



16 June 2020

Dear Speaker;

REFERRAL OF THE COPYRIGHT AMENDMENT BILL [B13B - 2017] AND THE PERFORMERS' PROTECTION AMENDMENT BILL [B24 - 2016] TO THE NATIONAL ASSEMBLY

- 1 The Copyright Amendment Bill [B13B-2017] and the Performers' Protection Amendment Bill [B24- 2016] were passed by the National Assembly and referred to me for assent and signing into law.
- 2 The Copyright Amendment Bill [B13B-2017] ("the Copyright Bill") raises important matters that *inter alia* seek to accommodate the visually impaired and otherwise print disabled persons by introducing exceptions to the exclusive right of authors or their assignees preventing the reproducing or copying of their work in any manner or form. The proponents of the exception contend that without such exception, the visually impaired will have limited access to copyright literary works as such works cannot be transcribed to braille and

other formats for the print disabled. Educators and librarians also seek greater and easier access to works of all kinds; broadening access is aimed at increasing access to information and facilitating freedom of expression. The Bill seeks to address all of these issues.

- 3 According to section 79(1) of the Constitution, the President must either assent to and sign the Bill referred to him by the National Assembly or, if he or she has reservations about the constitutionality of the Bill, refer it back to the National Assembly for reconsideration.
- 4 My office received submissions against the signing of the two Bills into law as well as submissions in favour of my assenting to the two Bills.
- 5 In considering the numerous and varied submissions made and the process followed in Parliament to pass the Bills, I have a number of reservations as to the Constitutionality of the Bills. These reservations lead me to conclude that, in its present form, the Bill may not pass constitutional muster and may therefore be vulnerable to constitutional challenge. I set out below those constitutional matters that require reconsideration so that these important statutes achieve their intended purpose without the risk of being set aside by the courts.
- 6 I raise the constitutional issues below, mindful of the noble objectives of the amendments and with the intention that these objectives may yet be achieved in a manner that accommodates the visually impaired, educators, students and

others who are meant to benefit from their provisions, without opening the statutes to future constitutional challenges, which would further impact on the very access the Bill seeks to facilitate.

- 7 The submissions received raise a series of issues with the Copyright Bill some of which I set out below. While I am encouraged by the objects of the Bill, I am dutybound to ensure that all possible constitutional vulnerabilities have been cured. The National Assembly is the body entrusted with such a task. I have considered the legal opinions obtained and the issues raised, and concluded that in order to do justice to these important Statutes, the National Assembly must satisfy itself that all the legitimate issues raised have been considered in the final Bills for signature by the President.

Incorrect Tagging

- 8 Many statutes have been set aside by our courts for incorrect tagging even if their substance passes constitutional muster. I set out below those issues that relate to the tagging of these Bills and which have been raised in the submissions I considered and form the basis for my referral of the Bills back to the National Assembly.
- 9 The Copyright Amendment Bill (“the Copyright Bill”) and the Performers’ Protection Amendment Bill have been incorrectly tagged as section 75 Bills when they are actually section 76 Bills by reason of those of their provisions which substantially affect two areas listed in schedule 4 to the Constitution, namely cultural matters and trade.

- 9.1 The Copyright Bill obviously affects trade because sections 6A, 7A, 8A, 39(cG), (cl), 22(3), 7B-F and 22A of the Bill provide for how copyright may be traded.
- 9.2 The Bill further affects cultural matters since indigenous works will become eligible for payment of royalties under the Bill. Indigenous work is defined in section 1 of the Copyright Bill as literary, artistic or musical work with an indigenous or traditional origin, including indigenous cultural expressions or knowledge which was created by persons who are or were members, currently or historically, or an indigenous community and which work is regarded as part of the heritage of such community. The Bill itself was referred to the House of Traditional Leaders for its comments in terms of section 18(1) of the Traditional Leadership and Governance Framework Act 41 of 2003.¹ This supports the view that the Bill deals with cultural matters as contemplated in Schedule 4 of the Constitution.
- 9.3 The Performers' Protection Amendment Bill affects performances and performers of "traditional works" including cultural expressions or knowledge, and the rights of these performances. It further regulates the manner in which related performances are made and shared.
- 10 The Bills therefore ought to have been enacted in terms of the section 76 process.

