**5. Report of the** **Portfolio Committee on Trade and Industry on the Copyright Amendment Bill [B 13 – 2017] (National Assembly – sec 75), dated 15 November 2018:**

The Portfolio Committee on Trade and Industry, having considered the subject of the *Copyright Amendment Bill*[B 13 – 2017] (National Assembly – sec 75), referred to it and classified by the Joint Tagging Mechanism (JTM) as a section 75 Bill, presents a redraft of the Bill [B 13B – 2017].

1. **Process followed by the Committee on the Copyright Amendment Bill**
2. The Bill was introduced to Parliament and referred to the Committee on 16 May 2017.
3. The Committee held two workshops on 7 February 2017 and on 27 to 28 June 2017, respectively. The Committee received a briefing on the Bill on 30 May 2017.
4. The Committee called for written submissions on 26 May 2017. Advertisements were in all official languages in national, provincial and regional newspapers, as well as on social media platforms. The closing date for submissions was 19 June 2017 and the Committee received 73 submissions.
5. The Committee held public hearings on the Bill on 1, 3 and 4 August 2017.
6. Based on the submissions, it became apparent that the Bill had a number of technical errors, which made it incompatible with the existing copyright legislation. Therefore, the Committee made a decision to redraft the Bill to address the technical inconsistencies before deliberating on any policy areas.
7. Given the specialised, technical nature of copyright, the Committee appointed two technical consultants, namely Prof Tobias Schonwetter and Prof Caroline Ncube, in 2017 to assist it during its consideration of the Bill. The consultants played a pivotal role with the redraft. However, due to delays in deliberating on the Bill, they were unable to effectively assist the Committee in 2018.
8. The technically corrected redraft of the Bill was tabled by the drafting team in October 2017 and the Committee proceeded to consider the policy matters based on this version of the Bill.
9. The Committee also established a subcommittee consisting of Adv A Alberts, Mr G Cachalia, Mr D Mahlobo, Mr S Mbuyane and Ms L Theko (chairperson), as well as Mr D Mahlobo joined the subcommittee at a later stage. The subcommittee was mandated to deal with the following policy areas that arose from the submissions[[1]](#footnote-1):
   1. Fair use versus fair dealing (Clause 10 – Section 12) including orphan works (Clause 22 – Section 22A);
   2. Exceptions and limitations (Clause 11 – Section 12A; Clause 12 – Section 13B & Clause 18 – Section 19C);
   3. Accessibility for people with disabilities (Clause 18 – Section 19D);
   4. Parallel importation (Clause 11 - Section 12B);
   5. Freedom of panorama (Section 15/not in introduced Bill);
   6. Private copying levy (not in introduced Bill);
   7. Regulation of collecting societies (Clause 23 – Sections 22B-22F);
   8. Ownership – Commissioned work and copyright ownership (Clause 20 – Section 21); public funding (Clause 3 – Section 5(2) & Clause 21(a) – Section 22(1));
   9. Royalties – broadcasting rights (Clause 8 – Section 9A(1)), artist’s resale right (Clause 9 – Sections 9B-9F);
   10. Assignment (Clause 21(b) – Section 22(3) and Clause 32(b) – Section 39(cG));
   11. The establishment, functions and processes of the Intellectual Property Tribunal (Clause 29 – Section 29 & Clause 30 – Sections 29A-29R);
   12. Technology – the inclusion of digital aspects and the use/limitations of copyright anti-circumvention device (Clauses 4-6 – Sections 6-8 & Clause 27 - Sections 28O-28S).
   13. Moral rights (Clause 19 – Section 20);
   14. Translation/reproduction licences (Clause 34 – Schedule 2); and
   15. Ensuring that proposed Amendment Bill does not conflict with the Intellectual Property Laws Amendment Act and the proposed Indigenous Knowledge Systems Bill.
10. As a result of time constraints, the Committee was of the view that the matter may be considered more efficiently if it was brought into the main Committee. Therefore, the subcommittee was dissolved before being able to complete its deliberations and recommendations on each of these matters. However, prior to this, it was tasked with providing a position on the clauses of the Bill.
11. After its initial deliberations, the Committee made a second call for submissions on specific clauses of the Bill on 29 June 2018. These proposed clauses were informed by the Committee’s deliberations on public submissions and were substantively “new” matters that warranted further consultation. This was advertised on Parliament’s social media platforms through a media statement and communication to identified stakeholders. The closing date was 9 July 2018, which was later extended to 20 July 2018. The specific clauses were as follows:
    1. The definition of “visual artistic work” (Clause 1, par (i));
