

BILL

To provide for the protection of Copyright and Related Rights ; to provide for the administration of Copyright and Related Rights ; to provide for the nature and extent of copyright; to provide for exceptions and limitations to copyright; to provide for rights of performers, producers sound recordings and audio-visual fixations and broadcasting organisations; to provide for expressions of folklore; to provide for transfer of ownership of copyright; to provide for infringement and remedies of Copyright and Related Rights ; to establish the Copyright and Related Rights Fund; to provide for collective management of Copyright and Related Rights ; to provide for the designation of Copyright and Related Rights tribunal; to repeal the Copyright and Neighbouring Rights Protection Act, 1994; and to provide for incidental matters.

(Introduced by the Minister of Industrialisation and Trade)

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PART 1
PRELIMINARY MATTERS

Definitions and interpretation

1. In this Act, unless the context otherwise indicates -

“accessible format copy” means a copy of a work or related subject matter -

- (a) in an alternative manner or form which gives a beneficiary person access to the work or related subject matter, including permit the person to have access as feasibly and comfortably as a person without visual impairment or other print disability; and

(b) that meets the requirement set out in section 33(3);

“adaptation”, in relation to -

(a) a dramatic work, includes conversion of the work from -

(i) non-dramatic form into dramatic form;

(ii) dramatic form into non-dramatic form;

whether the work is in its original language or not;

(b) a literary work, whether in a non-dramatic form or in a dramatic form, includes -

(i) a translation of the work;

(ii) a version of the work in which the story or action is conveyed solely or mainly by means of pictures in a form suitable for reproduction in a book or in a newspaper, magazine or similar periodical;

(c) a musical work, includes an arrangement or a transcription of the work, if such arrangement or transcription has an original creative character;

(d) an artistic work, includes a transformation of the work in such a manner that the original or substantial features thereof remain recognisable;

(e) a computer programme, includes -

(i) a version of the programme in which it is converted into or out of a computer language or code or into a different computer language or code;

(ii) a re-arrangement or altered version of the original programme;

- (iii) a fixation of the programme in or on a medium different from the medium of fixation of the programme;
- (f) a compilation of data, includes a rearrangement or altered version of the original compilation;

“artistic work”, irrespective of artistic quality or form, includes -

- (a) engravings, etchings, drawings, lithographs, paintings, woodcuts, products of photographs and prints;
- (b) photographs, not part of audio-visual works;
- (c) works of sculpture;
- (d) works of architecture in the form of buildings or models;
- (e) illustrations, maps, plans, charts, diagrams and three-dimensional works relative to geography, topography, architecture or science;
- (f) works of applied art;

“audio-visual fixation” means the embodiment of moving images, whether or not accompanied by sounds or by representations of sound, in a material form from which they can be perceived, reproduced or communicated through a device;

“audio-visual work” means a work that consists of a series of related images which impart the impression of motion when being used by machines or other devices, with or without accompanying sounds, regardless of the nature of the material objects, such as films, videotapes and videogames, in which they are embodied, but does not include a broadcast;

“author” means an author as described in section 14;

“authorised entity” means an entity that is recognised and authorised as such under section 33;

“beneficiary person” means a person who -

- (a) is blind;
- (b) has visual impairment or perceptual or reading disability and is unable to read printed works to the same degree as a person without such impairment or disability; or
- (c) is otherwise unable, through physical disability to hold, manipulate a book or focus or move the eyes to the extent that would be normally acceptable for reading,

regardless of any other disabilities;

“BIPA” means the Business and Intellectual Property Authority established by section 3 of the BIPA Act;

“BIPA Act” means the Business and Intellectual Property Authority Act, 2016 (Act No. 8 of 2016);

“Board” means the Board of BIPA constituted under section 8 of the BIPA Act;

“broadcast” means the transmission by wireless means of sounds or images, or both, or of representations the sounds or images, over a distance, for direct reception by the public and includes the -

- (a) transmission of encrypted signals where the means of decrypting are provided to the public by the broadcasting organisation or with its consent; and
- (b) emission of programme-carrying signals to a satellite;

“broadcaster” means any legal or natural person who provides a broadcasting service consisting of television or radio programmes for reception by the public or sections of the public or subscribers to such a service, irrespective of technology used;

“broadcasting organisation” means the Namibian Broadcasting Corporation established by section 2 of the Namibian Broadcasting Act, 1991 (Act No. 9 of 1991) or any other broadcasting organisation that holds a broadcasting licence issued under the Communications Act, 2009 (Act No. 8 of 2009) or any other law;

“building” means any permanent structure that has a roof and walls, and that is designed or intended for support, enclosure, shelter or protection of person, animals or property having a permanent roof that is supported by columns or walls;

“choreographic work” means a dance composition or design by a dance composer of dance patterns;

“collective management organisation” means any organisation or association of persons, recognised under section 72;

“communication to the public”, in relation to a work, a performance, sound recording, an audio-visual fixation or a broadcast, means the transmission to the public by any means, in such a way that it can be perceived by persons outside the normal circle of a family and its closest social acquaintances at a place or places so distant from the place where the transmission originates and that, without the transmission, the work, performance, sound recording, audio-visual fixation or broadcast would not be perceivable and, in the case of -

- (a) a sound recording, includes making the sounds or representations of sounds fixed in the sound recording audible to the public;
- (b) an audio-visual, includes making a performance fixed in the audio-visual audible or visible or both audible and visible to the public;

“computer” means an electronic or similar device having information-processing capabilities;

“computer programme” means a set of instructions whether expressed in words, codes, schemes or in any other form, which is capable, when incorporated in a medium that a computer can read, of causing a computer to perform or achieve a particular task or result;

“copy” means a reproduction of a work and, in the case of a literary, musical or an artistic work, an audio-visual work or a computer programme, also an adaptation thereof, but an object may not be taken to be a copy of a work of architecture unless the object is a building or a model of a building;

“copyright” means copyright under this Act;

“derivative work” means a work that constitutes an independent creation resulting from adaptation, translation, arrangement of an original work or other transformation of the work in relation to adaptation, translation, arrangement of the work;

“derived signal” means a signal obtained by modifying the technical characteristics of any signal which goes to a satellite, whether or not there have been one or more intervening fixations;

“diffusion service” means a telecommunication service of transmissions consisting of sounds, images, signs or signals, which takes place over wires or other paths provided by material substance and intended for reception by specific members of the public, but diffusion may not be considered -

- (a) to constitute a performance or a broadcast; or
- (b) as causing sounds, images, signs or signals to be seen or heard,

and where sounds, images, signs or signals are displayed or emitted by a receiving apparatus to which they are conveyed by diffusion in such manner as to constitute a performance or a causing of sounds, images, signs or signals to be seen or heard in public, they must be considered to be effected by the operation of the receiving apparatus;

“distribution”, in relation to -

- (a) a work, means the putting into circulation of the tangible original copies of the work, in any form through sale or other transfer of ownership, including importing for the purpose of such putting into circulation and public offering for sale and other transfer of ownership; and
- (b) a programme-carrying signal, means an operation by which a distributor transmits a derived signal to the public;

“distributor”, in relation to a programme-carrying signal, means the person who decides that the transmission of the derived signal to the public takes place;

“dramatic work” includes -

- (a) a choreographic work or entertainment in dumb show, if reduced to the material form in which the work or entertainment is to be presented; and
- (b) a scenario or script from an audio-visual work,

but does not include an audio-visual work;

“engraving” means the art of producing on hard material incised or raised patterns, lines or similar images, from which an impression or print is taken and includes any etching, lithograph, woodcut, print or similar work, but does not include a photograph;

“exclusive licence” means a license authorising a licensee, to the exclusion of all other persons, including the grantor of the licence, to exercise a right which by virtue of this Act would, apart from the licence, be exercisable exclusively by the owner of the copyright or related right;

“expressions of folklore” means any form, whether tangible or intangible, in which traditional culture and knowledge are expressed, appear, manifested, developed and preserved by the traditional communities of Namibia or by unidentified individuals of Namibia, and includes the following forms of expressions or combinations thereof:

- (a) verbal expressions, such as but not limited to stories, epics, legends, poetry, riddles and other narratives, words, signs, names, and symbols;
- (b) musical expressions, such as but not limited to songs and instrumental music;
- (c) expressions by movement, such as but not limited to dances, plays, rituals and other performances, whether or not reduced to a material or tangible form;
- (d) tangible expressions, such as productions of art, in particular, drawings, designs, paintings, including body-painting, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metal ware, jewellery, basketry, needlework, textiles, glassware, carpets, costumes and handicrafts;
- (e) traditional musical instruments; and
- (f) traditional architectural works;

“fixation” means the embodiment of sounds, images or both or of the representations of the sounds or images, in a material form, and sufficiently permanent and stable so as to enable the sounds or images to be perceived, reproduced or communicated through a machine or device;

“Fund” means the Copyright and Related Rights Fund established by section 60;

“implement” includes any machine, equipment, plate, stereotype, stone, block, mould, matrix, transfer, negative, record, disc, storage medium or any other device that may be used to make copies of a work or related subject matter;

“information systems” means a system of generating, sending, receiving, storing, displaying or otherwise processing data, including over digital networks and the internet;

“information system service” includes the provision of connections, the operation of facilities for information systems, the provision of access information systems, the transmission or

routing of data between or among points specified by a user and the processing and storage of data, at individual request of the recipient of the service;

“infringing copy” means a copy of a work or related subject matter produced by any process and in any form, the making of which involves infringement of copyright in the work or a related right;

“inspector” means an inspector designated or appointed under section 3;

“judicial proceedings” means proceedings before a court, tribunal or person having by law power to hear, receive and examine evidence on oath or affirmation;

“licence scheme”, in relation to licences of any description, means a scheme prepared by one or more collective management organisations recognised under section 72;

“literary works”, irrespective of literary quality or form, without limitation, includes -

- (a) novels, stories, or poetry works;
- (b) plays, stage directions, film scenarios or broadcasting scripts;
- (c) textbooks, treatises, histories, biographies, essays or articles;
- (d) letters, reports or memoranda;
- (e) lectures, addresses or speeches or similar works; and
- (f) computer programmes;

“make available to the public” means the making available to the public of a work or related subject matter by wire or wireless means in any form including an electronic database or a digital form, in such a way that members of the public may access them from a place and at a time individually chosen by them;

“Minister” means the Minister responsible for Industrialisation and Trade;

“musical work” means a work consisting of music, inclusive of any words or action intended to be sung, spoken or performed with the music and any graphical notation of such work;

“performance” means the presentation of a work, a related subject matter or an expression of folklore by such action as dancing, playing, reciting, singing, delivering, declaiming or projecting to listeners or spectators, live or by any means whatsoever;

“performer” means an actor, a singer, musician, dancer or other person who acts, sings, delivers, declaims, plays in, interprets or otherwise performs a work or expression of folklore and includes the conductor of a performance of any such work or expression of folklore;

“photograph” means a product of photolithograph and other work produced by any process analogous to photography, but does not include any part of an audio-visual work;

“prescribed” means prescribed by regulation made under section 87;

“producer of an audio-visual fixation” means the natural person or legal entity that undertakes the initiative and responsibility for making the first fixation of an audio-visual work;

“producer of a sound recording” means the natural person or legal entity that undertakes the initiative and responsibility for the first fixation of the sounds of a performance or other sounds or the representations of sounds;

“programme”, in relation to a programme-carrying signal, means a body of live or recorded material consisting of images or sounds, or both, embodied in a signal;

“programme-carrying signal” means a signal embodying a programme which is emitted and passes through a satellite;

“protected rights” means any of the rights whose violation would constitute an infringement as contemplated in sections 49, 50, 51 and 52;

“public display” means the showing of the original or a copy of a work or related subject matter -

- (a) directly;
- (b) by means of a film, slide, television image or otherwise on screen;
- (c) by means of any other device or process; or
- (d) in the case of an audio-visual work, the showing of individual images non-sequentially, at a place or places where persons outside the normal circle of a family and its closest social acquaintance are or can be present;

“public lending” means the transfer of the possession of the original or a copy of a work or a sound recording for a limited period of time for non-profit making purposes, by an institution, the services of which are available to the public, such as a public library, archive or museum;

“public performance” means a performance before a group of persons that goes beyond the normal circle of the family and closest social acquaintances of the person initiating the performance, and -

- (a) the case of a work other than an audio-visual work, includes the recitation, playing, dancing, acting or otherwise performing the work, either directly or by means of any device or process;
- (b) in the case of an audio-visual work, includes the showing of images in sequence and the making of accompanying sounds audible, either separately or in combination;
- (c) in the case of a sound recording, includes making the sounds or representations of sounds fixed in a sound recording audible;

- (d) in the case of works of expressions of folklore, includes dance, plays, acting, recitals, songs, declaiming or projection to an audience live or by any other means;

“publication” means making -

- (a) tangible copies of the work or related subject matter available to the public for sale, rent, public lending or for other transfer of ownership or possession of the copies such quantities as to satisfy the reasonable requirements of the public having regard to the nature of the work or related subject matter; and
- (b) available to the public of the work or related subject matter that took place with the consent of the author or other owner of copyright or related rights, but publication does not include -
 - (i) a performance of a musical work, dramatic work or an audio-visual work or a sound recording;
 - (ii) a public delivery of a literary work; and
 - (iii) a transmission in a diffusion service;
 - (iv) a broadcasting of a work;
 - (v) an exhibition of a work of art;
 - (vi) a construction of a work of architecture;

“published edition” means the first print by whatever process of a particular typographical arrangement of a literary or musical work;

“rebroadcasting” means the simultaneous or subsequent broadcasting in part or in whole by one broadcasting organisation of the broadcast of another broadcasting organisation;

“record” means a disc, tape, perforated roll or other device in or on which sounds are embodied so as to be capable of being automatically reproduced therefrom or performed;

“related rights” includes the rights granted to a performer, broadcasting organisation, producer of sound recordings or audio-visual fixations, and includes rights relating to expressions of folklore;

“related subject matter” includes expressions of folklore, performances, sound recordings, audio-visual fixations, broadcasts, typographical arrangements and fixations of any work or subject matter that may be subject to protection under this Act;

“rental” means the transfer of the possession or making available for use of the original or a copy of a work, sound recording or an audio-visual work for a limited period of time for direct or indirect commercial purposes;

