

Republic of Namibia

COPYRIGHT AND NEIGHBOURING RIGHTS PROTECTION ACT 6 OF 1994

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ACT

To provide for the protection of copyright and performers' rights, and to provide for matters incidental thereto.

BE IT ENACTED by the Parliament of the Republic of Namibia, as follows:-

INTRODUCTORY PROVISIONS

1 Interpretation

(1) In this Act, unless the context otherwise indicates-

"adaptation", in relation to-

(a) a literary work, includes-

(i) in the case of a non-dramatic work, a version of the work in which it is converted into a dramatic work;

(ii) in the case of a dramatic work, a version of the work in which it is converted into a non-dramatic work;

(iii) a translation of the work; or

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

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

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

(d) a computer program, includes-

(i) a version of the program in a programming language, code or notation different from that of the program; or

(ii) a fixation of the program in or on a medium different from the medium of fixation of the program;

"artistic work" means, irrespective of its artistic quality-

(a) a painting, sculpture, drawing, engraving or photograph;

(b) a work of architecture, being either a building or a model of a building; or

(c) a work of craftsmanship not falling within either a model of a building; or

"author", in relation to-

(a) a literary or musical work, or an artistic work other than a photograph, which is not computer-generated, means the person who first makes or creates the work, or in the case of such a work, which is 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) a cinematograph film, means the person by whom the arrangements for the making of the film were made;

(e) a broadcast, means the first broadcaster;

(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 program, which is not computer-generated, the person who exercised control over the making of the program, or in the case of a computer program, which is computer-generated, means the person by whom the arrangements necessary for the creation of the program were undertaken;

"broadcast", when used as a noun, means a broadcasting service as defined in section 1 of the Namibian Communications Commission Act, 1992 (Act 4 of 1992), and includes the emitting of programme-carrying signals to a satellite; and, when used as a verb, shall be construed accordingly;

"broadcaster" means a person who undertakes a broadcasting service as defined in section 1 of the Namibian Communications Commission Act, 1992 (Act 4 of 1992);

"broadcasting organisation" means the Namibian Broadcasting Corporation established by section 2 of the Namibian Broadcasting Act, 1991 (Act 9 of 1991) or any other broadcasting organisation licensed under the Namibian Communications Commission Act, 1992 (Act 4 of 1992) or any other law;

"building" includes any structure;

"cinematograph film" means the fixation by any means on film or any other material of a sequence of images capable, when used in conjunction with a mechanical, electronic or other device, of being seen as a moving picture and of being reproduced, and includes the sounds embodied in a soundtrack associated with the film, but shall not include a computer program;

"computer program" means a set of instructions fixed or stored in any manner and which, when used directly or indirectly in a computer, directs its operation to bring about a result;

"copy" means a reproduction of a work, and, in the case of a literary, musical or artistic work, a cinematograph film or a computer program, also an adaptation thereof, but an object shall 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;

"country" includes a colony, protectorate or territory subject to the authority or under the suzerainty of any other country, and a territory over which trusteeship is exercised;

"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; and diffusion shall not be deemed to constitute a performance or a broadcast or 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, this shall be deemed to be effected by the operation of the receiving apparatus;

"distribution", in relation to 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 shall take place;

"dramatic work" includes a choreographic work or entertainment in dumb show, if reduced to the material form in which the work or entertainment is to be presented, but does not include a cinematograph film as distinct from a scenario or script for a cinematograph film;

"drawing" includes a drawing of a technical nature or any diagram, map, chart or plan;

"engraving" includes any etching, lithograph, woodcut, print or similar work, but does not include a photograph;

"exclusive licence" means a licence 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; and "exclusive licensee" shall be construed accordingly;

"infringing copy", in relation to-

(a) a literary, musical or artistic work, or a published edition, means a copy thereof;

(b) a sound recording, means a record embodying that recording;

(c) a cinematograph film, means a copy of the film or a still photograph made therefrom;

(d) a broadcast, means a cinematograph film of it or a copy of such a cinematograph film or a sound recording of it or a record embodying such a sound recording or a still photograph made therefrom; and

(e) a computer program, means a copy of such computer program,

being, in any such case, an article the making of which constituted an infringement of the copyright in that work, recording, film, broadcast or program or, in the case of an imported article, would have constituted such an infringement if the article had been made in Namibia;

"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 licensing bodies, setting out the classes of cases in which they are willing, or the person on whose behalf they act is willing, to grant licences of that description and the charges, if any, and terms and conditions subject to which licences may be granted in those classes of cases, and includes anything in the nature of such a scheme, whether described as a scheme or as a tariff or by any other name;

"literary work" includes, irrespective of literary quality and in whatever mode or form expressed-

(a) novels, stories and poetical works;

(b) dramatic works, stage directions, cinematograph film scenarios and broadcasting scripts;

(c) textbooks, treatises, histories, biographies, essays and articles;

(d) encyclopedias and dictionaries;

(e) letters, reports and memoranda;

(f) lectures, speeches and sermons; and

(g) tables and compilations,

but does not include a computer program;

"Minister" means the Minister of Information and Broadcasting;

"musical work" means a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music;

"performance" includes a mode of visual or acoustic presentation of a work, including such a presentation by the operation of a loudspeaker, a radio, television or diffusion receiver or by the exhibition of a cinematograph film or by the use of a record or by any other means, and in relation to lectures, speeches and sermons, includes delivery thereof; and references to "perform" in relation to a work shall be construed accordingly, but shall not include broadcasting or rebroadcasting or transmitting a work in a diffusion service;

"performer" means an actor, singer, musician, dancer or other person who acts, sings, delivers, declaims, plays in or otherwise performs, a literary or musical work;

"photograph" means a product of photography or of a process analogous to photography, but does not include any part of a cinematograph film;

"plate" includes any stereotype, stone, block, mould, matrix, transfer, negative, record, disc, storage medium or any version of a work of any nature used to make copies;

"prescribed" means prescribed by regulation made under section 61;

"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;

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

"qualified person" means-

(a) a natural person who is a Namibian citizen or is domiciled or resident in Namibia; or

(b) a body incorporated under the laws of Namibia;

"rebroadcasting" means the simultaneous or subsequent broadcasting 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;

"reproduction" in relation to-

(a) a literary or musical work or a broadcast, includes a reproduction in the form of a record or a cinematograph film;

(b) an artistic work, includes a version produced by converting the work into a three-dimensional form or, if it is in three dimensions, by converting it into a two-dimensional form;

(c) any work, includes a reproduction made from a reproduction of that work;

(d) a performance, means a copy made of a fixation of a performance,

and references to "reproduce" and "reproducing" shall be construed accordingly;

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

"sculpture" includes a cast or model made for purposes of sculpture;

"signal" means an electronically generated carrier capable of transmitting programmes;

"sound recording" means affixation of sounds capable of being reproduced, but does not include a soundtrack associated with a cinematograph film;

"this Act" includes the regulations made and in force under section 61;

"Tribunal" means the Copyright Tribunal established by section 35;

"work" means a work of any description mentioned in section 2;

"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 a form of notation, whether by hand or by printing, typewriting or a similar process.

