



PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

**6th DEMOCRATIC
PARLIAMENT**



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

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 letter contains different sections in the discussion of concerns from the last paragraphs under the heading "Referral".

- The NA table confirmed that the matters that are actually discussed by the President are what the Committee must confine itself to.

The President's reservations (1)

1. Tagging: the Bills should have been classified as section 76 Bills as they fall in the functional areas of “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.
 - The impact reaches beyond what it seeks to protect;
 - It will result in substantial and arbitrary deprivation of property;
 - The uncertainty created by the unlimited retrospective operation aggravates the situation.
3. Lack of public participation related to fair use.
4. Impermissible delegation of legislative power to the Minister.
 - Sections 6A(7)(b), 7A(7)(b) and 8A(5)(b) confer substantial discretionary powers on the Minister.

The President's reservations (2)

5. The copyright exceptions:

- 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;
- Sections 12A and 12D may further violate the right to freedom of trade, occupation and profession.

6. International Treaty Implications – Do the remitted Bills comply with:

- WIPO Copyright Treaty
- WIPO Performance and Phonograms Treaty
- Marrakesh Treaty

Reservation 1: Tagging – legal opinion

- Performers' Protection AB (PPAB) and the Copyright AB deal with the regulation of intellectual property.
 - They do not fall in the functional areas of “trade” or “cultural matters”.
 - PPAB deals with performances and performers in a generic way.
 - They regulate products (copyright and intellectual property in the form of performers' rights) resulting from the expression of culture.
 - They do not affect “cultural matters” as they do not restrict, allow, or prescribe anything related to the expression of culture.
- Intellectual property is a national competency. Schedule 4 sets out areas of concurrent competency and the functional areas must be interpreted with that in mind.
- Iro the argument that the regulation of intellectual property will affect trade or cultural matters – we do not classify Bills for “knock on” effects of Bills.
 - *Democratic Alliance v President of South Africa and Others*[2014] 2 All SA 569 (WCC) (13 March 2014)
- Iro the Bills being referred to the National House of Traditional Leaders: Section 18(1)(a) is much broader than the wording of section 76(3) of the Constitution and thus affect more types of Bills.

Reservation 1: Tagging – possible actions

- Our legal view is that both Bills were correctly classified as section 75 Bills.
 - If the Committee agrees, it may report to the House that it does not agree with the President's reservation related to the tagging of the Bills.
- In *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill [1999] ZACC 15; 2000 (1) SA 732 (CC)* at par 26 the Constitutional Court stated:

“It would be formalistic in the extreme to hold a Bill invalid on the ground that those steering it through Parliament erred in good faith in assuming that it was required to be dealt with under the section 76 procedure, when the only consequence of their error was to give the NCOP more weight, and to make passage of the Bill by the National Assembly in the event of inter-cameral disputes more difficult.”

 - In essence, the Court found that it would likely accept a classification where the JTM erred on the side of caution and classified a section 75 Bill, as one that should follow the procedure set out in section 76.
 - If the Committee is uncomfortable with the section 75 classification, it may report to the House that it agrees with, or wish to be cautious in respect of, the President's reservation.
 - The Committee may then recommend that the JTM err on the side of caution and reclassify the Bills as section 76 Bills.

Reservation 2: Retrospective application – legal opinion

- Advised the Committee in the 5th Parliament:
 - The clauses do constitute deprivation of property.
 - Substantive reason (a clear rationale) + Law of general application.
 - However, further research is required - could make the deprivation arbitrary and unconstitutional:
 - Cannot distinguish between various scenarios.
 - E.g. what would happen to unconnected third parties.
 - Relief is offered to all assignments of copyright.
 - In some cases the harm (deprivation) would be greater than the benefits
 - This is not reasonable and justifiable in an open and democratic society.
 - Rule of law requires certainty.
 - Some uncertainties: The procedure to assist the relevant authors, how far back retrospectivity would apply.
 - Individuals cannot conform their conduct to its dictate.
- The Committee (5th) thought the need for the injustice to be addressed could not wait for further research and legislation.
- Drafted the Bill with a compromise:
 - Minister to do an impact assessment and develop regulations that would set out the process.
 - Approval of the regulations by the National Assembly.
 - Effective date of retrospective clauses dependent on the making of regulations.

Reservation 2: Retrospective application – possible actions

- Recommend that these clauses be amended to provide for prospective operation only.
 - The Department may then via an oversight exercise be required to do the research and regularly report back to the Committee.
- If the Committee agrees, it may amend the Copyright AB by--
 - Deleting subsections (7) in Clauses 5 (section 6A) and 7 (section 7A);
 - Deleting subsection (5) in Clause 9 (section 8A) and renumbering the following subsections; and
 - Deleting clause 38(2) (Short title and commencement).
- If the Committee disagrees with our legal view, it may report to the House that it does not agree with the President's reservation related to the clauses that provide for retrospective application.

Reservation 4: Delegations – legal opinion

- Delegations:
 - No express provision in the Constitution
 - *Executive Council, Western Cape Legislature v President of the RSA*: The Constitution does allow delegation by implication.
- Requiring the regulations to be tabled and approved by the National Assembly is not delegating plenary power.
 - This is part of the oversight function of the National Assembly.
 - Tabling of regulations before promulgation is a recent practice.
 - It is not a constitutional requirement.
 - The practice is sometimes tabling in “Parliament” / “both Houses” / “National Assembly” only.
 - Not including the NCOP does not breach any constitutional obligation.
- The delegations to the Minister would likely pass constitutional muster and need not necessarily be amended.

