**Report of the Portfolio Committee on Trade and Industry on the President’s reservations regarding the Copyright Amendment Bill and the Performers’ Protection Amendment Bill, dated 14 May 2021**

The Portfolio Committee on Trade and Industry, having reconsidered the **Copyright Amendment Bill** (CAB) [B13B-2017]and the**Performers’ Protection Amendment Bill** (PPAB) [B24B-2016](introduced in the National Assembly as sec 75 Bills), as well as the President’s reservations on the constitutionality thereof (Announcements, Tablings and Committee Reports, 24 June 2020), and having conferred with the Select Committee on Trade and Industry, Economic Development, Small Business Development, Tourism, Employment and Labour, reports as follows:

1. In a letter dated 16 June 2020, the President of the Republic of South Africa informed the National Assembly that he had reservations about the constitutionality of the **Copyright Amendment Bill** [B13B-2017] and the **Performers’** **Protection Amendment Bill** [B24B-2016](National Assembly –sec 75)and that, consequently, he was referring both Bills back to the National Assembly for reconsideration in terms of section 79(1) of the Constitution of the Republic of South Africa, 1996 (Constitution).
2. The President’s reservations related to the following, that:
   1. The Bills had been incorrectly tagged as section 75 Bills. He was of the view that they should be section 76 Bills because of provisions that substantially affect two areas listed in schedule 4 to the Constitution, namely cultural matters and trade. Specific areas where this might have been the case were:
      1. In the CAB, sections 6A, 7A, 8A, 39(cG) and (cI), 22(3), 7B-F and 22A provide for how copyright may be traded.
      2. The CAB further affects cultural matters since indigenous works will become eligible for payment of royalties. The definition of “indigenous work” and the fact that the CAB was referred to the House of Traditional Leaders for comments support the view that the CAB deals with cultural matters.
      3. The PPAB affects performances and performers of “traditional works” including cultural expressions or knowledge, and the rights in these performances. It further regulates the manner in which related performances are made and shared.
   2. The retrospective provisions contained in the CAB may constitute arbitrary deprivation of property. This specifically related to clauses 5, 7 and 9 inserting sub-sections 6A(7), 7A(7) and 8A(5) into the CAB. These provisions applied retrospectively resulting in copyright owners being entitled to a lesser share of the fruits of their property than was previously the case. The impact of these provisions reaches far beyond the authors it seeks to protect – those that live in poverty as a result of not having been fairly protected in the past. The retrospective provisions would deprive copyright owners of property without sufficient reason and would therefore result in substantial and arbitrary deprivation of property. In addition, the uncertainty created by its unlimited retrospective operation, how assignment by multiple authors would work or what would happen if the owner of the copyright was a non-profit organisation aggravates the situation.
   3. The “fair use” provisions as amended had not been put out for further public comment. The President referred to the substantial amendments that had been effected to various sections of the CAB following public hearings in August 2017, including section 12A, which deals with fair use of a work or a performance of a work. These amendments had not been put out for public comment before the final version of the CAB had been published. The changes made to this particular section were material to the scheme as a whole and the failure to consult, in the face of such materiality of the amendments, could render the provisions constitutionally invalid.
   4. The CAB conferred substantial discretionary powers on the Minister in sub-sections 6A(7)(b), 7A(7)(b) and 8A(5)(b), which could well constitute an impermissible delegation of legislative authority. These sections permit the Minister to make key decisions regarding the deprivation of property (copyright) from those to whom it was assigned in the past. It also has the effect that there is no participation process to which legislation is generally subjected. The CAB in this regard also failed to provide for an oversight role for the National Council of Provinces (NCOP). The decision-making process in the CAB is in fact within the domain of the National Assembly and is therefore impermissible delegation.
   5. The copyright exceptions might constitute reasonable grounds for constitutional challenges. This related to the following:
      1. The CAB introduces copyright exceptions in the new sections 12A to 12D, 19B and 19C. These sections may encounter constitutional challenges for the following reasons:
         1. Sections 12A, 12B(1)(a)(i), 12B(1)(c), 12B(1)(e)(i), 12B(1)(f), 12D, 19C(3), 19C(4), 19C(5)(b) and 19C(9) may constitute deprivation of property.
         2. Sections 12A and 12D may further violate the right to freedom of trade, occupation and profession.
      2. These sections may also be in conflict with the World Intellectual Property Organization (WIPO) Copyright Treaty and the WIPO Performance and Phonograms Treaty, both of which had been signed by South Africa, although they are yet to be acceded to.
      3. There was also a contention that the CAB breached the Three-Step test, first established under article 9(2) of the Berne Convention, to which South Africa is bound in terms of section 231(5) of the Constitution. This test involves that an exception or limitation shall only cover special cases; shall not conflict with the normal exploitation of the work; and shall not unreasonably prejudice the legitimate interests of the rights-holder.
   6. The remitted Bills might not comply with international treaty obligations specifically in relation to the WIPO Copyright Treaty, the WIPO Performance and Phonograms Treaty, and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled.
3. The Committee, having considered the President’s reservations, reports as follows:
   1. The Committee, after due consideration and having decided to rather err on the side of caution, agrees with the President’s reservation that both Bills should have been tagged as section 76 legislations and resolved that it would request the House to submit the Bills to the Joint Tagging Mechanism for reconsideration of its classification and to specifically consider whether both Bills should be dealt with in terms of section 76 of the Constitution.
   2. With respect to the President’s reservation regarding public participation in relation to sections of the CAB, including section 12A, which deals with the fair use of a work or the performance of a work, the Committee agrees with the President’s reservation and would accordingly request further submissions and that the relevant clauses be advertised for public comment.
   3. With respect to the President’s reservation that clauses 5, 7 and 9 of the CAB, inserting sub-sections 6A(7), 7A(7) and 8A(5) with retrospective effect, may constitute arbitrary deprivation of property, the Committee agrees with the President’s reservation and would accordingly amend the affected clauses to provide for prospective operation only.
   4. With regard to the President’s reservations that the CAB confers substantial discretionary powers on the Minister, which may well constitute an impermissible delegation of legislative authority, the Committee was of the view that with the deletion of sub-section 6A(7) in clause 5, sub-section 7A(7) in clause 7 and sub-section 8A(5) in clause 9, the reservation becomes moot. The Committee accordingly does not have to agree or disagree with the President’s reservation related to impermissible delegations as the delegations are already deleted.
   5. With regard to the President’s reservation that the copyright exceptions may constitute reasonable grounds for constitutional challenges, the Committee does not have to agree or disagree with the President’s reservation as it is recommending a call for further comments. Constitutionality of these clauses will thus in any event be revisited and any necessary amendments effected.
   6. With respect to the President’s reservations that the remitted Bills may not comply with international treaty obligations specifically in relation to the WIPO Copyright Treaty, the WIPO Performance and Phonograms Treaty, and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, the Committee is of the view that the reservation related to international treaties can be dealt with in conjunction with the call for public comments to be done on other reservations. In considering such inputs, the Committee may then appraise itself of whether the Bills do indeed comply with these treaties or not and, if necessary, effect amendments to the Bills.
4. After deliberations, the Committee recommends: That the National Assembly should consider–
   1. rescinding its decision, on 5 December 2018, to pass the **Copyright Amendment Bill** [B13B-2017] and the **Performers’ Protection Amendment Bill** [B24B-2016] as section 75 Bills;
   2. referring the Bills [B13B-2017] and [B24B-2016] referred to in 4.1 above to the Joint Tagging Mechanism to consider whether it agrees with the President’s reservation that the Bills should have been tagged as section 76 Bills;
   3. referring the Bills [B13-2017] and [B24-2016] to the Portfolio Committee on Trade and Industry to correct the procedural and substantive concerns in the manner proposed by it, and for report; and
   4. agreeing to the Committee, in addressing the reservations it supports and how it intends correcting it, incorporating in its work the proceedings and all the previous work of the Committee up to the Second Reading of the Bill.

Report to be considered.