July 6, 2017

The Honorable Joanmariae Louise Fubbs
Chair, Portfolio Committee on Trade and Industry
Parliament of the Republic of South Africa
Attention: Mr. A. Hermans

Re: South African Copyright Amendment Bill, 2017

Dear Chairperson Fubbs:

The Library Copyright Alliance ("LCA") consists of three major library associations in the United States: the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries. These associations represent over 100,000 libraries in the United States employing more than 350,000 librarians and other personnel. An estimated 200 million Americans use these libraries over two billion times each year. These libraries spend over $4 billion annually acquiring books and other copyrighted material.

In 2015, LCA submitted comments on the South African Copyright Amendment Bill, 2015. We now appreciate the opportunity to provide our views on the Copyright Amendment Bill, 2017.

We commend the South African government on the proposed exceptions for libraries, archives, museums and galleries (section 19C); persons with disabilities (section 19D); and educational activities (section 13B). Long experience in the United States with similar provisions indicates that these exceptions will significantly benefit the citizens of South Africa without harming the interests of domestic and foreign copyright holders.

At the same time, we offer three suggestions to further improve the Bill. First, the fair use provision in section 12 should be open-ended, and not limited to the eight purposes enumerated in section 12. The fair use right in the U.S. Copyright Act, 17 U.S.C. 107, is not restricted to the purposes listed

in the statute. Rather, these purposes serve as examples of the kind of legitimate purpose that would support a fair use determination. The non-exclusive nature of this list is unambiguous in the text of the statute, which refers to fair use "for purposes *such as* criticism, scholarship," etc.

The open-ended nature of the section 107 has allowed U.S. courts to respond quickly to the constantly evolving technology landscape. Thus, just after we submitted our comments on the 2015 Copyright Amendment Bill, the U.S. Court of Appeals for the Second Circuit found that fair use permitted Google's digitization of millions of books borrowed from libraries to create a search index. The court held that the manner in which Google created and operated its search index had significant public benefits without an adverse impact on the interests of the copyright holders. Technology companies, users, and libraries should be no worse off in South Africa than they are in the United States. We note that other countries with thriving technology-driven economies also have adopted open-ended fair use provisions, including Korea, Israel, Taiwan, and Singapore.

Second, a comma inserted in the quotation exception in section 12A(1)(a) after the word "periodical" should be removed. The addition of this comma completely changes the meaning of this provision, restricting the use of the quotation exception to summaries of works. Indeed, section 12A(1)(a) in its current form appears narrower than the scope of the obligation of Article 10(1) of the Berne Convention to permit the making of quotations.

Third, the orphan works issue would be better addressed within the framework of fair use than by the statutory license proposed in section 22A. Libraries, archives, and museums in the United States routinely rely on fair use to digitize works in their special collections that likely are orphan works. The fair use approach has proven to be a far more practical solution to the orphan works problem than the statutory license approach in Canada or the specific exception approach adopted by the European Union. Accordingly, LCA recommends that section 22A be deleted and that section 12 be amended to expressly encompass the use of orphan works.

We are happy to respond to any questions you may have.

Sincerely,

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