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**REQUEST TO TESTIFY  
UNITED STATES TRADE REPRESENTATIVE PUBLIC HEARING FOR  
COUNTRY PRACTICE REVIEW SOUTH AFRICA  
ON JANUARY 30, 2020  
DOCKET NO. USTR-2019-0020**

**SUBMISSION BY TERESA HACKETT  
COPYRIGHT AND LIBRARIES PROGRAMME MANAGER  
ELECTRONIC INFORMATION FOR LIBRARIES (EIFL)**

Submitted at: <https://www.federalregister.gov/documents/2019/11/19/2019-24947/generalized-system-of-preferences-gsp-notice-regarding-a-hearing-for-country-practice-reviews-of>  
January 17, 2020

**I request to testify at the USTR hearing on January 30, 2020 on the GSP country practice review concerning South Africa.**

**I intend to testify on the following points, and may submit additional comments in the post-hearing phase as needed.**

EIFL (Electronic Information for Libraries)<sup>1</sup> is an international non-profit organization 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 in impoverished communities to develop ICT skills and youth employment opportunities.

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<sup>1</sup> [www.eifl.net](http://www.eifl.net)

Our comments will focus on the Copyright Amendment Bill [B13B – 2017]<sup>2</sup>, in particular the exceptions and limitations<sup>3</sup> highlighted by the Petitioner as a cause for concern.

The Bill brings the 1978 Copyright Act, adopted in a pre-internet era, into the digital age. For sure, a law that undergoes a major overhaul after forty-two years will have many changes. However the new exceptions simply permit activities commonly allowed in copyright laws in other countries, including the United States, Australia, Canada, and the European Union.

We find no basis for the claim that this legislation will move South Africa further away from international norms, in fact, the Bill embraces new developments and global best practices especially for digital content. To illustrate, here is one example. Section 39B safeguards the exceptions from override by terms in licences for digital material. In other words, it ensures that the exception prevails regardless of the format of the material. In some jurisdictions, the principle is well established, while in others, it is under active consideration. Thus the language in the South African Bill mirrors provisions in the UK Copyright, Designs and Patents Act, as amended 2014<sup>4</sup>. Provisions with similar effect have been adopted in four European Directives, most recently the Digital Single Market Directive (2019)<sup>5</sup>. In reviews of national copyright laws

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<sup>2</sup> [www.gov.za/documents/copyright-amendment-bill-b13b-2017-16-nov-2018-0000](http://www.gov.za/documents/copyright-amendment-bill-b13b-2017-16-nov-2018-0000)

<sup>3</sup> Copyright Amendment Bill B13B – 2017 Section 12A, 12B, 12C, 12D, 19C, 19D, 39B.

<sup>4</sup> UK CDPA *Article 29(4B)* Research and private study; *29A(5)* Copies for text and data analysis for non-commercial research; *30(4)* Criticism, review, quotation and news reporting; *30A(2)* Caricature, parody or pastiche; *31F(8)* Sections 31A to 31BB: interpretation and general; *32(3)* Illustration for instruction; *41(5)* Copying by librarians: supply of single copies to other libraries; *42(7)* Copying by librarians etc: replacement copies of works; *42A(6)* Copying by librarians: single copies of published works; *50A(3)* Back up copies; *50B(4)* Decompilation; *50BA(2)* Observing, studying and testing of computer programs; *50D(2)* Acts permitted in relation to databases; *75(2)* Recording of broadcast for archival purposes

<sup>5</sup> *Directive* (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (Article 7);

*Directive* (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (Article 3.5);

*Directive* 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Article 8);

in two countries - Australia (2017)<sup>6</sup> and Singapore (2019)<sup>7</sup> – the governments have signalled their intention to protect certain exceptions from restrictions in contracts.

Further, the claim that the scope of the exceptions violates South Africa's international treaty obligations is unsupported. The exceptions in the Bill are carefully crafted. Each provision is subject to a clear condition, such as a proportionality test, effect on the market test, or is a strictly non-commercial use. Fair use is modelled on US copyright law<sup>8</sup>. The provisions on disability are modelled on the Marrakesh Treaty<sup>9</sup>. Thus the exceptions are drawn from international treaties, provisions with similar effect in other countries, including the United States, and the EIFL model law developed by international copyright experts and academics<sup>10</sup>.

The international copyright system recognizes the importance of exceptions to improve the welfare of society as a whole<sup>11</sup>. Copyright treaties expressly permit nations to tailor exceptions for national needs and priorities<sup>12</sup>. South Africa is legitimately availing of this policy space in pursuit of critical domestic priorities and development needs, especially education.

According to the World Bank, South Africa is the most economically unequal country in the world, and more than half the population (30+ million people) lives on less than \$5 a day<sup>13</sup>. These inequalities are especially evident in the informal settlements and rural areas, where the

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*Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (Article 15).*

<sup>6</sup> Australian Government Response to the Productivity Commission Inquiry into Intellectual Property Arrangements, August 2017. Recommendation 5.1

<sup>7</sup> Singapore Copyright Review Report, 17 January 2019. Proposal 14

<sup>8</sup> Copyright Law of the United States and Related Laws Contained in Title 17 of the United States Code 107. Limitations on exclusive rights: Fair use

<sup>9</sup> Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (2013)

<sup>10</sup> EIFL Draft Law on Copyright Including Model Exceptions and Limitations for Libraries and their Users (2016)

<sup>11</sup> The Limits of International Copyright Exceptions for Developing Countries. Ruth L. Okediji · 21 Vand. J. Ent. & Tech. 689

<sup>12</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) Article 7 Objectives, Article 8 Principles; WIPO Copyright Treaty Agreed Statement concerning Article 10

<sup>13</sup> Sulla, Victor; Zikhali, Precious. 2018. Overcoming Poverty and Inequality in South Africa : An Assessment of Drivers, Constraints and Opportunities Washington, D.C. : World Bank Group.

majority of Black South Africans live.

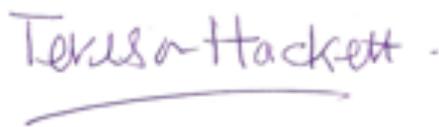
The exceptions in the Bill for the benefit of libraries and educational activities are designed to support ambitious national goals for improved education and training, set out in South Africa's National Development Plan 2030<sup>14</sup>. They will help to alleviate the chronic shortage of learning materials, especially for the poorest people who lack basic amenities and for whom buying books is not an option. They will help South Africa to achieve the Sustainable Development Goals, especially SDG4 on education<sup>15</sup>.

Crucially, better educational outcomes drive economic growth<sup>16</sup>, a core objective of the GSP programme. A more prosperous South Africa will benefit the nation, the region and the wider world.

For EIFL, South Africa's Copyright Amendment Bill is an excellent exemplar for other governments seeking to modernize their copyright laws, in particular in developing countries where EIFL works.

We urge USTR to reject the arguments by the Petitioner and to confirm that South Africa is meeting GSP criterion with respect to the protection of intellectual property rights.

Yours sincerely



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<sup>14</sup> National Development Plan 2030: Our future - make it work. National Planning Commission. The Presidency Republic of South Africa, 2012

<sup>15</sup> United Nations Sustainable Development Goal 4 Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all

<sup>16</sup> Education Quality and Economic Growth Eric A. Hanushek, Ludger Wößmann, 2007. The International Bank for Reconstruction and Development / The World Bank