



*Tonga*

# **COPYRIGHT ACT**

**Chapter 17.05**

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## COPYRIGHT ACT

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# COPYRIGHT ACT

## AN ACT TO PROVIDE COMPREHENSIVE PROVISIONS WITH RESPECT TO COPYRIGHT<sup>1</sup>

Commencement [1 September 2008]<sup>2</sup>

### 1 Short title

This Act may be cited as the Copyright Act.

### 2 Interpretation

In this Act unless the contrary intention appears —

“**audiovisual work**” means a work that consists of a series of related images which impart the impression of motion, with or without accompanying sounds, susceptible of being made visible and, where accompanied by sounds, susceptible of being made audible;

“**author**” means a natural person who has created the work;

“**broadcasting**” means the communication of a work, a performance or a phonogram to the public by wireless transmission, including transmission by satellite;

“**collective work**” means a work created by two or more natural persons at the initiative and under the direction of a natural person or legal entity, with the understanding that it will be disclosed by the latter person or entity under his or its own name and that the identity of the contributing natural persons will not be indicated;

“**communication to the public**” means the transmission by wire or without wire of the images or sounds, or both, of a work, a performance, a phonogram or a broadcast in such a way that the images or sounds can be perceived by persons outside the normal circle of a family and its closest social acquaintances at a place or places so distant from the place where the transmission originates that, without the transmission, the images or sounds would not be perceivable and, further irrespective of whether the persons can receive the images or sounds at the same place and time, or at different places and times individually chosen by them;

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

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

“**Court**” means the Supreme Court of Tonga;

“**economic rights**” means the rights mentioned in section 6;

“**expression of folklore**” means a group-oriented and tradition-based creation of groups or individuals reflecting the expectation of the community as an adequate expression of its cultural and social identity, its standards and values as transmitted orally, by imitation or by other means, including —

- (a) folktales, folk poetry and folk riddles;
- (b) folk songs and instrumental folk music;
- (c) folk dances and folk plays;
- (d) productions of folk arts in particular, drawings, paintings, carvings, sculptures, pottery, terra-cotta, mosaic, woodwork, metal ware, jewellery, handicrafts, costumes, and indigenous textiles;

“**fixation**” means the embodiment of sounds, images or both or of the representations thereof, from which they can be perceived, reproduced or communicated through a device;

“**moral rights**” means the rights mentioned in section 7;

“**owner of copyright**” means —

- (a) where the economic rights are vested in the author, the author;
- (b) where the economic rights are originally vested in a natural person other than the author or in a legal entity, that person or entity;
- (c) where the ownership of the economic rights has been transferred to a natural person or legal entity, that person or entity;

“**performers**” means any person who performs literary and artistic works or expressions of folklore;

“**phonogram**” means the fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work;

“**photographic work**” means a recording of light or other radiation on any medium on which an image is produced or from which an image may be produced, irrespective of the technique (chemical, electronic or other) by which such recording is made but does not include a still picture extracted from an audiovisual work;

“**producer**” of an audiovisual work or a phonogram means the natural person or legal entity that undertakes the initiative and responsibility for the making of the audiovisual work or phonogram;

“**public display**” means showing of the original or a copy of the work —

- (a) directly;
- (b) by means of a film, slide, television image or otherwise on screen;
- (c) by means of any other device or process; or
- (d) in the case of an audiovisual work, the showing of individual images non-sequentially at a place or places where persons outside the normal circle of a family and its closest social acquaintances are or can be present, irrespective of whether they are or can be present at the same place and time or at different places and times, and where the work can be displayed without communication to the public;

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

“**public performance**” means —

- (a) in the case of a work other than an audiovisual work, performing of the work, either directly or by means of any device or process;
- (b) in the case of an audiovisual work, the showing of images in sequence and the making of accompanying sounds audible; and
- (c) in the case of a phonogram, making the recording sounds audible,

in each case at a place or at places where persons outside the normal circle of the family and its closest acquaintances are or can be present, irrespective of whether they are or can be present at the same place and time, or at different places and times, and where the performance can be perceived without the need for communication to the public;

“**published**” refers to a work or a phonogram, tangible copies of which have been made available to the public in a reasonable quantity for sale, rental, public lending or for other transfer of the ownership or the possession of the copies, provided that, in the case of a work, the making available to the public took place with the consent of the author or other owner of copyright and, in

the case of a phonogram, with the consent of the producer of the phonogram or his successor in title;

“**rental**” means the transfer of the possession of the original or a copy of a work or phonogram for a limited period of time for profit-making purposes;

“**reproduction**” means the making of one or more copies of a work or phonogram in any manner or form, including any permanent or temporary storage of the work or phonogram in electronic form;