    2. The minimum content of the agreement related to royalty percentages (Clause 5 – Section 6A(4), Clause 7 – Section 7A(4) and Clause 9 – Section 8A(4));
    3. The issue of retrospective application (Clause 5 – Section 6A(5), Clause 7 – Section 7A(5) and Clause 9 – Section 8A(5));
    4. Reciprocal application of the resale royalty right (Clause 7 – Section 7B(3)(a)(i) read with Section 7B(5));
    5. Retrospective application of an artist’s resale right (Clause 7 – Section 7B(6));
    6. Log Sheets (Clause 11 – Section 9A(1)(aA));
    7. Failure to record acts or to report constituting an offence and the penalty for that offence (Clause 11 – Section 9A(4));
    8. Nature of copyright in programme-carrying signals (Clause 12 – Section 11);
    9. Panorama rights and incidental use (Clause 15 – Section 15);
    10. New process for commissioned work aimed at giving the author more rights (Clause 22 – Section 21(3));
    11. Transitional provisions to provide for existing collecting societies (Clause 25 – Section 22B(7));
    12. Reciprocity applying to pay-outs of royalties by collecting societies to foreign countries (Clause 25 – Section 22C(3)(c));
    13. How collecting societies should pay royalties out and what to do with funds if they cannot find the copyright owner or performer (Clause 25 – Section 22D(2)(b) and 22D(3));
    14. Increased penalties for infringement. Provision for fines when the convicted person is not a natural person (Clause 27 – Section 27(6));
    15. Copyright Tribunal (Clauses 29 and 30) in terms of (i) its composition (Section 29); (ii) it not having power to review administrative action by the Commission (Section 29A(3)); and (iii) its proceedings of the Tribunal (Section 29E); and
    16. Transitional provision (Clause 37).
12. The Committee received 60 written submissions based on this second call for written submissions.
13. The Committee, based on its further deliberations, introduced an offence for acting as a collecting society without being accredited. As this was a substantively “new” sub-clause, the Committee made a third call for written submissions on 3 September 2018 with a closing date of 21 September 2018. This was advertised on Parliament’s social media platforms, through a media statement and communication to identified stakeholders. The Committee received two submissions in this regard.
14. Furthermore, the Committee resolved to appoint a panel of technical experts to advise it on any technical or drafting issues pertaining to the Committee’s amendments to the Copyright Amendment Bill. The panel was tasked to focus on the following:
    1. the appropriateness of the terminology used in the Bill;
    2. whether the wording of the Bill would achieve the policy objectives as agreed to by the Committee;
    3. whether the amendments agreed to could withstand constitutional muster; and
    4. whether the concepts outlined in the Bill would comply with international copyright law.
15. The Committee nominated the following stakeholders to the panel:
    1. Prof S Karjiker (declined);
    2. Adv N Pather (accepted);
    3. Adv N Makhafola-Mokitimi (accepted);
    4. Mr T Mathibe (accepted);
    5. Mr W Ngubo (accepted);
    6. Ms M Woods (accepted);
    7. Adv J Baloyi (accepted); and
    8. Prof O Dean (no response).
16. The third draft of the Bill was sent to the technical panel of experts on 10 September 2018. The panel was initially given a deadline of 26 September 2018, which was later extended to 1 October 2018. Only four members of the panel (Adv J Baloyi, Mr A Myburgh, Mr W Ngubo and Ms M Woods) made inputs by or after the deadline, which were considered and reported on by the drafting team.
17. Consequently, the decision included the required permission from the National Assembly to go beyond amending the sections in the Act, as envisaged in the Copyright Amendment Bill. The additional sections were as follows:
    1. Sections 1 dealing with definitions;
    2. Section 6 dealing with the nature of copyright in literary or musical works;
    3. Section 7 dealing with the nature of copyright in artistic works;
    4. Section 8 dealing with the nature of copyright in cinematograph films;
    5. Section 9 dealing with the nature of copyright in sound recordings;
    6. Section 9A dealing with royalties;
    7. Section 12 dealing with general exceptions from protection of literary and musical works;
    8. Section 13 dealing with general exceptions in respect of reproduction of works;
    9. Section 17 dealing with general exceptions regarding protection of sound recordings;
    10. Section 18 dealing with general exceptions regarding protection of broadcasts;
    11. Section 22 dealing with assignment and licences in respect of copyright;
    12. Section 27 dealing with penalties and proceedings in respect of dealings which infringe copyright;
    13. Section 28 dealing with provisions for restricting importation of copies; and
