

REPUBLIC OF SOUTH AFRICA

PERFORMERS' PROTECTION AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75); explanatory summary of
Bill published in Government Gazette No. 40121 of 5 July 2016)
(The English text is the official text of the Bill.)*

(MINISTER OF TRADE AND INDUSTRY)

[B 24—2016]

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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 insert or substitute certain definitions; 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 Act 38 of 1997 and Act 8 of 2002

1. Section 1 of the Performers' Protection Act, 1967 (hereinafter referred to as the principal Act), is hereby amended— 5

(a) by the insertion before the definition of "broadcast" of the following definition:

“**audiovisual fixation** means the embodiment of moving images, whether or not accompanied by sounds or by the representations thereof, from which either can be perceived, reproduced or communicated through a device;” 10

(b) by the insertion after the definition of "broadcaster" of the following definition:

“**broadcasting** means— 15

(a) transmission, partially or wholly, by wire or wireless means for public reception of sounds or of images or of images and sounds or of the representations thereof;

(b) transmission, partially or wholly, by satellite; or

(c) transmission, partially or wholly, of encrypted signals if the means for decrypting are provided to the public by the broadcasting organisation or with its consent;” 20

(c) by the insertion after the definition of "collecting society" of the following definitions:

“**communication to the public of a performance** means the transmission to the public by any medium, other than by broadcasting of an unfixed performance or of a performance fixed in an audiovisual fixation including making a performance fixed in an audiovisual fixation audible or visible, or audible and visible to the public;” 25

- ‘communication to the public of a phonogram’** means the transmission to the public by any medium, other than by broadcasting of sounds of a performance or the sounds or the representations of sounds fixed in a phonogram;”;
- (d) by the substitution for the definition of “performer” of the following definition: 5
 “**‘performer’** means an actor, singer, musician, dancer or other person who acts, sings, delivers, declaims, plays in, or otherwise performs literary, musical or artistic works;”;
- (e) by the substitution for the definition of “phonogram” of the following definition: 10
 “**‘phonogram’** means [any exclusively aural fixation of sounds of a performance or of other sounds;] the fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work;”;
- (f) by the substitution for the definition or “reproduction” of the following definition: 15
 “**‘reproduction’** means a copy made [of a] as contemplated by the Copyright Act, 1978 (Act No. 98 of 1978), and shall include an audiovisual fixation of a performance;”;
- (g) by the insertion after the definition of “reproduction” of the following definition: 20
 “**‘Tribunal’** means the Intellectual Property Tribunal established in terms of section 29 of the Copyright Act, 1978 (Act No. 98 of 1978).” 25

Substitution of section 3 of Act 11 of 1967

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

‘Protection of performers’ moral and economic rights

- 3. (1)** Performers shall be granted the protection provided for in section 5 of this Act in respect of their performances— 30
- (a) taking place;
- (b) broadcast without a fixation; or
- (c) first fixed, in the Republic.
- (2) A performer shall, independently of a performer’s economic rights, after the transfer of those rights, as regards his or her live performances or performances fixed in audiovisual fixations, have the right— 35
- (a) to claim to be identified as the performer of his or her performances, except where the omission is dictated by the manner of the use of the performance; and 40
- (b) to object to any distortion, mutilation or other modification of his or her performances that would be prejudicial to his or her honour or reputation, taking due account of the nature of audiovisual fixations.
- (3) The rights granted to a performer in accordance with subsection (2) shall, after a performer’s death, be maintained at least until the expiry of other rights granted in terms of this section or other provisions of the Copyright Act. 45
- (4) A performer shall enjoy the exclusive right of authorising, as regards his or her performances—
- (a) the broadcasting and communication to the public of his or her unfixed performances except where the performance is already a broadcast performance; 50
- (b) the fixation of his or her unfixed performances;
- (c) the direct or indirect reproduction of his or her performances fixed in audiovisual fixations, in any manner or form; 55
- (d) the making available to the public of the original and copies of his or her performances fixed in audiovisual fixations through sale or other transfer of ownership;

- (e) the commercial rental to the public of the original and copies of his or her performances fixed in audiovisual fixations, even after distribution of such copies by, or pursuant to, authorisation by the performer;
- (f) the making available to the public of his or her performances fixed in audiovisual fixations, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them; and
- (g) the broadcasting and communication to the public of their performances, fixed in audiovisual fixations.”.