(2) A reference in this Act to a sound-track associated with a cinematograph film shall be construed as a reference to a record of sounds which is incorporated in a print, negative, tape or other article on which the film or part of it, in so far as it consists of visual images, is recorded or which is issued by the author of the film for use in conjunction with such a print, negative, tape or other article.

(3) A reference in this Act to the doing of an act in relation to a work, a performance, a fixation of a performance or a reproduction of such a fixation, shall, 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, performance, fixation of a performance or reproduction of such a fixation, as the case may be.

(4) This Act shall, 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, apply in the same manner as it applies with reference to acts or omissions within the territorial limits of Namibia.

(5) Notwithstanding paragraph (h) of the definition of "author" in subsection (1), the author of a computer program which is not computer-generated and made before the commencement of this Act, shall be deemed to be the person who first made or created that program, but if the program is original and has been published by a qualified person, that person shall be presumed to be the owner of the copyright subsisting in that program unless the contrary is proved.

(6) For the purposes of this Act the following provisions shall apply in connection with the publication of a work:

(a) Subject to paragraph (e), a work shall be deemed to have been published if copies of that work have been issued to the public with the consent of the owner of the copyright in that work in sufficient quantities to reasonably meet the needs of the public, having regard to the nature of the work.

(b) Publication of a cinematograph film or sound recording is the sale, letting, hire or offer for sale or hire, of copies thereof.

(c) A publication shall not be treated as being other than the first publication by reason only of an earlier publication elsewhere within a period of 30 days.

(d) Publication shall not include-

- (i) a performance of a musical or dramatic work, cinematograph film or sound recording;
 - (ii) a public delivery of a literary work;
 - (iii) a transmission in a diffusion service;
 - (iv) a broadcasting of work;
 - (v) an exhibition of a work of art;
 - (vi) a construction of a work of architecture.
- (e) For the purposes of sections 7, 8 and 14, a work shall be deemed to be published if copies thereof have been issued to the public.

PART I

PROTECTION OF COPYRIGHT

CHAPTER 1

COPYRIGHT IN ORIGINAL WORKS

2 Works eligible for copyright

- (1) Subject to the provisions of this Act, the original work of any of the following descriptions of works shall be eligible for copyright-
- (a) literary works;
 - (b) musical works;
 - (c) artistic works;
 - (d) cinematograph films;
 - (e) sound recordings;
 - (f) broadcasts;
 - (g) programme-carrying signals;
 - (h) published editions; and
 - (i) computer programs.

(2) A work, other than a broadcast or programme-carrying signal, shall not be eligible for copyright unless it has been written down, recorded or otherwise reduced to material form.

(3) A broadcast or a programme-carrying signal shall not be eligible for copyright until, in the case of a broadcast, the broadcast has been made, and in the case of a programme-carrying signal, such signal has been transmitted by satellite.

(4) A work shall not be 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.

3 Copyright by virtue of nationality domicile or residence

(1) Subject to subsection (2), copyright shall subsist in every work eligible for copyright of which the author or, in the case of a work of joint authorship, one of the authors, is, at the time the work or a substantial part thereof is made, a qualified person and in respect of which copyright is not conferred by section 5.

(2) Notwithstanding subsection (1), copyright shall subsist in a work of architecture erected in Namibia or any other artistic work incorporated in a building or any other permanent structure in Namibia, whether or not the author was a qualified person.

4 Copyright by reference to country of origin

Copyright shall subsist in every work eligible for copyright, which is a work in respect of which copyright is not conferred by section 3 or 5 and which-

(a) being a literary, musical or artistic work or a sound recording, is first published in Namibia;

(b) being a broadcast, is made in Namibia;

(c) being a programme-carrying signal, is emitted to a satellite from a place in Namibia;

(d) being a cinematograph film, is first published or made in Namibia;

(e) being a published edition, is first published in Namibia;

(f) being a computer program, is first published or made in Namibia.

5 Copyright in relation to the State and certain international organisations

(1) Copyright shall subsist 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 shall for administrative purposes be deemed to vest in such officer in the public service as may be designated by the President by proclamation in the *Gazette*.

6 Duration of protection of copyright

(1) Copyright conferred by section 3 or 4 shall endure, in the case of-

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

(i) the publication thereof;

(ii) the performance thereof in public;

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

(iv) the broadcasting thereof, 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) a cinematograph film, photograph or computer program, for a period of 50 years either from-

(i) the end of the year in which the film, photograph or program is made available to the public with the consent of the owner of the copyright; or

(ii) if such film, photograph or program was not so made available to the public within 50 years of its making, the end of the year in which the film, photograph or program was made;

(c) a sound recording or published edition, for a period of 50 years from the end of the year in which it is first published;

(d) a broadcast, for a period of 50 years from the end of the year in which the broadcast is made;

(e) a programme-carrying signal, for a period of 50 years from the end of the year in which the signal is emitted to a satellite.

(2) In the case of anonymous or pseudonymous works, the copyright shall endure for a period of 50 years from the end of the year in which the work is first made available to the public with the consent of the owner of the copyright or from the end of the year in which it is reasonable to presume that the author died, whichever term first expires.

(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 shall be calculated in accordance with subsection (1).

(4) In the case of a work of joint authorship the reference in subsections (1) and (2) to the death of the author shall be taken to refer to the author who dies last, whether or not he or she is a qualified person.

(5) Copyright conferred by section 5 shall endure, 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;

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

7 Nature of copyright in literary or musical works

Copyright in a literary or musical work vests the exclusive right to do or authorise the doing of any of the following acts in Namibia:

(a) Reproducing the work in any manner or form;

(b) publishing the work if it was hitherto unpublished;

(c) performing the work in public;

(d) broadcasting the work;

(e) causing the work to be transmitted in a diffusion service, unless such service transmits a lawful broadcast, including the work, and is operated by the original broadcaster;

(f) making an adaptation of the work;

(g) doing in relation to an adaptation of the work any act specified in paragraphs (a) to (e).

8 Nature of copyright in artistic works

Copyright in an artistic work vests the exclusive right to do or to authorise the doing of any of the following acts in Namibia:

(a) Reproducing the work in any manner or form;

- (b) publishing the work if it was hitherto unpublished;
- (c) including the work in a cinematograph film or a television broadcast;
- (d) causing 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;
- (e) making an adaptation of the work;
- (f) doing in relation to an adaptation of the work any act specified in paragraphs (a) to (d).

