

INTELLECTUAL PROPERTY LAWS AMENDMENT BILL, 2008

GENERAL EXPLANATORY NOTICE

[] Words in bold type in square brackets indicate deletions from existing provisions.

_____ Words underlined with solid lines indicate insertions into existing provisions.

BILL

To amend the Performers' Protection Act, 1967, so as to amend certain definitions and insert new definitions; to provide for the recognition of indigenous or traditional expressions of culture or knowledge as performances under the Act, the fixation thereof and the making of indigenous and cultural works as a result thereof; to provide for the payment of royalty in respect of such performances, the reproduction of fixations thereof and the reproduction of indigenous and cultural works made as a result thereof; to amend the Copyright Act, 1978, so as to insert new definitions; to provide for collecting societies for performers of indigenous or traditional expressions of culture or knowledge, to provide for moral rights in indigenous or traditional expressions of culture or knowledge under the Act; and to provide for matters incidental thereto.

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

Amendment of section 1 of Act 11 of 1967

1. Section 1 of the Performers' Protection Act, 1967, is hereby amended-

- (a) by the insertion in subsection (1) after the definition of '**collecting society**' of the following definitions:

"**community trust**' means -

- (a) a trust registered in terms of the Trust Property Control Act, 1988 (Act No. 57 of 1988), or
- (b) a company incorporated under the Companies Act, 1973 (Act No. 61 of 1973), or an association incorporated under section 21 of that Act, or
- (c) a co-operative incorporated under the Co-operatives Act, 2005 (Act No. 14 of 2005), or
- (d) a non-profit organisation registered in terms of the Non-Profit Organisations Act, 1997 (Act No. 71 of 1997),

which in each case has been established by the members of, or for, a community which has an indigenous or traditional expression of culture or knowledge for the purpose of collecting royalties in terms of section 5A of this Act and applying such royalties for the benefit of that community, including the performer to whose performance or indigenous or traditional work the permission relates;

'**expression of culture or knowledge**' includes expressions of folklore and can be made by way of: -

- (a) verbal expressions, such as stories, epics, legends, poetry, riddles and other narratives, words signs and symbols;
 - (b) musical expressions, such as songs and instrumental music;
 - (c) expressions by action, such as dances, plays, ceremonies, rituals and other performances;
 - (d) instruction as to how to carry out an action to achieve a specified result;"
- (b) by the insertion in subsection (1) after the definition of '**fixation**' of the following definitions:

"**indigenous or traditional expression of culture or knowledge**' means a creative expression of culture or knowledge which is generally recognised as a distinct traditional heritage of, and maintained, used and developed by, an indigenous or traditional community living within the borders of the Republic, which existed as a living community on or before 19 June 1913 and which continues to exist as a living community at the time of the performance concerned;

'indigenous or traditional work' means a literary or artistic work made by the performer of an indigenous or traditional expression of culture or knowledge as the sole and immediate result of his performance, which literary or artistic work:

- (a) is not made by an industrial process, and
- (b) is not original, as meant in the Copyright Act, 1978 (Act No. 98 of 1978), and
- (c) is or was not the subject of a patent in terms of the Patents Act, 1978 (Act No. 58 of 1978) or any predecessor of that Act, and
- (d) is or was not the subject of a registered design in terms of the Designs Act, 1993 (Act No. 195 of 1993) or any predecessor of that Act,

such as productions of art, in particular, drawings, designs, paintings (including body painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalwork, jewellery, baskets, needlework, textiles, glassware, carpets, costumes, handicrafts or musical instruments;"

- (c) by the substitution in subsection (1) for the definition of '**literary and artistic works**' of the following definition:

"'literary and artistic works' includes musical, dramatic and dramatic-musical works and any expression of culture or knowledge [expressions of folklore];"

- (d) by the insertion in subsection (1) after the definition of '**performer**' of the following definition:

"'performer of an indigenous or traditional expression of culture or knowledge' means a natural person who is a member of a community which has a certain indigenous and traditional expression of culture or knowledge, who performs, tells, exercises or implements that indigenous or traditional expression of culture or knowledge in a way that is observed by a person who is not a member of that community, including the making of an indigenous or traditional work;"

