws were drafted at the international level, they were expected to protect TPM insofar as they restricted acts not authorized by rightsholders (see article 11 of the 1996 WIPO Copyright Treaty). These laws should not be blind to the intent of the users: users should not be prevented from circumventing technological measures regardless of whether their aim is to infringe copyright or to exert their legal rights under the copyright exceptions. Otherwise they would lead to an unfair and costly legal environment for users and society, who would lose out on the opportunity to exercise the rights that should be guaranteed to them.

That is precisely what is happening in the European Union, where TPMs have near absolute protection in EU Copyright law (users wanting to enjoy their right to use TPM-protected content under copyright exceptions only have the right to require the rightholder to provide the technical means necessary to benefit from the exceptions, and not to remove the TPMs themselves). This has a deterring effect, causes inefficiency of the current EU copyright framework structure and is, thus, a source of cost incurred by citizens, society and stakeholders<sup>3</sup>. Note that technological restrictions were characterized as “the most frequently encountered difficulty” by users of digital works in education in Europe: 31.2% of educators and 36.9% of learners said they were not able to access or use TPM-protected works in a report commissioned by the European Union<sup>4</sup>.

For that reason, some European Member States already decided to deviate from the rules contained therein. For instance, Poland never implemented such rules, and Portugal revoked them, after learning of the constant obstacles faced by users, and after hearing from local representatives of rights holders that they did not have the technical means to ensure that local users could effectively access and use TPM-protected content. In Portugal the law now states that the legal protection granted to TPMs does not cover situations in which, as a result of an

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<sup>3</sup> See Review of the EU Copyright Framework: European Implementation Assessment (European Parliament, 2015) (pages I-79 to I-84) available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/558762/EPRS\\_STU\(2015\)558762\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/558762/EPRS_STU(2015)558762_EN.pdf)

<sup>4</sup> See Assessment of the impact of the European copyright framework on digitally supported education and training practices (European Union, 2016) (pages 62 to 64) available at <https://op.europa.eu/en/publication-detail/-/publication/1ba3488e-1d01-4055-b49c-fdb35f3babc8>

omission of conduct, a TPM prevents or restricts the use of TPM-protected content by a beneficiary of a copyright exception.

#### **4. South Africa Copyright Amendment Bill limitations to contractual freedom are inspired by those in other countries**

The provisions of the South Africa Copyright Amendment Bill aimed at strengthening the position of creators and performers in contractual relationships with intermediaries seem to draw inspiration from the policy discussions that have been taking place in Europe in the last few years and which lead to the adoption of several rules (namely those contained in the recently adopted EU Directive on Copyright in the Digital Single Market). This includes, in the EU, provisions that intend to ensure that creators and performers get appropriate remuneration for uses of their works, a provision that introduces a transparency obligation for intermediaries towards rights holders, and provisions on contract adjustment and revocation rights intended to give creators some recourse if, after they sign their rights away, their works end up being much more successful than originally envisioned.

#### **5. Contact Information**

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