

REPUBLIC  
OF  
SOUTH AFRICA



REPUBLIEK  
VAN  
SUID-AFRIKA

# Government Gazette Staatskoerant

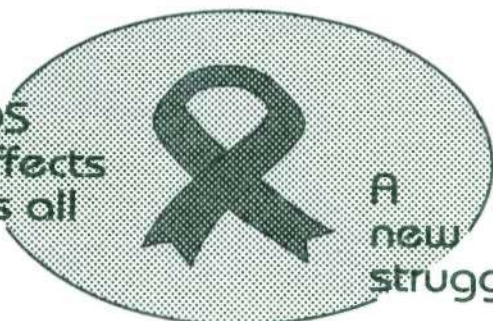
Vol. 419

PRETORIA, 10 MAY  
MEI 2000

No. 21156

**We all have the power to prevent AIDS**

AIDS  
affects  
us all



A  
new  
struggle

Prevention is the cure

**AIDS  
HELPUNE**

**0800 012 322**

DEPARTMENT OF HEALTH

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## GENERAL NOTICE

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### NOTICE 1805 OF 2000

#### DEPARTMENT OF TRADE AND INDUSTRY

#### DEPARTEMENT VAN HANDEL EN NYWERHEID

**(a) COPYRIGHT ACT; 1978 (ACT NO.98 OF 1978)**

**(b) PERFORMER'S PROTECTION ACT; 1967 (ACT NO.11  
OF 1967)**

**(c) TRADE PRACTICE ACT; 1976 (ACT NO.76 OF 1976)**

**(d) COUNTERFEIT GOODS ACT; 1997 (ACT NO.37 OF 1997)**

**(e) MERCHANDISE MARKS ACT; 1941 (ACT NO.17 OF  
1941)**

**(f) PATENTS ACT; 1978 (ACT NO.57 OF 1978)**

I, Alexander Erwin; Minister of Trade and Industry; do hereby publish for comment; amendments to the following Acts i.e: sections **1;9;12;23;24;26** and **27** of the Copyright Act No.98 of 1978; sections **5** and **8** of the Performer's Protection Act No.11 of 1967; sections **9** and **19** of the Trade Practice Act No.76 of 1976; sections **1;5** and **21** of the Counterfeit Goods Act No.37 of 1997; sections **1;2;6;7;8;9** and **14** of the Merchandise Marks Act No.17 of 1941 and sections **9(b)** and **19** of the Patents Act No.57 of 1978. In reading section 9(c) of the Copyright Act and section 8(3) (a) (iii) of the Performer's Protection Act read also attached document marked "A".

Interested persons are invited to make written comments on these amendments within a period of 14(fourteen) working days from the date of publication to:

The Registrar: South African Patents and Trademarks Office : Attention

Mr. A. Tuwe  
Private Bag X 400

COPYRIGHT AMENDMENT**Amendment of Definitions of section 1 of Act 98 of 1978**

Section 1 of the principal Act is hereby amended by the insertion after the definition of 'reproduction' of the following definition:

"'restricted act' means any act in respect of a work which falls within the scope of the exclusive rights comprised in the copyright in that work."

**Amendment of section 9 of Act 98 of 1978**

Section 9 of the principal Act is hereby amended by the insertion of the following at the end thereof:

"(c) without payment of a royalty for –

(i) broadcasting the sound recording;

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

(iii) communicating the sound recording to the public;

provided that

(aa) the amount of the aforesaid royalty shall be determined by the Copyright Tribunal in terms of Chapter III in the absence of the owner of the copyright and the user of the sound recording reaching agreement on it;

(bb) any payment made by the user of the sound recording in terms of this paragraph shall be deemed to have discharged any obligation which that user might have to make any payment in respect of his use of a corresponding fixation of a performance in terms of section 5(b) of the Performers Protection Act, 1967.

(cc) the person receiving payment of the royalty shall share such royalty with any performer whose performance is featured on the sound recording in question and who



would have been entitled to receive a royalty in that regard in terms of section 5(b) of the Performers Protection Act, 1967, on a basis determined by the Copyright Tribunal in terms of Chapter III in the absence of the parties reaching agreement on such basis.

#### **Amendment of section 12 of Act 98 of 1978**

Section 12(1) of the principal Act is hereby amended as follows:

##### **"12. General exceptions from protection of literary and musical works**

- (1) Copyright shall not be infringed by doing a restricted act in respect of [any fair dealing with] a literary or musical work if doing such act is compatible with fair practice and is –
- (a) for the purposes of research or private study by, or the personal or private use of, the person, being a natural person, doing such act [using the work];
  - (b) for the purposes of criticism or review of that work or of another work; or
  - (c) for the purpose of reporting current events –
    - (i) in a newspaper, magazine or similar periodical; or
    - (ii) by means of broadcasting or in a cinematograph film;

Provided that, in the case of paragraphs (b) and (c)(i), the source shall be mentioned, as well as the name of the author if it appears on the work."