- (e) by the insertion in subsection (1) after the definition of '**reproduction**' of the following definition:

"'trustee of a community trust' means a natural person who holds a fiduciary position in a community trust and is authorised to represent it, and who is, in the case of a community trust which is –

- (a) a trust, a trustee, or
- (b) a company or an association incorporated under section 21 of the Companies Act, 1973, a director, or

- (c) a co-operative, a director, or
- (d) a non-profit organisation, an office bearer.”
- (f) by the insertion after subsection (2) of the following subsection:
 - “(3) The provisions of sections 3, 4, 6, 9, 10, 12 and 13 shall apply *mutatis mutandis* to performers of an indigenous or traditional expression of culture or knowledge inasmuch as they apply to performers.”

Insertion of section 5A in Act 11 of 1967

2. The following section is hereby inserted in the Performers' Protection Act, 1967, after section 5:

“Restrictions on use of performances of indigenous or traditional expression of culture or knowledge

- 5A. (1) Subject to the provisions of this Act, no person shall without payment of a royalty -
- (i) broadcast or communicate to the public an unfixed performance of a performer of an indigenous or traditional expression of culture or knowledge 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 of an indigenous or traditional expression of culture or knowledge; or
 - (iii) make a reproduction of a fixation of a performance of such performer of an indigenous or traditional expression of culture or knowledge -
 - (aa) if the original fixation, other than a fixation excluded by section 8A from the necessity for obtaining the consent of the performer of an indigenous or traditional expression of culture or knowledge, 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 of an indigenous or traditional expression of culture or knowledge 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 8A, and the reproduction is made for purposes not covered by those provisions; or

- (iv) make a reproduction of an indigenous or traditional work made by such performer of an indigenous or traditional expression of culture or knowledge; or
 - (v) broadcast a fixation of a performance published for commercial purposes;
 - (vi) cause a performance published for commercial purposes 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
 - (vii) cause any communication of a performance published for commercial purposes to the public.
- (2) The royalty in terms of subsection (1) shall be payable to the performer of an indigenous or traditional expression of culture or knowledge concerned, or, if a community trust has been established for him or her in terms of subsection 5A(4), to that community trust, or, if he or she is one of several performers as contemplated in subsection 6(1) and no community trust has been established for them, to the manager or authority in charge, or, if a collective society represents any of them, to the collective society.
- (3) (a) The amount of any royalty contemplated in subsection (1) shall be determined by an agreement between the performer of an indigenous or traditional expression of culture or knowledge or, if a community trust has been established for him or her in terms of subsection 5A(5), to that community trust, and the person who broadcasts or transmits, or causes communication of, the performance, as the case may be, or between their respective 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 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).
- (4) A performer of an indigenous or traditional expression of culture or knowledge or a group of performers of an indigenous or traditional expression of culture or knowledge who are of the same community may participate in the establishment of a community trust, which will receive any royalties due under this section 5A.
- (5) A performer of an indigenous or traditional expression of culture or knowledge shall not be liable for any royalties under this section 5A for any

of the acts contemplated therein from any other performer of the same indigenous or traditional expression of culture or knowledge or from any community trust.”

Amendment of section 7 of Act 11 of 1967

3. Section 7 of the Performers’ Protection Act, 1967, is hereby amended by renumbering the existing section as subsection (1) and inserting after subsection (1) the following subsection:

“(2) The right to a royalty in respect of the use of a performance of an indigenous or traditional expression of culture or knowledge or the reproduction of an indigenous or traditional work as provided for in section 5A shall commence upon the day of the performance or on which the indigenous or traditional work was first made available to the public, and shall continue for a period of 50 years calculated from the end of the calendar year in which the performance took place or the indigenous or traditional work was made available, as the case may be.”

