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GENERAL NOTICE

NOTICE 479 OF 2004

DEPARTMENT OF TRADE AND INDUSTRY

PUBLICATION OF THE REGULATIONS ON THE ESTABLISHMENT OF COLLECTING SOCIETIES FOR PUBLIC COMMENT

The Regulations on the establishment of Collecting Societies are hereby published for comment. All interested parties are invited to submit, within 30 days from the date of publication of this Notice, any written presentations to:

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DEPARTMENT OF TRADE AND INDUSTRY

Government Notice in Government Gazette of
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COPYRIGHT ACT NO. 98 OF 1978**Collecting Society Regulations**

The Minister of Trade and Industry has, by virtue of the powers vested in him in terms of section 39 of the Copyright Act, 1978 (Act 98 of 1978), as amended, made the following regulations:

Interpretation

1. In these regulations, unless the context otherwise indicates -
 - (i) terms and expressions defined in the Acts of Parliament or in the regulations or in the General Notice listed below shall carry the same meaning as defined therein:
 - The Copyright Act, 1978 (Act 98 of 1978), as amended;
 - The Performers' Protection Act 1967, (Act 11 of 1967), as amended;
 - The Copyright Regulations, 1978, published as GN no R 2530 GG no 6252 of 22 December 1978, as amended by GN R1211 GG no 9775 of 7 June 1985, and by GN no 1375 GG no 9807 of 28 June 1985;
 - General Notice no 136 of 1989 published in GG no 11718 of 3 March 1989
 - (ii) "framework agreement" means
 - (a) a licensing agreement between a collecting society and a trade association or a user group fixing the terms and conditions of use of the repertoire of public playing rights collectively held by individual members of the trade associations or user groups, or persons affiliated to them; or
 - (b) an agreement setting common standards and providing a uniform basis for the conclusion of individual licensing agreements between the collecting society and potential users being members of the trade association or user group concerned, or affiliated to them;
 - (iii) "public playing right" means the right of a rightholder to receive a royalty in terms of section 9A of the Copyright Act, 1978, and/or the right to receive a royalty in terms of section 5(1)(b) of the Performers' Protection Act, 1967, as the context dictates;
 - (iv) "Registrar" means the Registrar of Copyright at the Companies and Intellectual Property Registration Office (CIPRO);
 - (v) "rights of members" or "members' rights" mean public playing rights of rightholders who are members of the collecting society seeking or granted accreditation;
 - (vi) "rightholders" means the owners or licensees of public playing rights.

Scope

2. The Collecting Society Regulations set out the conditions under which a collecting society may be established and may operate under the Copyright Act, 1978 (Act 98 of 1978), as provided for in section 39(cA) read together with section 9A of the Copyright Act, 1978, and with section 5(3) of the Performers' Protection Act, 1967 (Act 11 of 1967).

CHAPTER 1:***Supervision*****Accreditation**

- 3.(1) Any person or licensing body intending to act as a representative collecting society and
 - (a) administering on behalf of 50 or more copyright owners, or on behalf of an organisation representing 50 or more copyright owners, the right to receive payment of a royalty in terms of section 9A of the Copyright Act, 1978; or
 - (b) administering on behalf of 50 or more performers, or on behalf of an organisation representing 50 or more performers, the right to receive payment of a royalty in terms of section 5(1)(b) of the Performers' Protection Act, 1967; or
 - (c) administering on behalf of 50 or more copyright owners and performers jointly, or on behalf of an organisation representing 50 or more copyright owners and performers jointly, the right to receive payment of a royalty as contemplated in paragraphs (a) and (b) aboverequires an accreditation from the Registrar in order to be authorised to function as a collecting society established under the Copyright Act, 1978.
- (2) Any person or licensing body claiming the right to act as a representative collecting society shall lodge a written application with the Registrar for accreditation. The Registrar shall consider the written application together with any other relevant documents. The Registrar may for the purposes of issuing an accreditation under these regulations consult with any person or institution before granting or refusing to grant accreditation.
- (3) The Registrar shall not grant accreditation to an applicant unless he or she is satisfied that-
 - (a) it appears from the particulars supporting the application and the information considered that the applicant is able to ensure adequate, efficient and effective administration throughout the Republic of the rights to be entrusted to the collecting society for administration;
 - (b) membership is open to copyright owners or their licensees and/or to performers whose rights the applicant seeks to administer and/or to organisations representing such copyright owners or licensees and/or performers;