9 Nature of copyright in cinematograph films

Copyright in a cinematograph film vests the exclusive right to do or to authorise the doing of any of the following acts in Namibia:

- (a) Reproducing the film in any manner or form, including making a still photograph therefrom;
- (b) causing the film, in so far as it consists of images, to be shown in public, or, in so far as it consists of sounds, to be heard in public;
- (c) broadcasting the film;
- (d) causing the film to be transmitted in a diffusion service, unless such service transmits a lawful television broadcast, including the film, and is operated by the original broadcaster;
- (e) making an adaptation of the film;
- (f) letting, or offering or exposing for hire by way of trade, directly or indirectly, a copy of the film;
- (g) doing, in relation to an adaptation of the film, any act specified in paragraphs (a) to (d).

10 Nature of copyright in sound recordings

Copyright in a sound recording vests the exclusive right to do or to authorise the doing of any of the following acts in Namibia:

- (a) Making, directly or indirectly, a record embodying the recording;
- (b) causing the recording to be heard in public;

(c) broadcasting the recording;

(d) causing the recording to be transmitted in a diffusion service, unless such service transmits a lawful broadcast, including the recording, and is operated by the original broadcaster;

(e) letting, or offering or exposing for hire by way of trade, directly or indirectly, a reproduction of the recording.

11 Nature of copyright in broadcasts

Copyright in a broadcast vests the exclusive right to do or to authorise the doing of any of the following acts in Namibia:

(a) Reproducing, directly or indirectly, the broadcast in any manner or form, including, in the case of a television broadcast, making a still photograph therefrom;

(b) rebroadcast the broadcast;

(c) causing the broadcast to be transmitted in a diffusion service, unless such service is operated by the original broadcaster.

12 Nature of copyright in programme-carrying signals

Copyright in programme-carrying signals vest the exclusive right to undertake, or to authorise, the direct or indirect distribution of such signals by a distributor to the public in Namibia, or from Namibia.

13 Nature of copyright in published editions

Copyright in a published edition vests the exclusive right to make or to authorise the making of a reproduction of the edition in any manner.

14 Nature of copyright in computer programs

Copyright in a computer program vests the exclusive right to do or authorise the doing of any of the following acts in Namibia:

(a) Reproducing the program in any manner or form;

(b) publishing the program if it was hitherto unpublished;

(c) making an adaptation of the program;

(d) reproducing or publishing an adaptation of the program;

(e) letting, or offering or exposing for hire by way of trade, directly or indirectly, a copy of the program.

15 General exceptions regarding protection of literary and musical works

(1) Copyright shall not be infringed by a fair dealing in the use of a literary or musical work-

(a) for the purpose of research or private study by, or the personal or private use of, the person using the work;

(b) for the purpose of criticism or review of the work or of another work; or

(c) for the purpose of reporting on a current event-

(i) in a newspaper, magazine or similar periodical; or

(ii) by means of broadcasting or in a cinematograph film,

provided, in the case of paragraphs (b) and (c) (i), the source and the name of the author, if that name appears on the work, are mentioned.

(2) The copyright in a literary or musical work shall not be infringed by using the work for the purposes of judicial proceedings or by reproducing it for the purposes of a report of judicial proceedings.

(3) The copyright in a literary or musical work which is lawfully available to the public shall not be infringed by a quotation therefrom, including a quotation from an article in a newspaper, magazine or similar periodical that is in the form of a summary of that work, provided-

(a) the quotation is compatible with fair practice;

(b) the extent of the quotation does not exceed that justified by the purpose; and

(c) the source and the name of the author, if that name appears on the work, are mentioned.

(4) The copyright in a literary or musical work shall not be infringed by the use of such work by way of illustration in a publication, broadcast or sound or visual recording for teaching purposes, provided-

(a) such use is compatible with fair practice;

(b) the extent of such use does not exceed that justified by the purpose; and

(c) the source and the name of the author, if that name appears on the work, are mentioned.

(5) The copyright in a literary or musical work shall not be infringed by the reproduction of such work by any broadcasting organisation by means of its own facilities where that reproduction or a copy thereof-

(a) is intended exclusively for lawful broadcasts of such broadcasting organisation; and

(b) is destroyed before the expiration of a period of six months immediately following the making of the reproduction, or such longer period as may be agreed to by the owner of the relevant part of the copyright in the work:

Provided that where such reproduction is of an exceptional documentary nature, it may be preserved in the archive of the broadcasting organisation, but shall, subject to the provisions of this Act, not be used for broadcasting or any other purpose without the consent of the owner of the relevant part of the copyright in the work.

(6) The copyright in a lecture, address or other work of a similar nature delivered in public shall not be infringed by its reproduction in the press or its communication in a broadcast, if such reproduction or communication is made for an informatory purpose, but the author thereof shall have the exclusive right of making or publishing a collection of such works.

(7) The copyright in an article published in a newspaper, magazine or similar periodical on a current economic, political or religious topic or in any work on such a topic communicated in a broadcast shall not be infringed by its reproduction in the press or its communication in a broadcast, unless such reproduction or communication was expressly reserved when such article was first published or such work was broadcast, provided the source is clearly mentioned in such reproduction or communication.

(8) No copyright shall subsist in-

(a) the official text of any work of a legislative, administrative or legal nature, or an official translation thereof;

(b) a speech of a political nature or a speech delivered in the course of judicial proceedings; or

(c) publications or broadcasts of news of the day,

but the author of speeches referred to in paragraph (b) shall have the exclusive right of making or publishing a collection thereof.

(9) Subsections (1) to (7) shall apply also with reference to the making or use of an adaptation of a work.

(10) Subsections (6) and (7) shall apply also with reference to a work or an adaptation thereof which is transmitted in a diffusion service.

(11) Subsections (1), (2), (3), (4), (6), (7) and (10) shall be construed as including the right to use the work in question either in its original language or to make a translation thereof in a different language, and, in the latter case, the right of translation of the author shall be deemed not to have been infringed.

(12) The copyright in a literary or musical work shall not be infringed by the use thereof in a *bona fide* demonstration of radio or television receivers or recording or playback equipment to clients by a dealer in such receivers or equipment.

(13) An authorisation to use a literary work as a basis for the making of a cinematograph film or as a contribution in such making, shall, in the absence of an agreement to the contrary, include the right to broadcast that film.

16 General exceptions in respect of reproduction of works

In addition to reproductions permitted in terms of this Act reproduction of a work shall also be permitted in such circumstances as are prescribed, but in such a manner that the reproduction is not in conflict with a normal exploitation of the work and is not unreasonably prejudicial to the legitimate interests of the owner of the copyright.