¹ Explanatory Memorandum to the Bill, para 6.9. The referral was done on 11 September 2017.

Retrospective and arbitrary deprivations of property

- 11 I also have reservations that Sections 6A(7), 7A(7) and 8A(5) of the Copyright Bill may constitute retrospective and arbitrary deprivations of property. These provisions mean that going forward, copyright owners will be 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 deprive copyright owners of property without sufficient reason and will 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 is a non-profit organisation aggravates the situation. The sections which raise this concern are likely not to survive constitutional challenge.

Fair Use

- 12 Following public hearings in August 2017, substantial amendments were effected to various sections of the Bill, including section 12A which deals with the fair use of a work or performance of a work. The relevant provisions as amended were not put out for public comment before the final version of the Bill was published. The changes made to this particular section of the Bill 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.

Impermissible delegation of legislative power to the Minister

- 13 Sections 6A(7)(b), 7A(7)(b) and 8A(5)(b) confer substantial discretionary powers on the Minister and this may well constitute an impermissible delegation of legislative authority, and as such would be constitutionally invalid if the Bill is assented to in its current form.
- 14 Section 6A(7)(b) permits the Minister to make key decisions regarding the deprivation of property (copyright) from those to whom it was assigned in the past. This also has the effect that there is no participation process to which litigation is generally subjected. In this regard, I have reservations that the Bill fails to provide for the oversight role by the NCOP. The contention is that the decision making process in the Bill is in fact within the domain of the National Assembly and is therefore an impermissible delegation.

The Copyright exceptions

- 15 The Copyright Bill introduces copyright exceptions in the new sections 12A to 12D, 19B, and 19C. From my reading of the various submissions and advice, a number of issues arise from these provisions which may constitute reasonable grounds for constitutional challenges for the following reasons:
- 15.1. Sections 12 and 19 include exceptions and limitations that seek to align the Bill with the Marrakesh Treaty. However, sections 12A, 12B (1) (a) (i), 12B (1) (c), 12B (1) (e) (i), 12B (1) (f), 12D, 19C 93), 19C (4), 19 (c) (5) (b) and 19 (9) may constitute arbitrary deprivation of property.

Section 12A and 12D may further run the risk of violating the right to freedom of trade, occupation and profession;

15.2. It is also clear that these sections may be in conflict with the WIPO Copyright Treaty and the WIPO Performance and Phonograms Treaty both of which have been signed by South Africa, although they are yet to be acceded to. If these exceptions and limitations run the risk of constitutional challenges, they require reconsideration by the National Assembly.

15.1 There is also a contention that the Copyright Bill breaches 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, The Three-Step Test is also referred to extensively in the Marrakesh Treaty. The Test is that an exception or limitation:

20.1. shall cover only certain special cases;

20.2. shall not conflict with the normal exploitation of the work; and

20.3. shall not unreasonably prejudice the legitimate interests of the rightsholder.

International Treaty Implications

16 The Bill seeks to align national legislation with international treaties which have been reviewed and are in the process of being acceded to by South Africa,

including the World Intellectual Property Organization (“WIPO”) digital treaties, namely, the WIPO Copyright Treaty, the WIPO Performance and Phonograms Treaty, the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are blind, visually impaired or otherwise print disabled. It is not necessary for me to provide