Section 12 of the principal Act is hereby amended by the insertion of a new section 12(14) after section 12(13):

- "(14) In deciding whether doing any act in relation to a work is compatible with fair practice for purposes of this section, the court shall take account of inter alia the following factors –
- (a) the purpose and character of the act done;
  - (b) the nature of the copyrighted work;
  - (c) the amount and substantiality of the portion of the work in relation to which the act is done;
  - (d) the effect upon the plaintiff's potential market;

- (e) whether the work can be obtained within a reasonable time at a normal commercial price."

#### **Amendment of section 23 of Act 98 of 1978**

Section 23(2) of the principal Act is amended by the insertion of paragraph (e) immediately following the existing paragraph (d);

- "(e) possess or has under his or her control in the course of business."

#### **Amendment of section 24 of Act 98 of 1978**

Section 24(3) of the principal Act is amended as follows:

- "(3) Where in an action under this section an infringement of copyright is proved or admitted, and the court having regard, in addition to all other material consideration, to –
- (a) the flagrancy of the infringement; and
  - (b) any benefit shown to have accrued to the defendant by reason of the infringement,
- is of the view that justice and a sufficient deterrent against infringement of copyright will not have been achieved unless the defendant is ordered to make a suitable monetary payment [satisfied that effective relief would not otherwise be available] to the plaintiff, the court shall in assessing damages for the infringement have power to award such additional damages as the court may deem fit, which damages shall not exceed R10 000.00 for each article to which the infringement relates."

#### **Amendment of section 26 of Act 98 of 1978**

The following new subsections (13) and (14) are inserted after subsection (12) of the principal Act:

- "(13) In any proceedings by virtue of this chapter relating to the alleged infringement of copyright in a work:
- (a) copyright shall be presumed to subsist in the work to which the action relates if the defendant does not put in issue the question whether copyright subsists therein, and
  - (b) where the subsistence of the copyright is proved or admitted, or is presumed in pursuance of the preceding paragraph, the person claimed to be the owner of the copyright shall be presumed to be the owner of the copyright if the defendant or accused does not put in issue the question of his ownership thereof.
- (14) For the purposes of subsection (13) a question shall not be deemed to have been put in issue unless the person seeking to challenge it asserts facts which serve to place doubt on the correctness of the relevant averments made by the plaintiff or the State."

#### **Amendment of section 27 of Act 98 of 1978**

Section 27(1) of the principal Act is amended by the insertion of paragraph (g) immediately following the existing paragraph (f):

- "(f) distributes for any other purposes to such an extent that the owner of the copyright is prejudicially affected[.];
- (g) possess or has under his or her control in the course of business with a view to committing any act infringing the copyright.
- articles which he knows or has reason to suspect are [to be] infringing copies of the work, shall be guilty of an offence."



**PERFORMERS' PROTECTION AMENDMENT****Amendment of section 5 of Act 11 of 1967**

Section 5 of the principal Act is hereby amended as follows:

**"5. Restrictions on use of performances**

(1) Subject to the provisions of this Act, no person shall **[without the consent of the performer -]**

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

**(i)** broadcast or communicate to the public **[a]** an unfixed 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 a fixation; or]**

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

**[(c)]** **(iii)** make a reproduction of a fixation of a performance of such performer –

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

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

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

**(b)** by means of directly or indirectly using a fixation of the performance published for commercial purposes, without payment of a royalty to the performer

**(i)** broadcast the performance;

**(ii)** cause the performance to be transmitted in a diffusion service unless such service transmits a lawful broadcast, including the performance, and is operated by the original broadcaster;

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



provided that the amount of the aforesaid royalty shall be determined by the Copyright Tribunal established by the Copyright Act, 1978, in the absence of the performer and the user of the fixation reaching agreement on it.

- (4) In the absence of an agreement to the contrary, a performer's consent to the broadcasting of his performance shall be deemed to include his consent to the rebroadcasting of his performance, the fixation of his performance for broadcasting purposes, and the reproduction for broadcasting purposes of such fixation.
- (3) In the absence of any agreement to the contrary, where a performer has authorised the fixation of his performance he shall be deemed to have granted to the person who makes the arrangements for making the fixation the exclusive right to exact payment of a royalty for performing the acts set forth in paragraph (b) of subsection (1) where such acts are performed by use of the fixation of his performance or a reproduction thereof, and shall be entitled to share in any payment made to such person or his successor in title for the performance of such acts in the manner agreed upon between the parties, or in the absence of any such agreement, as determined by the Copyright Tribunal established by the Copyright Act, 1978; provided that any payment made by a user of a fixation of a performance in terms of this section shall be deemed to have discharged any obligation of that user to pay a royalty to the owner of any copyright subsisting in that fixation, in terms of section 9 of the Copyright Act, 1978."

