Written comments on the draft Performers' Protection Amendment Bill [B24D-2016]

The Anton Mostert Chair of Intellectual Property Law

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Introduction

These comments are submitted pursuant to the invitation extended by the Select Committee on Trade and Industry, Economic Development, Small Business Development, Tourism, Employment and Labour ("Select Committee") to submit written comments on the draft the Performers' Protection Amendment Bill [B24D-2016] (the "Amendment Bill"). These comments will focus on the interaction between the Performer's Protection Act 11 of 1967 (the "Principal Act") and the Copyright Act 98 of 1978 (the "Copyright Act"). However, the comments also raise matters of concern present in the Amendment Bill.

1 Definitions

1.1 “fixation”, “audiovisual fixation” and “sound recording”

These definitions are central to the application of the Principal Act, namely, “fixation”, “audiovisual fixation”, and “sound recording” (introduced by the Amendment Bill). Given the fact that the purpose of the Principal Act is to protect the rights of performers, the recording of a performance and exploitation of such recording should be one of the main areas of concern that the Act would seek to address. However, this concern is not consistently dealt with by the Amendment Act (and, also not by the Principal Act, as it currently exists). One would expect that most provisions would seek to protect performers’ rights in relation to the exploitation of any form of recording, unless there was a specific reason for distinguishing between an exclusively aural recording and an audiovisual recording. Thus, most provisions should simply refer to a “fixation” of a performance, which should be the umbrella term for any type of recording, be it an exclusively aural recording or an audiovisual recording. In other words, if necessary, there are two subcategories of fixation, namely, a sound recording and audiovisual fixation. To this end, it is unclear why the existing definition of “fixation” has been deleted, rather than simply amended, if desirable, by the addition of the following words “which can be perceived, reproduced or communicated by any means”. Having said that, it is not clear if a distinction between sound recordings and audiovisual recordings is at all necessary. This matter needs to be properly re-considered.

Subject to the aforementioned comments, the proposed definition of “audiovisual fixation” could then be simplified to read as follows: “means the visual fixation of images, by whatever means, whether or not accompanied by sounds”. Careful consideration should be given to whether the particular statutory provisions are intended to apply to fixations (that is, the recordings) generally, or specifically to sound recordings or audiovisual fixations. The phrase “or by the representations thereof” in the proposed definition seems a bit odd. On this basis, the comments below will indicate some of the areas in which the particular provision shall apply to all fixations, or simply to a particular subcategory of fixation (which need to distinguish, incidentally, is unclear). It may be the case that the definitions of “audiovisual fixation” and that of “sound recording” may not be required, and that a simple reference to a form of fixation may be adequate.

1.2 “communication to the public of a performance”

Having regard to comments in paragraph 1.1 above, is there any reason why the proposed definition must expressly refer to the two forms of fixations? The definition could simply be in respect of a fixation, which would then cover both an audiovisual fixation and a sound recording. The definition can be amended to read as follows: “means the communication to the public, including the making available, by any medium, other than by broadcasting, of an unfixed performance or the fixation of a performance that members of the public may access at a place and time of their choosing, and ‘communicate to the public a performance’ shall have the corresponding meaning”. If this right of communication to the public is envisioned to be a technology-neutral right covering any manner in which the public may access the protected performance, the inclusion of the words “that members of the public may access at a place and time of their choosing” must necessarily be included in the definition in order to include interactive forms of communication made possible through technology such as the Internet.

2 Proposed amendments to section 3

Given the fact that one of the stated objectives of the Amendment Bill is to promote performers’ moral and economic rights, the new proposed section 3(2) seems to contradict that objective. The Amendment Bill assumes that a performer may have transferred its rights in terms of the Principal Act, and, on the basis of that assumption, seeks to ensure that the performer at least has some moral rights, as well as a reversionary right.[1] In fact, in one material respect, the Amendment Bill appears to weaken the position of performers. Currently, the accepted view is that the rights granted to performers under the Principal Act cannot be transferred (more correctly, assigned) as the Act makes no provision for the rights granted to be transferred.[2] The most obvious, and simplest, way to enhance the rights of performers would be to maintain the principle that the rights afforded by the Act cannot be transferred by performers.

[1] See new proposed section 3A of the Amendment Bill.
[2] Dean OH, Dyer A Dean & Dyer: Introduction to Intellectual Property Law (2014) OUP at 67.

