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Justice and Constitutional Development  
REPUBLIC OF SOUTH AFRICA

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Mr L October  
Director-General  
Department of Trade and Industry  
Private Bag X 84  
PRETORIA  
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Dear Mr October

**Attention: Ms T Mabirimisa**

**ACCESSION TO BEIJING TREATY ON AUDIOVISUAL PERFORMANCES: YOUR  
E-MAIL DATED 9 APRIL 2018**

**Introduction**

1. The Department of Trade and Industry (hereinafter referred to as "the Department") informs us that South Africa intends to accede to the Beijing Treaty on Audiovisual Performances (hereinafter referred to as "the Treaty") concluded by members of the World Intellectual Property Organization (hereinafter referred to as "WIPO"). We have scrutinised the Treaty in terms of *paragraph 5.20(a) of the Manual on Executive Acts of the President of the Republic of South Africa* and with reference to *Chapter 5 of the Constitutional Handbook for Members of the Executive*.

### **Accession to the Treaty**

2. South Africa is a member state of WIPO and can therefore, in terms of Article 23(1) of the Treaty, become a contracting party to the Treaty. South Africa was not one of the original signatories of the Treaty contemplated in Article 25 of the Treaty. In terms of Article 27(ii) of the Treaty it will become binding on South Africa three months after the instrument of accession has been deposited with the Director-General of WIPO.

### **Overview of the contents of the Treaty**

3. Article 3 of the Treaty identifies the persons who are the beneficiaries of the protection granted under the Treaty as performers as defined in Article 2 of the Treaty. The performers that receive protection are citizens and permanent residents of the Contracting Party.

4. Article 4 provides that performers who are citizens of another Contracting Party must enjoy the same treatment as that enjoyed by the performers who are citizens of the Contracting Party.

5. Article 5 provides for the nature of the rights of a performer, apart from his or her economic rights, namely that—

- (a) the performer may claim to be identified as the performer of his or her performance;
- (b) the performer may object to distortion or modification of his or her performances which are prejudicial to his or her reputation.

6. Article 6 provides that a performer has the exclusive right to authorise the broadcasting of his or her performances before the said performance has been recorded and to authorise the recording of his or her performances.

7. Articles 7 to 10 of the Treaty provides that performers have the exclusive right to authorise —

- (a) the reproduction of their recorded performances;
- (b) the distribution by sale of their recorded performances;
- (c) the commercial rental of their recorded performances; and
- (d) the distribution of their recorded performances by wire or wireless means.

8. Article 11 of the Treaty deals with the rights of performers with regard to the broadcasting of their recorded performances. Paragraph (1) of Article 11 provides that performers have the exclusive right to authorise the broadcasting of their performances. Paragraph (2) provides that the Contracting Parties may, by depositing a notification with the Director-General of WIPO, establish the right that performers will be equitably remunerated for the broadcasting of their recorded performances instead of the performers having the exclusive right to authorise the broadcasting of such performances.

9. In terms of Article 12 of the Treaty a Contracting Party may by legislation provide that when a performer has authorised the recording of his or her performances, the rights provided for in Articles 7 to 11 of the Treaty will be owned by the producer of the recording subject to the provisions of the contract between such producer and the performer.

10. Article 13 of the Treaty provides that Contracting Parties may by legislation impose the same type of limitations on the rights of performers conferred in terms Articles 7 to 11 of the Treaty as the limitations imposed by legislation on the protection of copyright in literary and artistic work.

11. Article 14 of the Treaty provides that a performer's rights in the recording of his or her performance will be protected for a period of 50 years.

12. Articles 15 and 16 of the Treaty provide that Contracting Parties shall provide adequate legal protection and effective legal remedies against—

- (a) the circumvention of measures taken by performers to protect their rights under the Treaty; and
- (b) persons who infringe the rights of performers by—
  - (i) removing their particulars from recordings of their performances;
  - (ii) distributing or broadcasting recordings of performances from which the particulars of the performer have been removed.

13. Whilst Articles 5 to 16 of the Treaty deal with the substantive rights and obligations of performers and Contracting Parties in terms of the Treaty, Articles 17 to 20 deal with the following procedural matters:

- (a) The exercise of rights under the Treaty is not subject to any formality;
- (b) the Contracting Parties are not allowed to make reservations to the Treaty;

- (c) the Contracting Parties may deposit notifications in terms Articles 11 and 19 with the Director-General of WIPO;
- (d) the time from when the protection offered in terms of the Treaty **will** be applicable to recordings of performers;
- (e) obligations of the Contracting Parties to ensure the application of the Treaty within their countries.