#### **Amendment of section 8 of Act 11 of 1967**

Section 8(3) of the principal Act is hereby amended by the substitution of the following:

- "(3) (a) A broadcaster may make by means of his or her own facilities a fixation of a performance and reproductions of such fixation without the consent required by section 5, provided that, unless otherwise stipulated –
- (i) the fixation **[and the]** or any reproduction[s] thereof is intended exclusively for lawful **[are used solely in the]** broadcasts of the broadcaster to which the performer has consented **[made by the broadcaster]**;
- (ii) the fixation and any **[the]** reproductions thereof, if they are not of an exceptional documentary character, are destroyed before the end of the

period of six months commencing on the day on which the fixation was first made or such longer period as may be agreed to by the performer.

[; and]

- [(iii) the broadcaster pays to the performer, whose performance is so used, in respect of each use of the fixation or of any reproduction thereof, an equitable remuneration, which, in the absence of agreement, shall be determined in accordance with the provisions of the Arbitration Act, 1965 (Act No 41 of 1965), or alternatively, at the option of the performer, by the Copyright Tribunal established by the Copyright Act, 1978 (Act No 98 of 1978).]**

- (b) The fixation and the reproduction[s] thereof made under the provisions of the [this] subsection may, on the grounds of their exceptional documentary character[,], be preserved in the archives of the broadcaster [Corporation] but shall, subject to the provisions of this Act, not be further used without the consent of the performer.



REPUBLIC OF SOUTH AFRICA

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**THE TRADE PRACTICES ACT  
AMENDMENT ACT**

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## ACT

To amend the Trade Practices Act 76 of 1976, to provide for the prohibition of the practice known as "ambush marketing" in the context of sponsored events, and to increase the penalties for contraventions.

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

### Amendment of section 9 of the Trade Practices Act 76 of 1976

1. Section 9 of the Trade Practices Act 76 of 1976 (hereinafter referred to as the principal Act) is hereby amended by the insertion of a new paragraph (d) as follows:

"(d) For purposes of paragraphs (a), (b) and (c), the false or misleading advertisement, statement, communication, description or indication referred to shall include any which is intended, directly or indirectly, to represent, imply or suggest a contractual or other connection or association with any event, person, organisation or place by virtue of patronage or sponsorship.".

### Substitution of section 19 of Act 76 of 1976

2. Section 19 of the principal Act is hereby amended by the substitution for the section of the following section:

"9.(1) Any person who contravenes or fails to comply with any provision of this Act, shall be guilty of an offence.

(2) Any person convicted of an offence in terms of this Act will be punishable:

(a) in the case of a first conviction, with a fine not exceeding R5000 or with imprisonment for a period not exceeding two years or with both such fine and such imprisonment;

(b) in the case of a second or any subsequent conviction, with a fine not exceeding R10 000 or with imprisonment not exceeding five years or with both such fine and such imprisonment."



REPUBLIC OF SOUTH AFRICA

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**THE COUNTERFEIT GOODS ACT  
AMENDMENT**

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To amend the Counterfeit Goods Act 37 of 1997, so as to correct and clarify the Act.

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

**Amendment of section 1 of the Counterfeit Goods Act, 37 of 1997**

1. Section 1 of the Counterfeit Goods Act 37 of 1997 (hereinafter referred to as the principal Act) is hereby amended by the substitution for paragraph (xi) of subsection (1) of the following paragraph:

"(xi) 'intellectual property right'-

- (a) means the rights in respect of a trade mark conferred by the Trade Marks Act, 1993 (Act No. 194 of 1993) including unregistered rights conferred by section 35 thereof;
- (b) means the copyright in any work in terms of the Copyright Act, 1978 (Act No. 98 of 1978);
- (c) in the case where, by a notice issued under section 15 of the Merchandise Marks Act 1941, the use of a particular mark in relation to goods, except such use by a person specified in the notice, has been prohibited, means the concomitant exclusive right of that specified person so to use that mark; (ix)".

**Amendment of section 5 of Act, 37 of 1997**

2. Section 5 of the principal Act is hereby amended by the substitution for paragraph (a) of subsection (4) of the following paragraph:

"(a) any acts performed by an inspector by virtue of subsection (2) will cease to have any legal effect unless a magistrate or a judge of a High Court having jurisdiction in the area where the acts were performed, confirms those acts on the application of an inspector brought within 10 days of the day on which those acts had been performed;".



**Amendment of section 21 of Act 37 of 1997**

3. Section 21 of the principal Act is hereby amended by the substitution for the section of the following section:

"21. Subject to the Constitution of the Republic of South Africa, 1996 (Act no. 108 of 1996), and the Criminal Procedure Act, 1977, the provisions of this Act will not detract from a person's civil or criminal liability, in terms of any other law, on account of his or her infringement of any intellectual property right **[and]** or from the capacity or competence in terms of any law to institute civil or criminal proceedings in respect of such infringement or from the capacity or competence in terms of the Criminal Procedure Act, 1977, to proceed under any provisions of that Act.".

