

PERFORMERS' PROTECTION ACT 11 OF 1967

[ASSENTED TO 10 FEBRUARY 1967]
[DATE OF COMMENCEMENT: 30 DECEMBER 1967]

(Afrikaans text signed by the State President)

as amended by

Intellectual Property Laws Amendment Act 38 of 1997
Performers' Protection Amendment Act 8 of 2002

ACT

To provide for the protection of performers of literary and artistic works.

1. Interpretation of terms

(1) In this Act, unless the context otherwise indicates-

'broadcast', when used as a noun, means a telecommunication service of transmissions consisting of sounds, images, signs or signals which-

(a) takes place by means of electromagnetic waves of frequencies of lower than 3 000 GHz transmitted in space without an artificial conductor; and

(b) is intended for reception by the public or sections of the public,

and, when used as a verb, shall be construed accordingly;

[Definition of 'broadcast' inserted by s. 19 (b) of Act 38 of 1997.]

'broadcaster' means a person who undertakes a broadcast;

[Definition of 'broadcaster' inserted by s. 19 (b) of Act 38 of 1997.]

'broadcasting'

[Definition of 'broadcasting' deleted by s. 19 (a) of Act 38 of 1997.]

'collecting society' means a collecting society established under the Copyright Act, 1978 (Act 98 of 1978);

[Definition of 'collecting society' inserted by s. 1 (a) of Act 8 of 2002.]

'Corporation'

[Definition of 'Corporation' deleted by s. 19 (a) of Act 38 of 1997.]

'fixation' includes storage of-

(a) sounds or images or both sounds and images; or

- (b) data or signals representing sounds or images or both sounds and images;

[Definition of 'fixation' inserted by s. 19 (b) of Act 38 of 1997.]

'literary and artistic works' includes musical, dramatic and dramatico-musical works and expressions of folklore;

[Definition of 'literary and artistic works' substituted by s. 1 (b) of Act 8 of 2002.]

'performer' means an actor, singer, musician, dancer or other person who acts, sings, delivers, declaims, plays in or otherwise performs, literary or artistic works;

'phonogram' means any exclusively aural fixation of sounds of a performance or of other sounds;

'rebroadcasting' means the simultaneous broadcasting by one broadcaster of the broadcast of another broadcaster, and 'rebroadcast' has a corresponding meaning;

[Definition of 'rebroadcasting' substituted by s. 19 (c) of Act 38 of 1997.]

'reproduction' means a copy made of a fixation of a performance.

- (2) Except in so far as the context otherwise requires, any reference in this Act to the doing of an act in relation to a performance, a fixation of a performance or a reproduction of such a fixation, shall be taken to include a reference to the doing of that act in relation to a substantial part of the performance, the fixation or the reproduction, as the case may be.

2. Relation to copyright protection

The rights created by this Act shall in no way restrict or affect the rights provided for by any other law relating to copyright in literary and artistic works.

3. Protection of performers' rights in respect of performances in the Republic

Performers shall be granted the protection provided for in section 5 of this Act in respect of their performances-

- (a) taking place;
- (b) broadcast without a fixation; or
- (c) first fixed,

in the Republic.

4. Extension of protection of performers' rights to performances in certain countries

The protection granted to performers by this Act shall be extended automatically in respect of performances-

- (a) taking place;
- (b) broadcast without a fixation; or
- (c) first fixed,

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.

[S. 4 substituted by s. 20 of Act 38 of 1997 and by s. 2 of Act 8 of 2002.]

5. Restrictions on use of performances

- (1) Subject to the provisions of this Act, no person shall-
 - (a) without the consent of the performer-
 - (i) broadcast or communicate to the public an unfixed performance 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 of such performer; or
 - (iii) make a reproduction of a fixation of a performance of such performer-
 - (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
 - (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
 - (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
 - (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 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.
- (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.
- (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.
 - (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 98 of 1978), or the parties may agree to refer the matter for arbitration in terms of the Arbitration Act, 1965 (Act 42 of 1965).
- (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, 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 98 of 1978), or the parties may agree to refer the matter for arbitration in terms of the Arbitration Act, 1965 (Act 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 98 of 1978).

- (6) In the event of any right to a royalty being assigned to any successor in title, either by contractual arrangement, operation of law, testamentary disposition or otherwise, any successor in title shall be entitled to enforce such right to a royalty against the person who in terms of this section is obliged to pay or against his or her successor in title.

[S. 5 substituted by s. 3 of Act 8 of 2002.]

6. Collective performances

- (1) Where several performers as a group take part in the same performance, it shall suffice if the consent required under section 5 is given by the manager or other authority in charge of the group or, failing such authority, by the leader of the group.
- (2) In the case referred to in subsection (1) a single payment for the use of the performance shall, unless otherwise stipulated, be made to the manager or other authority in charge of the group or, failing such manager or authority, to the leader of the group, and the manager or authority or leader, as the case may be, shall distribute the proceeds as agreed by the performers or, in default of agreement, the right to remuneration of the respective performers shall be determined in accordance with the provisions of the Arbitration Act, 1965 (Act 42 of 1965), or alternatively, at the option of the majority of the performers, by the Copyright Tribunal established by the Copyright Act, 1965 (Act 63 of 1965).

