

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, delete or substitute certain definitions; to provide for performers' economic rights; to extend moral rights to performers in audiovisual fixations; to provide for the transfer of rights where a performer consents to fixation of a performance; to provide for the protection of rights of producers of sound recordings; to broaden the restrictions on the use of performances; to extend the application of restrictions on the use of performances to audiovisual fixations; to provide for royalties or equitable remuneration to be payable when a performance is sold or rented out; to provide for recordal and reporting of certain acts and to provide for an offence in relation thereto; to extend exceptions from prohibitions to audiovisual fixation and sound recordings and include exceptions provided for in the Copyright Act, 1978; to provide for the Minister to prescribe compulsory and standard contractual terms as well as guidelines for a performer to grant consent under this Act; to provide for prohibited conduct and exceptions in respect of technological protection measures and copyright management information respectively; to provide for further offences and penalties; to substitute certain expressions; to provide for transitional provisions; and to provide for matters connected therewith.

B E 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 1 of Act 38 of 1997, and section 1 of Act 8 of 2002 and section 1 Act 28 of 2013

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

- (a) by the insertion before the definition of “broadcast” of the following definition:
 “ **‘audiovisual fixation’** means the embodiment of images or 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;”;
- (b) by the insertion after substitution for the definition of “broadcaster” of the following definition:
 “ **‘broadcasting’** means—
 (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.”;

- (c) by the deletion of the definition of “cinematograph film”;
- (ed) by the insertion after the definition of “~~collecting society~~ Commission” of the following definitions:
- “**‘communication to the public’—**
- (a) of a performance² 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; and
- (b) ‘communication to the public of a phonogram² sound recording 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 sound recording.’;
- (e) by the deletion of the definition of “fixation”;
- (f) by the substitution for the definition of “performance” of the following definition:
- “**‘performance’** includes any mode of visual or acoustic presentation of a literary work, musical work, artistic work, dramatic work or **[work of joint authorship]** a traditional work including acting, singing, delivering, declaiming, playing or otherwise performing such work, and includes any such presentation by the operation of a loudspeaker, but excluding such performance by the use of a phonogram, a radio, television, diffusion receiver, by the exhibition of a cinematograph film, by the use of a record, broadcasting, rebroadcasting or transmission in a diffusion service, and “perform” has a corresponding meaning.”;
- (dg) by the substitution for the definition of “performer” of the following definition:
- “**‘performer’** means an actor, singer, musician, dancer or other person who acts, sings, delivers, declaims, plays in, or otherwise performs literary works, musical works, ~~or~~ artistic works, dramatic works, **[or works of joint authorship]** or traditional works as contemplated in the Copyright Act;”;
- (e) ~~by the substitution for the definition of “phonogram” of the following definition:~~
- “**‘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;”;
- (h) by the insertion after the definition of “prescribe” of the following definition:
- “**‘producer’** means the person who takes the initiative and has the responsibility for the first fixation of a sound recording or an audiovisual fixation;”;
- (fi) by the substitution for the definition of “reproduction” of the following definition:
- “**‘reproduction’** means a copy made **[of a]** as contemplated by the Copyright Act, 1978 (Act No. 98 of 1978), and shall include a copy of an audiovisual fixation or a sound recording of a performance;” and
- (j) by the insertion after the definition of “~~reproduction~~ traditional work” of the following definitions:
- “**‘sound recording’** means any fixation or storage of sounds, or data or signals representing sounds, capable of being reproduced, but does not include a sound-track associated with an audiovisual fixation;
- ‘Tribunal’** means the Intellectual Property Tribunal established in terms of section 29 of the Copyright Act, 1978 (Act No. 98 of 1978);”.

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—

- (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, during the circumstances contemplated in subsection (1) and after the transfer of ~~these~~ his or her economic rights, as regards his or her live performances or performances fixed in audiovisual fixations or sound recordings, have the right—

- (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
- (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 or sound recordings.

(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 either the economic rights granted in terms of this ~~section~~ Act or ~~other relevant~~ provisions of the Copyright Act.