“reproduction” means the making of one or more copies by any means, of a work or related subject matter, in whole or in part, and includes -

- (a) making a fixation from a performance or communication;
- (b) permanent or temporary storage in electronic form;
- (c) in the case of a literary or musical work or a broadcast, a reproduction in the form of a record or an audio-visual fixation;
- (d) in the case of an artistic work, converting a work into a three-dimensional form or, if existing in a three-dimensional form, converting it into a two-dimensional form; and
- (f) in the case a sound recording, making, directly or indirectly, a record embodying the recording;

“rights management information” means any information that identifies -

- (a) an author;
- (b) a work;
- (c) an expression of folklore;
- (d) a performer;
- (e) the performance of a performer;
- (f) the producer of a sound recording or an audio-visual fixation;
- (g) a sound recording or an audio-visual fixation;
- (h) a broadcast;
- (i) a broadcasting organisation;
- (j) a broadcaster;
- (k) owner of any right protected under this Act;
- (l) information about the terms and conditions of the use of the work, expression of folklore, performance, sound recording, audio-visual fixation, broadcast or typographical arrangement, and any numbers or codes that represent that information,

when any of these pieces of information -

- (i) is attached to a copy of a work, an expression of folklore, a fixed performance, sound recording, an audio-visual fixation, a broadcast or typographical arrangement; or
- (ii) appears in connection with the broadcasting, communication to the public or making available to the public or performance of a work, an expression of

folklore, a fixed performance, sound recording, an audio-visual fixation, a broadcast or a typographical arrangement;

“satellite” means a device in extra-terrestrial space capable of transmitting signals;

“sculpture” includes a cast or model made for the purposes of sculpture;

“service provider” means any person or entity providing an information system service or access software provider that provides or enables computer services and other digital networks access by multiple users to a computer server or digital system including connections for, the transmission or routing of data;

“signal” means an electronically generated carrier capable of transmitting programmes;

“sound recordings” means -

- (a) a fixation of sounds, from which the sounds may be reproduced; or
- (b) a fixation of the whole or any part of a literary, dramatic or musical work, from which the sounds are reproducing the work or part of it may be produced,

regardless of the medium on which the recording is made or the method by which the sounds are reproduced, but does not include a fixation incorporated in an audio-visual work as an integral part of the audio-visual work;

“tangible copy or form” means a fixed copy or form such that the copy or fixation can be put into circulation as a tangible object;

“technological protection measure” means any technology, product, device or component that, in the normal course of operation, is designed to -

- (a) prevent or restrict access to; or
- (b) prevent or restrict the doing of any acts or activities,

in respect of works or related subject matter, which access and acts or activities are not authorised by the right holder;

“this Act”, includes the regulations made under section 87;

“Tribunal” means the Copyright and Related Rights Tribunal established by section 76;

“work”, includes a literary, dramatic, musical, an artistic work, an audio-visual work and a derivative work, in the form of text notation or related illustrations whether published or otherwise made publicly available in any media;

“works of applied art” means an artistic work applied to objects for practical use whether handicraft or works produced on an industrial scale;

“work of joint authorship” means a work produced by the collaboration of two or more authors in which the contribution of each author is not separable from the contribution of the other author or authors; and

“writing” includes any form of notation, whether by hand or by printing, typewriting or a similar process.

(2) A reference in this Act to the doing of an act in relation to a work or related subject matter, must, unless the context otherwise indicates, be construed as a reference also to the doing of that act in relation to a substantial part of that work or subject matter.

(3) This Act, with reference to an act or omission outside the territorial limits of Namibia by or on a ship or aircraft registered under a law in Namibia, applies in the same manner as it applies with reference to acts or omissions within the territorial limits of Namibia.

PART 2

ADMINISTRATION

Functions of BIPA in relation to this Act

2. Without derogating from the functions and powers of BIPA conferred by section 5 of the BIPA Act, the functions of BIPA under this Act are to -

- (a) direct, co-ordinate and oversee the implementation of this Act and international conventions and agreements to which Namibia is party which relate to Copyright and Related Rights that are protected under this Act;
- (b) advise the Minister and other governmental agencies and institutions on the negotiation, conclusion and implementation of bilateral and multilateral conventions and agreements on Copyright and Related Rights ;
- (c) make recommendations to the Minister in regard to any amendments to this Act and advise the Minister on any matter referred to it by the Minister;
- (d) administer and enforce all matters of Copyright and Related Rights as provided for under this Act and to deal with ancillary matters connected with its functions under this Act;
- (e) recognise and register collective management organisations as provided for under this Act;
- (f) maintain the registers referred to in section 86 and enter into that register the matters specified in that section;
- (g) oversee and supervise the activities of collective management organisations as provided for under this Act;
- (h) develop and facilitate training programmes on Copyright and Related Rights ;

- (i) enlighten and inform the public on matters relating to Copyright and Related Rights ;
- (j) maintain an effective database on authors and their works and holders of other related rights and their rights; and
- (k) perform such other functions that BIPA is required to perform under this Act and as may be prescribed.

Inspectors

- 3. (1) BIPA may, for the purposes of enforcing the provisions of this Act -
 - (a) designate such number of staff members of BIPA; or
 - (b) appoint such other number of persons,

as may be necessary as inspectors and must issue to them, in writing or in such form as may be prescribed, certificates of authority to act as such inspectors.

(2) In addition to inspectors appointed under subsection (1), any member of the Board may perform the functions or exercise the powers of an inspector under this Act.

(3) Despite anything to the contrary in this Act or in any law, a member of the Namibian Police referred in section of the Police Act, 1990 (Act No. 19 of 1990) may, subject to such changes as may be necessary, perform the functions or exercise the powers of an inspector under this Act as if he or she were an inspector.

(4) A person appointed as an inspector holds office subject to such conditions as the BIPA may determine.

Powers of inspectors

4. (1) An inspector may, subject to Article 13 of the Namibian Constitution, at any reasonable time and on production of his or her certificate of authority, enter any premises, ship, aircraft or vehicle for the purpose search to ascertain whether there is or has been, on or in connection with such premises, ship, aircraft or vehicle any contravention of this Act.

(2) For the purpose of ascertaining whether there is or has been a contravention of this Act, an inspector may inspect -

- (a) any substance or implement appearing to him or her to be a work or related subject matter or thing subject to protection under this Act;
- (b) any container or package used or intended to be used to contain any work or related subject matter or thing subject to protection under this Act; or
- (c) any plant or implement appearing to him or her to be used or intended to be used in connection with the production, reproduction or otherwise manufacture of a work related subject matter or thing subject to protection under this Act.

(3) An inspector may search for and seize -

- (a) any substance or implement which he or she has reasonable cause to believe to be an infringing copy of any work or related subject matter;
- (b) any substance or implement in relation to which or by means of which he or she has reasonable cause to believe that an offence under this Act has been or is being committed; or ,
- (c) any document which he or she has reasonable cause to believe to be a document which may be required in proceedings under this Act.

(4) Where an inspector seizes any work, related subject matter or thing he or she must in writing, notify the person from whom it is seized the fact of that seizure and must in that notification specify any item seized.

- (5) A person who -
- (a) wilfully obstructs an inspector in the discharge of the inspector's duties;
 - (b) wilfully fails to comply with any requirement properly made to him or her by an inspector;
 - (c) without lawful or reasonable excuse fails to give to the inspector any assistance or information which the inspector may reasonably require of that person for the purpose of the performance of the inspector's duties under this Act; or
 - (d) in giving any such information as is mentioned in paragraph (c), makes any statement which he or she knows to be false or does not believe to be true,

commits an offence and is liable to a fine not exceeding N\$10 000 or to imprisonment for a period not exceeding 12 months or to both such fine and such imprisonment.

(6) In so far as this section provides for a limitation on the fundamental rights contemplated in Sub-Article (1) of Article 13 of the Namibian Constitution, in that it authorises interference with the privacy of a person's home, correspondence or communication, that limitation is enacted upon the authority of Sub-Article (2) of that Article.

Limitation of liability

5. The Minister, a member of the Board, the Registrar, an inspector or any other staff member of BIPA is not liable in respect of anything done or omitted to be done in good faith in the exercise of any power or the performance of any duty under this Act.

PART 3

COPYRIGHT

Scope of application

6. (1) Copyright protection under this Act must be extended to -
- (a) works of an author who is a citizen or permanent resident of Namibia or has his or her habitual residence in Namibia;
 - (b) works first published in Namibia;
 - (c) works first published in Namibia and also published in any of other country within 30 days of the first publication, irrespective of the nationality or residence of the author;
 - (d) audio-visual works, the maker or producer of which has his or her or its headquarters or habitual residence in Namibia; and
 - (e) works of architecture erected in Namibia and other artistic works incorporated in a building or another structure located in Namibia.

(2) The provisions of this Act also apply to works that are eligible for protection in any other country by virtue of, and in accordance with any international convention or other international agreement relating to copyright or related rights to which Namibia is party.

Eligibility for copyright

7. (1) Subject to the provisions of this Act, the following original works are eligible for copyright protection:

- (a) literary works;
- (b) dramatic works;
- (c) musical works;

- (d) artistic works;
- (e) audio-visual works;
- (f) sound recordings;
- (g) broadcasts; and
- (h) published editions;
- (i) programme-carrying signals.

(2) A work is entitled to protection under this Act irrespective of its content, quality and purpose.

(3) A work is eligible for copyright where -

- (a) it is in original character; or
- (b) a derivative work.

(4) A work, other than a broadcast or programme-carrying signal, is not, subject to Part 6, eligible for copyright unless it has been written down, recorded, represented in digital data or signals or otherwise reduced to material or tangible form.

(5) A broadcast or a programme-carrying signal is not eligible for copyright until -

- (a) in the case of a broadcast, the broadcast has been made; or
- (b) in the case of a programme-carrying signal, such signal has been transmitted by satellite.

(6) A work is not ineligible for copyright by reason only that the making of the work, or the doing of an act in relation to the work, constituted an infringement of copyright in any other work.

Derivative works

8. (1) The following derivative works, in so far as they constitute independent creations, are also eligible for protection under this Act -

- (a) translations, adaptations, arrangements and other transformations or modifications of works;
- (b) collections of works such as encyclopaedias, dictionaries, directories or anthologies, whether in machine -readable or other form or eligible for protection under this Act or not, which, by reason of the selection or arrangement of the contents, constitute intellectual creations;
- (c) compilations of data or other material, whether in machine -readable or other form, which, by reason of the selection or arrangement of the contents, constitute intellectual creations; and
- (d) collections of works derived from expressions of folklore.

(2) The protection of any work referred to in subsection (1) does not extend to the work or data concerned, and is without prejudice to any protection of a pre-existing work or expression of folklore incorporated in or utilized for the making of such a work.

Subject matter not eligible for copyright

9. Copyright protection does not extend to -
- (a) any idea, procedure, system, method of operation, concept, principle, discovery or mere data;

- (b) any written laws and decisions of courts and administrative bodies, as well as any official translation thereof;
- (c) decisions of courts and administrative bodies and official translations thereof;
- (d) political speeches delivered and speeches delivered during the course of legal proceedings, provided that the author of the speech is not precluded from making a collection of the speeches which is eligible for protection as derivative work under this Act;
- (e) news published, broadcast or communicated to the public by any other means.

Copyright for State and international organisations

10. (1) Copyright subsists in every work eligible for copyright and which is made by or under the direction or control of the State or such international organisations as may be prescribed.

(2) Copyright which vests in the State is for administrative purposes deemed to vest in such staff member in the public service or in any other person or entity as may be designated by the President by proclamation in the *Gazette*.

Economic rights of copyright holder

11. (1) Subject to the exceptions and limitations under this Act, the author or other owner of copyright has the exclusive right to do, or to authorise another person to do any of the following acts in relation to the work:

- (a) reproduction of the work in any material form including electronic and digital copies;
- (b) publishing the work if it was hitherto unpublished;
- (c) including the work in an audio-visual fixation or a television broadcast;

- (d) distribution of the original or a copy of the work by way of sale or other transfer of property;
- (e) public performance of the work;
- (f) broadcasting and rebroadcasting of the work;
- (g) public display of the work;
- (h) communication to the public of the work;
- (i) making available of the work to the public;
- (j) importation of the work;
- (k) rental of the original or copy of an audio-visual work, a computer programme or a work embodied in a sound recording;
- (l) make a derivative work out of the original work;
- (m) causing the work or a television or other programme, which includes the work, to be transmitted in a diffusion service, unless such service transmits a lawful television broadcast, including the work, and is operated by the original broadcaster;
- (n) in the case of a programme-carrying signal, the direct or indirect distribution of such signals by a distributor to the public in Namibia, or from Namibia; and
- (o) any of the actions in paragraphs (a) to (k) in relation to a derivative of the work.

(2) The right of distribution under subsection (1)(d) does not apply to the original or a copy of the work that has already been subject to a sale or other transfer of ownership in a

country contemplated in section 6(2) authorised by the owner of copyright or related right protected under this Act.

(3) The right of rental under subsection (1)(k) does not apply to rental of computer programmes where the programme itself is not the essential part of the rental.

(4) Copyright in a work of architecture also includes the exclusive right to control the erection of any building which reproduces the whole or a substantial part of the work either in its original form or in any form recognisably derived from the original, but copyright protection does not extend to the reconstruction of a building to which that copyright relates in the same style as the original.

Artist resale right

12. (1) Despite any assignment or sale of the original work, the author of an original artistic work or a manuscript of a work retains an inalienable right to a share of the proceeds of any sale or subsequent sale of the original artistic work or manuscript through a public auction, or through a dealer, whatever method used by the dealer to carry out the operation, after the first transfer of ownership.

(2) Subsection (1) does not apply to the subsequent sale of an architectural work or a work of applied art.

(3) The conditions for the exercise of the right conferred by this section, including the payable remuneration, are as prescribed.

(4) If a mark or name purporting to identify a person as an artist of an artwork appears on the artwork, it must be presumed in the absence of any other mark or evidence, that the person is the artist.

(5) Authors who are nationals of other countries and their successors in title enjoy the resale right in accordance with this Act provided the law in their country also provides for the resale right.

(6) The term of protection of the resale right last for as long as the work enjoys copyright protection under this Act.