REPUBLIC OF SOUTH AFRICA

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**THE MERCHANDISE MARKS ACT  
AMENDMENT**

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To amend the Merchandise Marks Act, 1941 to clarify the scope of the Act in its application to trade mark rights to remove any perceived overlap with the provisions of the Counterfeit Goods Act 37 of 1997, to prohibit the unauthorised use of the national flags, armorial bearings and other official signs of Convention countries, and to provide for matters connected therewith.

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

Amendment of section 1 of Act 17 of 1941, as amended by section 1 of Act 39 of 1952, section 1 of Act 47 of 1954, section 1 of Act 49 of 1966, section 1 of Act 54 of 1987 and section 1 of Act 38 of 1997.

1. Section 1 of the Merchandise Marks Act, 1941 (hereinafter referred to as the principal Act) is hereby amended-

(a) by the insertion before the definition of "covering" of the following definition:

"'convention country' means any country or group of countries in respect of which there is in force a proclamation under section 63 of the Trade Marks Act, 1993 (Act 194 of 1993) declaring such country or group of countries to be a convention country or convention countries for the purposes of that Act;"

(b) by the substitution for the definition of "device" of the following definition:

"'device' means any visual representation or illustration capable of being reproduced upon a surface, whether by printing or otherwise but excluding a trade mark;"

(c) by the substitution for the definition of "mark" of the following definition:

"'mark' [includes a trade mark and, for the purposes of



**Amendment of section 6 of Act 17 of 1941 as amended by section 1 of Act 26 of 1951 and as substituted by section 6 of Act 38 of 1997**

3. Section 6 of the principal Act is hereby amended by the substitution for the title of the section of the following title:

**"6. Applying false trade description and alteration of trade mark".**

**Amendment of section 7 of Act 17 of 1941 as substituted by section 7 of Act 38 of 1997**

4. Section 7 of the principal Act is hereby amended by the substitution for the section of the following section:

**"7. Sale and hiring out of goods bearing false trade description**

Any person who sells or lets or offers for sale or hire any goods to which any false trade description is applied, or in relation to which a trade mark has been altered, whether by addition or effacement or in any other manner, shall be guilty of an offence, if-

- (a) at the time of the commission of the alleged offence, the person knew or had reason to suspect that the trade description was not genuine or that the trade mark had been altered; or
- (b) the person did not take all reasonable steps in order to avoid the commission of the alleged offence."

**Amendment of section 8 of Act 17 of 1941 as amended by section 8 of Act 38 of 1997**

5. Section 8 of the principal Act is hereby amended by the substitution for the section of the following section:

**"8. Sale of imported goods bearing name or make of South African manufacturer or trader, unaccompanied by indication of origin**

- (1) Any person who sells or, for the purpose of advertising goods, distributes in the Republic any goods which were not made or produced in the Republic, and to which there is applied any

name or mark being or purporting to be the name or mark of any manufacturer, producer or trade in the Republic or the name of any place or district in the Republic, shall be guilty of an offence, unless there is added to that name or mark, in a conspicuous manner, the name of the country in which the goods were made or produced, with a statement that there were made or produced there.

- (2) This section shall not have effect in respect of the application of a name or **[trade]** mark to articles used or to be used for any of the following purposes, that is to say, as coverings, labels, reels, or otherwise as articles in or with which goods manufactured or produced in the Republic are or are to be sold, if the name or mark so applied is the name or **[trade]** mark of a manufacturer, producer or trader in those goods in the Republic, and the name or **[trade]** mark was applied with his consent."

**Amendment of section 9 of Act 17 of 1941 as substituted by section 9 of Act 38 of 1997.**

6. Section 9 of the principal Act is hereby amended by the substitution for the section of the following section:

**"9. Sale or imported goods bearing marks in official language, unaccompanied by indication of origin**

Any person who sells or, for the purpose of advertising goods, distributes in the Republic and goods which were not made or produced in the Republic, and to which there is applied any **[trade mark]**, mark or trade description in any official language of the Republic, shall be guilty of an offence, unless there is added to that mark or description, in a conspicuous manner, the name of the country in which the goods were made or produced, with a statement that they were made or produced there."