(4) A performer shall enjoys the following exclusive rights of authorising, as regards his or her performances—:

- (a) ~~T~~he broadcasting and communication to the public of his or her unfixed performances except where the performance is already a broadcast performance against payment of royalties or equitable remuneration;
- (b) the fixation of his or her unfixed performances in an audiovisual fixation or a sound recording;
- (c) the direct or indirect reproduction of his or her performances that are fixed in audiovisual fixations or sound recordings, in any manner or form;
- (d) the making available to the public of the original and copies of his or her performances fixed in audiovisual fixations or sound recordings 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 or sound recordings, 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 or sound recordings, 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~~ his or her performances, fixed in audiovisual fixations or sound recordings against payment of royalties or equitable remuneration; and
- (h) distributing the original or a copy of an audiovisual fixation or sound recording to the public.’.

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

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

“Transfer of rights

3A. (1) Where a performer has consented to fixation of his or her performance in an audiovisual fixation or sound recording, the exclusive rights of authorisation granted to a performer in terms of section 3(4)(c), (d), (e), (f), and (g) and (h) shall be ~~owned or exercised by, or~~ transferred to the ~~copyright owner~~ producer of such audiovisual fixation or sound recording, or his or her licensee.—

(2) Any consent contemplated in subsection (1) must be contained in a ~~subject to a prescribed~~ written ~~contractual~~ agreement ~~with~~ between the performer and the producer.

(3) The written agreement contemplated in subsection (2)—

(a) must at least contain the compulsory and standard contractual terms as may be prescribed;

(b) must set out the ~~which shall give the performer the right to receive~~ royalties or a ~~fair~~ equitable remuneration, whichever applicable, ~~due and payable to the performer~~ for any use of the ~~fixation of the performance~~; and

(c) ~~Provided that such agreement between the parties~~ shall be valid for a period of up to 25 years from the date of commencement of ~~the that~~ agreement in the case of a ~~sound recording~~, where after the exclusive rights contemplated in subsection (1) ~~reverts to the performer and may be novated by mutual consent.~~

Protection of rights of producers of ~~phonograms~~ sound recordings

3B. (1) A producer of a ~~phonogram~~ sound recording, who is also the owner of copyright in that sound recording, ~~shall~~ enjoys the exclusive right of ~~authorising—~~

(a) the direct or indirect reproduction of his or her ~~phonogram~~ sound recording in any manner or form;

(b) the making available to the public of the original and copies of his or her ~~phonogram~~ sound recording through sale or other transfer of ownership;

(c) the commercial rental to the public of the original and copies of his or her ~~phonogram~~ sound recording 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~~ sound recording 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 ~~the producer of a sound recording, who is also the owner of~~ copyright ~~owner of a phonogram~~ in that sound recording, ~~shall~~ enjoy the right to ~~earn an~~ equitable share equal remuneration, subject to an agreement to the contrary, ~~to be approved~~

by the Minister for the direct or indirect use of the phonogram sound recording 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 ~~or where that performance is fixed, the applicable audiovisual fixation or sound recording~~, 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]** ~~an audiovisual fixation or sound recording that contains~~ a performance ~~or performance fixed in an audiovisual fixation~~ of such performer—
 - (aa) if the original ~~audiovisual~~ fixation ~~or the audiovisual fixation or sound recording], 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 ~~and is not excluded by section 8 from the necessity for consent of the performer;~~ **[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 ~~audiovisual~~ fixation **[or]** ~~audiovisual fixation or sound recording [of a reproduction thereof];~~ or
 - (cc) if the original ~~audiovisual~~ fixation ~~or audiovisual fixation or sound recording~~ 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 by wire or wireless means, the original performance of the performer and or copies of that performance fixed in an audiovisual fixation or sound recording through sale or otherwise of such a performer;~~
- ~~(v) commercially rent out to the public the original or a performance and copies copy of that the performance of the performer that is fixed in audiovisual fixation or sound recording of such a performer; or~~
- ~~(vi) make available communicate to the public the performance fixed in an audiovisual fixation or sound recording, 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~~
- ~~(vii) distribute the original or a copy an audiovisual fixation or sound recording that contains the performance of such a performer, to the public.”;~~

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

- “(b) by means of [a fixation] ~~or an~~ audiovisual fixation or sound recording of a performance published for commercial purposes, without payment of a royalty or equitable remuneration 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 original or a copy of the audiovisual fixation or sound recording of the performance; or
 - (v) commercially rent out the original or a copy of the audiovisual fixation or sound recording of the ~~such~~ performance.”;
- (c) by the insertion in subsection (1) after paragraph (b) of the following subsections:

“(1A) A person who for commercial purposes intends to—

- (a) broadcast or communicate to the public an unfixed performance of a performer or copies of that performance fixed in an audiovisual fixation or sound recording of a performer;
- (b) make a fixation of the unfixed performance of a performer or copies of that performance fixed in an audiovisual fixation or sound recording of a performer;
- (c) make a reproduction of a fixation of a performance of a performer or copies of that performance fixed in an audiovisual fixation or sound recording of a performer;
- (d) make available to the public by wire or wireless means the original performance of a performer ~~and~~ or copies of that performance fixed in an audiovisual fixation or sound recording through sale or otherwise of a performer;
- (e) commercially rent out to the public ~~the original performance and~~ copies of ~~that~~ the performance of a performer that is fixed in an audiovisual fixation or sound recording of such a performer;
- (f) make available ~~communicate~~ to the public the performance of a performer that is fixed in an audiovisual fixation or sound recording 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) distribute the original or a copy of an audiovisual fixation or sound recording that contains the performance of such a performer to the public; or
- (h) perform any act contemplated in subsection (1)(b).

must register that act in the prescribed manner and form and submit a complete, true and accurate report to the performer, producer, copyright owner, the indigenous community or collecting society, as the case may be, in the prescribed manner, for the purpose of calculating the royalties or equitable remuneration due and payable by that person.

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 15 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.”;~~

~~(1B) (a) Any person who intentionally fails to register an act or who intentionally fails to submit a report as contemplated in subsection (1A), shall be guilty of an offence.~~

~~(b) A person convicted of an offence under paragraph (a) shall be liable to a fine or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment, or if the convicted person is not a natural person, to a fine of a minimum of ten per cent of its annual turnover.~~

~~(c) For the purpose of paragraph (b), the annual turnover of a convicted person that is not a natural person at the time the fine is assessed is the total income of that person during the financial year during which the offence or the majority of offences, were committed, and if that financial year has not yet been completed, the financial year immediately preceding the offence or the majority of offences, under all transactions to which this Act applies.”.~~

(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 audiovisual fixation or audiovisual fixation or sound recording of his or her performance for broadcasting purposes, **[and] nor** the reproduction for broadcasting purposes of such audiovisual fixation or audiovisual fixation or sound recording.”;

(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 audiovisual fixation or audiovisual fixation or sound recording 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 producer for~~ of such audiovisual fixation or audiovisual fixation or sound recording to be made, the exclusive right to receive the royalties or fair equitable remuneration, whichever is applicable, contemplated in subsection (1)(b) in respect of any broadcast, transmission, sale, commercially renting out, distribution or communication of such **[fixed performance]** audiovisual fixation or sound recording: Provided that the performer is entitled to share in any **[payment]** royalties or equitable remuneration received by the **[person who arranges for]** ~~copyright owner producer for~~ of the fixation, in the manner agreed upon between the performer and the **[person who arranges]** ~~copyright owner producer~~ for such audiovisual fixation or sound recording, or between their **[representative]** respective 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)]**.”; and
- (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, distributes or causes communication of the performance to pay a royalty or fair equitable remuneration, whichever is applicable, to the performer or owner of [any] performer or owner of the copyright subsisting in that audiovisual fixation or audiovisual fixation or sound recording, 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 or sound recording~~ of a performance or a reproduction of such a **[fixation]** ~~or audiovisual fixation or sound recording~~ may be used without the consent required by section 5, if it is for—
- (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 regarded as exceptions

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 an audiovisual fixation or sound recording** of a performance and reproductions of such fixation without the consent required by section 5, provided that, unless otherwise stipulated, the **[fixa**tion**] or audiovisual fixation or sound recording** 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].**”.

Amendment of section 8D of Act 11 of 1967 as inserted by section 2 of Act 28 of 2013

6. Section 8D of the principal Act is hereby amended by the addition of the following subsections:

“(3) The Minister must make regulations prescribing compulsory and standard contractual terms to be included in agreements to be entered in terms of this Act, which contractual terms must include—

- (a) The rights and obligations of the performer and the relevant producer, broadcaster or user;
- (b) the royalties or equitable remuneration payable to the performer agreed on as the case may be;
- (c) the method and period within which any royalty or equitable remuneration must be paid by the relevant producer, broadcaster or user, to the performer;
- (d) the period of the agreement;
- (e) a dispute resolution mechanism; and
- (f) provision for both parties to sign the written agreement as proof of consensus.

(4) The Minister may prescribe guidelines for a performer to grant consent under this Act.”.