Moral rights of authors

13. (1) Independently of the author's economic rights, and even after the transfer of such rights, the author has the exclusive right -

- (a) to claim authorship of the work, and to demand that his or her name or pseudonym be mentioned when any of the acts referred to in section 11(1) are done in relation to the work;
- (b) to object to, and seek relief, in connection with, any distortion, mutilation or other modification of, or derogatory action in relation to, the work, where such action would be prejudicial to his or her honour or reputation;
- (c) not to have his or her name or pseudonym mentioned as the author of the work or indicated on copies and in connection with any public use of the work, but an author -
 - (i) who authorises the use of his or her work in an audio-visual work or a television broadcast; or
 - (ii) of a computer programme or a work associated with a computer programme,

may not prevent or object to modifications that are necessary on technical grounds or for the purpose of commercial exploitation of the work.

(2) The author may waive the exercise of any of the moral rights mentioned in subsection (1), provided that such waiver is in writing and for specific uses.

(3) The waiver referred to in subsection section (2) is -

- (a) in the case of a work of joint authorship, required from each author; and
- (b) in the case of death of the author, exercisable by his or her successors in title.

(4) The rights referred to in subsection (1) are not transferable during the life of the author, but are transferable by testamentary disposition or by operation of law following the death of the author.

Authorship of works

14. (1) An author in relation to -

(a) a literary, musical work or an artistic work, other than a photograph, which is -

(i) not computer-generated, means the person who first makes or creates the work; or

(ii) computer-generated,

means the person by whom the arrangements necessary for the creation of the work were undertaken;

(b) photograph, means the person who is responsible for the composition of the photograph;

(c) a sound recording, means the person by whom the arrangements for the making of the sound recording were made;

(d) an audio-visual work, means the person by whom the arrangements for the making of the work were made;

(e) a broadcast, means -

(i) the first broadcaster, first person making the broadcast; or

- (ii) in the case of a broadcast which relays another broadcast by reception and immediate retransmission, the person making that other broadcast;
- (f) a programme-carrying signal, means the first person emitting the signal to a satellite;
- (g) a published edition, means the publisher of the edition;
- (h) a computer programme, which is -
 - (i) not computer-generated, means the person who exercised control over the making of the programme; or
 - (ii) computer-generated, means the person by whom the arrangements necessary for the creation of the programme were undertaken;

(2) Despite subsection (1)(h), the author of a computer programme which is not computer-generated and made before the commencement of this Act, is deemed to be the person who first made or created that programme, but if the programme is original and has been published by a person referred to in section 6, that person is presumed to be the owner of the copyright subsisting in that programme unless the contrary is proved.

(3) For the purposes of this Act, a work is of “unknown authorship” where the identity of the author is unknown or, in the case of a work of joint authorship, where the identity of none of the authors is known.

(4) For the purposes of this Act, the identity of an author must be regarded as unknown if it is not possible for a person to ascertain the author’s identity through prescribed inquiries, but once the author’s identity is known, it may not subsequently be regarded as unknown.

(5) References in this Act to the author of a work must, except as otherwise provided, be construed in relation to a work of joint authorship as references to all the authors of the work.

Ownership of copyright

15. (1) The original ownership in copyright vests in the author who has created the work subject to subsections (2), (3), (4) and (5).

(2) In case of works of joint authorship, original ownership of the copyright vests in the co-authors, but if a work of joint authorship consists of parts that can be used separately, and the author of each part can be identified, original ownership of the copyright vests in the author of each part that he or she has created.

(3) Where a person who is employed or commissioned by a natural person or legal entity creates a work in the course of his or her employment or commission, the original ownership of the copyright vests, unless provided otherwise in a contract, in the employer or the commissioner of the work.

(4) Where -

(a) a literary, musical or an artistic work is made by an employee in the course of his or her employment by the proprietor of a newspaper, magazine or similar periodical under a contract of service or apprenticeship; and

(b) the work referred to in paragraph (a) is made for the purpose of publication in a newspaper, magazine or similar periodical,

the ownership of the copyright in the work with respect to publication of the work in a newspaper, magazine or similar periodical or reproduction of the work for the purpose of such publication, vests in that proprietor, but in all other respects ownership of the copyright subsisting in the work vests in the employee who retains the right to be publicly recognized as the author of the work and has the right to supplement and improve the work.

- (5) Unless otherwise provided for in a contract, original ownership of copyright -
- (a) in an audio-visual work, vests in the producer, but the -
- (i) co-authors of the audio-visual work; and
- (ii) author of the pre-existing works included in or adapted for the making of the audio-visual work maintain their copyright in their respective contributions or pre-existing works, to the extent that those contributions or pre-existing works can be subject of acts covered by their rights separately from the audio-visual work;
- (b) in a sound recording, vests or is deemed to vest in the producer of the sound recording.
- (6) Ownership of any copyright conferred by section 10 vests in the State or the international organisation concerned and not in the author.

Presumptions relating authorship and ownership

16. (1) The person whose name is indicated as the author on a work is, in the absence of proof to the contrary, presumed to be the author and also owner of the work.

(2) Subsection (1) applies even if the name indicated on the work is a pseudonym, as long as the pseudonym leaves no doubt as to the identity of the author.

(3) The person whose name appears on a work in as required by proper usage or as prescribed is, in the absence of proof to the contrary, presumed to be the producer of the work.

(4) In the case of anonymous or pseudonymous works, subject to the provision of subsection (1), the publisher -

- (a) whose name appears on the work is, in the absence of proof to the contrary, presumed to represent the author; and
- (b) in his or her representative capacity as contemplated in paragraph (a), is entitled to exercise and enforce the moral and economic rights of the author,

but the presumption of representation ceases to apply when the author reveals his or her identity.

(5) In the case of sound recordings, where copies of the recording as issued, communicated or made available to the public, bear a label, mark or other accompanying data stating that -

- (a) a named person was the owner of the related rights in the recording at the date of issue, communication or making available to the public, or
- (b) the recording was first published in a specified year or in a specified country,

the label, mark or other data is admissible as evidence of the facts stated and is presumed to be correct until the contrary is proved.

(6) The co-authors of an audio-visual work are the original owners of the moral and economic rights in the audio-visual work who, in the absence of proof to the contrary, are presumed to be the producer, the author of the scenario, the author of the dialogue and the composer of the music specifically created for the audio-visual work.

(7) The author of a pre-existing work or related subject matter that has been included in, or adapted for, the making of an audio-visual work must be regarded as one of the co-authors of the audio-visual work as contemplated in subsection (6).

(8) Where a performer has consented to fixation of the performance in an audio-visual fixation, the producer of the audio-visual fixation is, subject to any contract to the contrary between him or her and the performer, presumed to be the owner of the exclusive rights of authorisation provided for in section 39, and is entitled to exercise those rights.

Duration of copyright

17. (1) Unless otherwise expressly stated in this Act, copyright protected under this Act endures for the following periods -

(a) in the case of a literary or musical work or an artistic work, other than a photograph, during the life of the author and for 50 years from the end of the year in which the author died, except that if such work or an adaptation thereof has not been made available to the public during the lifetime of the author through -

(i) publication;

(ii) performance in public;

(iii) offer for sale to the public of records; or

(iv) broadcasting,

of the work, for a period of 50 years from the end of the year in which the work is so first made available to the public after the author's death;

(b) in the case of a joint authorship of the works referred to in paragraph (a), during the life of the last surviving author and for 50 years from the end of the year in which the author died, but subject to the exception provided for in that paragraph;

(c) in the case of a photograph, for a period of 50 years either from -

(i) the end of the year in which the photograph was first made available to the public with the consent of the owner of the copyright; or

- (ii) if such photograph was not so made available to the public within 50 years of its making, the end of the year in which the photograph or programme was made;
 - (d) in the case of an audio-visual work or a sound recording, for a period of 50 years from the end of the year in which it was made, first made available to the public with the consent of the owner of the copyright or first published, whichever term expires first;
 - (e) in the case of a broadcast, for a period of 50 years from the end of the year in which the broadcast was made;
 - (f) in the case of a programme-carrying signal, for a period of 50 years from the end of the year in which the signal was emitted to a satellite;
 - (g) in the case of a work of applied art, for a period of 50 years from the end of the year in which the work was created.
- (2) In the case of anonymous or pseudonymous works, copyright endures for 50 years from -
- (a) the date on which the work was -
 - (i) made;
 - (ii) first made available to the public; or
 - (ii) first published; or
 - (b) the end of the year in which it is reasonable to presume that the author died,
- whichever, expires first.

(3) Where the identity of the author of a work referred to in subsection (2) becomes known before the expiration of the period referred to in that subsection, the term of the copyright in such work must be calculated in accordance with subsection (1).

(4) Copyright conferred by section 10 endures, in the case of -

(a) a literary or musical work or an artistic work, other than a photograph, for a period of 50 years from the end of the year in which the work is first published;
or

(b) an audio-visual work, a photograph, sound recording, broadcast, programme-carrying signal, published edition or computer programme, for the same term provided for in subsection (1) for a similar work.

(5) The date of the creation of a work must be determined as follows -

(a) a work, other than a broadcast or programme-carrying signal, is presumed, in the absence of evidence to the contrary, to be made at the time when it is first reduced to writing, recorded or otherwise reduced to material form;

(b) a broadcast is considered to be made at the time when it is first broadcast;

(c) a programme-carrying signal is considered to be made at the time when it is first transmitted.

(6) Every period of time specified in this section begins to run from end of the calendar year in which the action or event takes place.

Public domain

18. (1) The following works belong in the public domain -

(a) works whose terms of protection have expired;

- (b) works in respect of which authors have renounced their rights; and
- (c) foreign works that do not enjoy protection under this Act.

(2) For the purpose of subsection (1)(b), renunciation by an author or the author's successor in title of the author's rights must be in writing and made public, but such renunciation may not be contrary to any previous contractual obligation relating to the work.

PART 4

EXCEPTIONS AND LIMITATIONS

General provisions on exceptions and limitations

- 19.** Sections 20 and 32 do not apply where the acts referred to are concerned with -
- (a) private use;
 - (b) the reporting of current events, which involves the use of only short excerpts of a performance, sound recording, audio visual work or broadcast;
 - (c) teaching or scientific research;
 - (d) quotations in the form of short excerpts of a performance, sound recording, audio-visual work or broadcast, which are compatible with fair practice and are justified by the informative purpose of those quotations; or
 - (e) cases where, under permitted users of copyright in sections 20 to 33, inclusive, a work can be used without the authorisation of the author or other owner of the copyright.

Temporary reproduction

20. The temporary reproduction of work which is transient or incidental is permissible when the reproduction is an integral and essential part of a technological process and whose sole purpose is to enable -

- (a) digital transmission of the work or an act of making a digitally stored work perceptible;
- (b) transmission or making the work perceptible;
- (c) transmission in a network between third parties by an intermediary; or
- (d) transmission that occurs during the normal operation of the equipment used and that entails the automatic deletion of the copy without enabling the retrieval of the work for any other purpose than those referred to in paragraphs (a) or (b),

is permitted, except that the reproduced copy may not have an independent economic significance.

Reproduction for private and personal use

21. (1) The reproduction, translation, adaptation, arrangement or other transformation of a work for the exclusive private or personal use of a work that has already been lawfully made available to the public or published and which the user has lawfully acquired is permitted.

- (2) The permission referred to in subsection (1) does not extend to reproduction -
 - (a) of a work of architecture in the form of building or other construction;
 - (b) in the form of reprography of the whole or of a substantial part of a literary work or of a musical work in the form of a notation;
 - (c) of the whole or a substantial part of a database or other material that is stored in digital or electronic form;

- (d) of a computer programme, except as provided in section 26; and
- (e) of any work in cases where the reproduction would be contrary to the provisions of section 19(2) or (3).

Inclusion in quotations

22. (1) The reproduction of a work, other than a sound recording, in the form of a quotation from a published work or work that has lawfully been made available to the public is permitted, provided that the quotation is compatible with fair dealing and does not exceed the extent justified by the purpose.

(2) The quotation referred to in subsection (1) must be accompanied by an acknowledgement of source and the name of the author, if the name appears in the source from which the quote is taken.

Reproduction for educational purposes

23. (1) The use of a work is permitted where -
- (a) the use is by way of illustration of a work in publications, broadcasts or sound or visual recordings for teaching and educational purposes if -
 - (i) the work has lawfully been made available to the public;
 - (ii) such use is compatible with fair dealing and does not exceed the extent justified by the purpose; and
 - (iii) the source name of the author, if the name appears in the source from which the quote is taken, is acknowledged;

- (b) it includes the making available of the works referred to in paragraph (a) in digital networks, provided that access to the works is only available to enrolled pupils or students and their teachers and other educators;
- (c) the reproduction of published articles, other short works or short extracts of works is for face-to-face teaching in educational institutions, and the activities do not serve direct or indirect commercial gain, to the extent justified by the purpose,

but -

- (i) the reproduction of any particular work is an isolated act occurring, if repeated, on separate and unrelated occasions;
- (ii) not more than a single copy for each pupil or student and the teacher is made; and
- (iii) there is no licence from a reproduction rights collective management organisation available under which such reproduction can be made, unless the terms of the licence are so unreasonable such that the purpose of the exception is defeated.

Reproduction by libraries and archives and educational institutions and museums

24. (1) The reproduction by reprography or otherwise, of a prescribed number of copies of a work by a library, an educational establishment, a museum or an archive whose activities do not serve direct or indirect economic or commercial advantage is permitted where the -

- (a) reproduction is for the purposes of text or data-mining, deposit in another library, educational establishment, museum or archive or public lending of tangible copies of the work;
- (b) work was lawfully acquired by the library, educational establishment, museum or archive; and
- (c) conditions specified in subsection (2) are fulfilled.

- (2) The conditions referred to in subsection (1) are fulfilled where -
- (a) the work reproduced is a published article, other short work or short extract of a work, but -
- (i) the library, educational establishment, museum or archive is satisfied that the copy will be used solely for the purposes of study, scholarship or private research;
 - (ii) the act of reproduction is an isolated act occurring, if repeated, only on separate and unrelated occasions;
 - (iii) there is no licence available from a reproduction rights collective management organisation under which such copies can be made, unless the terms of the licence are so unreasonable such that the purpose of the exception is defeated; and
 - (iv) the source of the work and the author are acknowledged as such.
- (b) the copy of the work is made in order to preserve and, if necessary, replace a copy, which has been lost, destroyed or rendered unusable: provided that -
- (i) it is not possible to obtain such a copy under reasonable conditions; and
 - (ii) the reproduction of any particular work is an isolated act occurring, if repeated, on separate and unrelated occasions.