**Amendment of section 14 of Act 17 of 1941 as amended by section 2 of Act 39 of 1952 and section 1 of Act 55 of 1967, substituted by section 2 of Act 54 of 1987, amended by section 1 of Act 49 of 1996 and substituted by section 10 of Act 38 of 1997.**



7. Section 14 of the principal Act is hereby amended by substituting for subsection (1) of the following subsection:

"(1) Any person who uses in connection with his or her trade, business, profession or occupation, or in connection with a trade mark or mark or trade description applied by him or her to goods made, produced or sold by him or her without authority in writing signed by or on behalf of the Minister-

- (a) a mark or trade mark which consists of or contains the national flag of a convention country, or an imitation from a heraldic point of view, without the authorization of the competent authority of the convention country, unless it appears that use of the flag in the manner proposed is permitted without such authorization;
- (b) a mark or trade mark which consists of or contains the armorial bearings or any other state emblem of the Republic or a convention country, or an imitation from a heraldic point of view, without the authorization of the competent authority of the Republic or convention country, as the case may be;
- (c) a mark or trade mark which consists of or contains an official sign or hallmark adopted by the Republic or a convention country, or an imitation from a heraldic point of view, and which indicates control and warranty, in relation to goods or services of the same or a similar kind as those in relation to which it indicates control and warranty, without the authorization of the competent authority of the Republic or convention country, as the case may be; or
- (d) a mark or trade mark which consists of or contains the flag, the armorial bearings or any other emblem, or an imitation from a heraldic point of view, or the name, or the abbreviation of the name, of any international organization of which one or more convention countries are members, without the authorization of the organization concerned, unless it appears



that use of the flag, armorial bearings, other emblem or imitation or the name or abbreviation in the manner proposed, is not such as to suggest to the public that a connection exists between the organization and the mark, or is not likely to mislead the public as to the existence of a connection between the organization and the proprietor of the mark,

shall be guilty of an offence: Provided that this subsection shall not apply to a trade mark registered before and in existence on 1 February 1941[.],  
and

provided further that-

- (i) paragraphs (b), (c) and (d) shall apply to a state emblem and an official sign or hallmark of a convention country and an emblem, the name, or the abbreviation of the name, of any international organization only if and to the extent that-
  - (aa) the convention country or international organization, as the case may be, has notified the Republic in accordance with Article 6ter of the Paris Convention that it desires to protect that emblem, official sign or hallmark, name or abbreviation, as the case may be;
  - (bb) such notification remains in force; and
  - (cc) the Republic has not objected to it in accordance with Article 6ter of the Paris Convention or any such objection has been withdrawn;
- (ii) paragraph (b) or (c) shall not prevent the use of a trade mark by a citizen of any country who is authorized to make use of a state emblem or official sign or hallmark of that country, notwithstanding the fact that it is similar to that of another country."

**Amendment of section 19 of Act 57 of 1978**

1. Section 19 of the Patents Act, 1978, is hereby amended by the substitution for subsection (3) of the following subsection:

“(3) A party to any proceedings before the Commissioner may appear in person or be represented thereat by an advocate or an agent or an attorney who has been granted the right of appearance in the High Court in terms of section 4 of the Right of Appearance in Courts Act 62 of 1995.”

**Amendment of section 9 (b) of Act 57 of 1978**

2. Section 9 (b) of the Patents Act; 1978 (Provides that: **no complete specification shall be accepted in terms of Section 34 and no application for an amendment of a complete specification shall be allowed unless it has been signed by an agent**), is hereby amended by deleting the provisions in brackets.



INDUSTRIAL PROPERTY  
AND COPYRIGHT—JANUARY 1996

ANNEXURE A—SWISS ACT ON  
COLLECTING SOCIETIES  
COPYRIGHT AND NEIGHBORING RIGHTS  
LAWS AND TREATIES

to the rights enjoyed by performers, phonogram and videogram producers and broadcasting organizations.

*Term of protection*

*Article 39.* 1. Protection shall begin with performance of the work by the performers, with production of the phonogram or videogram or with the transmission of the broadcast; it shall end after 50 years.

2. The term of protection shall be calculated as from December 31 of the year in which the event determining the calculation occurred.

TITLE IV: COLLECTING SOCIETIES

CHAPTER 1: FIELDS SUBJECT TO FEDERAL SUPERVISION

*Article 40.* 1. The following shall be subject to federal supervision:

- a. the administration of exclusive rights for the performance and broadcasting of non-theatrical works of music and the production of phonograms and videograms of such works;
- b. the assertion of the claims to remuneration provided for in this Law under Articles 13, 20, 22 and 35.

2. The Federal Council may subject further fields to federal supervision if the public interest so requires.

3. The personal administration of exclusive rights by the author or his heirs shall not be subject to federal supervision.

CHAPTER 2: AUTHORIZATION

*Principle*

*Article 41.* Any person who administers rights subject to federal supervision shall require an authorization from the Federal Intellectual Property Office.

*Requirements*

*Article 42.* 1. Authorization shall be granted only to collecting societies that:

- a. have been established under Swiss law, have their headquarters in Switzerland and conduct their business from Switzerland;
- b. have the administration of authors' rights or neighboring rights as their main purpose;
- c. are open to all owners of rights;
- d. afford an appropriate right of participation in the decisions of the society to authors and performers;
- e. afford a guarantee of compliance with statutory provisions, particularly on the basis of their statutes;

f. may be expected to conduct effective and economic administration.