“**reprography**” means the making of a facsimile copy of the original or a copy of the work, including photocopying;

“**rights management information**” means any information which identifies the author, the work, the performer, the performance of the performer, the producer of the phonogram, the phonogram, the broadcaster, the broadcast, the owner of any right under this Act, or information about the terms and conditions of use of the work, the performance, the phonogram or the broadcast, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work, a fixed performance, a phonogram or fixed broadcast, or appears in connection with the broadcasting, communication to the public or making available to the public of a work, a fixed performance, a phonogram or a broadcast;

“**work**” means any literary or artistic work under sections 3(1) and 4(1);

“**work of applied art**” means artistic creation with utilitarian functions or incorporated in a useful article, whether made by hand or produced on an industrial scale;

“**work of joint authorship**” means a work to the creation of which two or more authors have contributed, provided the work does not qualify as a “collective work”.

## **PART I—COPYRIGHT**

### **3 Works protected**

- (1) Literary and artistic works are original intellectual creations including —
  - (a) books, pamphlets, articles, computer programs and other writings;
  - (b) speeches, lectures, addresses, sermons and other oral works;
  - (c) dramatic, dramatico-musical works, pantomimes, choregraphic works and other works created for stage productions;
  - (d) musical works, with or without accompanying words;
  - (e) audiovisual works;
  - (f) works of architecture;



- (g) works of drawing, painting, sculpture, engraving, lithography, tapestry and other works of fine art;
  - (h) photographic works;
  - (i) works of applied art;
  - (j) illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.
- (2) Works shall be protected by the sole fact of their creation and irrespective of their mode or form of expression, or of their content, quality and purpose.

#### **4 Derivative works**

- (1) The following shall also be protected as works —
- (a) translations, adaptations, arrangements, and other transformations or modifications of works; and
  - (b) collections of works, collections of mere data (databases), whether in machine readable or other form, and collections of expressions of folklore, provided that such collections are original by reason of the selection or arrangement of their contents.
- (2) The protection of any work referred to in subsection (1) shall be without prejudice to any protection of a pre-existing work or expression of folklore incorporated in or utilised for the making of such a work.

#### **5 Subject matter not protected**

Notwithstanding the provisions of section 3 and 4, no protection under this Act shall extend to —

- (a) any idea, procedure, system, method of operation, concept, principle, discovery or mere data, even if expressed, described, explained, illustrated or embodied in a work;
- (b) any official text of a legislative, administrative or legal nature, or any official translation thereof.

#### **6 Economic rights**

- (1) Subject to the provisions of sections 9 to 17, the author or other owner of copyright shall have the exclusive right to carry out or to authorise the following acts in relation to the work —
- (a) reproduction of the work;
  - (b) translation of the work;
  - (c) adaptation, arrangement or other transformation of the work;

- (d) the distribution to the public by sale, rental, public lending or otherwise of the original or a copy of the work that has not already been subject to a sale or other transfer of ownership authorised by the owner of copyright;
  - (e) rental or public lending of the original or a copy of an audiovisual work, a work embodied in a phonogram, a computer program, a database or a musical work in the form of notation, irrespective of the ownership of the original or copy concerned;
  - (f) importation of copies of the work;
  - (g) public display of the original or a copy of the work;
  - (h) public performance of the work;
  - (i) broadcasting of the work;
  - (j) other communication to the public of the work.
- (2) The rights of rental and lending under subsection (1)(e) do not apply to rental or lending of computer programs where the program itself is not the essential object of the rental or lending.

## **7 Moral rights**

- (1) Independently of his economic rights, and even where he is no longer the owner of the said rights, the author of a work shall have the right —
- (a) to have his name indicated prominently on the copies and in connection with any public use of his work, as far as practicable;
  - (b) not to have his name indicated on the copies and in connection with any public use of his work, and the right to use a pseudonym;
  - (c) to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, his work which would be prejudicial to his honour or reputation.
- (2) None of the rights mentioned in subsection (1) shall be transmissible during the life of the author, but the right to exercise any of those rights shall be transmissible by testamentary disposition or by operation of law following the death of the author.
- (3) The author may waive any of the moral rights mentioned in subsection (1), provided that such a waiver is in writing and clearly specifies the right or rights waived and the circumstances in which the waiver applies and provided further, that any waiver of the right under subsection (1)(c) specifies the nature and extent of the modification or other action in respect of which the right is waived. Following the death of the author, the natural person or legal entity upon whom or which the moral rights have devolved shall have the right to waive the said rights.