7. Term of protection

The prohibition against the use of a performance as provided for in section 5, shall commence upon the day when the performance first took place or, if incorporated in a phonogram, when it was first fixed on such phonogram, and shall continue for a period of 50 years calculated from the end of the calendar year in which the performance took place or was incorporated in a phonogram, as the case may be.

[S. 7 substituted by s. 21 of Act 38 of 1997.]

8. Exceptions from prohibition against use of performance without the consent of the performer

- (1)
- [Sub-s. (1) deleted by s. 22 (a) of Act 38 of 1997.]
- (2) A performance, a fixation of a performance or a reproduction of such a 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 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 premises to a specific client.

(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) 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.

(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 broadcaster but shall, subject to the provisions of this Act, not be further used without the consent of the performer.

[Sub-s. (3) amended by s. 22 (b) of Act 38 of 1997 and substituted by s. 4 of Act 8 of 2002.]

(4)

[Sub-s. (4) deleted by s. 22 (c) of Act 38 of 1997.]

9. Offences and penalties

(1) Any person-

(a) who knowingly contravenes any of the provisions of section 5 (1); or

(b) who knowingly sells or lets for hire or distributes for the purposes of trade, or by way of trade exposes or offers for sale or hire, any fixation of a performance or a reproduction of such a fixation made in contravention of section 5; or

(c) who makes, or has in his possession, a plate or similar contrivance for the purpose of making fixations of a performance or reproductions of such fixations in contravention of section 5,

shall be guilty of an offence and liable on conviction-

- (i) in the case of a contravention referred to in paragraph (a), to a fine or to imprisonment for a period not exceeding three months, and the court convicting him or her may in addition, on the application of the performer whose rights have been infringed, and without proof of any damages, order him or her to pay to the performer as damages such amount, not exceeding the amount determined by the Minister from time to time by notice in the Gazette, as may in the circumstances of the case appear to it to be reasonable;

[Para. (i) substituted by s. 23 of Act 38 of 1997.]

- (ii) in the case of a contravention of paragraph (b), to a fine not exceeding the amount determined by the Minister, in consultation with the Minister of Justice, from time to time by notice in the Gazette in respect of each fixation or reproduction; and

[Para. (ii) substituted by s. 23 of Act 38 of 1997.]

- (iii) in the case of a contravention of paragraph (c), to a fine or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment.

[Para. (iii) substituted by s. 23 of Act 38 of 1997.]

- (2) Any order made under subsection (1) for the payment of damages to a performer may be executed as if it were a civil judgment in favour of that performer.

10. Damages or interdict for infringement of performers' rights

Any person who infringes the rights of any performer may be sued in any court of law by such performer for-

- (a) an amount not exceeding the amount determined by the Minister from time to time by notice in the Gazette, and such court may, without proof of any damages and in addition to the costs of the action, award as damages such amount, not exceeding the said amount, as may in the circumstances of the case appear to it to be reasonable; or

[Para. (a) substituted by s. 24 of Act 38 of 1997.]

- (b) damages or an interdict or for both damages and an interdict, and such court may, in addition to the costs of the action, award such damages as may appear to it to have been suffered by the performer, or award as damages such amount as it may determine in terms of paragraph (a), or grant an interdict or both award damages and grant an interdict.

11. Power of the court in respect of fixations, reproductions and plates made in contravention of this Act

The court before which any legal proceedings are taken under this Act may order that all fixations, reproductions of fixations or plates (including contrivances similar to plates) in the possession of the accused or the defendant, which appear to the court to have been made in contravention of this Act, be destroyed or otherwise dealt with as the court may in its discretion determine.

12. Consent on behalf of performers and criminal liability of unauthorized agent

(1) Where in any legal proceedings under this Act it is proved-

- (a) that the fixation, the reproduction of a fixation, the broadcast or the public communication to which the legal proceedings relate, was made with the consent of a person who, at the time of giving the consent, represented that he was authorized by the performers to give it on their behalf, and
- (b) that the person who made the fixation, the reproduction of a fixation, the broadcast or the public communication had no reasonable grounds for believing that the person giving the consent was not so authorized,

the provisions of this Act shall apply as if it had been proved that the performers had themselves consented to the making of the fixation, the reproduction of the fixation or the broadcast or the public communication, as the case may be.

(2) Where-

- (a) a fixation, a reproduction of a fixation, a broadcast or a public communication is made with the consent of a person who, at the time of giving the consent, represented that he was authorized by the performers to give it on their behalf when, to his knowledge, he was not so authorized, and
- (b) if legal proceedings were brought against the person to whom the consent was given, the consent would by virtue of subsection (1) afford a defence to those legal proceedings, the person who gave the consent shall be guilty of an offence and liable on conviction to a fine not exceeding two hundred rand, or to imprisonment for a period not exceeding twelve months, or to both such fine and such imprisonment.

13. Contracts in respect of use of performances

Notwithstanding the provisions of this Act any performer may enter into any contract with any user or prospective user of his performance in respect of the use of his performance, but such contract shall be enforceable only in the Republic.

14. Savings

- (1) The rights acquired by any performer prior to the commencement of this Act shall not be prejudiced by this Act.

- (2) This Act shall apply to performances which took place before the commencement of this Act as it applies in relation to performances which take place thereafter.

[Sub-s. (2) substituted by s. 25 of Act 38 of 1997.]

15. Short title and date of commencement

This Act shall be called the Performers' Protection Act, 1967, and shall come into operation on a date to be fixed by the State President by proclamation in the Gazette.