Insertion of sections 8AE and 8BF in Act 11 of 1967

7. The principal Act is hereby amended by the insertion after section 8D 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.’’.~~

‘‘Prohibited conduct in respect of technological protection measures

8E. (1) No person may make, import, sell, distribute, rent out, offer or expose for sale, rental or advertise for sale a technological protection measure circumvention device if such a person knows or has reason to believe that it will or is likely to be used to infringe the right of a performer in respect of a performance that is fixed in a technologically protected audiovisual fixation or sound recording.

(2) No person may provide a service to any other person if—

(a) such other person intends to use the service to circumvent an effective technological protection measure in an audiovisual fixation or sound recording; or

(b) such person knows or has reason to believe that the service will or is likely to be used by another person to infringe copyright or the right of a performer in a technologically protected audiovisual fixation or sound recording.

(3) No person may publish in the Republic information enabling or assisting another person to circumvent an effective technological protection measure with the specific intention of inciting that other person to unlawfully circumvent a technological protection measure.

(4) No person may, during the subsistence of the right of a performer in respect of a performance that is fixed in a technologically protected audiovisual fixation or sound recording and without a licence of that performer and the owner of copyright in the relevant work, circumvent an effective technological protection measure applied to such work.

(5) A technological protection measure shall be deemed to be effective if the use of the audiovisual fixation or sound recording is controlled by the exclusive licensee, producer or copyright owner in such work through the application of an access control or protection process, such as encryption, scrambling or other transformation of the work or a copy control mechanism which achieves the protection objective.

(6) The provisions of this section must be read together with the provisions of sections 86, 87 and 88 of the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002).

Exceptions in respect of technological protection measure

8F. (1) For the purposes of this Act and of section 86 of the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002), nothing in this Act shall prevent any person from using a technological protection measure circumvention device

applied to an audiovisual fixation or sound recording to perform any of the following:

- (a) An act permitted in terms of any exception provided for in this Act or the Copyright Act; or
 - (b) the sale, offer to sell, procurement for use, design, adaptation for use, distribution or possession of any device or data, including a computer program or a component, which is designed primarily to overcome security measures for the protection of data in order to enable the performance of any act permitted in terms of paragraph (a).
- (2) A person who wishes to circumvent a technological protection measure so as to perform a permitted act contemplated in subsection (1) but cannot practically do so because of such technological protection measure, may—
- (a) apply to the performer and the copyright owner for assistance to enable such person to circumvent such technological protection measure in order to perform such permitted act; or
 - (b) if either the copyright owner, or the performer has refused such person's request or has failed to respond to it within reasonable time, engage the services of any other person for assistance to enable such person to circumvent such technological protection measure in order to perform such permitted act.
- (3) A person engaging the services of another person for assistance to enable such person or user to circumvent a technological measure in terms of subsection (2)(b) shall maintain a complete record of the particulars of the—
- (a) other person, including his or her name, address and all other relevant information necessary to identify him or her; and
 - (b) purpose for which the services of such other person has been engaged.

Prohibited conduct in respect of copyright management information

8G. No person may—

- (a) in respect of any copy of an audiovisual fixation or sound recording, remove or modify any copyright management information; and
- (b) make, import, sell, rents out, offer or expose for sale, advertise for sale or rental or communicate to the public an audiovisual fixation or sound recording or a copy of an audiovisual fixation or sound recording, if any copyright management information has been removed or modified without the authority of the copyright owner and performer.

Exceptions in respect of copyright management information

8H. The prohibition in section 8G does not apply if a person—

- (a) is authorized by the performer and copyright owner to remove or modify the copyright management information;
- (b) does not know and has no reason to believe that the removal or modification of the copyright management information will induce, enable, facilitate or conceal an infringement of the copyright or any right of the performer in the audiovisual fixation or sound recording; or
- (c) does not know or has no reason to believe that the copyright management

information has been removed or modified without the authority of the performer and copyright owner.”.

Amendment of section 9 of Act 11 of 1967 as amended by section 23 of Act 38 of 1997

8. Section 9 of the principal Act is hereby amended—
- (a) by the substitution in subsection (1), for paragraph (b) of the following subsection:
 “(b) who knowingly sells or **[lets for hire] rents out**; or distributes for the purposes of trade, or by way of trade exposes or offers for sale or **[hire] rental**, any fixation of a performance or a reproduction of such a fixation made in contravention of section 5; or”;
 - (b) by the insertion at the end of paragraph (c) of “or”;
 - (c) by the insertion in subsection (1) after paragraph (c) of the following paragraph:
 “(d) who knowingly contravenes the provisions of sections 8E, F, G or H.”;
 - (d) by the deletion in subsection (1), at the end of subparagraph (ii) of “and”;
 - (e) the substitution at the end of subparagraph (iii) for “.” of “and”; and
 - (f) by the addition in subsection (1) after subparagraph (iii) of the following subparagraph:
 “(iv) in the case of a contravention of paragraph (d), to a fine or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.”