Reproduction for broadcasting and other communication to public

25. (1) The following acts are permitted in respect of a work, subject to the obligation to acknowledge the source and the name of the author -

- (a) the reproduction in a newspaper or periodical or the broadcasting or other communication to the public, of an article published in a newspaper or periodical on current economic, political or religious topics or a broadcast work of the same character;
- (b) the reproduction and the broadcasting or other communication to the public, for the purpose of reporting current events, of short excerpts of a work seen or heard in the course of such events, to the extent justified by the purpose;
- (c) the reproduction in a newspaper or periodical, the broadcasting or other communication to the public of a lecture, address or other work of a similar nature delivered in public, to the extent justified by the purpose of providing current information.

(2) Subsection (1) does not apply where the right to authorise reproduction, broadcasting or other communication to the public is expressly reserved on the copies by the author or other owner of copyright, or in connection with broadcasting or other communication to the public of the work.

Computer programmes

26. (1) The reproduction of a copy, or the adaption, of a computer programme by the lawful owner or person in lawful possession of the computer programme is permitted if the reproduction or adaption is necessary -

- (a) to make copies of the programme to the extent necessary to correct errors;
- (b) to make a back-up copy;
- (c) for the purpose of testing a programme to determine its suitability for that person's use;
- (d) for any purpose that is not prohibited under any licence or agreement whereby the person is permitted to use the programme.

(2) The consent or authorisation of the right holder of a computer programme is not required to decompile the programme, convert the programme into a version expressed in different programming language, code or notation for the purpose of obtaining information needed to enable the programme to operate with other programmes.

(3) Any copy made pursuant to this section must be used only for the purpose for which it was made and be destroyed when the person's possession of the computer programme ceases to be lawful.

Ephemeral recordings

27. (1) The making, by a broadcasting organisation, of an ephemeral recording of any work which it is authorised to broadcast, for the purpose of its own broadcasts and by means of its own facilities is permitted if the reproduction is intended exclusively for lawful broadcasts of such broadcasting organisation.

(2) A copy made pursuant subsection (1) is destroyed within six months of the making or within any longer term agreed to by the author, however, where such recording has an exceptional documentary character; one copy of it may be preserved in official archives.

Importation for personal purposes

28. The importation of a lawfully acquired copy of a work by any person for his or her own personal purposes is permitted.

Display of works

29. The public display of originals or copies of works is permitted: provided that the

- (a) display is made other than by means of a film, slide, television image or otherwise on screen or by means of any other device or process; and

- (b) work has been published or the original or the copy displayed has been sold, given away or otherwise transferred to another person by the author or his or her successor in title.

Caricature, parody and pastiche

30. The use of a work for parody, caricature or pastiche is permitted.

Reporting on judicial and administrative proceedings

31. The use of a work for the purpose of reporting of administrative, parliamentary or judicial proceedings is permitted.

Reproduction for persons with disabilities

32. (1) The reproduction in an accessible format, of a published work or work that has been made available to the public, by an authorised entity or a person acting on behalf of a beneficiary person, for use by a beneficiary person, and for distribution of the copies exclusively to beneficiary persons is permitted, provided that -

- (a) the work is not reasonably available in an identical or accessible format in Namibia; and,
- (b) the reproduction and distribution are made on a non-profit basis.

(2) A distribution contemplated in subsection (1) is also permitted in case the accessible format copies have been made outside Namibia provided that the conditions mentioned in subsection (1) have been fulfilled.

(3) The provisions of subsections (1) and (2) are subject to the obligation to acknowledge the source and the name of the author.

Authorised entities

33. (1) The Minister, on application made to him or her in the prescribed manner, may by notice in the *Gazette* recognise an entity -

(a) whose main objectives are to provide education, institutional training, adaptive reading or information access needs to beneficiary persons on a non-profit basis, including a non-profit organisation or governmental agency that provides those services to beneficiary persons as one of its primary objectives or functions; and

(b) which meets any prescribed requirements,

as an authorised entity for purposes of this Act.

(2) In relation only to works or subject matter protected under this Act that are in the form of text, notation or related illustrations, whether published or otherwise made publicly available in any media, including works in audio-visual form, and subject to the conditions in subsection (2) -

(a) an authorised entity is permitted, to make an accessible format copy of a work or subject matter, obtain from another authorised entity an accessible format copy, and supply that copy to a beneficiary person by any means, undertaking any intermediate steps to achieve those objectives, subject to the following conditions:

(i) the authorised entity has lawful access to a copy of the work or subject matter;

(ii) the work or subject matter is converted to an accessible format copy;

(iii) such accessible format copy is supplied exclusively to be used by a beneficiary person; and

(iv) the activity is undertaken on a non-profit basis;

- (b) a beneficiary person, or a person acting on behalf of a beneficiary person, is permitted to make and use an accessible format copy of a work or subject matter for personal use of a beneficiary person where beneficiary person or other person has lawful access to a copy of that work or subject matter.
 - (c) an authorised entity is permitted to export by any means accessible format copies to another authorised entity and directly to a beneficiary person or to someone acting on behalf of the beneficiary person, subject to the following conditions:
 - (i) the authorised entity or beneficiary person is located in a country party to -
 - (aa) the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled of 27 June 2013; or
 - (bb) an international convention or agreement that regulates the right of access by blind or visually impaired persons to works or subject matter protected by this Act;
 - (ii) prior to exporting the accessible format copy the authorised entity did not know or have reasonable grounds to know that the accessible format copy would be used for anyone other than a beneficiary person;
 - (d) a beneficiary person, or someone acting on his or her behalf, or an authorised entity, is permitted to import an accessible format copy for the benefit of the beneficiary person.
- (3) Acts pursuant to subsection (2) are subject to the following conditions -
- (a) an accessible format copy must be used exclusively by beneficiary persons;
 - (b) when creating and supplying an accessible format copy the integrity of the original work must be respected, taking due consideration of the changes needed to make the work accessible for beneficiary persons.

Special exception in respect of records of musical works

34. (1) The copyright in a musical work is not infringed by a person (in this section referred to as the “manufacturer”) who makes a record of the work or of an adaptation thereof in Namibia, whether from an imported disc, tape, matrix or otherwise, if -

- (a) records embodying the work or a similar adaptation of the work were previously made in or imported into Namibia for the purposes of retail sale and were so made or imported by, or with the consent or authorisation of, the owner of the copyright in the work;
- (b) before making the record the manufacturer gave the prescribed notice to the owner of the copyright of his or her intention to make it;
- (c) the manufacturer intends to sell the record by retail or to supply it for the purpose of resale by retail by another person or to use it for making other records to be so sold or so supplied; and
- (d) in the case of a record which is sold by retail or supplied for the purpose of resale by retail, the manufacturer pays to the owner of the copyright the prescribed royalties in the prescribed manner and at the prescribed time.

(2) Where a record, whether with or without other material, comprises a performance of a musical work or of an adaptation of a musical work in which words are sung or spoken that are incidental to, or in association with, the music and no copyright subsists in that work or, if copyright does subsist therein, the conditions specified in subsection (1) are fulfilled in relation to such copyright, and -

- (a) the words consist or form part of a literary work in which copyright subsists;
- (b) the records referred to in subsection (1)(a) were made or imported by, or with the consent or authorisation of, the owner of the copyright in the literary work; and

- (c) the conditions specified in paragraphs (b) and (d) of subsection (1) are fulfilled in relation to the owner of that copyright,

the making of the record does not constitute an infringement of the copyright in the literary work.

(3) For the purposes of this section an adaptation of a work is deemed to be similar to an adaptation thereof embodied in a previous record if the two adaptations do not differ substantially in their treatment of the work, either in respect of style or, apart from a difference in number, in respect of the performers required to perform them.

(4) A manufacturer may for the purposes of subsection (1)(a) make the prescribed enquiries in order to ascertain whether the previous records referred to in that paragraph were previously made or imported into Namibia, and if the owner of the copyright fails to reply to any such enquiry within the prescribed period, the previous records must be taken to have been made or imported with the consent or authorisation of the owner of the copyright.

(5) Subsections (1), (2), (3) and (4) apply also with reference to records of a part of a work or an adaptation thereof, but subsection (1) does not apply with reference to -

- (a) a record of the whole of a work or an adaptation thereof unless the previous records contemplated in paragraph (a) of subsection (1) were records of the whole of the work or of a similar adaptation; or
- (b) a record of a part of a work or an adaptation thereof unless the records previously made in or imported into Namibia as contemplated in paragraph (a) of subsection (1) were records of, or which included, that part of the work or records of a similar adaptation.

Exceptions relating to protection of artistic works

35. (1) The copyright in an artistic work is not infringed by its inclusion in an audio-visual work or television broadcast or its transmission in a diffusion service, if -

- (a) such inclusion is merely by way of background to the principal matters represented in the work, broadcast or transmission or incidental thereto;
- (b) such work is permanently situated in a street, square or a similar public place.

(2) The copyright in a work of architecture or in the relevant drawings of such work is not infringed by the reconstruction of such work on the same site in the same style as the original.

(3) The copyright in an artistic work of which three-dimensional reproductions were made available, whether inside or outside Namibia, to the public by or with the consent or authorisation of the owner of the copyright (in this subsection referred to as “authorised reproductions”), is not infringed if a person without the consent or authorisation of the owner makes or makes available to the public -

- (a) three-dimensional reproductions; or
- (b) adaptations of the authorised reproductions,

but the authorised reproductions primarily have a utilitarian purpose and are made by an industrial process.

Exceptions regarding protection of programme-carrying signals

36. (1) Subject to subsection (2), the copyright in programme-carrying signals is not infringed by the distribution of short excerpts of the programme so carried -

- (a) that consist of a report of a current event; or
- (b) as are compatible with fair practice,

and to the extent justified by the informative purpose of such excerpt.

(2) Subsection (1) does not apply with reference to a programme carried by programme-carrying signals representing a sporting event.

PART 5

RIGHTS OF PERFORMERS, PRODUCERS OF SOUND RECORDINGS AND AUDIO-VISUAL FIXATIONS AND BROADCASTING ORGANISATIONS

Scope of application

37. (1) The provisions of this Act on the protection of performers apply to -
- (a) performers who are citizens or permanent residents of, or are habitually resident in, Namibia;
 - (b) performers who are not citizens or permanent residents of, or habitually resident in, Namibia but whose performances -
 - (i) take place in the territory of Namibia;
 - (ii) are incorporated in sound recordings or audio-visual works that are protected under this Act; or
 - (iii) have not been fixed in a sound recording or an audio-visual fixation, but are included in a broadcast qualifying for protection under this Act.
- (2) The provisions of this Act on the protection of sound recordings and audio-visual fixations apply to -
- (a) sound recordings and audio-visual fixations whose producers are citizens or permanent residents of, or are habitually resident in, Namibia or have an establishment in Namibia in accordance with the laws of Namibia;
 - (b) sound recordings and audio-visual fixations first fixed in Namibia;

- (c) sound recordings and audio-visual fixations first published in Namibia.
- (3) The provisions of this Act on the protection of broadcasts apply to -
- (a) broadcasts by broadcasting organisations whose headquarters are situated in Namibia;
 - (b) broadcasts transmitted from transmitters situated in Namibia;
 - (c) programme-carrying signals transmitted by originating broadcasting organizations whose headquarters are situated in Namibia.
- (4) The provisions of this Act also apply to -
- (a) performers that are nationals of, or habitually resident in, a country that is a party to any international convention or other agreement protecting the rights of performers;
 - (b) producers of sound recordings or audio-visual fixations and broadcasting organisations whose headquarters are situated in a country that is a party to any international convention or other agreement protecting the rights of producers of sound recordings or audio-visual fixations and broadcasting organisations; and
 - (c) performances, sound recordings, audio-visual fixations and broadcasts that are eligible for protection by virtue of, and in accordance with, any international convention or other international agreement,

to which Namibia is also party to.

Rights of performers, producers and publishers not to affect copyright

38. The protection granted under this Part relating to -

- (a) rights of performers, producers of sound recordings or audio-visual fixations and broadcasting organisations and publishers does not in any way, affect copyright in a work under this Act, and no provision in this Part may be construed so as to affect copyright in any such work; and
- (b) rights of one category of owners of rights does not affect the rights of another category.

Exclusive rights of performers

39. (1) A performer has the exclusive right to do or to authorise another person to do any of the following acts as regards his or her performances including audio-visual performances:

- (a) the broadcasting or other communication to the public of the performance, except where the broadcasting or other communication is -
 - (i) made from a fixation of the performance which the performer has authorised to be made; or
 - (ii) a rebroadcasting made or authorised by the organization initially broadcasting the performance;
- (b) the fixation in any manner or form of his or her unfixed performance;
- (c) the direct or indirect reproduction of a fixation of his or her performance, in any manner or form, but any other person would infringe this right if that person makes a fixation of a performance of such performer -
 - (i) where the original fixation was itself made without the consent or authorisation of the performer;

- (ii) where the reproduction is made for purposes other than those in respect of which such performer gave his or her consent or authorisation to the making of the original fixation or of a reproduction thereof; or
 - (iii) where the original fixation was permitted in terms of section 46, and the reproduction is made for purposes not covered by that section;
- (d) the distribution of a fixation of his or her performance, or of copies thereof, to the public;
 - (e) the rental to the public of a fixation of his or her performance, or copies thereof;
 - (f) the making available to the public of his or her fixed performance, by wire or wireless means, in such a way that members of the public may access it from a place or at a time individually chosen by them; and
 - (g) public performance of a fixed form of the performance.

(2) In the absence of an agreement to the contrary, a performer's consent or authorisation to the broadcasting of his or her performance is deemed to include his or her consent or authorisation to -

- (a) the rebroadcasting of such performance;
- (b) the fixation of such performance for broadcasting purposes; and
- (c) the reproduction for broadcasting purposes of such fixation.

(3) Once the performer has authorised the incorporation of the performance in sound recording or an audio-visual fixation, the performer is, in the absence of contractual provisions to the contrary, deemed to have assigned the exclusive economic rights with respect to that fixation to its producer.

(4) The right of distribution subsection (1)(d) does not apply to a copy of a fixation of the performance that has already been subject to a sale or other transfer of ownership, authorised by the performer, in Namibia in any country that is party to an international convention or agreement that protects performers' rights and to which Namibia is also party.