The proposed new section 3(3) is, at best, unclear. First, although the rights granted under the Principal Act may in some respects be similar to copyright, it is not copyright. It is, thus, important to distinguish performers' right from copyright. Second, it is submitted that the moral rights in copyright law are considered to be akin to common-law personality rights protecting honour or reputation. At present, such personal rights can only be enforced by the author of the copyright work, and will, thus, terminate on the death or termination of the author.[3] Accordingly, the proposed new section creates confusion. It is best not to confuse issues of copyright with that of performers' rights, or try to oversimplify the relationship between the two concepts. For example, there would still be performers' rights if a performer sings a song which is no longer protected by copyright, as it is in the public domain. It is also not clear whether the reference to the Copyright Act is to the general duration of copyright protection (which is potentially much longer than the term of performers' rights) or whether it simply refers to the corresponding term for moral rights under copyright law. However, as indicated the latter is considered to terminate on death, which would defeat the purpose of trying to extend rights after a performer's death. In keeping with the comments in paragraph 1.1, the proposed sections 3(4)(c) to (g) could simply refer to "fixations".

3 Proposed new section 3B

Guidance should be provided as to whether the term "producer" is considered to be the same as the "author" (or even the "owner") under the Copyright Act, or whether there may be a distinction between the two concepts. If it is the latter case, what if there is a dispute between the "producer" and the copyright owner (or author) of the phonogram? What if the copyright owner wishes to commercially exploit the phonogram but the producer refuses to consent to such exploitation? Will this not introduce another layer of complexity? A way should be found to avoid too much fragmentation of rights. For example, the copyright owner could be the agent of the other rights holders, in a manner similar to the position which currently exists between the copyright holder of a sound recording and the performer who features on such sound recording. The royalty collected pursuant to section 9A is not only for the required right to use the particular sound recording, but also discharges any obligation to pay a royalty in relation to any performers' rights in relation to the particular sound

[3] Dean and Karjiker Handbook of South African Copyright Law (2015) 1-112.

recording.[4] Thus, section 9A also provides that any performer whose performance is featured on a sound recording is entitled to a share of the royalty in relation to the playing of the sound recording.[5] The Collecting Societies Regulations provide that a collecting society who represents both the performers and the copyright owners must distribute the royalties on an equal basis between such rights holders.[6] If producers — as a distinct category of rights holders — are also to be given rights, the entire Principal Act needs to be reconsidered to ensure that in all relevant cases the provisions cater for both the rights of the performer and producer. Thus, the interrelation between the producers, copyright owner and performer needs to be clarified.

Why is specific reference only made to “sound recordings” (and not also to “audiovisual fixations”)? Why should the producer (or director) of a music video not be given the same types of rights as the producer of a sound recording?

4 Proposed amendment to section 5

Proposed sections 5(1)(a)(i) to (iv), and 5(1)(b) may be simplified by merely referring to “fixations”. See the comments in paragraph 1.1 above.

In relation to the proposed subsection (2), it is not clear why the performer (and producer) should not be deemed to have also consented to the rebroadcasting of the relevant performance. Legislation of this nature should really serve as a type of standard-form contract, and serve to reduce the transaction costs. The proposed amendment will unnecessarily increase transaction costs. The provision should rather provide for a reasonable royalty to be paid for any further broadcasts, in the absence of an agreement relating to further broadcasts.

5 Proposed amendment to section 8

The proposed section 8(2)(f) is inappropriate, and should be deleted. It cannot apply to the performance. As indicated above, copyright is regulated by the Copyright Act, and is a distinct right. Issues of fair-dealing in the fixation should be left to be dealt with in terms of the Copyright Act, otherwise it may result in possible confusion.

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[4] Section 9A(2)(d) Copyright Act 98 of 1978.
[5] Section 9A(2)(a).
[6] Regulation 8(5)(b).

In relation to the proposed section 8(3)(a), it is not clear why there should not be a general archiving right. Archiving should not affect any of the moral or economic interests at issue. In fact, archiving should not be limited to material of an “exceptional documentary character” as it would lead to uncertainty as to what would qualify under such right. Also, it often happens that material is only later considered to be significant.

6 Proposed new sections 8E, 8F, 8G and 8H

These sections are identical to proposed sections 28O, 28P, 28R and 28S of the Copyright Amendment Bill [B13D-2017] and any issues pertaining to the proposed sections of the Copyright Amendment Bill will apply accordingly.

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