2. Authorization shall be granted as a rule to one society only for each category of works and to one society for neighboring rights.

*Duration: publication*

*Article 43.* 1. An authorization shall be granted for five years; on the expiry of each such period it may be renewed for the same duration.

2. The grant, renewal, modification, withdrawal or non-renewal of an authorization shall be published.

CHAPTER 3: OBLIGATIONS OF THE COLLECTING SOCIETIES

*Obligation to administer*

*Article 44.* The collecting societies shall have an obligation to the owners of rights to administer the rights belonging to their field of activity.

*Principles of the conduct of business*

*Article 45.* 1. The collecting societies shall be required to conduct their business in accordance with the principles of orderly and economic administration.

2. They shall administer the rights in accordance with fixed rules and with the requirement of equal treatment.

3. They may not aim to make a profit.

4. They shall conclude, wherever possible, reciprocal agreements with foreign collecting societies.

*Obligation of tariffs*

*Article 46.* 1. The collecting societies shall draw up tariffs for the remuneration that they collect.

2. They shall negotiate the terms of each tariff with the relevant associations of users.

3. They shall submit the tariffs to the Federal Arbitration Board (Article 55) for approval and shall publish the approved tariffs.

*Joint tariff*

*Article 47.* 1. Where more than one collecting society operates in the same field of utilization, they shall draw up for the same utilization of works or performances a joint tariff applying uniform principles and shall designate one of their number as the joint office for payment.

2. The Federal Council may issue further provisions concerning their collaboration.

*Principles of distribution*

*Article 48.* 1. The collecting societies shall be required to draw up distribution regulations and to submit



**INDUSTRIAL PROPERTY  
AND COPYRIGHT—JANUARY 1996**

**COPYRIGHT AND NEIGHBORING RIGHTS  
LAWS AND TREATIES**

them to the Supervisory Authority (Article 52.1) for approval.

2. With the approval of the supreme organ of the society, a portion of the proceeds may be used for social welfare purposes and for appropriate furtherance of culture.

*Distribution of the proceeds*

**Article 49.** 1. The collecting societies shall be required to distribute the proceeds of exploitation in proportion to the revenue from the individual works and performances. They shall do all that may reasonably be expected of them to identify those who are entitled.

2. If such distribution entails unreasonable expense, the collecting societies may estimate the extent of revenue; the estimates shall be based on factors that are capable of verification and are appropriate.

3. The proceeds shall be divided between the original owners of rights and other entitled persons in such a way that an equitable share falls to the authors and performers. A different distribution shall be permissible where the expense would be unreasonable.

4. Contractual agreements made by the original owners of rights with third parties shall take precedence over the rules of distribution.

*Obligation to provide information and render accounts*

**Article 50.** The collecting societies shall provide the Supervisory Authority with all information and make available all documents required to carry out the supervision and shall also render accounts yearly in an activity report.

**CHAPTER 4: OBLIGATION TO GIVE INFORMATION TO  
COLLECTING SOCIETIES**

**Article 51.** 1. Where it may reasonably be expected of them, the users of works shall provide the collecting societies with all the necessary information for drawing up and applying the tariffs and for distributing the proceeds.

2. The collecting societies shall be obliged to preserve business secrets.

**CHAPTER 5: SUPERVISION OF  
THE COLLECTING SOCIETIES**

**Part 1: Supervision of Conduct of Business**

*Supervisory Authority*

**Article 52.** 1. The Federal Intellectual Property Office (Supervisory Authority) shall supervise the collecting societies.

2. The Supervisory Authority shall levy fees for its activity; the Federal Council shall issue a schedule of fees.

*Extent of supervision*

**Article 53.** 1. The Supervisory Authority shall supervise the conduct of business of the collecting societies and shall ensure that they comply with their obligations. It shall examine and approve their annual reports.

2. It may issue instructions concerning the obligation to provide information (Article 50).

3. It may also call upon agents not belonging to the Federal Administration in order to exercise its responsibilities; such persons shall be bound to secrecy.

*Consequences of failure to comply with obligations*

**Article 54.** 1. If a collecting society fails to comply with its obligations, the Supervisory Authority shall set an appropriate time limit to regularize the situation; if that time limit is not complied with, the Supervisory Authority shall take the necessary measures.

2. In the event of refusal to comply with its instructions, the Supervisory Authority may, after issuing a warning, limit or withdraw the authorization.

3. The Supervisory Authority may publish final instructions at the cost of the collecting society.

**Part 2: Supervision of Tariffs**

*Federal Arbitration Board for the Exploitation of Authors' Rights and Neighboring Rights*

**Article 55.** 1. The Federal Arbitration Board for the Exploitation of Authors' Rights and Neighboring Rights (Arbitration Board) shall be responsible for approving the tariffs of the collecting societies (Article 46).