(5) Nothing in this section may be construed as depriving a performer of the right to agree by contract to terms and conditions that are more favourable for him or her in respect of his or her performances.

(6) The rights under this section are protected until the end of 50 years following the year in which the performance was fixed or -

- (a) if during that period the recording or audio-visual fixation is published, 50 years from the end of the year in which it is first published; or
- (b) if during that period the recording or audio-visual fixation is not published but is made available to the public by being played in public or communicated to the public, 50 years from the end of the year in which it is first so made available,

but in determining whether a sound recording or an audio-visual fixation has been published, played in public or communicated to the public, account may not be taken of any unauthorised act published.

Moral rights of performers and directors

40. (1) Independently of a performer's economic rights, and even after the transfer of those rights, the performer has, as regards his or her live performances or performances fixed in sound recordings or audio-visual fixations, the right to -

- (a) claim to be identified as the performer of the performances, except where an omission is dictated by the manner of the use of the performance; and
- (b) object to any distortion, mutilation or other modification of his or her performances that would be prejudicial to his or her reputation.

(2) Independently of a director of an audio-visual fixation's economic rights, and even after the transfer of those rights, the director has, with regards to the audio-visual fixation, the right to -

- (a) claim to be identified as the director of the audio-visual fixation, except where an omission is dictated by the manner of the use of the fixation; and
- (b) object to any distortion, mutilation or other modification of their work that would be prejudicial to his or her reputation.

(3) The rights granted to a performer in accordance with subsection (1) or a director in accordance with subsection (2) must, after the performer's death, be maintained at least until the expiry of the economic rights.

(4) The provisions of section 13(2), (3) and (4) apply with necessary changes to the rights granted under subsections (1) and (2).

Collective performances

41. (1) Where several performers take part as a group in the same performance, it suffices, for the purposes of section 39, if consent or authorisation is given by the manager or other authority in charge of the group or, in the absence of such a manager or authority, by the leader of the group.

(2) In a case contemplated in subsection (1), and unless otherwise stipulated, payment for the use of the performance must be made by way of a single payment to the manager or other authority in charge of the group or, in the absence of such a manager or an authority, to the leader of the group.

(3) Any payment made in accordance with subsection (2) to a manager, an authority or leader referred to in that subsection is distributed by him or her as agreed by the performers, or failing such an agreement the right to remuneration of the respective performers is determined -

- (a) in accordance with the Arbitration Act, 1965 (Act 42 of 1965); or
- (b) by the Tribunal where the majority of the performers so elect.

Exclusive rights of producers of sound recordings and audio-visual fixations

42. (1) Subject to the provisions of this Act, a producer of a sound recording or an audio-visual fixation has the exclusive right to do or to authorise another person to do any of the following acts:

- (a) the direct or indirect reproduction of the sound recording or audio-visual fixation, in whole or in part and in any manner or form;
- (b) the distribution of the original or copies of the sound recording or audio-visual fixation to the public;
- (c) the rental of a copy of the sound recording or audio-visual fixation to the public;
- (d) the broadcast of the sound recording or audio-visual fixation;
- (e) the communication to the public of the sound recording or audio-visual fixation;
- (f) the public performance of the sound recording or audio-visual fixation;
- (g) the making available to the public of the sound recording, by wire or wireless means, in such a way that members of the public may access it from a place and at a time individually chosen by them;
- (h) importation of copies of the sound recording or audio-visual fixation, even where the imported copies were made with the consent or authorisation of the producer; and

- (i) the adaptation or other transformation of the sound recording or audio-visual fixation.

(2) The right of distribution under subsection (1)(b) does not apply to the original or the tangible copies of the sound recording or audio-visual fixation that have already been subject to a sale or other transfer of ownership, authorised by the producer, in Namibia in any country that is party to an international convention or agreement that protects performers' rights and to which Namibia is also party.

- (3) The rights under subsection (1) are protected -

- (a) from publication of the sound recording or audio-visual fixation until the end of 50 years following the year of publication; or
- (b) if the sound recording or audio-visual fixation has not been published, from the fixation of the sound recording or audio-visual fixation until the end of 50 years, following the year of fixation.

Remuneration for performers and producers of sound recordings and audio-visual fixations

43. (1) If a sound recording or an audio-visual fixation is published for commercial purposes, or a reproduction of such sound recording or audio-visual fixation -

- (a) is used directly for broadcasting or other communication to the public; or
- (b) is publicly performed,

the user of the sound recording or audio-visual fixation must pay a single equitable remuneration for the performer or performers and the producer of the sound recording or audio-visual fixation to the producer.

(2) Unless otherwise agreed between the performers and the producer, the producer must pay half of the amount received by the producer under subsection (1) to the performer or performers.

(3) The provisions of section 41(3) apply with necessary changes to a disagreement between a performer and a producer arising from the application of subsection (2).

(4) The right to an equitable remuneration under this section subsists from the date of publication of the sound recording or audio-visual fixation until the end of 50 years following the year of publication, provided that the sound recording or audio-visual fixation is still protected under this Act.

(5) For the purposes of this section, sound recordings or audio-visual fixations that have been available to the public 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 must be considered as if they have been published for commercial purposes.

Remuneration for performers of audio visual works

44. (1) Independent of the transfer of rights described in section 39(3), the performer has the unwaivable and non-transferable rights to receive equitable remuneration or royalties in respect of any broadcast, communication to the public, rental or making available to the public of his or her performance fixed in an audio-visual fixation.

(2) The right to equitable remuneration is effected by the appropriate collective management organisation that, under the this Act, must collect the remuneration from the persons carrying out any of such uses as regards performances fixed in audio-visual fixation, and distribute it accordingly to the concerned performers.

(3) The right to an equitable remuneration under this section subsists from the date of publication of the audio-visual performance until the end of 50 years following the year of publication, provided that the audio-visual work is still protected under this Act.

Exclusive rights of broadcasting organisations

45. (1) Subject to the provisions of this Act, a broadcasting organisation has the exclusive right to do or to authorise another person to do any of the following acts:

- (a) the rebroadcasting of its broadcast;
- (b) the communication to the public of its broadcast;
- (c) the fixation of its broadcast;
- (d) the reproduction of a fixation of its broadcast.

(2) A person may not broadcast or communicate to the public any programme-carrying signal transmitted by satellite which is not intended for direct reception by the public, but for simultaneous or subsequent broadcasting or cable transmission by an authorised receiving organization, unless that person has been authorised to do so by the person or legal entity that decided what programme the emitted signal must carry.

(3) The rights under this section are protected from the moment when the broadcasting takes place until the end of 50 years following the year in which the broadcast takes place.

(4) Nothing in this section confers a broadcasting organisation rights over, nor otherwise affect the rights in, any work or subject matter protected by copyright or related rights that forms part of a broadcast.

Exceptions and limitations on protection

46. (1) Sections 39, 42 and 45 do not apply where the acts referred to in those sections are related to -

- (a) the use by a person exclusively for his or her own private study or personal purposes;

- (b) using short excerpts for reporting current events to the extent justified for the purpose of providing current information;
- (c) use solely for the purpose of face-to-face teaching activities or for scientific research;
- (d) criticism or review of the performance or any other performance or for reporting on a current event, provided that only short excerpts from the performance, to the extent justified by the purpose, are used and, where available, the performer's or producer's name or the names of the leading performers are acknowledged;
- (e) cases where, under Part 4, a work can be used without the consent or authorisation of the author or other owner of copyright.

(2) Despite section 39(1), a broadcasting organisation may by means of its own facilities make a fixation of a performance and reproductions of such a fixation without the consent or authorisation of the performer, provided that, unless otherwise agreed -

- (a) such fixation or reproduction is used solely in broadcasts made by the broadcasting organisation;
- (b) such fixation or reproduction is, subject to subsection (3), destroyed before the expiration of a period of six months immediately following the making of the fixation or reproduction; and
- (c) the broadcasting organisation pays to the performer in question, in respect of each occasion the fixation or reproduction is used, equitable remuneration, which, in the absence of agreement, must be determined in accordance with the provisions of the Arbitration Act, 1965 (Act No. 42 of 1965) or, where the performer so elects, by the Tribunal.

(3) A fixation of a performance or a reproduction of such a fixation made in accordance with subsection (2) may, if it is of exceptional documentary character, be

preserved in the archive of the broadcasting organisation but must, subject to the provisions of this Part, not be further used without the consent or authorisation of the performer.

PART 6 EXPRESSIONS OF FOLKLORE

Expressions of folklore

47. (1) Copyright in expressions of folklore vests in the State on behalf of, and for the benefit of the people of Namibia and the provisions of section 10 with necessary changes apply to such copyright.

(2) The provisions of this Part apply whether or not the expressions of folklore are fixed in material or tangible form.

(3) Expressions of folklore are protected in perpetuity.

(4) The following uses of the expressions of folklore are subject to prior written authorisation by the Minister when they are made for gainful purposes or outside their traditional and customary context -

- (a) any publication, reproduction and any distribution of copies of expressions of folklore; or
- (b) any communication to the public, including recitation, performance, broadcasting or distribution by cable, of expressions of folklore.

(5) Authorisation of any use of expressions of folklore may be general or specific and may be granted upon application in the prescribed manner to the Minister.

(6) The provisions of subsection (4) do not apply to any use of the expressions of folklore in the following cases:

- (a) for the purposes of education;

- (b) by way of illustration in an original work of an author provided that the extent of such use is compatible with fair practice;
- (c) use of expressions of folklore for creation of an original work by an author inspired by folklore; and
- (d) incidental use of expressions of folklore, including -
 - (i) that which can be seen or heard in the course of a current event by means of photography, broadcasting or audio-visual work or sound recording: provided that the extent of such use is justified by the informative purposes thereof; and
 - (ii) use of objects containing the expressions of folklore which are permanently located in a place where they can be viewed by the public, if the use consists in the inclusion of their image in a photograph, an audio-visual fixation or a television broadcast.

(7) A user of the expression of folklore must acknowledge the source from where the expressions of folklore used by him or her in any printed publication or communication to the public except for uses referred to in subsection 6(c) or (d).

(8) The protection of expressions of folklore under this Act may not in any way be construed so as to hinder the normal use, maintenance and development of expressions of folklore.

(9) Protection of expressions of folklore conferred by this Part is additional to, and does not in any way limit or prejudice protection on such expressions conferred by any other law or international convention or agreement to which Namibia is a party.

PART 7

TRANSFER OF OWNERSHIP

Transfer of ownership in copyright

48. (1) Economic rights in copyright or related rights are transferable and may be transferred, in whole or in part by assignment, licensing, testamentary disposition, or by operation of law, as moveable property.

(2) An assignment or testamentary disposition of copyright or related rights may be limited so as to apply -

- (a) only to one or more of the acts which the owner of the copyright or related rights has the exclusive right to do or authorise;
- (b) to a part only of the term of the copyright or related rights; or
- (c) to a specified country or other geographical area.

(3) Any assignment of an economic right, and any exclusive licence to do an act subject to authorisation by the author or other owner of copyright or a related right, must be in writing and signed by both the assignor and the assignee, or by the licensor and the licensee.

(4) A non-exclusive licence to do an act which is subject to copyright or related rights may be -

- (a) granted in writing or orally;
- (b) inferred from conduct; and
- (c) revoked at any time,

but where such a licence was granted by contract it may not be revoked by the licensor or his or her successor in title, except in accordance with the provisions of such contract or by a further contract.

(5) An assignment, licence or testamentary disposition may be granted or made in respect of -

- (a) copyright in a future work;
- (b) copyright in an existing work in which, although copyright does not subsist therein, copyright will come into existence in the future;
- (c) future protection of related rights in any related subject matter,

and the future copyright or protection in any such work or related subject matter is transferable as movable property.

(6) A testamentary disposition of the original document or other material on which a work or related subject matter is first written or otherwise recorded or fixed must, in the absence of a stipulation to the contrary, be construed as including a disposition of -

- (a) the copyright in the work or a right in a related subject matter in so far as the testator was the owner of the copyright or related right immediately before his or her death; or
- (b) if at the testator's death no copyright subsisted in the work or no right existed in a related subject matter, a disposition of any future copyright in that work or related right in the related subject matter.

(7) A licence granted in respect of any copyright or related right by the person who, in relation to the matters to which the licence relates, is the owner of the copyright or related right, is binding upon every successor in title to his or her interest in the copyright or related right except -

- (a) a purchaser in good faith and without notice, whether actual or constructive, of the licence; or
- (b) a person deriving title from a purchaser referred to in paragraph (b),

and any reference in this Act to the doing in relation to copyright or a related right of anything with or without the licence of the owner of the copyright or related right must be construed accordingly.

(8) Where, in accordance with the terms of a licence, the doing of anything is authorised by the grantee of such licence or a person deriving title from the grantee, anything which is done under such consent or authorisation is for the purpose of this Act deemed to have been done with the licence of the grantor and of every person, if any, upon whom the licence is binding.

PART 8

INFRINGEMENT AND REMEDIES

Infringement of Copyright and Related Rights

- 49.** (1) A person infringes -
- (a) copyright in a work if he or she does, permits or causes to be done, any of the acts specified in section 11;
 - (b) a performer's rights if he or she does, permits or causes to be done, any of the acts specified in section 39;
 - (c) a producer's rights if he or she does, permits or causes to be done, any of the acts specified in section 42;
 - (d) a broadcasting organisation's rights if he or she does, permits or causes to be done, any of the acts specified in section 45;

- (e) copyright in expressions of folklore if he or she does, permits or causes to be done, any of the acts specified in section 47(4),

without the consent of, or an authorisation granted by the right holder the under this Act.

(2) For the purposes of this section, the following acts in relation to any of the rights protected by sections 13 and 40 are deemed to be an infringement of the rights granted to the authors of the work or performers or directors of the related subject matter:

- (a) to make the work available to the public without mention of the name or the pseudonym of the author, performer or director in the manner required by proper usage;
- (b) to use the work in a manner prejudicial to the honour or reputation of the author, performer or director; or
- (c) when making the work or subject matter available to the public, to mention the name of the author, performer or director when the author, performer or director has requested that he or she does not want to be mentioned.

(3) Subject to subsection (4), the copyright in a work or a right in a related subject matter is infringed by a person who permits a place of public entertainment to be used for a performance in public of the work, where the performance constitutes an infringement of the copyright in the work.