Insertion of section 8A in Act 11 of 1967

4. The following section is hereby inserted in the Performers’ Protection Act, 1967, after section 8:

“Exceptions from requirement of payment of a royalty to a performer of an indigenous or traditional expression of culture or knowledge

8A. (1) A performance of an indigenous or traditional expression of culture or knowledge, a fixation of such a performance or a reproduction of such a fixation may be used, and a representation of an indigenous or traditional work may be made, by members of a community of which that indigenous or traditional expression of culture is generally recognised as its traditional heritage, for the purpose of the normal use and development of that indigenous or traditional expression of culture or knowledge.”

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

- (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 purpose of teaching or scientific research; or

(d) if it is for the purpose of legal proceedings.

Amendment of section 9 of Act 11 of 1967

5. Section 9(1) of the Performers' Protection Act, 1967, is hereby amended by replacing –

(a) the term “section 5(1)” with “section 5(1) or 5A(1)”, and

(b) the term “section 5” with “section 5 or 5A”,

wherever they appear.

Amendment of section 1 of Act 98 of 1978

6. Section 1 of the Copyright Act, 1978, is hereby amended:

(a) by the insertion in subsection (1) after the definition of ‘**collecting society**’ of the following definition:

“**community trust**’ means a community trust as meant in section 1 (1) of the Performers’ Protection Act, 1967 (Act No. 11 of 1967);”

(b) by the addition in subsection (1) after the definition of ‘**exclusive licence**’ of the following definitions:

“**expression of culture or knowledge**’ includes expressions of folklore and can be made by way of: -

(a) verbal expressions, such as stories, epics, legends, poetry, riddles and other narratives, words signs and symbols;

(b) musical expressions, such as songs and instrumental music;

(c) expressions by action, such as dances, plays, ceremonies, rituals and other performances;

(d) instruction as to how to carry out an action to achieve a specified result;

‘**indigenous or traditional expression of culture or knowledge**’ means a creative expression of culture or knowledge which is generally recognised as a distinct traditional heritage of, and maintained, used and developed by, an indigenous or traditional community living within the borders of the Republic,

which existed as a living community on or before 19 June 1913 and which continues to exist as a living community at the time of the performance concerned;

'indigenous or traditional work' means a literary or artistic work made by the performer of an indigenous or traditional expression of culture or knowledge as the sole and immediate result of his performance, which literary or artistic work:

- (a) is not made by an industrial process, and
- (b) is not original, as meant in the Copyright Act, 1978 (Act No. 98 of 1978), and
- (c) is or was not the subject of a patent in terms of the Patents Act, 1978 (Act No. 58 of 1978) or any predecessor of that Act, and
- (d) is or was not the subject of a registered design in terms of the Designs Act, 1993 (Act No. 195 of 1993) or any predecessor of that Act,

such as productions of art, in particular, drawings, designs, paintings (including body painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalwork, jewellery, baskets, needlework, textiles, glassware, carpets, costumes, handicrafts or musical instruments;"

Amendment of section 2 of Act 98 of 1978

7. Section 2 of the Copyright Act, 1978, is hereby amended by the substitution of subsection (3) of the following subsection:

“(3) A work shall not be ineligible for copyright by reason only that the making of the work, or the doing of any Act in relation of the work, involved an infringement of copyright in some other work or contained an indigenous or traditional expression of culture or knowledge or a reproduction of an indigenous or traditional work.”

Amendment of section 9A of Act 98 of 1978

8. Section 9A of the Copyright Act, 1978, is hereby amended by –
- (a) the substitution in subsection (2) of the term “section 5 of the Performers’ Protection Act, 1967 (Act No. 11 of 1967)” with “section 5 or 5A of the Performers’ Protection Act, 1967 (Act No. 11 of 1967)”, wherever it appears;
 - (b) the insertion after subsection (2) of the following subsection:

“(2A) The amount of any royalty due to a performer of an indigenous or traditional expression of culture or knowledge in terms of section 5A of the Performers’ Protection Act, 1967 (Act No. 11 of 1967) shall be paid to that performer or, if a community trust has been established for him or her, to his or her community trust. One or more community trusts and/or one or more performers of indigenous or traditional expression of culture or knowledge may establish or become members of or contract with a collecting society to negotiate agreements for royalties and collect royalties on their behalf, in which case such collecting society will represent such community trusts and performers as an exclusive agent, and any royalty due to such a performer or community trust shall be made to such representative collecting society.”