14. Article 21 of the Treaty provides for the establishment of an Assembly in which each Contracting Party is represented by one delegate. The function of the Assembly is to deal with matters concerning the maintenance and development of the Treaty and with matters relating to the application and operation of the Treaty. The meetings of the Assembly will take place during the same time and at the same place as the meetings of the General Assembly of WIPO.

15. Article 22 of the Treaty provides that the International Bureau of WIPO performs the administrative tasks concerning the Treaty.

16. Article 24 of the Treaty provides that each Contracting Party enjoys all the rights and assumes all the obligations in the Treaty subject to any specific provision of the Treaty.

17. In terms of Article 27 of the Treaty South Africa shall become a Contracting Party three months after it deposited its instrument of accession with the Director-General of WIPO.

18. In terms of Article 28 of the Treaty any Contracting Party may denounce the Treaty by notification addressed to the Director-General of WIPO.

#### **Salient features of the Treaty and their implications**

19. Accession to the Treaty means that the relevant authorities in South Africa **will** have to extend the same protection to the intellectual property rights of performers who are nationals of other countries as that which it extends to performers of South Africa..

20. Accession to the Treaty also means that the right to equitable remuneration provided for in Article 11 must be extended to performers who are nationals of other countries. However, if nationals of South Africa enjoy limited rights in the country of

another Party to the Treaty the rights of the performers of that country may also be limited.

21. Article 20(1) of the Treaty provides as follows:

"Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty."

The relevant authorities in South Africa will in terms of Article 20(1) of the Treaty therefore be obliged to ensure that the rights provided for in the Performers' Protection Act, 1967 (Act No. 11 of 1967), (hereinafter referred to as "the Protection Act") are also extended to nationals of signatories of the Treaty who perform in South Africa.

22. If the Treaty is enacted into law in terms of section 231(4) of the Constitution of the Republic of South Africa, 1996 ("the Constitution") the authorities dealing with the implementation of the Protection Act will have to ensure that the following sections of the Protection Act are not in conflict with the provisions of the Treaty:

**"Protection of performers' rights in respect of performances in the Republic**

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

- (a) taking place,
  - (b) broadcast without a fixation, or
  - (c) first fixed,
- in the Republic.

**Extension of protection of performers' rights to performances in certain countries**

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

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

in a country which is a member of the World Trade Organization: Provided that the right conferred on performers in section 5(1)(b) shall, in the case of performances in the Republic but emanating from a country which is a member of the World Trade Organization, only be granted to them to the extent that performances emanating from the Republic enjoy corresponding

protection in that country, and such performances of foreign origin shall not enjoy any wider protection in the Republic than is enjoyed in that country by performances emanating from the Republic.

#### **Restrictions on use of performances**

**5.(1)** Subject to the provisions of this Act, no person shall -

**(a)** without the consent of the performer -

**(i)** broadcast or communicate to the public an unfixed performance of such performer, unless the performance used in the broadcast or the public communication is itself already a broadcast performance; or

**(ii)** make a fixation of the unfixed performance of such performer;  
or

**(iii)** make a reproduction of a fixation of a performance of such performer -

**(aa)** if the original fixation, other than a fixation excluded by section 8 from the necessity for obtaining the consent of the performer, was itself made without his or her consent; or

**(bb)** if the reproduction is made for purposes other than those in respect of which such performer gave his or her consent to the making of the original fixation or of a reproduction thereof; or

**(cc)** if the original fixation was made in accordance with the provisions of section 8, and the reproduction is made for purposes not covered by those provisions; or

**(b)** by means of a fixation of a performance published for commercial purposes, without payment of a royalty to the performer concerned -

**(i)** broadcast the performance;

**(ii)** cause the performance to be transmitted in a diffusion service defined in section 1 of the Copyright Act, 1978 (Act No. 98 of 1978), unless such service transmits a lawful broadcast, including the performance, and is operated by the original broadcaster; or

**(iii)** cause any communication of the performance to the public.

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

or her consent to the rebroadcasting of his or her performance, the fixation of his or her performance for broadcasting purposes, and the reproduction for broadcasting purposes of such fixation.

(3)(a) The amount of any royalty contemplated in subsection (1)(b) shall be determined by an agreement between the performer and the person who broadcasts or transmits, or causes communication of, the performance, as the case may be, or between their representative collecting societies.

(b) In the absence of an agreement contemplated in paragraph (a), any party may refer the matter to the Copyright Tribunal established in terms of section 29(1) of the Copyright Act, 1978 (Act No. 98 of 1978), or the parties may agree to refer the matter for arbitration in terms of the Arbitration Act, 1965 (Act No. 42 of 1965).