(4) Subsection (3) not apply in a case where the person permitting the place of public entertainment to be so used was not aware and had no reasonable grounds for suspecting that the performance would constitute an infringement of the copyright or related right.

Secondary infringement

50. (1) A person commits a secondary infringement of copyright or a related right if that person, without the consent of, or an authorisation granted by the right holder the under this Act -

- (a) imports into Namibia an article for a purpose other than for his or her private and personal use;
- (b) sells, lets or by way of trade offers or exposes for sale or hire in Namibia an article;
- (c) distributes in Namibia an article for the purposes of trade, or for any other purpose, to such an extent that the owner of the copyright or related right in question is prejudicially affected; or
- (d) acquires in Namibia an article relating to a computer programme,

if to such person's knowledge the making of that article constituted an infringement of that copyright or related right, or would have constituted such an infringement had that article been made in Namibia.

(2) A person similarly commits a secondary infringement of copyright or a related right if such person, without the consent of, or an authorisation granted by the right holder under this Act -

- (a) manufactures, imports, possesses in the course of business, sells or lets for hire, or offers or exposes for sale or hire implements or software that are used to infringe copyright or related rights; or
- (b) manufactures or distributes implements which are primarily designed or produced for the purpose of circumventing technical protection measures designed to protect works protected under this Act.

Technological protection measures

51. (1) It is unlawful and an infringement of the rights of any person who has put in place effective protection measures for another person, without the consent or authorisation of the person whose rights are affected, to -

- (a) circumvent the technological protection measures; or
- (b) manufacture, import, distribute, sell, rent, advertise for sale or rental, or possess for commercial purposes a device, product or component or the provision of service which -
 - (i) is promoted, advertised or marketed for the purpose of circumvention of;
 - (ii) has only a limited commercially significant purpose or use other than to circumvent; or
 - (iii) is primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of,the effective technological protection measures.

(2) For purposes of subsection (1) technological protection measures are “effective” where the use of a work or object of related rights is controlled by the right holder through application of -

- (a) an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter; or
- (b) a copy control mechanism which, in the normal course of its operation, if not circumvented, achieves the protection objective.

(3) The Minister may prescribe exceptions to subsection (1)(a) as long as the extent of the exceptions do not impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of technological protection measures.

Rights management information

52. (1) It is unlawful and an infringement of the rights of the owner of copyright in a work or related rights in a related subject matter for another person to do any of the following acts in relation to the work or related subject matter:

- (a) remove, modify or alter any electronic rights management information; or
 - (b) in the course of business make, distribute, import, sell, let for hire, offer or expose for sale, advertise for sale or hire, broadcast, communicate or make available to the public, works or related subject matter from which electronic rights management information has been removed, modified or has been altered.
- (2) A person does not commit an infringement under subsection (1) if that person -
- (a) is authorised by the owner of the copyright or related right to remove or modify the rights management information;
 - (b) does not know and has no reason to believe that the removal, modification or alteration of the rights management information will induce, enable, facilitate or conceal an infringement of the copyright in the work or related right in the subject matter; or
 - (c) does not know or has no reason to believe that the rights management information has been removed or modified without the authority of the owner of the copyright or related right.

Liability of internet service providers

53. (1) The automated transmission and associated transient storage of a copyrighted work or related subject matter by a service provider are permissible, even in the absence of consent or authorization from the copyright owner or holder of related rights, if the service provider does not initiate the transmission, does not select or modify the material, and does not select the recipients of the transmission.

(2) The automated storage of a copyrighted work or related subject matter by a service provider is permissible, even in the absence of consent or authorization from the copyright owner or holder of related rights, if the service provider does not select or modify the stored work or subject matter and complies with reasonable requests from the party who made the work or subject matter available online concerning -

- (a) the updating of the work or subject matter;
- (b) gathering of information concerning the usage of the work or subject matter; or
- (c) limitations on access to the work or subject matter.

(3) The storage of copyrighted work or related subject matter by a service provider at the direction of a user for the purpose of making that work or subject matter available to the public is permissible, even in the absence of consent or authorisation from the copyright owner or related right holder, if the service provider -

- (a) does not have actual knowledge that the work or subject matter or the use thereof is infringing, is not aware of circumstances from which the infringing activity is apparent, and upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the work or subject matter;
- (b) does not receive a financial benefit directly attributable to the infringing activity that the service provider has the right and ability to control;
- (c) provides copyright owners and holders of related rights a convenient mechanism for notifying the service provider of claims of infringement;
- (d) upon receipt of specific claims of infringement, responds expeditiously to remove, or disable access to, the work or subject matter in question; and
- (e) adopts a system designed to reduce the incidence of repeat offences.

(4) The provision by a service provider of information location tools that refer or link users to online locations containing infringing work or related subject matter is permissible, even in the absence of consent or authorization from the relevant copyright owner or holder of related rights, if the service provider -

- (a) does not have actual knowledge that the work or subject matter or the use thereof is infringing, is not aware of circumstances from which infringing activity is apparent, and upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the work or subject matter;
- (b) does not receive a financial benefit directly attributable to infringing activity that the service provider has the right and ability to control;
- (c) provides copyright owners and holders of related rights a convenient mechanism for notifying the service provider of claims of infringement; and
- (d) upon receipt of specific claims of infringement, responds expeditiously to remove, or disable access to, the work or subject matter material in question; and
- (e) adopts a system designed to reduce the incidence of repeat offences.

(5) If a service provider, upon receipt of a specific claim of infringement pursuant to subsection (3)(d) or (4)(d), removes the copyrighted work or related subject matter in question or disables access to it, a party adversely affected may in writing demand for reinstatement of the work or subject matter.

(6) Upon receipt of a written demand referred to in subsection (5), the service provider must reinstate the work or subject matter and notify the party who submitted the original claim of infringement and if the claimant then initiates an infringement claim against the person who made the demand, the service provider must expeditiously remove, or disable access to, the work or subject matter in question, until and unless directed to the contrary by the court.

(7) A failure by the service provider to comply with the procedures set out in this section invalidates the service provider's immunity and renders the provider liable for any expenses incurred and any loss or damages sustained by, the person who made the demand.

(8) A service provider may use an automated system to comply with its obligation under subsection (3)(e) or (4)(e), but if it does so, and if copyrighted work or related subject matter excluded by that system is later determined to be non-infringing, the service provider is liable for reasonable expenses, including legal fees, incurred by parties whose submissions were initially excluded and for all losses and damages sustained as a result of the exclusion.

Interim measures

- 54.** (1) A court with competent jurisdiction may in a matter brought before it -
- (a) grant an interdict prohibiting the committing, continuation of committing, of infringement of any right protected under this Act;
 - (b) grant an interdict against intermediaries whose services are used by a third party to infringe a copyright in a work or related right in a related subject matter;
 - (c) order the seizure of infringing copies where the making or importation of copies is subject to authorisation, as well as the seizure of the packaging and contrivances that could be used for the making of infringing copies;
 - (d) order prompt and effective interim measures to preserve relevant evidence in regard to an alleged infringement;
 - (e) order the infringer to inform the right holder of the identity of third persons involved in the production, distribution, communication or making available to the public of the infringing goods, copies or rendering of services, and of their channels of distribution.

(2) In an action for infringement of copyright in respect of the construction of a building, an interdict or other order may not, where the construction of the building has been begun, be granted or made so as to -

- (a) prevent the building from being completed; or
- (b) require the building, in so far as it has been constructed, to be demolished.

Civil remedies

55. (1) A court with competent jurisdiction may in a matter brought before it -

- (a) order payment of any damages suffered in consequence of an infringement of a protected right, including any profits enjoyed by the infringing party, that are attributable to the infringement; or
- (b) award exemplary damages where it finds that the infringement is prejudicial to the honour or reputation of the person whose rights were infringed.

(2) Damages contemplated in subsection (1) may, at the option of the right holder, be calculated on the basis of the amount of a reasonable royalty which would have been payable under the circumstances by a licensee or sub-licensee in respect of the right concerned.

(3) In assessing the amount of damages that are payable under this section, the court must have regard to any of the following factors:

- (a) the importance of the material and moral prejudice suffered by the right holder;
- (b) the extent and nature of the infringement of the protected right;
- (c) the amount which could be payable to the right holder in respect of the exercise of the protected right by some other person; and
- (d) any benefit accruing to the infringer by reason of the infringement.

(4) If a right holder intends to exercise the option contemplated in subsection (2), he or she must give notice in writing to any exclusive licensee or sub-licensee of the protected right in question of his or her intention.

(5) Where in an action for infringement of a protected right, such infringement is proved or admitted, and the court having regard, in addition to all other material considerations, to -

(a) the flagrancy of the infringement; and

(b) any benefit shown to have accrued to the infringer by reason of the infringement,

is satisfied that effective relief would not otherwise be available to the right holder, the court may, in assessing damages for the infringement, award such additional damages as the court thinks fit.

(6) Where in an action for infringement of a protected right, it is proved or admitted that an infringement was committed but that at the time of the infringement the infringer was not aware and had no reasonable grounds for suspecting there existed a protected right in the work or matter to which the action relates, the right holder is not entitled under this section to any damages against the infringer in respect of the infringement.

(7) Despite subsection (6), where it is established that the infringer did not know, or had no reasonable reason to know that he or she or was engaged in infringing activity, the court may, instead of making an order under subsection (1), order that the infringer pay over any profit derived from the infringement to the right holder.

(8) In addition to any civil remedy that may be ordered by the court against any person who has infringed any protected right, the court may order the destruction or other reasonable disposition of -

(a) infringing copies, where they exist; and

- (b) their packaging outside the channels of commerce in such a manner as to avoid harm to the right holder,

unless the right holder requests otherwise, but copies and their packaging which were acquired by a third party in good faith may not be so destroyed.

(9) Where there is a danger that any implement may be used to commit or continue to commit acts of infringement, the court must, whenever and to the extent that it is reasonable, order its destruction or other reasonable disposition outside the channels of commerce in such a manner as to minimize the risks of further infringements.

(10) A person who in contravention of subsection (8) or (9) fails to carry out the order of the court for the destruction or other reasonable disposition of the infringing copies or implements, commits an offence and is liable to a fine not exceeding N\$10 000 or to imprisonment for a term not exceeding two years, or to both such fine and such imprisonment.

Restrictions on importation of copies and powers of customs officials

56. (1) Subject to subsections (2) and (3), the owner of the copyright in any published work or a right in a fixed related subject matter may give notice in writing to the Commissioner of the Revenue Authority appointed in terms of section 18 of the Namibia Revenue Agency Act, 2017 (Act No. 12 Of 2017), (in this section referred to as “the Commissioner”) that he or she -

- (a) is the owner of the copyright in that work or of a related right in that related subject matter; and
- (b) requests the Commissioner to treat as prohibited goods, during a period specified in the notice, any copies of that work or subject matter to which this section applies.

(2) The period specified in a notice under subsection (1) may not extend beyond the end of the period for which the copyright or related right is to subsist.

(3) The Commissioner is not bound to act in terms of a notice under subsection (1) unless the owner of the copyright or related right furnishes the Commissioner with security, in such form and for such amount as the Commissioner may require for securing -

- (a) the fulfilment of any liability; and
- (b) the payment of any expenses which the Commissioner may incur by reason of the detention of any copy of the work or related subject matter to which the notice relates or as a result of anything done by the Commissioner in relation to a copy so detained.

(4) This section applies to any copy of the work or subject matter in question made outside Namibia which, if it had been made in Namibia, would be an infringing copy of the work or subject matter.

(5) Where a notice has been given under subsection (1) in respect of a work or related subject matter and has not been withdrawn, the importation into Namibia at a time before the end of the period specified in the notice of any copy of such a work or subject matter is prohibited.

(6) Despite anything contained in the Customs and Excise Act, 1998 (Act No 20 of 1998) (Customs and Excise Act) a person is not liable to a penalty under that Act (other than forfeiture of the goods) by reason of the fact that any goods are treated as prohibited goods by virtue of this section.

(7) This section applies with necessary changes with reference to an exclusive licensee who has the right to import into Namibia a work or related subject matter published elsewhere.

(8) Any infringing copies, implements or devices or other equipment that are imported into Namibia with the intention that they be used to contravene any provision of this Act may be seized pursuant to section 98 of the Customs and Excise Act, and the provisions of that section and sections 99 to 106 of that Act apply with necessary changes to such

copies, implements, devices or equipment as if they were goods liable to forfeiture under that Act.

(9) A person who in contravention of a prohibition imposed by subsection (5) imports any copy of the work or subject matter commits an offence and is on conviction, liable to a fine of N\$1 000 000 and to imprisonment for two years or to both such fine and imprisonment.

Rights of action and remedies of exclusive licensee and sub-licensee

57. (1) An exclusive licensee and sub-licensee has the same rights of action and is entitled to the same remedies as if the licence were an assignment, and those rights and remedies are concurrent with the rights and remedies of the owner of the copyright or related right under which the licence or sub-licence were granted.

(2) If an exclusive licensee or sub-licensee intends to enforce any rights under section 55 he or she must give notice in writing to the owner of the copyright or related right concerned of the intention.

Offences and penalties

58. (1) A person who -

(a) knowingly infringes any protected right; or

(b) makes or has in his or her possession an implement knowing that it is to be used for making an infringing copy of a work or related subject matter,

commits an offence.

(2) A person who -

- (a) without the authorisation of the Minister imports, sells, offers or exposes for sale or distribution in Namibia any copy of the following subject matter outside Namibia -
 - (i) expressions of Namibian folklore;
 - (ii) translations, adaptations or arrangements of expressions of Namibian folklore; or
- (b) contravenes or fails to comply with section 47(4) or (7),

commits an offence.

- (3) A person who -
 - (a) provides a service to any other person knowing that that other person intends to use the service to circumvent an effective technological protection measure as described in section 51(2); or
 - (b) provides a service to any other person knowing or having reason to believe that the service will or is likely to be used by another person to infringe rights in a work or subject matter protected by a technological protection measure.
 - (c) within Namibia, publishes information enabling or assisting another person to circumvent an effective technological protection measure as described in section 51(2), with the specific intention of inciting that other person to unlawfully circumvent a technological protection measure,

commits an offence.