    14. Section 29 dealing with the establishment of the Copyright Tribunal.
18. On Tuesday, 11 September 2018, the National Assembly granted permission to the Committee to inquire into amending these other provisions of the Copyright Act, 1978 (No 78 of 1978) in terms of Rule 286(4)(c).
19. The Committee, having considered the technical panel’s inputs and the two submissions from the third call for written submissions, made further amendments to the Bill, which required a further call for submissions. This was advertised on Parliament’s social media platforms, through a media statement and communication to identified stakeholders on 12 October 2018. The closing date was 26 October 2018. The following specific clauses were advertised:
    1. Definition of collecting society (Clause 1);
    2. Adding the rights of distribution and rental (Clause 4 – Section 6; Clause 6 - Section 7; Clause 8 – Section 8; and Clause 10 – Section 9);
    3. Requiring recording of acts in respect of audiovisual works and providing for an offence in this regard (Clause 9 – Section 8A);
    4. Empowering collecting societies further (Clause 25 – Section 22C);
    5. Creating an offence for not providing information to a collecting society (Clause 25 – Section 22C);
    6. Providing for the skills of an administrator to be appointed for a collecting society (Clause 25 – Section 22F); and
    7. Clarifying Section 28 to avoid unintended consequences (Clause 28 – Section 28).
20. The Committee received 16 written submissions in this regard.
21. On 7 November 2018, the technical drafting team, consisting of the senior parliamentary legal advisor and the Department of Trade and Industry, submitted a redrafted Bill based on public comments received, as well as Committee deliberations, for the Committee’s consideration.
22. The team also briefed the Committee on an opinion received from Prof T Schonwetter in relation to the following questions:
    1. Do the proposed exceptions and limitations comply with the Berne three-step test? If not, is it necessary to comply?
    2. Would any of the proposed exceptions and limitations constitute deprivation of property? If so, would section 36 of the Constitution be covered?
23. The DTI submitted a legal opinion on 13 November 2018. The opinion focused on the legal validity or constitutionality of certain provisions of the Amendment Bill. These clauses were:
    1. Clause 3 – Amendment of Section 5(2) of the principal Act;
    2. Clause 5 – Insertion of Section 6A of the principal Act in respect of subsection (7) only;
    3. Clause 7 – Insertion of Section 7A of the principal Act in respect of subsection (7) only;
    4. Clause 9 – Insertion of Section 8A of the principal Act in respect of subsection (5) only;
    5. Clause 13 – Insertion of Sections 12A to 12D of the principal Act;
    6. Clause 22(b) – Substitution of Section 21(2) of the principal Act;
    7. Clause 23(b) – Substitution of Section 22(3) of the principal Act; and
    8. The justification in law for the principle of one collecting society per intellectual property right, with reference to Clause 25 – insertion of Chapter 1A in the principal Act.
24. From 15 August 2017 to 7 November 2018, the Committee deliberated on the content of the Bill.
25. No consensus was reached on a number of clauses. The Democratic Alliance objected to the following:
    1. Clause 5 – Section 6A(7), Clause 7 – Section 7A(7) and Clause 9 – Section 8A(5): They objected to the inclusion of the retrospective application of the royalty share.
    2. Clause 7 – Sections 7B to 7F: They objected to inclusion of the resale royalty right.
    3. Clause 11 – Section 9A(4)(b) and Clause 27(b) – Section 27(6): They objected to the penalty being proposed.
    4. Clause 11 – Section 9A(2)(a): They objected to the words “is equally shared”.
    5. Clause 19 – Section 19D: They were of the view that the definition was too broad and that the section should clearly define the types of disabilities that should be eligible for this exception.
    6. Clause 25 – Section 22B(4)(b): They were of the view that the word “transformation” is open to interpretation and the only legislation in this regard is the B-BBEE legislation. This legislation cannot prescribe transformation requirements, as this would be arbitrary. They proposed that “the prescribed transformation requirements be” deleted.

**B. Minority views were expressed on the following aspects contained in this report:**

The Democratic Alliance objected to the report.

**C. Recommendation**

The Portfolio Committee on Trade and Industry recommends that the House adopts this report and approves the second reading of the redrafted Bill.

Report to be considered.

1. The references to clauses and sections refer to the Bill as introduced to Parliament. Subsequent references are to the technically corrected redraft of the Bill. [↑](#footnote-ref-1)