



PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

Section 79(1) referral of Copyright Amendment Bill and Performers' Protection Amendment Bill



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Section 79(1) process

- A Bill is passed by both Houses and sent to the President for assent.
- Section 79(1): The President must refer any concerns about the Bill's constitutionality to the National Assembly for reconsideration.
- Section 79(2): The Joint Rules must provide for a procedure.
- Part 8 of the Joint Rules deal with the procedure to consider these remitted Bills.
 - The Bill is referred to a committee, who must consider the reservations and report on it
 - JR 203(2): “The committee must consider, and confine itself to, the President’s reservations”



The President's reservations

1. Tagging: the Bills should have been classified as section 76 Bills (“trade” and “cultural matters”).
2. Retrospective and arbitrary deprivations of property → Clauses 5, 7 and 9 inserting sections 6A(7), 7A(7) and 8A(5) into the Copyright AB.
3. Lack of public participation related to fair use.
4. Impermissible delegation of legislative power to the Minister → Again Clauses 5, 7 and 9 of the Copyright AB.
5. The copyright exceptions – some clauses may:
 - Constitute arbitrary deprivation of property;
 - Affect the right to freedom of trade, occupation and profession.
6. Do the Bills comply with International Treaty Implications?

Reservation 1: Tagging

- Performers' Protection AB (PPAB) and the Copyright AB deal with the regulation of intellectual property (a national competency).
 - The Bills regulate copyright and performers' rights resulting from the expression of culture and products that are used in trade.
 - They do not fall in the functional areas of “trade” or “cultural matters”.
 - “Cultural matters”: The Bills do not restrict, allow, or prescribe anything related to the expression of culture.
 - “Trade”: Although context specific, even if broadly interpreted, it does not include the administration and protection of intellectual property copyright protection, or transactions in respect of such intellectual property.
- We do not classify Bills for “knock on” effects of Bills – whether the regulation of IP in these Bills will in practice affect cultural matters or trade is not relevant for classification.
- Referral to National House of Traditional Leaders: Section 18(1)(a) (TLGFA) is much broader than section 76(3) (Constitution) – cannot be used to classify.
- **Recommendation:** Our legal view is that both Bills were correctly classified as section 75 Bills. The Committee may however decide to err on the side of caution and recommend a reclassification of section 76 to the JTM.

Reservation 2: Retrospective application

Reservation 4: Delegations



- Advice to the Committee in the 5th Parliament **iro retrospective application:**
 - Clauses constitute deprivation of property.
 - ✓ Substantive reason (a clear rationale) + Law of general application.
 - ✗ Further research is required: This uncertainty could make the deprivation arbitrary and unconstitutional.
- The Committee (5th) thought the need to address the injustice could not wait.
- **Recommendation:** Amend these clauses to provide for prospective operation only.
- **Delegations:**
 - Requiring tabling and approval by the NA is not delegating plenary power: This is part of the oversight function of the NA.
 - Not including the NCOP does not breach any constitutional obligation.
 - The delegations to the Minister would likely pass constitutional muster.
- **Recommendation:** If the clauses are amended as recommended above – this reservation is automatically dealt with. If the clauses are retained, the delegations need not be amended.

Reservation 3: Public participation (fair use)



- The Copyright Act uses “fair dealing” (closed list of exceptions).
 - The Copyright AB [B13-2017] introduces “fair use”.
- Public comments: 3 systems: “fair use”, “fair dealing”, hybrid.
 - The Committee agreed on a hybrid system.
- The drafting of [B13-2017] criticised - Committee agreed to redraft.
 - To comply with drafting conventions section 12 had to be amended → new section 12A
 - No need to publish for comments
 - Content was mostly the same as the Bill as introduced.
 - Changes made resulted from public comments: Not new matters that required inputs from the public.
- **Recommendation:** There was sufficient public involvement on whether to use “fair use”.
 - Parliament has significant discretion iro the facilitation of public involvement (S59) - may request further submissions from the public.

Reservation 5: Copyright exceptions (1)



- **Not arbitrary deprivation**
 - IP must have exceptions: without exceptions it limits the rights to education, dignity, equality, trade, and freedom of expression.
 - The exceptions in the Bills align copyright with the digital era and promote multilateral development, which includes advancing constitutional values and human rights.
 - The exceptions are not open ended – they subject to a general four-factor test in clause 12A(b) and some have additional limits.
- **Not limiting section 22 rights (to choose trade, occupation, profession (TOP))**
 - Constitutional Court: Legislation limits the choice of TOP if its effect makes the practice of that TOP so undesirable / difficult / unprofitable that the choice to enter it is limited.
 - Test: Is there a legal barrier to entry or an effective limit / bar to “deter” persons from entering that trade, occupation or profession?
 - The remitted Bills aims to achieve a shift in the profits towards authors so as to address exploitive practices: Not an effective limit / bar, alternatively would pass the test set by section 36.
 - The remitted Bills will also generate new trade, occupational and professional opportunities.
 - Regulation TOP: Test: “(t)he question is whether there is a rational basis for section 20A; whether another measure may have been more effective, or less disruptive, is not relevant.”



- **Three Step test**
- Compliance with international treaties is not a ground for section 79(1) referral.
- Australian Law Reform Commission: Based on history of test, interpretation of the test, and member practices, concluded that it does comply.
- Article 31(3)(b) of the Vienna Convention on the Law of Treaties 1969 - Practices of other signatories:
 - USA already applied fair use when it joined – not required to change.
 - A number of other signatories have since changed to fair use and none have been challenged.
- The “fair use” exception will bring economic and social benefits.
 - Our Courts will accordingly require strong and persuasive arguments that fair use does not comply with the Three-Step Test.

Recommendation: The exceptions are not arbitrary, do not limit the right to choose a TOP and complies with the three step test (although the latter is not a ground for referral under section 79(1)).

- None of these treaties have been ratified, or domesticated, as required by section 231.
 - The legislature cannot legislate subject to possible law.
- Not a constitutional concern that can be referred to S79(1):
 - *Glenister v President of the Republic of South Africa and Others*: “It follows that the incorporation of an international agreement creates ordinary domestic statutory obligations. Incorporation by itself does not transform the rights and obligations in it into constitutional rights and obligations.”
 - An international agreement (even if incorporated into SA law), does not in itself constitute a constitutional obligation.
 - When any reservation to the Bill of Rights is considered, international agreements must be taken into account in that discussion on the Bill of Rights.
- **Recommendation:** This reservation should not be considered as it falls outside section 79(1). However, the Committee may decide to reconsider the remitted Bills in respect of compliance with the treaties and make any amendments it deems necessary.



The end