Insertion of sections 3A and 3B in Act 11 of 1967 10

3. The principal Act is hereby amended by the insertion after section 3 of the following sections:

“Transfer of rights

3A. Where a performer has consented to fixation of his or her performance in an audiovisual fixation, the exclusive rights of authorisation granted to a performer in terms of section 3(4)(c), (d), (e), (f) and (g) shall be owned or exercised by, or transferred to the copyright owner of such audiovisual fixation, or his or her licensee, subject to a prescribed written contractual agreement with the performer which shall give the performer the right to receive royalties or a fair equitable remuneration, whichever applicable, for any use of the performance: Provided that such agreement between the parties shall be valid for a period of 25 years from the date of commencement of the agreement and may be novated by mutual consent.

Protection of rights of producers of phonograms

3B. (1) A producer of a phonogram shall enjoy the exclusive right of authorising—

- (a) the direct or indirect reproduction of his or her phonogram in any manner or form;
- (b) the making available to the public of the original and copies of his or her phonogram through sale or other transfer of ownership;
- (c) the commercial rental to the public of the original and copies of his or her phonogram even after distribution of them by or pursuant to the authorisation by the producer; and
- (d) the making available to the public of his or her phonogram by wire or wireless means in such a way that members of the public may access them from a place and at a time individually chosen by them.

(2) A performer and copyright owner of a phonogram shall enjoy the right to earn an equitable remuneration to be approved by the Minister for the direct or indirect use of the phonogram published for commercial purposes for broadcasting or for any communication to the public.”.

Amendment of section 5 of Act 11 of 1967, as amended by Act 8 of 2002

4. Section 5 of the principal Act is hereby amended—

- (a) by the substitution in subsection (1) for paragraph (a) of the following paragraph:

“(a) without the consent of the performer—

- (i) broadcast or communicate to the public an unfixed performance or performance fixed in an audiovisual fixation of such performer, unless the performance used in the broadcast or the public communication is itself already a broadcast performance; **[or]**
- (ii) make a fixation of the unfixed performance or performance fixed in an audiovisual fixation of such performer; **[or]**
- (iii) make a reproduction of a fixation of a performance or performance fixed in an audiovisual fixation of such performer—

- (aa) if the original fixation or the audiovisual 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]**
- (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 audiovisual fixation of a reproduction thereof; or
- (cc) if the original fixation or audiovisual fixation was made in accordance with the provisions of section 8 and the reproduction is made for purposes not covered by those provisions; **[or]**
- (iv) make available to the public the original performance and copies of that performance fixed in an audiovisual fixation through sale or otherwise of such a performer;
- (v) commercially rent out to the public the original performance and copies of that performance fixed in audiovisual fixation of such a performer; or
- (vi) make available to the public the performance fixed in audiovisual fixation, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.”;
- (b) by the substitution in subsection (1) for paragraph (b) of the following paragraph:
- “(b) by means of a fixation or audiovisual 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]**
- (iii) cause any communication of the performance to the public;
- (iv) sell the performance; or
- (v) commercially rent out such performance.”;
- (c) by the insertion in subsection (1) after paragraph (b) of the following subsections:
- “(1A) A person who intends to—
- (a) broadcast or communicate to the public an unfixed performance or performance fixed in audiovisual fixation of a performer;
- (b) make a fixation of the unfixed performance or performance fixed in audiovisual fixation of a performer;
- (c) make a reproduction of a fixation of a performance or performance fixed in audiovisual fixation of a performer;
- (d) make available to the public the original performance and copies of that performance fixed in an audiovisual fixation through sale or otherwise of a performer;
- (e) commercially rent out to the public the original performance and copies of that performance fixed in an audiovisual fixation of such a performer;
- (f) make available to the public the performance fixed in an audiovisual fixation of a performer, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them; or
- (g) perform any act contemplated in subsection (1)(b), must give the copyright owner, performer or collecting society, a notice in the prescribed manner of his or her intention to perform such acts, indicating where practical, the date of the proposed performance, the proposed terms and conditions for the payment of royalty or fair equitable remuneration, whichever applicable, and request the copyright owner or collecting society to sign the proposal attached thereto.

(1B) The copyright owner, performer or collecting society must as soon as is reasonably possible upon receipt of such notice respond to such a proposal.

(1C) If the copyright owner, performer or collecting society rejects such proposal or proposes different terms and conditions and the parties are unable to agree on either of the proposals, either party may in the prescribed manner refer the matter to the Tribunal.