17 Special exception in respect of records of musical works

(1) The copyright in a musical work shall not be 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 licence 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 paragraph (a) of subsection (1) were made or imported by, or with the licence 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 shall not constitute an infringement of the copyright in the literary work.

(3) For the purposes of this section an adaptation of a work shall be 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 paragraph (a) of subsection (1) 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 shall be taken to have been made or imported, as the case may be, with the licence of the owner of the copyright.

(5) Subsections (1), (2), (3) and (4) shall apply also with reference to records of a part of a work or an adaptation thereof, but subsection (1) shall 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.

18 General exceptions regarding protection of artistic works

(1) The copyright in an artistic work shall not be infringed by its inclusion in a cinematograph film 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 film, 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 shall not be 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 of the owner of the copyright (in this subsection referred to as "authorised reproductions"), shall not be infringed if a person without the consent of the owner makes or makes available to the public three-dimensional reproductions or adaptations of the authorised reproductions, provided the authorised reproductions primarily have a utilitarian purpose and are made by an industrial process.

(4) Sections 15 (1), (2), (4), (5), (9) (10), (12) and (13) shall apply *mutatis mutandis* with reference to an artistic work.

19 General exceptions regarding protection of cinematograph films

(1) Section 15 (1) (b) and (c), (2), (3), (4), (12) and (13) shall apply *mutatis mutandis* with reference to a cinematograph film.

(2) Where sounds embodied in a sound-track associated with a cinematograph film are also embodied in a record other than such a sound-track or in a record derived directly or indirectly from such a sound-track, the copyright in the film shall not be infringed by the use of such record.

20 General exceptions regarding protection of sound recordings

Section 15 (1) (b) and (c), (2), (3), (4), (5), (12) and (13) shall apply *mutatis mutandis* with reference to a sound recording.

21 General exceptions regarding protection of broadcasts

Section 15 (1), (2), (3), (4), (5), (12) and (13) shall apply *mutatis mutandis* with reference to a broadcast.

22 General exceptions regarding protection of programme-carrying signals

(1) Subject to subsection (2), the copyright in programme-carrying signals shall not be 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 informatory purpose of such excerpt.

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

23 General exceptions regarding protection of published editions

Section 15 (1), (2), (4), (5), (8), (12) and (13) shall apply *mutatis mutandis* with reference to a published edition.

24 General exceptions regarding protection of computer programs

(1) Subject to section 29 (2) (d), the provisions of section 15 (1) (b) and (c), (2), (3), (4), (5), (12) and (13) shall apply *mutatis mutandis* with reference to a computer program.

(2) The copyright in a computer program shall not be infringed by a person who is in lawful possession of that program, or an authorised copy thereof, if- (a) such person makes copies thereof to the extent reasonably necessary for back-up purposes;

(b) a copy so made is intended exclusively for personal or private purposes; and

(c) such copy is destroyed when the possession of that program, or authorised copy thereof, ceases to be lawful.

25 Moral rights

(1) Notwithstanding the transfer of the copyright in any work, being a literary, musical or artistic work, a cinematograph film or a computer program, the author shall have the right-

(a) to claim authorship of the work, subject to the provisions of this Act; and

(b) to object to a distortion, mutilation or other modification of the work where such distortion, mutilation or modification is or would be prejudicial to the honour or reputation of the author, but an author-

(i) who authorises the use of his or her work in a cinematograph film or a television broadcast; or

(ii) of a computer program or a work associated with a computer program,

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

(2) Any infringement of subsection (1) shall be considered to be an infringement of copyright under Chapter 2, and for the purposes of the provisions of that Chapter the author shall be deemed to be the owner of the copyright in question.

26 Ownership of copyright

Subject to section 27, the ownership of any copyright conferred by section 3 or 4 in a work shall vest in the author or, in the case of a work of joint authorship, in the co-authors of the work.

27 Ownership of copyright in works of employed authors

(1) Where a literary or 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 such work is so made for the purpose of publication in a newspaper, magazine or similar periodical, that proprietor shall be the owner 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, but in all other respects the employee shall be the owner of the copyright subsisting in the work by virtue of section 3 or 4.

(2) Where a person commissions the taking of a photograph, the painting or drawing of a portrait, or the making of a gravure, cinematograph film or sound recording against payment of any valuable consideration, the person who commissions such work shall, subject to subsection (1), be the owner of any copyright subsisting in the work by virtue of section 3 or 4.

(3) Where, in a case not falling within either subsection (1) or (2), a work is made by an employee in the course of his or her employment under a contract of service or apprenticeship, such person's employer shall be the owner of any copyright subsisting in the work by virtue of section 3 or 4.

(4) Subsections (1), (2) and (3) shall have effect subject to any agreement excluding the operation thereof and subject to section 25.

(5) Ownership of any copyright conferred by section 5 shall vest in the State or the international organisation concerned and not in the author.

28 Assignment and licences in respect of copyright

(1) Subject to this section, copyright shall be transmissible as movable property by assignment, testamentary disposition or operation of law.

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

(a) only to one or more of the acts which the owner of the copyright has the exclusive right to do or authorise;

(b) to a part only of the term of the copyright; or

(c) to a specified country or other geographical area.

(3) An assignment of copyright or an exclusive licence to do an act which is subject to copyright shall not have effect unless it is in writing signed by or on behalf of the assignor, the licensor or, in the case of an exclusive sub-licence, the exclusive sub-licensor, as the case may be.

(4) A non-exclusive licence to do an act which is subject to copyright may be granted in writing or orally, or may be inferred from conduct, and may be revoked at any time, but where such a licence was granted by contract it shall 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 the copyright in a future work, or the copyright in an existing work in which, although copyright does not subsist therein, copyright will come into existence in the future, and the future copyright in any such work shall be transmissible as movable property.

(6) A testamentary disposition of the original document or other material on which a work is first written or otherwise recorded shall, in the absence of a stipulation to the contrary, be construed as including a disposition of the copyright in the work in so far as the testator was the owner of the copyright immediately before his or her death or, if at the testator's death no copyright subsisted in the work, a disposition of any future copyright in that work.

(7) A licence granted in respect of any copyright by the person who, in relation to the matters to which the licence relates, is the owner of the copyright, shall be binding upon every successor in title to his or her interest in the copyright, except a purchaser in good faith and without notice, whether actual or constructive, of the licence or a person deriving title from such a purchaser, and any reference in this Act to the doing in relation to copyright of anything with or without the licence of the owner of the copyright shall 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 authorisation shall for the purpose of this Act be deemed to have been done with the licence of the grantor and of every person, if any, upon whom the licence is binding.

CHAPTER 2

INFRINGEMENTS OF COPYRIGHT AND REMEDIES

29 Infringement

(1) Copyright shall be infringed by a person who, without the licence of the owner of the copyright, does or causes any other person to do, in Namibia, any act which the owner has the exclusive right to do or to authorise.