2. Its members shall be appointed by the Federal Council. The Federal Council shall determine the organization and procedures of the Arbitration Board in accordance with the Federal Law on Administrative Procedures.

3. The Arbitration Board shall accept no instructions in taking its decisions; the staff of the Secretariat of the Board shall be answerable for such activity to the Chairman of the Board.

*Composition of the Arbitration Board*

**Article 56.** 1. The Arbitration Board shall comprise a chairman, two assessors, two alternates and additional members.



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AND COPYRIGHT—JANUARY 1996

2. The additional members shall be proposed by the collecting societies and the relevant associations of users of works and performances.

*Composition for taking decisions*

*Article 57.* 1. The Arbitration Board shall take its decisions with a composition of five members: the chairman, two assessors and two additional members.

2. The chairman shall designate for each proceeding the two additional members, who shall be technically competent. One of the members shall be designated on a proposal by the collecting societies and one on a proposal by the associations of users.

3. The fact of a technically competent member belonging to a collecting society or to an association of users shall not on its own constitute grounds for his refusal.

*Administrative supervision*

*Article 58.* 1. The Federal Department of Justice and Police shall be the administrative supervisory body for the Arbitration Board.

2. The Arbitration Board shall submit a yearly report to the Department on its activities.

*Approval of tariffs*

*Article 59.* 1. The Arbitration Board shall approve a tariff submitted to it if its structure and individual provisions are appropriate.

2. It may make modifications after hearing the collecting society and the associations of users (Article 46.2) involved in the procedure.

3. Finally approved tariffs shall be binding on the courts.

*Principle of equitableness*

*Article 60.* 1. When determining compensation, account shall be taken of:

- a. the proceeds obtained from use of the work, performance, phonogram or videogram or broadcast or, subsidiarily, the outlay involved in the use;
- b. the nature and quantity of the works, performances, phonograms or videograms or broadcasts used;
- c. the ratio of protected to unprotected works, performances, phonograms or videograms or broadcasts, and other services.

2. Compensation shall normally amount to a maximum of 10 percent of the proceeds from or cost of utilization for authors' rights and a maximum of 3 percent for neighboring rights; however, it shall be determined in such a way that, subject to economic administration, the entitled persons receive equitable remuneration.

3. Uses of works under article 19.1.b shall be made subject to preferential tariffs.

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LAWS AND TREATIES

TITLE V: LEGAL PROTECTION

CHAPTER 1: CIVIL LAW PROTECTION

*Action for declaratory judgment*

*Article 61.* Any person who proves a legal interest therein may apply to the court for a declaratory judgment on whether or not a right or a legal relationship subsists under this Law.

*Action for execution*

*Article 62.* 1. Whoever suffers or is likely to suffer a violation of his copyright or neighboring right may request the courts:

- a. to prohibit an imminent prejudice;
- b. to remove an existing prejudice;
- c. to require the defendant to state the origin of the unlawfully manufactured or marketed articles in his possession.

2. He may further, under the Code of Obligations, institute proceedings for damages and redress and may also require the surrender of profits in accordance with the provisions on agency without authority.

*Confiscation in civil proceedings*

*Article 63.* 1. The court may order that the unlawfully manufactured or utilized articles in the possession of the defendant be confiscated, destroyed or rendered unusable.

2. The above shall not apply to executed works of architecture.

*Jurisdiction*

*Article 64.* 1. The court of the domicile of the defendant or of the place where the act was committed or of the place where the act had effect shall be competent to hear actions concerning copyright or neighboring rights.

