



## Procedural reservations

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. Lack of public participation related to fair use.

### Reservations:

1. The President concludes that the Bills have been incorrectly tagged as section 75 Bills. He is of the view that they are section 76 Bills because of provisions that substantially affect two areas listed in schedule 4 to the Constitution, namely cultural matters and trade.
  - In the Copyright AB, sections 6A, 7A, 8A, 39(cG), (cI), 22(3), 7B-F and 22A provide for how copyright may be traded. The Copyright AB further affects cultural matters since indigenous works will become eligible for payment of royalties. The definition of "indigenous work" and the fact that the Copyright AB was referred to the House of Traditional Leaders for comments support the view that the Copyright AB deals with cultural matters.
  - 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 president's reservations specifically relate to clauses 5, 7 and 9 inserting sections 6A(7), 7A(7) and 8A(5) into the Copyright AB. These provisions apply 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 has not been felt in the past. The impact of these provisions is arbitrary deprivation of property or what would happen if



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## Tagging (1)

The Performers' Protection AB (PPAB) deals with the following:

- Sets out the economic and moral rights of performers;
- Where a performer consents to fixation of a performance, certain rights of the performer are transferred to the producer – the consent to fixation must be set out in a written agreement;
- Sets out the rights of producers of sound recordings;
- Broadening restrictions on the use of performances and fixations to allow for digital developments;
- Includes equitable remuneration as alternative to royalties;
- Provides for records to support, and methods to calculate, royalties or equitable remuneration;
- Includes exceptions in Copyright AB to apply to performers' rights;
- Provides for the Minister to prescribe compulsory and standard contractual terms as well as guidelines for a performer to grant consent under this Act;
- Provides for prohibited conduct and exceptions in respect of technological protection measures and copyright management information respectively;
- Provides for further offences and penalties;
- Updated definitions and terminology, and transitional provisions.



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## Tagging (4)

- 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.
  - E.g. the fact that a trader must keep records to report to SARS, and must pay tax on profits made, does not make tax legislation fall within the functional area of “trade”.
  - E.g. the fact that wills must be in writing, does not mean legislation that requires that formality affects the trade of attorneys.
  - The President refers to clauses that provide for copyright to be traded – it is not copyright that is traded. It is works that are traded and when works are traded there are other laws that must be kept in mind – including laws regulating copyright in those works.
- “How intellectual property is regulated, affects 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)
- “The bills were referred to the National House of Traditional Leaders”
  - Section 18(1)(a) is much broader than the application of section 76(3) of the Constitution and thus affect more types of Bills.



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## Tagging (5)

- The Bills do not fall in the functional areas of “trade” or “cultural matters”.
  - The Bills regulate products and rights (copyright and intellectual property in the form of performers’ rights) that are affected by trade or that results from the expression of culture.
  - The Bills do not affect “trade” as the Bills regulates rights, the protection of those rights and limitations relevant to those rights and not the actual acts of trading.
  - The Bills regulates the incidence, nature and extent of performers’ protection. The Bills do not affect “cultural matters” as they do not restrict, allow, or prescribe anything related to the expression of culture.

## Tagging – possible actions

- Advice: Both Bills were correctly classified as section 75 Bills.

### Possible action 1:

- If the Committee agrees with our advice, it may report to the House that it does not agree with the President's reservation related to the tagging of the Bills.

### Possible action 2:

- If the Committee disagrees with our advice, or is uncertain whether these should be section 75 or section 76 Bills, or is concerned that tagging may successfully be used as a technical argument in a Court case:
  - The courts have indicated that it is very unlikely that the courts would hold an Act invalid where it should have been classified as a section 75, but Parliament classified it as a section 76.
  - In this event, the Committee may report to the House that it wishes to be cautious in respect of the President's reservation recommending that the Bills be reclassified as section 76 Bills.

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## Public participation (fair use) (1)

### The Copyright Act – “fair dealing”

#### “12. General exceptions from protection of literary and musical works.

(1) Copyright shall not be infringed by any fair dealing with a literary or musical work—”  
(own emphasis)

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### The Copyright AB [B13-2017] - “fair use”.

“Amendment of section 12 of Act 98 of 1978, as amended by section 11 of Act 125 of 1992 and section 54 of Act 38 of 1997

10. Section 12 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) (a) In addition to uses specifically authorised, **fair use** in respect of a work or the performance of that work, for the following purposes, does not infringe copyright in that work:” (own emphasis **in bold**).

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### Redrafted Bill – “hybrid system”

#### “General exceptions from copyright protection

12A. (1) (a) In addition to specifically authorised, fair use in respect of a work or the performance of that work, for ~~the following~~ purposes **such as the following**, does not infringe copyright in that work:”

## Public participation (fair use) (2)

- Public comments: 3 systems: “fair use”, “fair dealing”, hybrid.
  - 1 August 2017: ‘The Committee asked for the stakeholders’ views on the incorporation of the doctrine of ‘fair use’, the use of the phrase ‘such as’ for exceptions...’.
  - 3 August 2017: Further further engagement on fair use.
  - 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

## Public participation (fair use) (3)

### Legal requirements iro public participation

- S59: “The National Assembly must... facilitate public involvement in the legislative and other processes of the Assembly and its committees;”
- *Doctors for life* case:
  - “What is ultimately important is that a legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law-making process.”
- *SAVA* case:
  - Where a committee makes a material amendment to a Bill, it triggers a duty on that committee to invite further public comment.
  - A whole sector was being included (is in the Act, but was not yet in mentioned in the Bill)
- *Truworths* case
  - “[43] It was submitted, correctly, on behalf of the respondents, that the Minister is not obliged to re-advertise for comment. However, where the Minister changes the draft regulations in a material respect, calling for further comment might under certain circumstances be advisable.”
- The fair use clauses were shuffled around and took into account public comments received.
- The fair use clauses were however NOT substantive and thus did not have to be subject to consultation again.

## Public participation (fair use) – possible actions

- Advice: There was sufficient public involvement on which system of exceptions to use (hybrid “fair use”).

### Possible action 1:

- If the Committee agrees with our advice, 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”.

### Possible action 2:

- If the Committee disagrees with our advice, or is uncertain about whether sufficient public participation did occur:
  - The courts regard Parliament to have significant discretion when it comes to the facilitation of public involvement (S59).
  - The Committee (6<sup>th</sup>) may decide to request further submissions from the public and will then report to the House that it recommends that the relevant clauses be advertised.
- Reminder: Joint Rule 203(2)(a - com [REDACTED] President’s reservations.