(2) Without derogating from the generality of subsection (1), copyright in a work shall be infringed by a person who, without the licence of the owner of the copyright-

(a) imports into Namibia an article for a purpose other than for his or her private and domestic 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 in question is prejudicially affected; or

(d) acquires in Namibia an article relating to a computer program,

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

(3) Subject to subsection (4), the copyright in a literary or musical work shall be 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) shall 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.

30 Action by owner of copyright for infringement

(1) Subject to the provisions of this Act, infringements of copyright shall be actionable at the suit of the owner of the copyright, and in any action arising from such an infringement all such relief by way of damages, interdict, delivery of infringing copies or plates used or intended to be used for infringing copies or otherwise shall be available to the plaintiff as is available to the plaintiff in any corresponding proceedings in respect of infringements of other proprietary rights.

(2) Damages contemplated in subsection (1) may, at the option of the plaintiff, 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 copyright concerned.

(3) In the determination of the amount of damages referred to in subsection (2) the court shall, in addition to all other material considerations, take into account-

(a) the extent and nature of the infringement of copyright; and

(b) the amount which could be payable to the owner in respect of the exercise of copyright by some other person.

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

(5) Where in an action for infringement of copyright, it is proved or admitted that an infringement was committed but that at the time of the infringement the defendant was not aware and had no reasonable grounds for suspecting that copyright subsisted in the work to which the action relates, the plaintiff shall not be entitled under this section to any damages against the defendant in respect of the infringement.

(6) Where in an action for infringement of copyright, 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 defendant by reason of the infringement,

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

(7) In an action for infringement of copyright in respect of the construction of a building, no interdict or other order shall, 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.

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

(1) An exclusive licensee and sub-licensee shall have the same rights of action and be entitled to the same remedies as if the licence were an assignment, and those rights and remedies shall be concurrent with the rights and remedies of the owner of the copyright under which the licence or sub-licence were granted.

(2) If an exclusive licensee or sub-licensee intends to exercise the option contemplated in section 30 (2) he or she shall give notice in writing to the owner of the copyright concerned of his or her intention.

32 Onus of proof

(1) Where in the case of a literary, musical or artistic work or a computer program a name purporting to be that of the author appeared on copies of that work or program as published or, in case of 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, shall, in any criminal or civil proceedings brought by virtue of this Chapter, be presumed to be the author of the work or program unless the contrary is proved.

(2) In the case of a literary, musical or artistic work or a computer program alleged to be a work or program of joint authorship, subsection (1) shall apply in relation to each person alleged to be one of the authors of the work or program as if references in that subsection to the author were references to one of the authors.

(3) Where in any criminal or civil proceedings brought by virtue of this Chapter with respect to a literary, musical or artistic work or a computer program which is anonymous or pseudonymous it is established-

(a) that such a work or program 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 program as first published,

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

(4) Where in any criminal or civil proceedings brought by virtue of this Chapter with respect to a literary, musical or artistic work or a computer program it is proved or admitted that the author of that work or program is dead, that work or program shall be presumed to be an original work or program unless the contrary is proved.

(5) Subsection (4) shall also apply where a literary, musical or artistic work or a computer program has been published and-

(a) the publication was anonymous or under a name alleged by the plaintiff or the State to be a pseudonym; and

(b) it is not proved that the work or program has ever been published under the true name of the author, 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 by reasonable inquiry.

(6) Where in any criminal or civil proceedings brought by virtue of this Chapter with respect to the alleged infringement of copyright in a cinematograph film it is proved that the name purporting to be the name of the author of that film appears thereon in the prescribed manner, the person whose name so appears shall be presumed to be the author of that film unless the contrary is proved.

(7) Where in any criminal or civil proceedings brought by virtue of this Chapter with respect to the alleged infringement of copyright 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 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 shall be sufficient evidence of the facts so stated, except in so far as the contrary is proved.

(8) A claim contemplated in paragraph (a) of subsection (7) may be made by means of the symbol 'C' in conjunction with the name of the person concerned, and a claim contemplated in paragraph (b) of that subsection 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 Chapter with respect to the alleged infringement of the copyright in a cinematograph film it is proved that the person alleged to have committed an infringement has done an act which the owner of the copyright has the exclusive right to do or to authorise, it shall be 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 Chapter with respect to the alleged infringement of the copyright in a cinematograph film, sound recording or computer program, it shall be presumed, unless the contrary is proved, that a person trading in the selling, letting or distribution of copies of any works of such descriptions and who was found in possession of a copy of any of such works 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 Chapter with respect to the alleged infringement of the copyright in a work it is proved that the person alleged to have done an act which allegedly infringes the relevant copyright did that act without the authority of the exclusive licensee, it shall be presumed, unless the contrary is proved, that the relevant act was done also without the authority of the owner of the copyright concerned.

33 Offences and penalties and proceedings in respect of dealings which infringe copyright

(1) A person who, at a time when copyright subsists in a work-

(a) without the authority of the owner of the copyright-

(i) makes for sale or hire;

(ii) sells or lets or by way of trade offers or exposes for sale or hire;

(iii) by way of trade exhibits in public;

(iv) imports into Namibia for a purpose other than for his or her private or domestic use;

(v) distributes for purposes of trade; or

(vi) distributes for any other purpose, to such an extent that the owner of the copyright is prejudicially affected, any article which he or she knows to be an infringing copy of the work; or

(b) makes or has in his or her possession a plate knowing that it is to be used for making an infringing copy of the work, shall be guilty of an offence.

(2) A person who causes-

(a) a literary or musical work to be performed in public, knowing that copyright subsists in the work and that such performance constitutes an infringement of the copyright;

(b) a broadcast to be rebroadcast or transmitted in a diffusion service, knowing that copyright subsists in the broadcast and that such rebroadcast or transmission constitutes an infringement of the copyright;

(c) programme-carrying signals to be distributed by a distributor for whom they were not intended, knowing that copyright subsists in the signals and that such distribution constitutes an infringement of the copyright, shall be guilty of an offence.

(3) A person convicted of an offence under sub-section (1) or (2) shall-

(a) in the case of a first conviction, be 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; or

(b) in the case of a second or any subsequent conviction, be liable to a fine not exceeding N\$20 000 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment, in respect of each article to which the offence relates.

34 Provision for restricting importation of copies

(1) Subject to subsections (2) and (3), the owner of the copyright in any published work may give notice in writing to the Commissioner for Customs and Excise referred to in section 1 B of the Customs and Excise Act, 1964 (Act 91 of 1964) (in this section referred to as "the Commissioner") -

(a) that he or she is the owner of the copyright in that work; and

(b) that he or she requests the Commissioner to treat as prohibited goods, during a period specified in the notice, any copies of that work to which this section applies.