- (c) the applicant affords to copyright owners or their licensees and/or to performers, or to organisations representing copyright owners or licensees and/or performers an appropriate right and opportunity to take part in decision making concerning the affairs of the applicant and the administration of the rights in question, as well as the distribution of royalties to be received;
 - (d) the applicant is able to comply with the obligations set out in these Regulations (chapter 2);
 - (e) the person or persons appointed as representatives, managers and members of the governing body of the applicant are fit or proper persons to act as such and are in their majority South African citizens or permanent residents;
 - (f) the principal place of business in respect of rights administered in the Republic is situated in the Republic;
 - (g) the accreditation of the applicant does not conflict with, undermine or diminish the adequate, efficient and effective administration of the right to receive payment of a royalty in terms of section 9A of the Copyright Act, 1978, or section 5(1)(b) of the Performers' Protection Act, 1967, as undertaken by a collecting society already accredited and established under the Copyright Act, 1978.
- (4) Within thirty days from the lodging of the application, the Registrar shall-
- (a) grant accreditation authorising the applicant to act as a collecting society established under the Copyright Act, 1978, if the Registrar is satisfied that the requirements referred to in subregulation (3) are met; or
 - (b) provisionally refuse to grant accreditation, if the Registrar is not satisfied that the requirements referred to in subregulation (3) are met, but if, in the opinion of the Registrar, the applicant may modify and/or supplement the application in a manner that would satisfy the requirements; or
 - (c) refuse to grant accreditation, if the Registrar is not satisfied that the requirements referred to in subregulation (3) are met, and within thirty days of notifying the applicant of the refusal to grant accreditation, the Registrar shall furnish the applicant with the reasons for refusing in writing.
 - (d) In the case of a provisional refusal to grant accreditation as contemplated in paragraph (b), the Registrar shall within thirty days of notifying the applicant of the provisional refusal furnish the applicant with the reasons for the provisional refusal in writing and grant the applicant a further period of not less than thirty days to submit a modified and/or supplemented application, and/or such further particulars as may be required. Thereafter the Registrar shall grant or refuse the application as provided for in paragraph (a) or (c) of subregulation (4).
- (5) An accreditation shall be granted for a term of five years and shall subsequently be renewable for further periods of five years. Six months prior to the expiry of a five-year term, a collecting society established under the Copyright Act, 1978, may apply for a renewal. The provisions of subregulations (3) and (4) shall apply *mutatis mutandis* to such a renewal application.

- (6) The Registrar may withdraw an accreditation granted if-
- (a) the collecting society failed to disclose material facts that, if known at the time of accreditation, would have constituted cause for a refusal of the accreditation; or
 - (b) the Registrar becomes aware of facts unknown at the time of accreditation or of subsequent occurrences which, if placed before him or her prior to a decision in regard to the granting of accreditation, would have constituted a ground for refusal of accreditation and cannot be remedied within a time period to be fixed by the Registrar; or
 - (c) in the opinion of the Registrar, the collecting society commits
 - (i) a material breach of its obligations; or
 - (ii) continues to breach the obligations set out in this regulation and ignores directions given to it by the Registrar regarding any such breaches.

The Registrar shall notify the collecting society in writing of the withdrawal and shall furnish reasons in support of his or her decision.

- (7) The grant, renewal, refusal or non-renewal, and the withdrawal of an accreditation shall be published in the Government Gazette by General Notice, and may also be published in the South African Intellectual Property Journal for notification.
- (8) The grant, renewal, refusal or non-renewal, and the withdrawal of an accreditation shall be subject to judicial review on application to the High Court of South Africa, Transvaal Provincial Division (TPD), brought within three months after publication.

Powers and functions of the Registrar

- 4.(1) The Registrar shall exercise a supervisory function in regard to collecting societies in accordance with the Copyright Act, 1978, the Performers' Protection Act, 1967, and these Regulations.
- (2) The Registrar shall keep a register of all accredited collecting societies established under the Copyright Act, 1978, and these Regulations, and shall ensure that these collecting societies shall discharge their obligations under the law. The Registrar shall be invited to attend annual or special general meetings of the members of an accredited collecting society and shall receive an annual activity report from each collecting society, setting out information on its activities, financial records and such other records as may be necessary to assess the degree of compliance of the collecting society with these Regulations, and with the Copyright Act, 1978 and Performers Protection Act, 1967. Such report shall be submitted within thirty days of the end of the financial year of such collecting society.
- (3) An accredited collecting society shall keep the Registrar informed at all times as to its organisational structure and operational features, and also in regard to changes concerning the persons entitled by law or in terms of their organisational structures to represent it, by way of written notification given to the Registrar, such notification to be given within thirty days of the occurrence of a change. In particular, an accredited collecting society shall furnish the Registrar with:
- (a) copies of the memorandum and articles of association, trust deed, founding documents, articles of incorporation, reciprocal agreements

