

REPUBLIC OF SOUTH AFRICA

**PERFORMERS' PROTECTION
AMENDMENT BILL**

*(As amended by the Portfolio Committee on Trade and Industry (National Assembly))
(The English text is the official text of the Bill)*

(MINISTER OF TRADE AND INDUSTRY)

[B 74B—2001]

ISBN 0 621 32076 5

No. of copies printed 1 800

GENERAL EXPLANATORY NOTE:

- [] Words in bold type in square brackets indicate omissions from existing enactments.
- _____

 Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Performers' Protection Act, 1967, so as to define an expression and to amend a definition; and to make new provision for restrictions on the use of performances; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 1 of Act 11 of 1967, as amended by section 19 of Act 38 of 1997

1. Section 1 of the Performers' Protection Act, 1967 (hereinafter referred to as the principal Act), is hereby amended— 5
- (a) by the insertion in subsection (1) after the definition of "broadcaster" of the following definition:

" 'collecting society' means a collecting society established under the Copyright Act, 1978 (Act No. 98 of 1978);"; and 10
- (b) by the substitution in subsection (1) for the definition of "literary and artistic works" of the following definition:

" 'literary and artistic works' **[include]** includes musical, dramatic and dramatico-musical works and expressions of folklore";".

Substitution of section 4 of Act 11 of 1967 15

2. The following section is hereby substituted for section 4 of the principal Act:

"Extension of protection of performers' rights to performances in certain countries

4. The protection granted to performers by this Act shall be extended automatically **[to performers]** in respect of **[their]** performances— 20
- (a) taking place;

(b) broadcast without a fixation; or

(c) first fixed, 25

in a country which is a member of the World Trade Organization: Provided that the right conferred on performers in section 5(1)(b) shall, in the case of performances in the Republic, but emanating from a country which is a member of the World Trade Organization, only be granted to them to the extent that performances emanating from the Republic enjoy corresponding protection in that country, and such performances of foreign origin shall not enjoy any wider protection in the Republic than is enjoyed in that country by performances emanating from the Republic." 5

Substitution of section 5 of Act 11 of 1967

3. The following section is hereby substituted for section 5 of the principal Act:

"Restrictions on use of performances" 10

5. (1) Subject to the provisions of this Act, no person shall—

(a) without the consent of the performer—

[(a)] (i) broadcast or communicate to the public [a] an unfixed performance of such performer, unless the performance used in the broadcast or the public communication is itself already a broadcast performance [or is made from a fixation of the performance or from a reproduction of such a fixation]; or 15

[(b)] (ii) make a fixation of the unfixed performance of such performer; or

[(c)] (iii) make a reproduction of a fixation of a performance of such performer— 20

[(i)] (aa) if the original fixation, other than a fixation excluded by section 8 from the necessity for obtaining the consent of the performer, was itself made without his or her consent; or

[(ii)] (bb) if the reproduction is made for purposes other than those in respect of which such performer gave his or her consent to the making of the original fixation or of a reproduction thereof; or 25

[(iii)] (cc) if the original fixation was made in accordance with the provisions of section 8, and the reproduction is made for purposes not covered by those provisions; or 30

(b) by means of a fixation of a performance published for commercial purposes, without payment of a royalty to the performer concerned—

(i) broadcast the performance;

(ii) cause the performance to be transmitted in a diffusion service defined in section 1 of the Copyright Act, 1978 (Act No. 98 of 1978), unless such service transmits a lawful broadcast, including the performance, and is operated by the original broadcaster; or 35

(iii) cause any communication of the performance to the public.

(2) In the absence of an agreement to the contrary, a performer's consent to the broadcasting of his or her performance shall be deemed to include his or her consent to the rebroadcasting of his or her performance, the fixation of his or her performance for broadcasting purposes, and the reproduction for broadcasting purposes of such fixation. 40

(3) (a) The amount of any royalty contemplated in subsection (1)(b) shall be determined by an agreement between the performer and the person who broadcasts or transmits, or causes communication of, the performance, as the case may be, or between their representative collecting societies. 45

(b) In the absence of an agreement contemplated in paragraph (a), any party may refer the matter to the Copyright Tribunal established in terms of section 29(1) of the Copyright Act, 1978 (Act No. 98 of 1978), or the parties may agree to refer the matter for arbitration in terms of the Arbitration Act, 1965 (Act No. 42 of 1965). 50

(4) (a) A performer who has authorized the fixation of his or her performance shall, in the absence of any agreement to the contrary, be deemed to have granted to the person who arranges for such fixation to be made the exclusive right to receive the royalties contemplated in subsection (1)(b) in respect of any broadcast, transmission or communication of such fixed performance: Provided that the performer is entitled to share in any payment received by the person who arranges for the fixation, 55

or his or her successor in title, in the manner agreed upon between the performer and the person who arranges for such fixation, or between their representative collecting societies.