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

(3) The Commissioner shall not be bound to act in terms of a notice under subsection (1) unless the owner of the copyright furnishes the Commissioner with security, in such form and for such amount as the Commissioner may require, for securing the fulfilment of any liability and the payment of any expense which the Commissioner may incur by reason of the detention of any copy of the work 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 shall apply to any copy of the work in question made outside Namibia which, if it had been made in Namibia, would be an infringing copy of the work.

(5) Where a notice has been given under subsection (1) in respect of a work 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 shall be prohibited.

(6) Notwithstanding anything contained in the Customs and Excise Act, 1964 a person shall not be 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 shall apply *mutatis mutandis* with reference to an exclusive licensee who has the right to import into Namibia a work published elsewhere.

CHAPTER 3

COPYRIGHT TRIBUNAL

35 Establishment and jurisdiction of Copyright Tribunal

(1) The Judge-President of the High Court of Namibia shall from time to time designate one or more judges or acting judges of the High Court to be the Copyright Tribunal for the purposes of this Act.

(2) Subject to this Chapter, the function of the Tribunal shall be-

(a) to determine disputes arising between-

(i) licensing bodies;

(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;

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

36 Reference of licence schemes to Tribunal

(1) Where at any time, while a licence scheme is in operation, a dispute arises with respect to the scheme between the licensing body 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 shall be-

(a) the organisation or person at whose instance the reference is made;

(b) the licensing body 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 an organisation (whether claiming to be representative of persons requiring licences or not) or 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 shall 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 shall, 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 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 shall thereafter, notwithstanding 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.

37 Further reference of licence schemes to Tribunal

(1) Where the Tribunal has made an order under section 36 with respect to a licence scheme-

(a) the licensing body 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 shall not, except with the special leave of the Tribunal, again be referred to the Tribunal under subsection (1)-

(a) where 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) where 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 36 shall apply *mutatis mutandis* in respect of a reference under this section or an order made upon such a reference.

38 Applications to Tribunal

(1) For the purposes of this Chapter a case shall 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 shall be taken not to be covered by the scheme.

(2) A person, who claims that in a case covered by a licence scheme the licensing body operating the scheme has refused or failed to grant him or her a licence in accordance with the provisions of the scheme, or 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 for such an order 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 licensing body 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 licensing body proposes that the licence should be granted are unreasonable.

(4) Where an organisation (whether claiming to be representative of persons requiring licences or not) or 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) Upon an application under subsection (2) or (3), the Tribunal shall give the applicant and the licensing body 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 shall 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 shall 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.

39 Diffusion service

In a dispute concerning the transmission of broadcasts in a diffusion service in Namibia, the Tribunal shall 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.

40 Effect of orders of Tribunal and supplementary provisions relating thereto

(1) A person who-

(a) complies with the conditions of an order made by the Tribunal under this Chapter; or

(b) has given a satisfactory undertaking to the owner or prospective owner of the copyright to comply with such conditions,

shall be 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 shall have regard *inter alia* to any conditions imposed by the promoters of any entertainment or other event which is to be comprised in the broadcasts, and in particular the Tribunal shall 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 shall be entitled to the copyright, wholly or partially, in a work in which copyright does not yet subsist or whose entitlement to the copyright which does exist shall become effective upon a future event.

41 Costs and expenses in respect of proceedings before Tribunal

The Tribunal may order that the costs or expenses of any proceedings before it incurred by a party shall 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.

42 Proof of orders of Tribunal

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 shall in any legal proceedings be sufficient evidence of the order unless the contrary is proved.

43 Appeals against orders or decisions of Tribunal

(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 shall 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 16 of 1990) and section 14 of the Supreme Court Act, 1990 (Act 15 of 1990) shall apply *mutatis mutandis*.

(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; and

(e) make such order as to costs as the court considers fair.

44 Regulations relating to proceedings before and appeals against orders or decisions of Tribunal

Regulations made under paragraph (b) of section 61 may-

(a) apply any of the provisions of the Arbitration Act, 1965 (Act 42 of 1965); and

(b) include provision for-

(i) requiring notice of an appeal under section 43 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 43 is noted;

(iii) modifying in relation to orders of the Tribunal, of which the operation is suspended, the operation of any provision of this Chapter 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 43 or any order or decision made or given under that section.

PART II

PROTECTION OF PERFORMERS' RIGHTS

45 Relation to copyright protection

The rights conferred by this Part shall in no way restrict or affect any rights provided for elsewhere in this Act in relation to copyright in literary and musical works.

46 Protection of performers rights in respect of performances in Namibia and convention countries

Performers shall be granted the protection provided for in section 47 in respect of their performances which-

- (a) take place;
- (b) are broadcast without a fixation thereof; or
- (c) are first fixed,

in Namibia or in any other country which, being a party to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, by law grants in its territory similar rights to performers in respect of their performances in Namibia.

47 Restrictions on use of performances

(1) Subject to the provisions of this Part, no person shall without the consent of the performer-

- (a) broadcast or communicate to the public a performance of such performer, unless the performance used in the broadcast or the public communication is itself already a broadcast performance or is made from a fixation of the performance or from a reproduction of such fixation;
- (b) make a fixation of the unfixed performance of such performer; or

(c) make a reproduction of a fixation of a performance of such performer-

(i) if the original fixation, other than a fixation made in accordance with section 50, was itself made without his or her consent;

(ii) 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

(iii) if the original fixation was made in accordance with section 50, and the reproduction is made for purposes not covered by that section.

(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-

(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.

48 Collective performances

(1) Where several performers take part as a group in the same performance, it shall suffice, for the purposes of section 47, if consent 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 shall 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 authority, to the leader of the group.

(3) Any payment made in accordance with subsection (2) to a manager, authority or leader referred to in that subsection shall be distributed by him or her as agreed by the performers, or failing such an agreement, the right to remuneration of the respective performers shall be determined in accordance with the provisions of the Arbitration Act, 1965 (Act 42 of 1965) or, where the majority of the performers so elect, by the Tribunal.

49 Duration of protection of performers rights

(1) The prohibition against the use of a performance without the consent of the performer, as imposed by section 47, shall commence upon the day when the performance first took place or, if incorporated in a phonogram, when it was fixed on such phonogram, and shall continue for a period of 20 years calculated from the end of

the calendar year in which the performance so took place or was so incorporated, as the case may be.

(2) For the purposes of subsection (1), "phonogram" means an exclusively aural fixation of sounds of a performance or of other sounds.

50 Exceptions from prohibition against use of performance without consent of performer

(1) If a performer consents to the incorporation of his or her performance in a visual or audiovisual fixation, section 47(1) shall cease to apply in respect of the performance so fixed.