- with foreign collecting societies, or any similar document setting out the basic organisational structure of the collecting society, including the name and address of its auditors;
- (b) notice of any amendments or changes to the documents referred to in paragraph 4(3)(a), together with a report setting out succinctly the reasons for the amendment or change;
 - (c) tariffs set by the collecting society for potential users or user groups, and any amendments thereto;
 - (d) annually, an up-to-date list of members;
 - (e) annually, an up-to-date list of agreements with foreign collecting societies;
 - (f) annual audited financial statements; and
 - (g) any documentation or report that the Registrar may reasonably require.
- (4) In the event that a collecting society does not comply with its obligations under this Regulation, the Registrar may stipulate an appropriate time period of not less than thirty days but not more than ninety days for the collecting society to remedy the situation. Should the collecting society fail to comply within such time period, the Registrar may do one or both of the following:
- (a) withdraw the collecting society's accreditation; and/or
 - (b) apply to court for any appropriate relief, including relief in terms of the common law or the law governing the entity acting as collecting society, and including but not limited to relief by placing the collecting society under judicial management, or by seeking the winding-up or dissolution of the collecting society.

CHAPTER 2

Obligations of collecting societies

Membership structure

- 5.(1) A representative collecting society shall be open to all persons either directly or through the membership of a collective organisation representing a particular group of rightholders having a similar interest.
- (2) Where a representative collecting society has as members both owners of copyright in sound recordings and performing artists, whether directly or through one or several of its members as a collective organisation of performers or of copyright owners, the governing structure of the collecting society shall provide for equal representation of both owners of copyright in sound recordings and performers to take part in the decision-making process of the highest executive organ of the collecting society and the general assembly of members.
- (3) Each member of a collecting society must have at least one vote.
- (4) Any member shall be entitled, to obtain-
- (a) annual statements of accounts and the list of persons that constitute the highest executive organ and/or senior management of the collecting society;

- (b) reports of the highest executive organ and of the auditors, the reports to be submitted to the general meeting;
 - (c) where appropriate, the text and motivation of resolutions submitted to the general meeting of members, and information concerning candidates for the highest executive organ and senior management; and
 - (d) the overall amount, certified by the auditors, of the remuneration paid to any director or other employee of the collecting society.
- (5) Nothing in these Regulations shall reduce, detract or affect in any way the rights or remedies that members of the collecting society are entitled to, or any relief available to them, under their membership agreement, the common law or any applicable legislation governing the legal entity accredited as a collecting society.

Administration of rights

- 6.(1) A collecting society shall administer the rights of its members and the proceeds of the exercise of such rights in accordance with the Copyright Act, 1978, the Performers' Protection Act, 1967, and these Regulations.
- (2) The aim of a collecting society shall be to administer public playing rights effectively and efficiently, to maximise the economic exploitation of the rights entrusted by the rightholders for their direct benefit and not to generate or accumulate unneeded profits in the hands of the collecting society itself, and to distribute the proceeds of such exploitation equitably amongst its members. A collecting society shall distribute at least 80% amongst its members, and not more than 20% shall be retained by the collecting society after distribution to defray its costs or apply otherwise.
- (3) Whenever desirable or expedient, a collecting society shall enter into reciprocal agreements with foreign collecting societies or rightholders, and it shall administer the rights entrusted to it and shall distribute at least 80% of the money collected to its members.

Licensing

- 7.(1) A collecting society shall make available, on non-discriminatory terms, for any potential user of public playing rights the complete repertoire of records in respect of which the public playing rights are owned by the South African and foreign rightholders that it represented by it.
- (2) A collecting society may enter into framework agreements with representative trade association and user groups concerning the use of the repertoire by potential users affiliated to them. Based on any framework agreement, or in the absence of a framework agreement by way of negotiation, the collecting society may enter into non-exclusive licence agreements with individual users or user groups. Framework agreements and individual non-exclusive licence agreements shall contain such terms and conditions as are necessary to enable the collecting society to comply with its obligations under the Copyright Act, 1978, Performers' Protection Act, 1967, and these Regulations.