(b) In the absence of an agreement contemplated in the proviso to paragraph (a), any party contemplated in that proviso may refer the matter to the Copyright Tribunal established in terms of section 29(1) of the Copyright Act, 1978 (Act No. 98 of 1978), or the parties may agree to refer the matter for arbitration in terms of the Arbitration Act, 1965 (Act No. 42 of 1965).

(5) Any payment made in terms of subsection (4) shall be deemed to have discharged any obligation by the person who broadcasts or transmits or causes communication of the performance to pay a royalty to the owner of any copyright subsisting in that fixation in terms of section 9A of the Copyright Act, 1978 (Act No. 98 of 1978)."

Amendment of section 8 of Act 11 of 1967, as amended by section 22 of Act 38 of 1997

4. Section 8 of the principal Act is hereby amended by the substitution for subsection (3) of the following subsection:

"(3) (a) A broadcaster may make by means of his or her own facilities a fixation of a performance and reproductions of such fixation without the consent required by section 5, provided that, unless otherwise stipulated, the fixation or any reproduction thereof—

- (i) [the fixation and the reproductions thereof are used solely in the] is intended exclusively for broadcasts [made by the broadcaster] to which the performer has consented;
- (ii) [the fixation and any reproductions thereof] if they are not of an exceptional documentary character, are destroyed before the end of the period of six months commencing on the day on which the fixation was first made [**; and**] or such longer period as may be agreed to by the performer.

- [(iii) **the broadcaster pays to the performer, whose performance is so used, in respect of each use of the fixation or of any reproduction thereof, an equitable remuneration, which, in the absence of agreement, shall be determined in accordance with the provisions of the Arbitration Act, 1965 (Act No. 42 of 1965), or alternatively, at the option of the performer, by the Copyright Tribunal established by the Copyright Act, 1978 (Act No. 98 of 1978).]**

(b) The fixation and the reproductions thereof made under the provisions of this subsection may, on the grounds of their exceptional documentary character, be preserved in the archives of the **[Corporation] broadcaster** but shall, subject to the provisions of this Act, not be further used without the consent of the performer."

Short title

5. This Act is called the Performers' Protection Amendment Act, 2001.

MEMORANDUM ON THE OBJECTS OF THE PERFORMERS' PROTECTION AMENDMENT BILL, 2001

1. The Performers' Protection Act, 1967 (Act No. 11 of 1967) ("the Act"), confers rights on performers of literary and musical works. The Act, however, fails to specify who is entitled to ephemeral copies and related royalties of work that is subject to intellectual property protection. This is referred to as "pay for play time", i.e. whenever a record is played by a broadcaster, there should be an accompanying royalty payment to the owner of the rights.

2. The Act also fails to address the management of the payment of royalties and as a result non-statutory associations or collecting societies are formed to regulate agreements or contracts on behalf of performers. Unfortunately these agreements are often disproportionately in favour of broadcasters and recording companies, thus resulting in local performing artists being unfairly disadvantaged by such agreements.

3. Performing artists have made representations in respect of royalties related to the "pay for play time" for the past six years and have requested that such royalties should be paid to copyright owners.

4. Consultations with stakeholders within the music industry have taken place and consensus was reached amongst stakeholders that the issue of royalties should be addressed by means of amending the Act as well as the Copyright Act, 1978 (Act No. 98 of 1978).

5. It was agreed that for the rights of copyright owners to be exercisable, statutory bodies (collecting societies) need to be formed in order to collectively bargain with broadcasters and recording companies in the collection of royalties. It is envisaged that the collective bargaining powers of such bodies will equalise the relationship between performers and consumers of their material (broadcasters and recording companies). In the event of a failure to reach agreement through the collective bargaining process, any of the parties concerned may refer the matter to the Copyright Tribunal or, if all the parties agree, refer the matter for arbitration.

6. The Bill seeks to amend the Act in order to give effect to the abovementioned proposals and also seeks to bring performers of expressions of folklore under the protection of the Act.

7. Financial implications for State

None.

8. Consultation

The following persons and bodies were consulted:

- * Department of Arts, Culture, Science and Technology.
- * South African Broadcasting Corporation.
- * South African Musicians Union (Samu).
- * Non-members of Samu.
- * Association of South African Music Industry (Asami).
- * South African Music Rights Organisation (Samro).
- * The Standing Advisory Committee on Intellectual Property Rights.
- * The Music Industry Task Team.
- * National Association of Broadcasters.

9. Parliamentary Procedure

The State Law Advisers and the Department of Trade and Industry are of the opinion that the Bill should be dealt with in accordance with the procedure set out in section 75 of the Constitution since it does not contain any provision to which the procedure set out in section 74 or 76 applies.