- (4) A person convicted of an offence under subsection (1) (2) or (3) -

- (a) in the case of a first conviction, liable to a fine not exceeding N\$30 000 or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment; or
- (b) in the case of a second or any subsequent conviction, be liable to a fine not exceeding N\$50 000 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

Onus of proof

59. (1) Where, in the case of -

- (a) a work, related subject matter, or other protected matter, a name purporting to be that of the author or producer appeared on copies of that work or subject matter as published; or
- (b) an artistic work, appeared on that work when it was made,

the person whose name so appeared, if it was his or her true name or a name by which he or she was commonly known, must, in any criminal or civil proceedings brought by virtue of this Part, be presumed to be the author of the work or programme or the producer of the related subject matter or owner of the other protected matter, unless the contrary is proved.

(2) In the case of a work or related subject matter alleged to be a work or subject matter of joint authorship, co-production or joint ownership subsection (1) applies in relation to each person alleged to be one of the authors of the work, producers of the subject matter or other owner as if references in that subsection to the author, producer or other owner were references to one of the authors, producers or owners.

(3) Where in any criminal or civil proceedings brought by virtue of this Part with respect to a work or a related subject matter which is anonymous or pseudonymous it is established -

- (a) that such a work or subject matter was first published in Namibia and was so published within the period of 50 years ending with the beginning of the calendar year in which the proceedings were brought; and
- (b) that a name purporting to be that of the publisher appeared on copies of that work or subject matter as first published,

copyright or a related right must be presumed to subsist in that work or subject matter and the person whose name so appeared must be presumed to have been the owner of that copyright or related right at the time of the publication, unless the contrary is proved or the actual name of the author or producer of a pseudonymous work or related subject matter is commonly known.

(4) Where in any criminal or civil proceedings brought by virtue of this Part with respect to a work or subject matter it is proved or admitted that the author of that work or producer of a related subject matter is dead, that work or subject matter must be presumed to be an original work or subject matter work unless the contrary is proved.

(5) Subsection (4) also applies where a work or subject matter has been published and -

- (a) the publication was anonymous or under a name alleged by the right holder or the State to be a pseudonym; and
- (b) it is not proved that the work or subject matter has ever been published under the true name of the author or producer, or under a name by which he or she was commonly known or that it is possible for a person without previous knowledge of the facts to ascertain the identity of the author or producer by reasonable inquiry.

(6) Where in any criminal or civil proceedings brought by virtue of this Part with respect to the alleged infringement of copyright or related rights in an audio-visual work it is proved that the name purporting to be the name of the author or producer of that work

appears thereon in the prescribed manner, the person whose name so appears is presumed to be the author or producer of that work unless the contrary is proved.

(7) Where in any criminal or civil proceedings brought by virtue of this Part with respect to the alleged infringement of copyright or related rights in a sound recording it is proved that records embodying that recording or part thereof have been issued to the public and that at the time of such issue there appeared on a label or any other printed matter affixed to such records or in or on anything in which they were contained, a statement claiming -

- (a) that a person named on the label or printed matter is the author or producer of that recording; or
- (b) that the recording was first published in a year and at a place specified on the label or printed matter,

that label or printed matter is, unless the contrary is proved, sufficient evidence of the facts so stated.

(8) A claim contemplated in subsection (7) -

- (a) paragraph (a) may be made by means of the symbol 'C' in conjunction with the name of the person concerned; and
- (b) paragraph (b) may be made by means of the symbol 'P' in conjunction with the year and place in question.

(9) Where in any civil proceedings brought by virtue of this Part with respect to the alleged infringement of the copyright or related rights in an audio-visual work it is proved that the person alleged to have committed an infringement has done an act which the owner of the copyright or producer has the exclusive right to do or to authorise to do, it is presumed, unless the contrary is proved, that such person did that act without the required authority.

(10) In any civil proceedings brought by virtue of this Part with respect to the alleged infringement of the copyright or related rights in an audio-visual work, sound recording or computer programme, it is presumed, unless the contrary is proved, that a person -

- (a) trading in the selling, letting or distribution of copies of any works or related subject matter of such descriptions; and
- (b) who was found in possession of a copy of any of such works or subject matter,

has sold or let or by way of trade offered or exposed for sale or hire such copy.

(11) Where in any civil proceedings brought by virtue of this Part with respect to the alleged infringement of the copyright in a work or a related right it is proved that the person alleged to have done an act which allegedly infringes the relevant copyright or related right did that act without the authority of the exclusive licensee, it is presumed, unless the contrary is proved, that the relevant act was done also without the authority of the owner of the copyright or right concerned.

PART 9

COPYRIGHT AND RELATED RIGHTS FUND

Copyright and Related Rights Fund

60. (1) There is established a fund to be known as the Copyright and Related Rights Fund.

(2) The Fund vests in BIPA and, subject to this Act, is managed and administered in accordance with this Act.

(3) BIPA, with the approval of the Minister, must make rules for the management and administration of the Fund.

Objects and utilisation of Fund

61. (1) The Fund must be used for the promotion of Copyright and Related Rights activities and production in Namibia in which persons who are resident in Namibia take part, as follows:

- (a) the creation of music, fiction and nonfiction such as poetry, essays, plays and textbooks, fine art and audio-visual works, and the production of particular sound recordings or audio-visual works or performances of dramatic works or musical works;
- (b) the improvement of Namibian authors and performers, producers and publishers, and their living or working conditions by the way of offering -
 - (i) measures such as training courses, seminars, organisational improvement and legal aid, organised or approved by BIPA; and
 - (ii) grants to individual authors or performers;
- (c) enforcement of Copyright and Related Rights law;
- (d) promotion and improvement of -
 - (i) creativity; and
 - (ii) artistic skills;
- (e) promotion and preservation of works which depict the cultural identities of Namibia; and
- (f) public education and awareness of Copyright and Related Rights matters.

Finances of Fund

62. (1) The Fund is financed through levies on the following acts:
- (a) importing, manufacturing or placing of devices for digital storage materials on the market;
 - (b) commercial reproduction of works under copyright protection through use of photocopiers or electronic copiers.
- (2) Despite the sources in subsection (1) -
- (a) the Minister must determine and specify annually the grant which may be awarded from State resources to the Fund for the use of works and related subject matter in public libraries which offer their collections to the general public for lending or consultation free of charge; and
 - (b) the Fund may, with the approval of the Minister, receive funding from other lawful sources, including fundraising activities conducted by BIPA and donations made available to the Fund.
- (3) The levies and funds raised pursuant to this Part must be paid directly to the Fund.
- (4) The right to benefit from the measures and grants under this section are equally enjoyed by such persons as referred to in this section, regardless of whether or not they are members of a collective management organisation or not.
- (5) For purposes of this section “public libraries “means the libraries which are wholly or partly funded by the State.

Levy on storage devices

63. (1) The levy on the placing of devices for digital storage of material pursuant to section 62 applies with regard to -

- (a) devices integrated in computers or other specialised computer equipment; and
- (b) standalone storage devices such as compact disks and memory sticks as specified in regulations.

(2) Manufacturers or importers of devices for the digital storage of material must the pay the levy payable under this section.

Levy on copy shops

64. (1) The levy on the offering to the public of paper reproduction pursuant to section 62 applies to the offering of -

- (a) services in the form of reprographic reproduction; and
- (b) access to photocopiers or electronic copiers without offering the machines themselves,

as long as the offer is made on commercial terms.

(2) In order to offer a service or access that is subject to the levy under this section, the owner of the operation is obliged to register it with BIPA as a copy shop, such registration to include identification of the copiers and their location.

(3) The registered owner of the copy shop is obliged pay the levy payable under this section.

Obligation to pay levies independent of protection

65 The obligation to pay levies pursuant to this Part does not depend on the works and related subject matter involved in the acts referred to in section 63 being subject to protection under this Act.

Determination of levies

66. (1) The Minister, after consultation with the Minister responsible for finance, may make regulations on the applicable rates for the determination of the levies that are established by section 62.

(2) The Minister, with the concurrence of the Minister responsible for finance, must determine the levies payable under this Part by notice in the *Gazette*.

Exemption from payment of levies

67. (1) A person who is required to pay any levy payable under this Part may in the prescribed form and manner apply to the Minister for exemption from payment of the levy.

(2) An application made under subsection (1) must be accompanied by a statement of the reasons why the exemption must be granted and such other information as the Minister may require to enable him or her to determine the application.

(3) If the Minister is satisfied that there are sufficient reasons for granting the exemption, the Minister must grant such exemption on such conditions and for such period of time as the Minister may determine.

Access to accounts

68. (1) The Chief Executive Officer or a person designated in writing by BIPA as inspector must, on request in writing, be granted access to the accounts of -

- (a) manufacturers or importers of devices for digital storage placed on the market for consumers;
- (b) sellers of artistic works; and
- (c) copy shops,

in order to determine whether they are complying with the provisions in this Act, and this right to access is limited to the accounts of the last three years before the year in which the request for access is made.

(2) Information gathered by reason of access to the accounts may not be exploited for other purposes, and Chief Executive Officer or a person designated in writing by BIPA as inspector, must observe strict confidentiality with respect to this information except as is necessary in order to enforce the levy schemes pursuant to section 62.

Books and other records of account

69. (1) The Board must cause to be kept proper books and other records of account in respect of receipts and expenditures of the Fund in accordance with generally accepted accounting standards.

(2) The accounts of the Fund must be audited by the Auditor General in accordance with the State Finance Act, 1991(Act No. 31 of 1991).

(3) The Board must cause to be prepared, as soon as practicable, but not later than six months after the end of the financial year, an annual report on all the financial transactions of the Fund.

(4) The report referred to in subsection (3) must include a balance sheet, an income and expenditure account and the annual report of the Auditor General. and the Board must submit that report to the Minister within 90 days from the end of the financial year of the Fund.

(5) The Minister must lay the report referred to in subsection (4) before the National Assembly within 14 days after it became available, if the National Assembly is then in session, or, if the National Assembly is not then in session, within 14 days after the commencement of its next ensuing session.

Financial year of Fund

70. The financial year of the Fund ends on 31 March each year.

PART 10

COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS

Recognition of collective management organisations

71. (1) Any organisation or association of persons -
- (a) formed to represent the interests of owners of copyright or related rights and licensees; and
 - (b) whose main objectives include -
 - (i) the promotion and protection of the interests of owners of Copyright and Related Rights , licensees or performers;
 - (ii) the negotiation or granting of licences, on behalf of the owners, of Copyright and Related Rights through licence schemes; and
 - (iii) the granting of licences covering works or related subject matter of more than one right holder and distributing the remuneration or royalties to the right holders,

may apply to BIPA to be recognised as a collective management organisation for the purposes of this Act.

(2) An application in terms of subsection (1) must be in writing and must be accompanied by -

- (a) the constitution of the organisation or association;
- (b) the application fee as determined by BIPA; and
- (c) such other information or documents as may be prescribed or BIPA may determine.

(3) If BIPA is satisfied that the constitution of the organisation or association submitted in terms of subsection (2) provides adequately for -

- (a) the requirements for, and the manner of, admission to membership of the organisation or association of persons who are owners of copyright or related rights and licensees;
- (b) the establishment of licence schemes for the purpose of granting copyright or related rights licences in respect of works or related subject matter in which copyright or related rights are not owned by the body or person on whose behalf the collective management organisation acts;
- (c) the collection on behalf of, and the accounting and distribution to, its members of royalties or other remuneration accruing by reason of the use of works or related rights affecting rights pertaining thereto which are protected by this Act; and
- (d) the inspection by its members of the accounts which it is required to keep in terms of section 74(1),

BIPA may recognise such organisation or association as a collective management organisation under a name approved by BIPA and issue to it, in such form as BIPA may determine, a certificate to that effect.

(4) BIPA may not approve a name under subsection (3) which is identical to the name of a company registered under the Companies Act, 2004 (Act No. 28 of 2004), or similar to the name of such registered such that, in the opinion of BIPA, it is likely to cause confusion.

(5) Upon the recognition of an organisation or association as a collective management organisation under subsection (3), BIPA must enter the name of the collective management organisation in the registers kept by the Registrar.

(6) With effect from a date determined by BIBPA by notice in the *Gazette*, no person, other than a collective management organisation, may on behalf of any owner of copyright or a related right or a licensee collect or demand from any person payment of any royalty or other remuneration in respect of the use of any work or related subject matter in respect of which the rights pertaining thereto are protected by this Act.

(7) Subsection (6) may not be construed as prohibiting any owner of copyright or a related right or a licensee to personally, or through his or her legal representative, demand or collect from any person any royalty or other remuneration accruing to him or her by reason of any use of any work or related subject matter affecting any right of him or her protected by this Act.

(8) A person who contravenes or fails to comply with the provisions of subsection (6) commits an offence and is liable to a fine not exceeding N\$12 000 or to imprisonment for a period not exceeding three years, or to both such fine and such imprisonment.

Legal status of collective management organisation

72. Every collective management organisation is, with effect from the date of issue of the certificate referred to in section 72(3), a juristic person.

Accounts and auditing

73. (1) Every collective management organisation must cause proper accounts to be kept of all royalties or other remuneration collected by it on behalf of its members and the

manner in which such royalties or other remuneration have been distributed or otherwise applied.

(2) Every collective management organisation must cause its books and accounts to be audited annually by a person registered as a public accountant and auditor in terms of the Public Accountants' and Auditors' Act, 1951 (Act No. 51 of 1951).

Withdrawal of recognition

74. (1) The Registrar may, upon information received by him or her that a collective management organisation -

(a) is failing in its duty towards its members with respect to -

(i) any function contemplated in section 72(3)(b); or

(ii) the inspection of its accounts contemplated in section 72(3)(c); or

(b) has failed to comply with the provisions of section 74,

by written notice delivered or sent by registered post to the organisation at its last known address, request the organisation to make written representations, within a period of 21 days from the date of the notice, with respect to any such failure.

(2) When, after consideration of any written representations made in terms of subsection (1), the BIPA is of the opinion that the failure in question on the part of the collective management organisation -

(a) is materially prejudicing; or

(b) has materially prejudiced its members,

the BIPA may withdraw the recognition thereof as a collective management organisation and cancel the certificate issued to the organisation under section 72(3).

(3) The Registrar must notify the Companies Registration Office of any withdrawal and cancellation under subsection (2), and the Companies Registration Office must delete the name of the collective management organisation concerned from the registers referred to in section 72(5).