(1D) The Tribunal must adjudicate such matter as soon as is reasonably practicable and where possible, before the performance which is the subject of the application takes place and may make any order it deems fit, including but not limited to an order that a provisional payment of royalty be made into a trust account of an attorney nominated by the copyright owner, performer or collecting society pending the finalisation of the terms and royalty payable: Provided that such amount shall be paid over to the copyright owner, performer or collecting society as represents the difference, if any, between the amount determined as the appropriate royalty and the amount already paid and any balance, if any, must be repaid.”;

(d) by the substitution for subsection (2) of the following subsection:

“(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 not include his or her consent to the rebroadcasting of his or her performance, the fixation or audiovisual fixation of his or her performance for broadcasting purposes, and the reproduction for broadcasting purposes of such fixation or audiovisual fixation.”;

(e) by the substitution in subsection (3) for paragraph (b) of the following paragraph:

“(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).**].”;

(f) by the substitution for subsection (4) of the following subsection:

“(4) (a) A performer who has authorised the fixation or audiovisual 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**] copyright owner for such fixation or audiovisual fixation to be made the exclusive right to receive the royalties or fair equitable remuneration, whichever applicable, contemplated in subsection (1)(b) in respect of any broadcast, transmission, sale, commercially renting out or communication of such fixed performance: Provided that the performer is entitled to share in any payment received by the [**person who arranges**] copyright owner for the fixation, in the manner agreed upon between the performer and the [**person who arranges**] copyright owner 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).**].”;

(g) by the substitution for subsection (5) of the following subsection:

“(5) Any payment made in terms of subsection (4) shall be deemed to have discharged any obligation by the person who broadcasts or transmits, sells, commercially rents out or causes communication of the performance to pay a royalty or fair equitable remuneration, whichever applicable, to the [**owner of any**] performer or owner of the copyright subsisting in that fixation or audiovisual 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 Act 38 of 1997 and Act 8 of 2002

5. Section 8 of the principal Act is hereby amended—

(a) by the substitution for subsection (2) of the following subsection:

“(2) A performance, a fixation or audiovisual fixation of a performance or a reproduction of such a fixation or audiovisual fixation may be used without the consent required by section 5—

(a) if it is for the purposes of private study or personal and private use; **[or]**

(b) if it is for the purposes of criticism or review or for the purpose of reporting on current events, provided that not more than short excerpts from the performance are used and, whenever possible, the performer’s name or the names of the leading performers are acknowledged; **[or]**

(c) if it is for the purposes of teaching or for scientific research; or

(d) if it is for the purpose of legal proceedings; **[or]**

(e) if it is for the demonstration of recording, amplifying or similar apparatus, provided that the demonstration is made by a licensed dealer on his or her premises to a specific client[.]; or

(f) if it is for purposes which are acceptable and exempted in terms of any other provision of the Copyright Act, 1978 (Act No. 98 of 1978).”; and

(b) by the substitution in subsection (3) for paragraph (a) of the following paragraph:

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

(i)] is intended exclusively for broadcasts to which the performer has consented[;

(ii) **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 or such longer period as may be agreed to, by the performer].”.**

Insertion of sections 8A and 8B in Act 11 of 1967

6. The principal Act is hereby amended by the insertion after section 8 of the following sections:

“Prohibited conduct in respect of technological protection measure

8A. (1) The prohibited conduct in respect of the technological protection measure, the use of a technological protection measure circumvention device and the exceptions related to technological protection measures contemplated in sections 280 and 28P of the Copyright Act, 1978 (Act No. 98 of 1978), shall apply, with the necessary changes, in respect of performances which are fixed or fixed in audiovisual fixations.

(2) The contravention of the technological protection measure provisions contemplated in subsection (1) shall be an offence and a person convicted thereof shall be liable in terms of the provisions of this Act.

Prohibited conduct in respect of copyright management information

8B. (1) The prohibited conduct in respect of the removal or modification of copyright management information attached to or embodied in a copy of work and the exceptions relating to such removal or modification contemplated in sections 28Q and 28R of the Copyright Act, 1978 (Act No. 98 of 1978), shall apply, with the necessary changes, in respect of performances which are fixed or fixed in audiovisual fixations.

(2) The contravention of the copyright management information provisions contemplated in subsection (1), shall be an offence and a person convicted thereof shall be liable in terms of the provisions of this Act.”

Short title and commencement

7. This Act is called the Performers’ Protection Amendment Act, 2016, and shall come into operation on a date fixed by the President by proclamation in the *Gazette*. 5

MEMORANDUM ON THE OBJECTS OF THE PERFORMERS’ PROTECTION AMENDMENT BILL 2016

1. BACKGROUND

- 1.1 The draft Performers’ Protection Amendment Bill (“the Bill”) seeks to amend the Performers’ Protection Act, No. 11 of 1967 (“the principal Act”). It addresses issues relating to the payment of royalties to performers; safeguarding the rights of contracting parties; promotes performers’ moral and economic rights for performances in audiovisual fixations. Thus, the proposed provisions in the Bill are strategically aligned with the priorities outlined in the National Development Plan (“NDP”), with the aim of ensuring effective governance, social protection, employment creation, recreation and leisure.
- 1.2 The Bill outlines the policy proposals that intend to review the structure of the Tribunal in order to broaden access to justice by aggrieved parties which is hampered by the delays in allocating the dates for hearing and making findings. The Bill’s proposals are premised partly on the World Intellectual Property Organisation (“WIPO”) treaties such as The Beijing Treaty for the protection of Audio Visual Performances, the Performers and Phonograms Treaty and the WIPO Copyright Treaty.