- (3) As part of a framework agreement or a non-exclusive licence agreement, the collecting society may negotiate with trade associations and representative bodies of potential users or user groups, or with individual users, a tariff that determines the amount and the manner of payment of the royalties in respect of the use in question, as well as the conditions of use and the information to be furnished to the collecting society to enable the proper distribution of any payments received.
- (4) A tariff accepted by the collecting society and the trade association in question, or by the representative bodies or user groups, as the case may be, may jointly be submitted to the Registrar for approval and publication in the Government Gazette and South African Intellectual Property Law Journal for notification. Any potential user falling within the scope of the tariff as published and complying with its terms shall be granted a licence by the collecting society upon assuming the obligation of the payment of the royalties established under the tariff. Should a dispute regarding the applicability of a tariff concerning an individual user or user group arise, application may be made for appropriate relief to the Copyright Tribunal in terms of sections 31 to 33 of the Copyright Act, 1978.
- (5) Should a tariff proposed by the collecting society not be accepted by the trade associations and representative bodies or the potential users, user groups, or individual users, such potential users and user groups shall have the option to pay the amount demanded by the collecting society into an escrow account, pending the outcome of a referral to the Copyright Tribunal or, if the parties so agree, pending the outcome of a referral for arbitration under the Arbitration Act, Act no. 42 of 1965, as amended. Any potential user or user group in respect of which a deposit is being made and who furnishes the required information to the collecting society to allow for the later distribution of the funds placed in escrow, shall provisionally be allowed by the collecting society to engage in the use that is subject to the payment of a royalty as provided for in section 9A of the Copyright Act, 1978, and Section 5(1)(b) of the Performers' Protection Act, 1967.
- (6) The collecting society may, pending any referral to the Copyright Tribunal or, if the parties so agree, pending any arbitration proceedings, apply to the Copyright Tribunal or the designated body in accordance with the provisions of the Arbitration Act, for a ruling requiring any potential user or user group to make payments to an escrow account of the amount demanded by the collecting society and to furnish information that will permit the later distribution of the funds to be placed in such escrow account once the Copyright Tribunal or the designated arbitration body has rendered its final decision or award in the matter before it.

Distribution

- 8.(1) Subject to subregulation 6(2), a collecting society shall distribute at least once every year amounts collected by it according to a distribution plan and after deducting such amounts as are necessary to cover the costs incurred in the administration of the collecting society. The first such distribution shall be made not later than 18 months after the initial

accreditation of the collecting society and subsequently not later than any anniversary of the initial accreditation and any renewal thereof.

- (2) The costs and expenses incurred in the administration of the collecting society shall be calculated in conformity with Generally Accepted Accounting Practices (GAAP) set from time to time by the professional bodies of South African chartered accountants. The manner of bookkeeping and maintenance of records by a collecting society shall be such as to enable the ready verification of revenue received or accrued, as well as expenditures and costs incurred.
- (3) A collecting society shall distribute the amounts collected in a manner to reflect as nearly as possible the actual use of sound recordings and protected performances covered by the repertoire under its administration, taking into account the need for an economical and efficient management of the collecting society.
- (4) A collecting society shall establish a distribution plan and apply it based on information publicly available, trade information available to its members and on information to be furnished by individual users and user groups in terms of framework agreements and non-exclusive licensing agreements.
- (5) The distribution plan and any amendments thereof shall be submitted to the Registrar. The Registrar shall approve a distribution plan if it complies with the following principles and conditions:
 - (a) A distribution plan shall not provide for arbitrary or discretionary distributions;
 - (b) Subject to any contractual agreement to the contrary as contemplated in section 9A(2)(b) of the Copyright Act, 1978, and section 5(4) of the Performers' Protection Act, 1967, where a representative collecting society has as members both owners of copyright in sound recordings and performing artists, whether directly or through one or more collective organisations of performers or of owners of copyright in sound recordings, money collected shall be distributed on an equal basis to performers and to owners of the copyright in sound recordings, either directly or to their collective organisation so that copyright owners and performers shall benefit equally on the basis of their volumes of use.
 - (c) A collecting society may provide in its distribution plan that, with the approval of the highest executive organ of the society, a portion of the proceeds may be set aside for the promotion of the creative arts, and culture and for welfare purposes (including pension benefits) of performing artists. Such portion shall not exceed 10% of the amount to be distributed in any one year.

CHAPTER 3

Miscellaneous

Entry into force

9. These Regulations shall enter into force on promulgation by the Minister.