(2) Notwithstanding section 47(1), a performance, a fixation of a performance or reproduction of such a fixation may be used without the consent of the performer if such use is for the purpose of-

(a) private study or personal and private use;

(b) criticism or review of the performance or any other performance or for reporting on a current event, provided only short excerpts from the performance, to the extent justified by the purpose, are used and, where available, the performer's name or the names of the leading performers are acknowledged;

(c) teaching or scientific research;

(d) judicial proceedings; or

(e) *a bona fide* demonstration of radio or television receivers or recording or playback equipment to clients by a dealer in such receivers or equipment.

(3) Notwithstanding section 47 (1), any broadcasting organisation may by means of its own facilities make a fixation of a performance and reproductions of such a fixation without the consent of the performer, provided, 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 (4), 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, shall be determined in accordance with the provisions of the Arbitration Act, 1965 (Act 42 of 1965) or, where the performer so elects, by the Tribunal.

(4) A fixation of a performance or a reproduction of such a fixation made in accordance with subsection (3) may, if it is of exceptional documentary character, be preserved in the archive of the broadcasting organisation but shall, subject to the provisions of this Part, not be further used without the consent of the performer.

51 Offences and penalties

(1) A person who-

(a) knowingly contravenes any provision of section 47 (1);

(b) sells or lets or distributes for the purposes of trade, or by way of trade exposes or offers for sale or hire, a fixation of a performance or a reproduction of such a fixation which such person knows was made in contravention of section 47; or

(c) makes, or has in his or her possession, a plate knowing it is to be used for making a fixation of a performance or a reproduction of such a fixation in contravention of section 47, shall be guilty of an offence.

(2) A person convicted of an offence under subsection (1) shall-

(a) in the case of a first conviction, be 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; or

(b) in the case of a second or any subsequent conviction, be liable to a fine not exceeding N\$20 000 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

(3) If a person is convicted of an offence referred to in paragraph (a) of subsection (1), the court may, upon the application of the performer whose right has been infringed, and without proof of any damages, order such person, in addition to any penalty it may impose under subsection (2) in respect of such offence, to pay to the performer as damages such amount, not exceeding N\$12 000, as may in the circumstances of the case appear to the court to be just.

(4) An order for the payment of damages made under subsection (3) may be executed as if it were a civil judgement given in favour of the performer.

52 Damages or interdict for infringement of performers rights

A person who infringes the right of a performer may be sued in a court of law by such performer for-

(a) an amount not exceeding N\$12 000, and the court may, without proof of any damages, and in addition to the costs of the action, award as damages such amount,

not exceeding N\$12 000, as may in the circumstances of the case appear to the court to be just; or

(b) damages or an interdict or for both damages and an interdict, and the court may, in addition to the costs of the action, award such damages as may appear to it to have been suffered by the performer, or award as damages such amount as it may determine in terms of paragraph (a), or grant an interdict or both award damages and grant an interdict.

53 Power of court in respect of fixations, reproductions and plates made in contravention of this Part

In any legal proceedings brought by virtue of this Part, the court may order that all fixations, reproductions of fixations or plates in the possession of the accused or the defendant, which appear to the court to have been made in contravention of any provision of this Part, be destroyed or otherwise dealt with as the court may determine.

54 Consent on behalf of performers and criminal liability of unauthorised agent

(1) Where in any legal proceedings under this Part it is proved-

(a) that the fixation, the reproduction of a fixation, the broadcast or the public communication to which the legal proceedings relate, was made with the consent of a person who, at the time of giving the consent, represented that he or she was authorised by the performer or performers in question to give such consent on his or her or their behalf; and

(b) that the person by whom the fixation, the reproduction of a fixation, the broadcast or the public communication was made had no reasonable grounds for believing that the person giving the consent was not so authorised,

it shall be deemed that the performer or performers had personally consented to the making of the fixation, the reproduction of the fixation, the broadcast or the public communication, as the case may be.

(2) Where-

(a) a fixation, a reproduction of a fixation, a broadcast or a public communication is made with the consent of a person who, at the time of giving the consent, represented that he or she was authorised by the performer or performers in question to give it on his or her or their behalf when, to his or her knowledge, he or she was not so authorised; and

(b) if legal proceedings were brought against the person to whom the consent was given, the consent would by virtue of subsection (1) afford a defence to those proceedings,

the person who gave the consent shall be guilty of an offence.

(3) A person convicted of an offence under subsection (2) shall-

(a) in the case of a first conviction, be 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; or

(b) in the case of a second or any subsequent conviction, be liable to a fine not exceeding N\$20 000 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

PART III

COPYRIGHT OWNERS' COLLECTING SOCIETIES

55 Definition of copyright owners' collecting society

For the purposes of this Part, "copyright owners' collecting society" means any organisation or association formed for the purpose of promoting and protecting the interests of owners of copyright, licensees or performers and which has been recognised by the Minister under section 56 (3).

56 Recognition of organisation or association as copyright owners' collecting society

(1) Any organisation or association of persons formed for the purpose of promoting and protecting the interests of owners of copyright, licensees or performers may apply to the Minister to be recognised as a copyright owners' collecting society for the purposes of this Part.

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

(a) the constitution of the organisation or association;

(b) the prescribed application fee; and

(c) such other information or documents as may be prescribed or the Minister may determine.

(3) If the Minister 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, licensees or performers;

(b) 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 performances affecting rights pertaining thereto which are protected by this Act; and

(c) the inspection by its members of the accounts which it is required to keep in terms of section 58 (1),

the Minister may recognise such organisation or association as a copyright owners' collecting society under a name approved by the Minister and issue to it, in such form as the Minister may determine, a certificate to that effect.

(4) The Minister shall not approve a name under subsection (3) which is identical to the name of a company registered under the Companies Act, 1973 (Act 61 of 1973) or which corresponds in such manner therewith that, in the opinion of the Minister, it is likely to cause confusion.

(5) Upon the recognition of an organisation or association as a copyright owners' collecting society under subsection (3), the Minister shall furnish a copy of the certificate issued to the society in terms of that subsection to the Registrar of Companies, who shall enter the name of the society in the registers kept by the Registrar in terms of the Companies Act, 1973 (Act 61 of 1973).

(6) With effect from a date determined by the Minister by notice in the *Gazette*, no person, except a copyright owners' collecting society, shall on behalf of any owner of copyright, licensee or performer collect or demand from any person payment of any royalty or other remuneration in respect of the use of any work or performance in respect of which the rights pertaining thereto are protected by this Act.

(7) Subsection (6) shall not be construed as prohibiting any owner of copyright, licensee or performer to personally, or through his or her attorney, demand or collect from any person any royalty or other remuneration accruing to him or her by reason of any use of any work of performance affecting any right of him or her protected by this Act.