Amendment of certain expressions in Act 11 of 1967

9. The principal Act, is hereby amended by the substitution for the expression—
- (a) of “phonogram” where it appears in the Act, of the expression of “sound recording”;
 - (b) of “fixation” wherever the context of the sentence in which the word appears refers to a sound recording, of “sound recording”.

Transitional provisions

10. (a) Until the date of commencement of section 1 of the Intellectual Property Laws Amendment Act, 2013 (Act No. 28 of 2013)—
- (i) **‘artistic works’** have the meaning assigned to it in the Copyright Act in so far as such works are capable of being performed, and include musical, dramatic, dramatico-musical works and traditional works;
 - (ii) **‘Commission’** means the Commission established in terms of section 185 of the Companies Act, 2008 (Act No. 71 of 2008);
 - (iii) **‘Copyright Act’** means the Copyright Act, 1978 (Act No. 98 of 1978);
 - (iv) **‘derivative indigenous work’** means any work forming the subject of this Act, applied to any form of indigenous work recognised by an indigenous community as having an indigenous or traditional origin, and a substantial part of which, was derived from indigenous cultural expressions or knowledge irrespective of whether such derivative indigenous work was derived before or after the commencement of the Intellectual Property Laws Amendment Act, 2013;
 - (v) **‘dramatic works’** have the meaning assigned to it in the Copyright Act in so far as such works are capable of being performed, and include musical, dramatic, dramatico-musical works and traditional works;
 - (vi) **‘indigenous community’** means any recognisable community of people

originated in or historically settled in a geographic area or areas located within the borders of the Republic, as such borders existed at the date of commencement of the Intellectual Property Laws Amendment Act, 2013, characterised by social, cultural and economic conditions which distinguish them from other sections of the national community, and who identify themselves and are recognised by other groups as a distinct collective;

- (vii) **‘indigenous cultural expressions or knowledge’** means any form, tangible or intangible, or a combination thereof, in which traditional culture and knowledge are embodied, passed on between generations, and tangible or intangible forms of creativity of indigenous communities, including, but not limited to—
 - (aa) phonetic or verbal expressions, such as stories, epics, legends, poetry, riddles and other narratives, words, signs, names or symbols;
 - (bb) musical or sound expressions, such as songs, rhythms, or instrumental music, the sounds which are the expression of rituals;
 - (cc) expressions by action, such as dances, plays, ceremonies, rituals, expressions of spirituality or religion, sports, traditional games, puppet performances, and other performances, whether fixed or unfixed; or
 - (dd) tangible expressions, such as material expressions of art, handicrafts, architecture, or tangible spiritual forms, or expressions of sacred places;
 - (viii) **‘indigenous work’** means a literary, artistic or musical work with an indigenous or traditional origin, including indigenous cultural expressions or knowledge which was created by persons who are or were members, currently or historically, of an indigenous community and which literary, artistic or musical work is regarded as part of the heritage of such indigenous community;
 - (ix) **‘literary works’** have the meaning assigned to it in the Copyright Act in so far as such works are capable of being performed, and include musical, dramatic, dramatico-musical works and traditional works;
 - (x) **‘musical works’** have the meaning assigned to it in the Copyright Act in so far as such works are capable of being performed, and include musical, dramatic, dramatico-musical works and traditional works;
 - (xi) **‘prescribe’** means prescribe by regulation in terms of this Act and **‘prescribed’** has a corresponding meaning; and
 - (xii) **‘traditional work’** includes a derivative indigenous work, an indigenous work and expressions of folklore.
- (b) Until the date of commencement of the Intellectual Property Laws Amendment Act, 2013 (Act No. 28 of 2013) section 8D of the principal Act will be deemed to be operational: Provided that the Minister may only make the regulations contemplated in section 8D(3) and (4) as added by the Performers Protection Amendment Act, 2019.

Short title and commencement

711. This Act is called the Performers’ Protection Amendment Act, 2016⁹, and shall come into operation on a date fixed by the President by proclamation in the *Gazette*.

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 or sound recordings. 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).