(4)(a) A performer who has authorized the fixation of his or her performance shall, in the absence of any agreement to the contrary, be deemed to have granted to the person who arranges for such fixation to be made the exclusive right to receive the royalties contemplated in subsection (1)(b) in respect of any broadcast, transmission or communication of such fixed performance: Provided that the performer is entitled to share in any payment received by the person who arranges for the fixation, in the manner agreed upon between the performer and the person who arranges for such fixation, or between their representative collecting societies.

(b) In the absence of an agreement contemplated in the proviso to paragraph (a), any party contemplated in that proviso may refer the matter to the Copyright Tribunal established in terms of section 29(1) of the Copyright Act, 1978 (Act No. 98 of 1978), or the parties may agree to refer the matter for arbitration in terms of the Arbitration Act, 1965 (Act No. 42 of 1965).

(5) Any payment made in terms of subsection (4) shall be deemed to have discharged any obligation by the person who broadcasts or transmits or causes communication of the performance to pay a royalty to the owner of any copyright subsisting in that fixation in terms of section 9A of the Copyright Act, 1978 (Act No. 98 of 1978).

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

### **Collective performances**

6. (1) Where several performers as a group take part in the same performance, it shall suffice if the consent required under section 5 is given by the manager or other authority in charge of the group or, failing such authority, by the leader of the group.

(2) In the case referred to in subsection (1) a single payment for the use of the performance shall, unless otherwise stipulated, be made to the manager or other authority in charge of the group or, failing such manager or authority, to the leader of the group, and the manager or authority or leader, as the case may be, shall distribute the proceeds as agreed by the performers or, in default of agreement, the right to remuneration of the respective performers shall be determined in accordance with the provisions of the Arbitration Act, 1965 (Act No. 42 of 1965), or alternatively, at the option of the majority of the performers, by the Copyright Tribunal established by the Copyright Act, 1965 (Act No. 63 of 1965).

### **Term of protection**

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

### **Exceptions from prohibition against use of performance without the consent of the performer**

8. (1) .....

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

- (a) if it is for the purposes of private study or personal and private use; or
- (b) if it is for the purposes of criticism or review or for the purpose of reporting on current events, provided that not more than short excerpts from the performance are used and, whenever possible, the performer's name or the names of the leading performers are acknowledged; or
- (c) if it is for the purposes of teaching or scientific research; or



- (d) if it is for the purpose of legal proceedings; or
  - (e) if it is for the demonstration of recording, amplifying or similar apparatus, provided that the demonstration is made by a licensed dealer on his premises to a specific client.
- (3)(a) A broadcaster may make by means of his or her own facilities a fixation of a performance and reproductions of such fixation without the consent required by section 5, provided that, unless otherwise stipulated, the fixation or any reproduction thereof -
- (i) is intended exclusively for broadcasts to which the performer has consented;
  - (ii) if they are not of an exceptional documentary character, are destroyed before the end of the period of six months commencing on the day on which the fixation was first made or such longer period as may be agreed to by the performer
- (b) The fixation and the reproductions thereof made under the provisions of this subsection may, on the grounds of their exceptional documentary character, be preserved in the archives of the broadcaster but shall, subject to the provisions of this Act, not be further used without the consent of the performer."

#### **Entry into force of the Treaty in South Africa**

23.1 The Department's attention is drawn to section 231 of the Constitution which deals with international agreements and provides as follows:

- "(1) The negotiating and signing of all international agreements is the responsibility of the national executive.
- (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
- (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.
- (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
- (5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect."

23.2 International agreements that need ratification or accession can only become binding on South Africa in terms of section 231(2) of the Constitution. As South Africa has to accede to the Treaty the procedure provided for in section 231(2) of the Constitution will have to be followed, with the effect that it will bind the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces. After this procedure has been followed the instrument of accession must be submitted to the Director-General of WIPO.

23.3 We have also considered the—

- (a) Intellectual Property Rights from Publicly Financed Research and Development Act, 2008 (Act No. 51 of 2008);
- (b) Protection Act,

with regard to the Treaty and are of the view that it is not in conflict therewith.

20. Subject to our remarks in paragraphs 19 to 22 above the Republic can accede to Treaty as there is, as far as we could ascertain, no provision of the Treaty that is in conflict with the domestic law of the Republic of South Africa.

Yours sincerely,



**OFFICE OF THE CHIEF STATE LAW ADVISER**  
**J N McLACHLAN/W J J NEL/M A OLWAGE/A JOHAAR**