57 Copyright owners collecting society to be a juristic person

Every copyright owners' collecting society shall, with effect from the date of issue of the certificate referred to in section 56 (3), be a juristic person.

58 Keeping of accounts and auditing

(1) Every copyright owners' collecting society shall 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 has been distributed or otherwise applied.

(2) Every copyright owners' collecting society shall 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 51 of 1951).

59 Withdrawal of recognition

(1) The Minister may, upon information received by him or her that a copyright owners' collecting society-

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

(i) any function contemplated in paragraph (b) of section 56 (3); or

(ii) the inspection of its accounts contemplated in paragraph (c) of section 56 (3); or

(b) has failed to comply with the provisions of section 58,

by written notice delivered or sent by registered post to the society at its last known address, request the society 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 Minister is of the opinion that the failure in question on the part of the copyright owners' collecting society is materially prejudicing or has materially prejudiced its members, he or she may withdraw the recognition thereof as a copyright owners' collecting society and cancel the certificate issued to such society under section 56 (3).

(3) The Minister shall notify the Registrar of Companies of any withdrawal and cancellation under subsection (2), and the Registrar of Companies shall delete the name of the copyright owners' collecting society concerned from the registers referred to in section 56 (5).

60 Offence and penalties

A person who contravenes the provisions of section 56 (6) shall be guilty of an offence and liable on conviction 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.

PART IV

GENERAL AND MISCELLANEOUS PROVISIONS

61 Regulations

The Minister may make regulations by notice in the *Gazette*-

- (a) in relation to any matter required or permitted by this Act to be prescribed;
- (b) prescribing the procedure for making references and applications to the Tribunal and for proceedings before the Tribunal;
- (c) in consultation with the Minister of Finance, prescribing the tariff of fees payable in respect of proceedings before the Tribunal;
- (d) in consultation with the Minister of Finance, prescribing the remuneration and allowances of members of the advisory committee referred to in section 62, and of its subcommittees, and the conditions upon which such members shall be appointed; and
- (e) generally, as to any matter which the Minister considers it necessary or expedient to prescribe in order that the objects of this Act may be achieved.

62 Advisory committee

(1) The Minister shall appoint an advisory committee on copyright and neighbouring rights law, consisting of-

- (a) a chairperson who shall be a person who has practised as an advocate or attorney for a period of not less than five years; and
- (b) such *ex officio* and other members as the Minister may from time to time determine.

(2) A member of the advisory committee shall hold office for such period as the Minister may direct and shall be eligible for re-appointment upon the expiration of his or her period of office.

(3) The advisory committee shall in relation to witnesses and their evidence have the powers of a commission under the Commissions Act, 1947 (Act 8 of 1947).

(4) The advisory committee may from time to time make recommendations to the Minister in regard to any amendments to this Act and shall advise the Minister on any matter referred to it by the Minister.

(5) (a) The advisory committee may from time to time constitute and maintain subcommittees.

(b) The advisory committee shall appoint as members of the subcommittees such of its members and such other persons and for such periods of office as the advisory committee may from time to time determine.

(6) The advisory committee may call to its assistance any person it may consider necessary to assist it with, or to investigate matters relating to, the functions referred to in subsection (4).

63 Application of Act to other countries

(1) The Minister may by notice in the *Gazette* provide that any provision of this Act specified in the notice shall in the case of a country so specified apply-

(a) in relation to literary, musical or artistic works, computer programs, cinematograph films, sound recordings and published editions, first published in that country as it applies in relation to literary, musical or artistic works, computer programs, cinematograph films, sound recordings and published editions first published in Namibia;

(b) in relation to persons who at a material time are citizens or subjects of that country as it applies in relation to persons who at such a time are Namibian citizens;

(c) in relation to persons who at a material time are domiciled or resident in that country as it applies in relation to persons who at such a time are domiciled or resident in Namibia;

(d) in relation to bodies incorporated under the laws of that country as it applies in relation to bodies incorporated under the laws of Namibia;

(e) in relation to broadcasts and programme-carrying signals emitted to a satellite from places in that country as it applies in relation to broadcasts made and programme-carrying signals emitted to a satellite from a place in Namibia.

(2) A notice under subsection(1) may provide that the provision in question shall apply-

(a) subject to such exceptions or modifications as may be specified in the notice;

(b) either generally or in relation to such classes of works or classes of cases as may be so specified.

(3) No country, other than a country which is a party to a convention relating to copyright to which Namibia is also a party, shall be specified in a notice issued under subsection (1) unless the Minister is satisfied that, in respect of the class of works to which the notice relates, provision has been or will be made under the laws of that country whereby adequate protection will be given to owners of copyright under this Act.

64 Savings

(1) Nothing in this Act shall affect 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 shall affect the right of the State or of a person deriving title from the State to sell, use or otherwise deal with articles forfeited under the laws relating to customs and excise, including an article forfeited by virtue of this Act or a law repealed by section 68 (1).

(3) Nothing in Part II shall affect the rights acquired by a performer before the commencement of this Act.

(4) The provisions of this Act shall 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 or right in the nature of copyright shall subsist otherwise than by virtue of this Act or any other law.

65 Application of Act in relation to works or performances made before commencement of Act

(1) Subject to subsection (2), this Act shall apply in relation to works before the commencement of this Act as it applies in relation to works made thereafter.

(2) Nothing in this Act contained shall-

(a) affect the ownership, duration or existence of a copyright which subsists under the Copyright Act, 1965 (Act 63 of 1965); or

(b) be construed as creating a copyright which did not subsist prior to 11 September 1965.

(3) Part II shall not apply to performances which took place before the commencement of this Act.

66 Time when a work is made

(1) For the purposes of this Act a work, other than a broadcast or programme-carrying signal, shall be deemed to have been made at the time when it was first reduced to writing, recorded or otherwise reduced to material form.

(2) A broadcast shall be deemed to have been made at the time when it has first been broadcast.

(3) A programme-carrying signal shall be deemed to have been made at the time when it has first been transmitted by a satellite.

67 Act binds State

This Act shall bind the State.

68 Repeal of laws

(1) Subject to subsection (2), the Copyright Act, 1965 (Act 63 of 1965), the Copyright Amendment Act, 1967 (Act 56 of 1967), the Copyright Amendment Act, 1972 (Act 75 of 1972) and the Copyright Amendment Act, 1975 (Act 64 of 1975) are hereby 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, shall be deemed to have been done under such corresponding provision.

69 Short title and commencement

This Act shall be called the Copyright and Neighbouring Rights Protection Act, 1994, and shall come into operation on a date to be determined by the Minister by notice in the *Gazette*.