Reservation 4: Delegations – possible actions

- Our legal view is that the delegation to the Minister falls within the limits of implied legislative delegation that is allowed by the Constitution.
 - If the Committee agrees, it may report to the House that it does not agree with the President's reservation related to impermissible delegations.
- However, if the recommendation on reservation 2, is accepted, these clauses would also be deleted, making this reservation moot.
- If the Committee disagrees with our legal view, it may amend the Copyright Amendment Bill to delete the delegation, or amend its terms.

Reservation 3: Public participation (fair use) - legal opinion

- The Copyright Act - “fair dealing” (closed list of exceptions).
- The Copyright AB [B13-2017] - “fair use”.
- Public comments: 3 systems: “fair use”, “fair dealing”, hybrid.
 - The Committee agreed on a hybrid system:
 - Keep the list, but include “such as” (proposed by the public).
- The drafting of [B13-2017] criticised - Committee agreed to redraft.
- To comply with drafting conventions the insertion of fair use into 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 (which was published).
 - Changes made took public comments into account.
 - Changes were thus not new matters that required inputs from the public.

Reservation 3: Public participation (fair use) – possible actions

- Our legal view is that there was sufficient public involvement on whether to use “fair use”.
 - If the Committee agrees, it may report to the House that it does not agree with the President’s reservation related to facilitation of public participation on “fair use”.
- Courts regard Parliament to have significant discretion when it comes to the facilitation of public involvement (S59).
 - The Committee (6th) may decide to request further submissions from the public.
 - Joint Rule 203(2)(a - confine to the President’s reservations.
- If the Committee decides to call for further comments, it will report such recommendation to the House.

Reservation 5: Copyright exceptions – legal opinion (1)

- Arbitrary deprivation
 - Copyright has always been subject to exceptions.
 - Copyright without exceptions limits the rights to education, dignity, equality, trade, and freedom of expression.
 - The purpose of the exceptions in the remitted Bills align copyright with the digital era and promote multilateral development, which includes advancing constitutional values and human rights.
 - The exceptions are subject to a general four-factor test in clause 12A(b) and some are further subject to specific limits (see slide notes).
 - The exceptions are thus not open ended.

Reservation 5: Copyright exceptions – legal opinion (2)

- Section 22: “Every citizen has the right to choose their trade, occupation or profession (“TOP”) freely. The practice of a trade, occupation or profession may be regulated by law.”
- 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 – consider:
 - Is there a legal barrier to entry?
 - Is there an effective limit on, or an effective bar to, that choice in that would “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. This is not an effective limit / bar to choose a TOP, alternatively would pass the test set by section 36.
 - The remitted Bills will also generate new trade, occupational and professional opportunities.
- The remitted Bills regulate the TOP – the test here is one of rationality.
 - Constitutional Court: “(t)his means that the 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.”

Reservation 5: Copyright exceptions – legal opinion (3)

- Three Step test:
- Compliance with international treaties is not a ground for section 79(1) referral.
- Australian Law Reform Commission also considered the question:
 - 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.

Reservation 5: Copyright exceptions – possible actions

- It is our legal view that the exceptions—
 - are not arbitrary;
 - they are not open ended, they balance the rights affected and are aimed at achieving a legitimate government purpose.
 - There is also a rational connection between these exceptions and this purpose.
 - do not limit the right to choose your TOP, and if they do, the exceptions would pass the test of section 36; and
 - complies with the three-step test.
- It is our legal view that the remitted Bills will pass constitutional muster.
- If the Committee agrees with our legal view, it may report to the House that it does not agree with the President's reservation related to the copyright exceptions.
- If the Committee disagrees with our legal view, it may amend the affected exceptions.
 - Clause 13 [inserting sections 12A, 12B(1)(a)(i), 12B(1)(c), 12B(1)(e)(i), 12B(1)(f), 12C and 12D], clause 19 [inserting section 19B] and clause 20 [inserting sections 19C(3), 19C(4), 19C(5)(b) and 19C(9)]

International Treaty Implications – legal opinion

- None of these treaties are currently enforceable in South African law – they have not yet been ratified, nor domesticated, as required by section 231.
 - The legislature cannot legislate subject to possible law.
- *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 (incorporated into ss 231(2) and 231 (4)), does not in itself constitute a constitutional obligation.
 - When any reservation that relate to the Bill of Rights is considered, international agreements must be taken into account in that discussion on the Bill of Rights.
 - Accordingly, the fact that legislation may be in breach of a treaty – even one that has been ratified and domesticated – cannot in itself be a ground for referral in terms of section 79(1).

International Treaty Implications – possible actions

It is our legal view that this referral reason is not a constitutional ground as required by section 79(1).

- If the Committee agrees with our legal view, it may report to the House that the President's reservation related to international treaties is not a legal section 79(1) ground and may thus not be considered.
- If the Committee disagrees with our legal view, it may decide to reconsider the remitted Bills in respect of compliance with the treaties and make any amendments it deems necessary.