Insertion of section 19C in Act 98 of 1978

9. The following section is hereby inserted in the Copyright Act, 1978, after section 19B:

“General exceptions regarding protection of works containing indigenous or traditional expression of culture or knowledge

19C. The copyright in any work containing an indigenous or traditional expression of culture or knowledge shall not be infringed by the performance of that work by a person to whom that indigenous or traditional knowledge or expression of culture has been imparted by virtue of being a member of the community which has that indigenous or traditional expression of culture or knowledge.”

Amendment of section 20 of Act 98 of 1978

10. Section 20 of the Copyright Act, 1978, is hereby amended: -

(a) by the insertion after subsection (1) of the following subsection:

“(1A) A performer of an indigenous or traditional expression of culture or knowledge or who makes an indigenous or traditional work, as meant in paragraph (b) of the definition of “performer” in the Performers’ Rights Protection Act, 1967, or a community trust established for the community of which that performer is a member, shall have the right to state that that indigenous or traditional expression of culture or knowledge or traditional work originates from his community and to prevent any distortion, mutilation or other modification of, or other derogatory action in relation to, that indigenous or traditional expression of culture or knowledge or traditional work; Provided that a performer or a community trust may not prevent or object to

modifications to the use thereof in a cinematograph film or a television broadcast that are absolutely necessary on technical grounds.”

(b) by the substitution of subsection (2) of the following subsection:

“(2) Any infringement of the provisions for this section shall be treated as an infringement of copyright under Chapter 2, and for the purposes of the provisions of the said Chapter the author shall be deemed to be treated as the owner of the copyright in question in the case of an infringement of subsection (1), or, as the case may be, the indigenous or traditional expression of culture or knowledge or the indigenous or traditional work shall be deemed to be a literary or artistic work protected by copyright and the performer or community trust shall be treated as the owner of the copyright in the case of an infringement of subsection (1A).”

Transitional provisions

11. (1) This Act shall apply to performances of an indigenous or traditional expression of culture or knowledge and to the making of an indigenous or traditional work, irrespective of whether the relative performance or manufacture took place before or after the coming into operation of this Act.

(2) Section 5A shall not apply in respect of broadcasts, fixations and reproductions of fixations of an indigenous or traditional expression of culture or knowledge or to reproductions of an indigenous or traditional work, or to any literary and artistic works embodying or incorporating an indigenous or traditional expression of culture or knowledge or an indigenous or traditional work, which existed on the date of the coming into operation of this Act, or to further broadcasts or reproductions of such existing broadcasts, fixations and reproductions of such literary or artistic works or of any other use of literary or artistic works covered by any of the exclusive rights or rights of remuneration under the Copyright Act, 1978.

(3) Section 14 of the Performers' Protection Act, 1967, is hereby amended by the insertion after subsection (2) of the following subsections:

“(3) This Act shall apply to performances of an indigenous or traditional expression of culture or knowledge and to the making of an indigenous or traditional work, irrespective of whether the relative performance or manufacture took place before or after the coming into operation of the Intellectual Property Laws Amendment Bill, 2008.

(4) Section 5A shall not apply in respect of broadcasts, fixations and reproductions of fixations of an indigenous or traditional expression of culture or knowledge or to reproductions of an indigenous or traditional work, or to

any literary and artistic works embodying or incorporating an indigenous or traditional expression of culture or knowledge or an indigenous or traditional work, which existed on the date of the coming into operation of the Intellectual Property Laws Amendment Bill, 2008, or to further broadcasts or reproductions of such existing broadcasts, fixations and reproductions or such literary or artistic works or of any other use of literary or artistic works covered by any of the exclusive rights or rights of remuneration under the Copyright Act, 1978.”

Short title and commencement

12. This Act is called the Intellectual Property Laws Amendment Act, 2008, and comes into operation on the date fixed by the President by proclamation in the Gazette.