- 17 The WIPO Copyright Treaty was adopted in Geneva on 20 December 1996. It is a special agreement under the Berne Convention dealing with the protection of works and the rights of the authors of such published works. It grants authors the right to authorize distribution, rental and communication to the public of their work. It further provides legal remedies against the circumvention of technological measures used by authors to protect their works. South Africa has signed this treaty although we have not yet acceded to it.
- 18 The WIPO Performance and Phonograms Treaty is another relevant international treaty signed by the member states of WIPO. South Africa has signed this treaty, but has not yet acceded to it. Like the WIPO Copyright Treaty, it was adopted in Geneva on 20 December 1996 but came into effect on 20 May 2002. It deals with the rights of performers and producers of phonograms. It grants performers economic rights in their performances, i.e. the right of reproduction, the right of distribution, the right of rental as well as the right of making it available. Various of the submissions received by my office expressed concern about the economic implications of the Bills as they relate to the economic rights of performers. It is not clear that the Bills appropriately consider the implications in this regard of the WIPO Performance and Phonograms Treaty.

- 19 The Marrakesh Treaty is a multilateral treaty on copyright and was adopted in Marrakesh, Morocco, on 28 June 2013. It has a bearing on the rights contained in the WIPO Copyright Treaty and the WIPO Performance and Phonograms Treaty. Since first signed by India, many other countries seeking to cater for their visually impaired have signed it and enacted statutes that seek to facilitate the terms of the treaty within their relevant national statutes. Its objective is to facilitate access to published works by visually impaired persons and persons with print disabilities. It is the first treaty to deal with copyright exceptions. It seeks to harmonize and strike a balance between the interests of rights-holders and vulnerable users, particularly the visually impaired and print disabled persons. It does this by allowing for copyright exceptions to facilitate accessible versions published books and other copyrighted works for visually impaired persons. It also requires contracting parties to include limitations and exceptions in order to allow reproduction, distribution and formats of published works designed for the visually impaired persons. It also seeks to facilitate exchange of published works between different countries.
- 20 The Marrakesh Treaty also includes in its definition of affected persons, persons with physical disabilities that prevent them from holding a book or any such published work if it requires holding in order for one to read. In its definition of “works” it includes works “...*in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available in any media.*”

- 21 I have reservations about whether the Bills comply with the above Treaties and am therefore referring the Bills back to Parliament in order that it may consider the Bills against South Africa's International Law obligations.

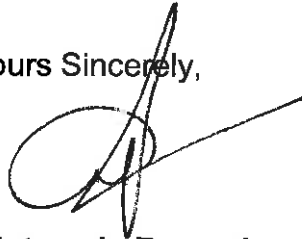
Referral

- 22 I have considered both the Bills, all submissions received and the process followed by Parliament in passing the Bills. Having done so, I have reservations about the constitutionality of the Bills for the following reasons:

- 22.1 I am of the view that the Bills have been incorrectly tagged and that they ought to have been classified and passed as section 76 Bills. This is primarily because their provisions have an impact on "Trade" and "Cultural matters" as contemplated in Schedule 4 of the Constitution.
- 22.2 The retrospective application of the proposed new sections 6A, 7A and 8A of the Copyright Bill to copyright assigned before the new sections come into operation may indeed be unconstitutional on the ground that it constitutes an arbitrary deprivation of property under section 25 of the Constitution.
- 22.3 The new exceptions introduced by sections 12A, 12B, 12C, 12D and 19B and 19C of the Copyright Bill are also likely to be declared unconstitutional on the basis that they are in breach of section 25(1) of the Constitution and the Three-Step test binding South Africa under international law.

- 23 For the reasons set out above, and in terms of section 79(1) of the Constitution, I hereby express my reservations about the constitutionality of the Bills. I request the National Assembly to consider these Bills afresh so that their objectives can be realized speedily and without the risk of any constitutional challenge.
- 24 Although the submissions broadly related to the constitutionality of the Copyright Bill, similar concerns have been raised in relation to the provisions of the Performers Protection Amendment Bill, which incorporate the provisions of the Copyright Bill through cross-referencing. It follows that both Bills ought to be referred back to the National Assembly in terms of section 79(1) of the Constitution.

Yours Sincerely,



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President of the Republic of South Africa

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