

REPUBLIC OF SOUTH AFRICA

PERFORMERS' PROTECTION AMENDMENT BILL

(As presented by the Portfolio Committee on Trade and Industry)
(The English text is the official text of the Bill.)

(MINISTER OF TRADE AND INDUSTRY)

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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.

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 1 of Act 38 of 1997, 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— 5

(a) by the insertion after the definition of "artistic works" 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;" 10

- (b) by the substitution for the definition of “broadcast” of the following definition:
- “**‘broadcast’** 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; 5
- (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;” 10
- (c) by the deletion of the definition of “cinematograph film”;
- (d) by the insertion after the definition of “Commission” of the following definition:
- “**‘communication to the public’**—
- (a) 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; and 15
- (b) of a 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 sound recording;” 20
- (e) by the insertion after “Copyright Act” of the following definition:
- “**‘copyright management information’** has the meaning assigned to it in the Copyright Act;” 25
- (f) by the deletion of the definition of “fixation”;
- (g) 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]** audiovisual fixation, by the use of a record, broadcasting, rebroadcasting or transmission in a diffusion service, and “**perform**” has a corresponding meaning;” 30 35
- (h) 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, artistic works, dramatic works, **[or works of joint authorship]** or traditional works as contemplated in the Copyright Act;” 45
- (i) by the deletion of the definition of “phonogram”;
- (j) 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;” 50
- (k) by the substitution for the definition or “reproduction” of the following definition:
- “**‘reproduction’** means a copy made **[of a]** as contemplated by the Copyright Act, and includes a copy of an audiovisual fixation or a sound recording of a performance;” 55
- (l) by the insertion after the definition of “reproduction” 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; **‘technologically protected work’** has the meaning assigned to it in the Copyright Act;” 60

- ‘**technological protection measure**’ has the meaning assigned to it in the Copyright Act;
‘**technological protection measure circumvention device**’ has the meaning assigned to it in the Copyright Act;” and
(m) by the insertion after the definition of “traditional work” of the following definition:
“ ‘**Tribunal**’ means the Tribunal established in terms of section 29 of the Copyright Act;”.

Substitution of section 3 of Act 11 of 1967

2. The following section is hereby substituted for section 3 of the principal Act: 10

“**Protection of performers’ moral and economic rights [in respect of performers in the Republic]**”

3. (1) Performers shall be granted the protection provided for in section 5 of this Act in respect of their performances—

- (a) taking place; 15
- (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 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 25
- (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. 30

(3) The rights granted to a performer in accordance with subsection (2) shall, after a performer’s death, be maintained until the expiry of the economic rights granted in terms of this Act or other relevant provisions of the Copyright Act.

(4) A performer enjoys the following exclusive rights of authorising, as regards his or her performances: 35

- (a) The 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; 40
- (b) the fixation of his or her unfixed performances in an audiovisual fixation or a 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; 45
- (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 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; 50
- (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; 55
- (g) the broadcasting and communication to the public of 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), (g) and (h) shall be transferred to the 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 written agreement 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 royalties or equitable remuneration, whichever applicable, due and payable to the performer for any use of the fixation of the performance; and
- (c) shall be valid for a period of up to 25 years from the date of commencement of that agreement in the case of a sound recording, where after the exclusive rights contemplated in subsection (1) reverts to the performer.

Protection of rights of producers of sound recordings

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

- (a) the direct or indirect reproduction of his or her sound recording in any manner or form;
- (b) the making available to the public of the original and copies of his or her 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 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 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 in that sound recording, enjoy the right to share equal remuneration, subject to an agreement to the contrary, for the direct or indirect use of the sound recording published for commercial purposes, for broadcasting or for communication to the public.”.

Amendment of section 5 of Act 11 of 1967, as substituted 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 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 of such performer; [or]