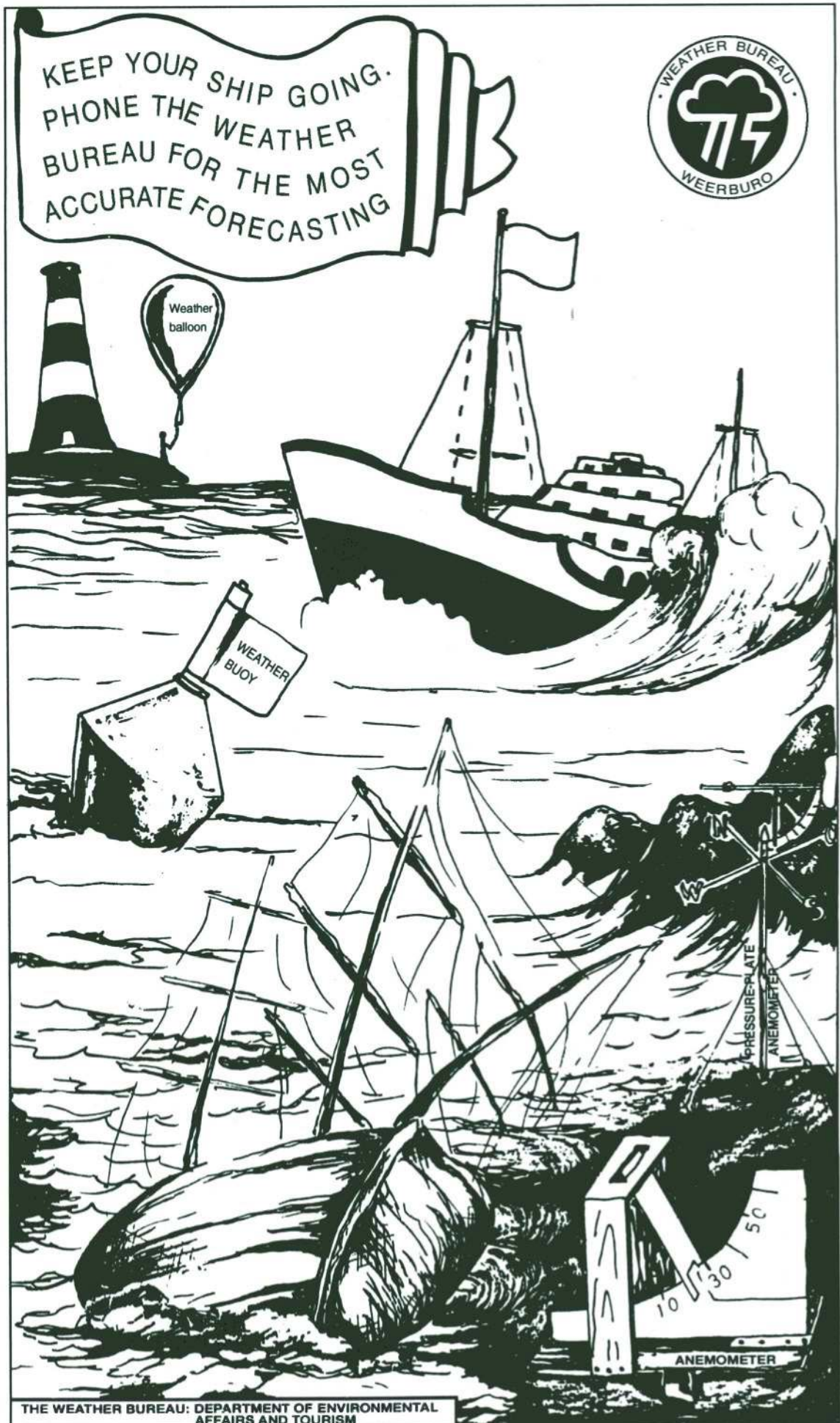
2. Where actions may be brought against several defendants and where they are essentially based on the same facts and legal grounds, action may be instituted against all defendants before any competent court; the court before which first action is instituted shall have exclusive jurisdiction.

3. Each Canton shall designate one single court that has jurisdiction for the whole of its territory for civil proceedings.

*Precautionary measures*

*Article 65.* 1. Any person who provides reasonable evidence that his copyright or neighboring right is infringed or is likely to be infringed and that the infringement is likely to result in a prejudice for him that may not be readily made good may request that precautionary measures be ordered.







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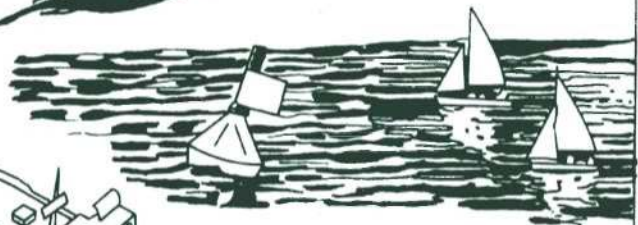
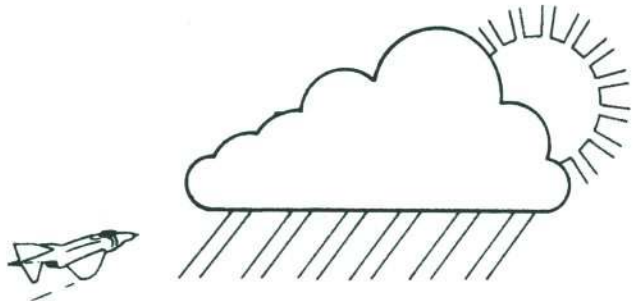
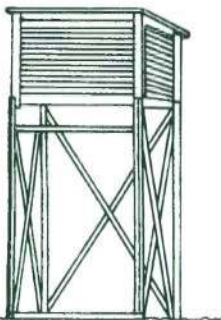
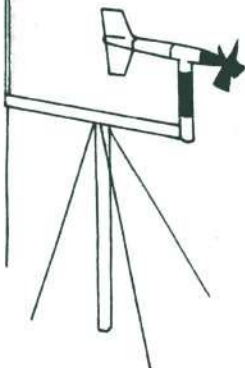
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