2. OBJECTIVES OF BILL

- 2.1 The Bill seeks to address the challenges facing the creative industry from non-payment of royalties; lack of formalisation of the creative industry which exposes it to abuse; piracy; and rights of performers by making provision for—
 - 2.1.1 the protection of performers’ moral and economic rights;
 - 2.1.2 written agreement where rights of performers are involved;
 - 2.1.3 the protection of rights of producers of phonograms; and
 - 2.1.4 prohibition of conduct in respect of technological protection measures (“TPMS”) and copyright management information.

3. OVERVIEW OF BILL

- 3.1 Clause 1 proposes amendments to certain definitions and the insertion of definitions of “audiovisual fixation”, “broadcasting”, “communication to the public of a performance”, “communication to the public of a phonogram”, and “Tribunal” and by the substitution for the definitions of “**performer**”, “**phonogram**” and “**reproduction**” .
- 3.2 Clause 2 of the Bill proposes the substitution of section 3 of the principal Act. The primary objective of this clause is to clearly circumscribe the statutory rights conferred upon a performer, in particular certain exclusive rights of authority in respect of his or her performances.
- 3.3 Clause 3 of the Bill—
 - 3.3.1 proposes the insertion of sections 3A and 3B to provide for the transfer of rights where the performer has consented to fixation of his or her performance in an audiovisual fixation, subject to written contractual agreement which shall give the performer the right to receive royalties for any use of the performance. It is proposed that the exercise of this right shall be valid for a period of 25 years from the date of commencement of the agreement;

- 3.3.2 proposes the deletion of a phrase in subsection (1) by virtue of the insertion of the definition of “**communication to the public of a phonogram**” in section 1 of the principal Act.
- 3.3.3 grants exclusive rights to the producer of a phonogram and the right to earn an equitable remuneration for the direct or indirect use of phonogram to the performer, composer and producer of phonogram.
- 3.4 Clause 4 of the Bill proposes amendments to section 5 of the principal Act to—
 - 3.4.1 provide for the consent of the performer for performance fixed in audiovisual fixation. It provides for availability of the original and copies of performance fixed in audiovisual fixation to the public;
 - 3.4.2 provide for persons who intend to broadcast or communicate to the public a performance fixed in audiovisual fixation of a performer, to give the performer, trust or community trust or representative or collecting society notice of his or her intention to do so; and
 - 3.4.3 provide for a matter to be referred to the Tribunal where the copyright owner, performer, trust, community trust or representative or collecting society rejects the proposal by any person.
- 3.5 Clause 5 of the Bill proposes amendments to section 8 of the principal Act and provides for situations where audiovisual fixation can be used without consent.
- 3.6 Clause 6 of the Bill proposes the insertion of sections 8A and 8B to—
 - 3.6.1 provide for the prohibited conduct in relation to a Technological Protection Measure as contemplated in sections 28O and 28P of the Copyright Act, 1978, to apply in respect of performance fixed or fixed in audiovisual fixations; and
 - 3.6.2 provide for the prohibited conduct in relation to the removal or modification of copyright management information; and the exceptions relating to such removal or modification contemplated in sections 28Q and 28R of the Copyright Act, 1978, to be applicable in respect of performances that are fixed or fixed in audiovisual fixation. The Bill makes it an offence to contravene these prohibitions.

4. DEPARTMENTS/BODIES/PERSONS CONSULTED

The Department of Trade and Industry consulted various stakeholders in different sectors within the South African Copyright regime, such as local performers, composers, academics, Non-Government Organisations “(NGOs)”, copyright consultants and the general public, through meetings and a conference.

5. IMPLICATIONS FOR PROVINCES

The Provinces will be consulted.

6. FINANCIAL IMPLICATIONS FOR STATE

To be accommodated within the existing budget.

7. PARLIAMENTARY PROCEDURE

- 7.1 The State Law Advisers and the Department of Trade and Industry are of the opinion that the Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution of the Republic of South Africa, 1996, since it contains no provision to which the procedure set out in section 74 or section 76 of the Constitution applies.
- 7.2 Although Intellectual Property (“IP”) is a national legislative competence, copyright and performers protection affect the people and Indigenous Knowledge (“IK”) at provincial level. Therefore there is a need to consult with the provinces and the House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003).

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