(4) The Minister may make regulations relating to -

- (a) the establishment and recognition of one or more collective management organisations; and
- (b) the requirements to be met by an organisation or association before it can be recognised as a collective management organisation;
- (c) the establishment of licence schemes for the purpose of granting copyright or related rights licences in respect of works or related subject matter in which copyright or related rights are not owned by the body or person on whose behalf the collective management organisation acts.

(5) The regulations may provide for -

- (a) the copyright or related rights owner to have a right to limit or exclude the grant of licences by virtue of the regulations; and
- (b) any licence not to give exclusive rights.

(6) A licence scheme established under subsection (4) must specify -

- (a) the classes of works or subject matter in which the organisation is willing render services;
- (b) the person on whose behalf the organisation is willing to grant licences of a description, and the charges, if any,

- (c) terms and conditions subject to which licences may be granted in those classes of works or subject matter;
- (d) the acts restricted by copyright or related rights that the organisation is authorised to licence;
- (e) anything in the nature of such a scheme, whether described as a scheme or as a tariff or by any other name.

PART 11

COPYRIGHT AND RELATED RIGHTS TRIBUNAL

Copyright and Related Rights Tribunal

75. (1) The Judge-President of the High Court of Namibia must from time to time designate one or more judges or acting judges of the High Court as Copyright and Related Rights Tribunal for the purposes of this Act.

(2) Subject to this Part, the functions of the Tribunal are -

(a) to determine disputes arising between -

(i) collective management organisations;

(ii) other persons from whom licences are required and persons requiring licences; or

(iii) organisations claiming to be representative of any of such persons,

either upon the reference of a licence scheme to the Tribunal or upon the application of a person requiring a licence, whether in accordance with a licence scheme or in a case not covered by a licence scheme; and

- (b) to make such other determinations as are provided for in this Act.

Reference of matters to Tribunal

76. (1) Where at any time, while a licence scheme is in operation, a dispute arises with respect to the scheme between the collective management organisation operating the scheme and -

- (a) an organisation claiming to be representative of persons requiring licences in cases of a class to which the scheme applies; or
- (b) a person claiming that he or she requires a licence in a case of a class to which the scheme applies,

the organisation or person in question may refer the scheme to the Tribunal in so far as it relates to cases of that class.

- (2) The parties to a reference under this section are -

- (a) the organisation or person at whose instance the reference is made;
- (b) the collective licensing organisation operating the scheme to which the reference relates; and
- (c) any such other organisation or person as has been made a party thereto in accordance with subsection (3).

- (3) Where -

- (a) an organisation, whether claiming to be representative of persons requiring licences or not; or
- (b) a person, whether requiring a licence or not,

applies to the Tribunal to be made a party to a reference made to the Tribunal, the Tribunal may, if it is satisfied that the organisation or person has a substantial interest in the matter in dispute, make that organisation or person a party to the reference.

(4) The Tribunal may not entertain a reference under this section by an organisation unless it is satisfied that the organisation is reasonably representative of the class of persons which it claims to represent.

(5) Subject to subsection (4), the Tribunal must, upon a reference under this section, consider the matter in dispute and, after giving the parties to the reference an opportunity of presenting their respective cases, make such order, either confirming or varying the licence scheme in so far as it relates to cases of the class to which the reference relates, as the Tribunal may determine to be reasonable in the circumstances.

(6) An order of the Tribunal under subsection (5) may be made so as to be in force either indefinitely or for such period as the Tribunal may determine.

(7) Where the Tribunal has made an order in respect of a licence scheme which has been referred to it, such scheme must thereafter, despite anything contained therein, and in so far as it relates to the class of cases in respect of which the order was made, remain in operation subject to the terms of the order.

Subsequent reference of matters to Tribunal

77. (1) Where the Tribunal has made an order under section 77 with respect to a licence scheme -

- (a) the collective management organisation operating the scheme;
- (b) an organisation claiming to be representative of persons requiring licences in cases of the class to which the order applies; or
- (c) a person claiming that he or she requires a licence in a case of that class,

may, subject to subsection (2), at any time while the order is in force, again refer the scheme to the Tribunal in so far as it relates to cases of the class in respect of which the order applies.

(2) A licence scheme may not, except with the special leave of the Tribunal, again be referred to the Tribunal under subsection (1) where -

- (a) the relevant order was made so as to be in force indefinitely or for a period exceeding 15 months, before the expiration of a period of 12 months from the date on which the order was made; or
- (b) that order was made so as to be in force for a period not exceeding 15 months, at any time more than three months before the date of expiry of the order.

(3) Subsections (3), (4), (5), (6) and (7) of section 77 apply with necessary changes in respect of a reference under this section or an order made upon such a reference.

Applications to Tribunal

78. (1) For the purposes of this Part a case must be taken to be covered by a licence scheme if, in accordance with a licence scheme for the time being in operation, licences would be granted in cases of the class to which that case belongs: provided that where in accordance with the provisions of a licence scheme -

- (a) the licences which would be so granted would be subject to terms and conditions whereby particular matters would be excepted from the licences; and
- (b) the case in question relates to one or more matters falling within such an exception, that case must be taken not to be covered by the scheme.

(2) A person, who claims that in a case covered by a licence scheme the collective licensing organisation operating the scheme has refused or failed -

- (a) to grant him or her a licence in accordance with the provisions of the scheme; or

- (b) to procure the grant to him or her of such a licence,

may apply to the Tribunal for an order under this section.

(3) An application pursuant to subsection (2) may also be made by a person who claims that he or she requires a licence in a case not covered by a licence scheme, and either -

- (a) that a collective licensing organisation or person has refused or failed to grant the licence or to procure the grant thereof, and that in the circumstances it is unreasonable that the licence should not be granted; or
- (b) that any charges, terms or conditions subject to which a collective licensing organisation proposes that the licence must be granted are unreasonable.

(4) Where -

- (a) an organisation, whether claiming to be representative of persons requiring licences or not; or
- (b) a person, whether requiring a licence or not,

applies to the Tribunal to be made a party to an application under subsection (2) or (3), the Tribunal may, if it is satisfied that the organisation or person has a substantial interest in the matter in dispute, make that organisation or person a party to the application.

(5) On an application under subsection (2) or (3), the Tribunal must give the applicant and the collective licensing organisation in question and every other party to the application an opportunity of being heard and submitting representations in writing.

(6) If the Tribunal is satisfied that the claim of an applicant is well-founded, it must make an order declaring that, in respect of the matters specified in the order, the applicant is entitled to a licence on such terms and conditions and subject to the payment of such charges, if any, as the Tribunal may -

- (a) in the case of an application under subsection (2), determine to be applicable in accordance with the licence scheme; or
- (b) in the case of an application under subsection (3), determine to be reasonable in the circumstances.

(7) A reference in this section to failure to grant or procure the grant of a licence must be construed as including a reference to a failure to grant, or to procure the grant of, a licence within a reasonable time after being requested to do so.

Diffusion service

79. In a dispute concerning the transmission of broadcasts in a diffusion service in Namibia, the Tribunal must disallow a claim under this Act to the extent to which the licences of the broadcasting organisation concerned provide for or include such transmission in a diffusion service.

Effect of orders of Tribunal

80. (1) A person who -

- (a) complies with the conditions of an order made by the Tribunal under this Part; or
- (b) has given a satisfactory undertaking to the owner or prospective owner of the copyright or related right to comply with such conditions, is deemed to be the holder of a licence under this Act.

(2) In the exercise of its jurisdiction in respect of licences relating to television broadcasts, the Tribunal -

- (a) must have regard, among other things, to any conditions imposed by the promoters of any entertainment or other event which is to be comprised in the broadcasts; and

- (b) in particular the Tribunal may not hold a refusal or failure to grant a licence to be unreasonable if it could not have been granted consistently with those conditions.

(3) For the purpose of subsection (1), “prospective owner” means a person who will be entitled to the copyright or related right, wholly or partially, in a work or subject matter in which copyright does not yet subsist or rights in the subject matter do not exist or whose entitlement to the copyright or related right which does exist will become effective upon a future event.

Costs and expenses

81. The Tribunal may order that the costs or expenses of any proceedings before it incurred by a party be paid by any other party, and may tax or settle the amount of any costs or expenses to be paid under that order or direct the manner in which they are to be taxed.

Orders of Tribunal

82. A document purporting to be a copy of an order of the Tribunal and certified by the Registrar of the High Court of Namibia to be a true copy of such an order is, in any legal proceedings sufficient evidence of the order, unless the contrary is proved.

Appeals from Tribunal

83. (1) A party to proceedings before the Tribunal may appeal against an order or decision of the Tribunal pursuant to such proceedings.

(2) Every appeal must be noted and prosecuted in the manner prescribed by law for appeals against a judgement or order of a single judge of the High Court of Namibia sitting as a court of first instance, and section 18 of the High Court Act, 1990 (Act No. 16 of 1990) and section 14 of the Supreme Court Act, 1990 (Act No. 15 of 1990)), apply to such appeal with the necessary changes.

- (3) The court hearing the appeal may -

- (a) receive further evidence, either orally or by deposition before a person appointed by the court;
- (b) remit the matter to the Tribunal with such instructions in relation to the taking of further evidence or any other matter as the court considers necessary;
- (c) confirm, amend or set aside the order or decision which is the subject of appeal;
- (d) take any other course which in the opinion of the court is fair and may lead to the speedy and as far as may be possible inexpensive settlement of the case; or
- (e) make such order as to costs as the court considers fair.

Regulations relating to proceedings before and appeals from Tribunal

84. Regulations made under paragraph (b) of section 87 may -

- (a) apply any of the provisions of the Arbitration Act, 1965 (Act 42 of 1965); and
- (b) include provisions for -
 - (i) requiring notice of an appeal under section 83 to be given to the Tribunal and to the other parties to the proceedings;
 - (ii) suspending or authorising or requiring the Tribunal to suspend the operation of an order of the Tribunal in a case where after giving its decision an appeal under section 83 is noted;
 - (iii) modifying in relation to orders of the Tribunal, of which the operation is suspended, the operation of any provision of this section as to the effect of such an order;

- (iv) the publication of a notice or the taking of any other steps for ensuring that persons affected by the suspension of an order of the Tribunal will be informed of its suspension; and
- (v) regulating or prescribing any other matters incidental to or consequential upon any appeal under section 84 or any order or decision made or given under that section.

PART 12

GENERAL PROVISIONS

Voluntary registration of rights and organisations

85. (1) Registration of copyright or a related right under this section is voluntary and may not be construed as a formal requirement which constitutes a precondition for the protection of copyright or a related right under this Act.

(2) BIPA must pursuant to the BIPA Act, open and maintain registers in which must be registered:

- (a) collective management organisations recognised under this Act; and
 - (b) works and related subject matter protected by Copyright and Related Rights that have been voluntarily registered under this Act.
- (3) The purposes of registration are to -
- (a) maintain a record of those involved in the management of Copyright and Related Rights ; and
 - (b) maintain a record of works or related subject matter subject to protection under this Act.

(4) A person who wishes to register a work or related subject must in the prescribed manner, submit an application for such registration to the Registrar.

(5) A publisher of a work or related subject matter may, in the prescribed manner, submit an application for the registration of the work or subject matter before its publication.

(6) An application made under subsection (4) or (5) must be accompanied by a copy of the work or subject matter to be registered together with such other documents and information as may be prescribed.

(7) BIPA must consider every application made under this section and if satisfied that the application meets the requirements of this Act, register the work or subject matter as applicable, and issue the prescribed certificate of registration to the applicant.

(8) Copyright protection of a work or the protection of a related right is not dependent on the registration of the work.

(9) A or collective management organisation is, on submission of proof to the Registrar that it has been recognised under this Act, entitled to registration and to be issued with the prescribed certificate of registration by the Registrar.

(10) In any legal proceedings before any court or tribunal the production of any certificate of registration issued by the Registrar constitutes *prima facie* evidence of any matter stated in such certificate, unless the contrary is proven.

Effect of international agreements

86. Provisions of any international convention or agreement in respect of Copyright and Related Rights to which Namibia is a party apply to matters dealt with in this Act and, in case of conflict with any provision of this Act the provision of such convention or agreement prevails over the provision of this Act.

Regulations

- 87.** The Minister may make regulations relating to -
- (a) any matter required or permitted by this Act to be prescribed;
 - (b) the procedure for making references and applications to the Tribunal and for proceedings before the Tribunal;
 - (c) the tariff of any fees payable under this Act, with the concurrence of the Minister responsible for finance, including fees in respect of proceedings before the Tribunal;
 - (d) generally, to any matter which the Minister considers it necessary or expedient to prescribe in order that the objects of this Act may be achieved.

Repeal of laws

88. (1) Subject to subsection (2) and section 90, the Copyright and Neighbouring Rights Protection Act, 1994 (Act No.6 of 1994) is repealed.

(2) Anything done under a provision of a law repealed by subsection (1) which could have been done under a corresponding provision of this Act is deemed to have been done under that corresponding provision.

Savings and transitional provisions

89. (1) Nothing in this Act affects a right or privilege of the State or of any other person under a law not expressly repealed, amended or modified by this Act.

(2) Nothing in this Act affects the right of the State or of a person deriving title from the State to sell, use or otherwise deal with implements forfeited under the laws relating to customs and excise, including an implement forfeited by virtue of this Act or a law repealed by section 89(1).

(3) Nothing in Part 5 affects the rights acquired by a performer before the commencement of this Act.

(4) The provisions of this Act do not derogate from a rule of law relating to confidential or privileged information, unlawful competition or personality rights.

(5) Subject to this section, no copyright, related right or a right in the nature of copyright may subsist otherwise than by virtue of this Act or any other law.

(6) This Act applies to -

(a) works and related subject matter made prior to the commencement of this Act, where the term of protection had not expired under the former Act or under the legislation of the country of origin of such works;

(b) related subject matter that is to be protected under an international convention or agreement relating to protection of such subject matter to which Namibia is a party.

(7) This Act does not affect a contract on a work and related subject matter, concluded before the commencement of this Act.

Act binds State

90 This Act binds the State.

Short title and commencement

91. (1) This Act is called the Copyright and Related Rights Protection Act, 2021, and commences on a date determined by the Minister by notice in the *Gazette*.

(2) Different dates may be determined under subsection (1) in respect of different provisions of this Act.