## 8 Private reproduction for personal purposes

- (1) Notwithstanding the provisions of section 6(1)(a), and subject to the provisions of subsection (2), the private reproduction of a published work in a single copy shall be permitted without the authorisation of the author or owner of copyright, where the reproduction is made by a person exclusively for his own personal purposes.
- (2) The permission under subsection (1) shall not extend to reproduction —
  - (a) of a work of architecture in the form of building or other construction;
  - (b) in the form of reprography of the whole or a substantial part of a book or of a musical work in the form of notation;
  - (c) of the whole or a substantial part of a database in digital form;
  - (d) of a computer program, except as provided in section 14; or
  - (e) of any work in cases where reproduction would conflict with a normal exploitation of the work or would otherwise unreasonably prejudice the legitimate interests of the author or other owner of the copyright.

## 9 Temporary reproduction

Notwithstanding the provisions of section 6(1)(a), the temporary reproduction of a work shall be permitted if all the following conditions are met —

- (a) the reproduction is made in the process of a digital transmission of the work or an act of making a digitally stored work perceptible;
- (b) it is caused by a person or entity that, by way of authorisation by the owner of copyright or by operation of law, is entitled to make that digital transmission or making a digitally stored work perceptible; and
- (c) it is ancillary to that digital transmission or the making perceptible of digitally stored work, that occurs during the normal operation of the equipment used and entails the automatic deletion of the copy without enabling the retrieval of the work for any other purpose than those, referred to in paragraphs (a) and (b).

## 10 Quotation

Notwithstanding the provisions of section 6(1)(a), the reproduction, in the form of quotation, of a short part of a published work shall be permitted without authorisation of the author or other owner of copyright, provided that the reproduction is compatible with fair practice and does not exceed the extent justified by the purpose. The quotation shall be accompanied by an indication of source and the name of the author, if his name appears in the work from which the quotation is taken.

## 11 Reproduction for teaching

- (1) Notwithstanding the provisions of section 6(1)(a), the following acts shall be permitted without authorisation of the author, or other owner of copyright —
- (a) the reproduction of a short part of a published work for teaching purposes by way of illustration, in writings or sound or visual recordings, provided that such reproduction is compatible with fair practice and does not exceed the extent justified by the purpose;
  - (b) the reprographic reproduction, for face-to-face teaching in educational institutions the activities of which do not serve direct or indirect commercial gain, of published articles, other short works or short extracts of works, to the extent justified by the purpose, provided that —
    - (i) the act of reproduction is an isolated one occurring, if repeated, on separate and unrelated occasions; and
    - (ii) there is no collective licence available (that is, offered by a collective administration organisation of which the educational institution is or should be aware) under which such reproduction can be made.
- (2) The source of the work reproduced and the name of the author shall be indicated as far as practicable on all copies made under paragraph (1).

## 12 Reprographic reproduction by libraries and archives

Notwithstanding the provisions of section 6(1)(a), any library or archive whose activities do not serve direct or indirect commercial gain may, without the authorisation of the author or other owner of copyright, make a single copy of the work by reprographic reproduction —

- (a) where the work reproduced is a published article, other short work or short extract of a work, and where the purpose of the reproduction is to satisfy the request of a natural person, provided that —
  - (i) the library or archive is satisfied that the copy will be used solely for the purposes of study, scholarship or private research;
  - (ii) the act of reproduction is an isolated case occurring, if repeated, on separate and unrelated occasions; and
  - (iii) there is no collection licence available (that is, offered by a collective administration organisation of which the library or archive is or should be aware) under which such copies can be made; or
- (b) where the copy is made in order to preserve and, if necessary, replace a copy or to replace a copy which has been lost, destroyed or rendered unusable in the permanent collection of another similar library or archive provided that it is impossible to obtain such a copy under

reasonable conditions and provided further that the act or reprographic reproduction is an isolated case occurring, if repeated, on separate and unrelated occasions.

### **13 Reproduction, broadcasting and other communication to the public for information purposes**

Notwithstanding the provisions of section 6(1)(a), (i) and (j), the following acts shall be permitted in respect of a work without the authorisation of the author or other owner of copyright, subject to the obligation to indicate the source and the name of the author as far as practicable —

- (a) the reproduction in a newspaper or periodical or the broadcasting or other communication to the public, of an article published in a newspaper or periodical on current economic, political or religious topics or a broadcast work of the same character, provided that this permission shall not apply where the right to authorise reproduction, broadcasting or other communication to the public is expressly reserved on the copies by the author or other owner of copyright, or is acknowledged in connection with broadcasting or other communication to the public of the work;
- (b) for the purpose of reporting current events, the reproduction and the broadcasting or other communication to the public of short excerpts of a work seen or heard in the course of such events, to the extent justified by the purpose;
- (c) the reproduction in a newspaper or periodical, the broadcasting or other communication to the public of a political speech, a lecture, address, sermon or other work of a similar nature delivered in public, or a speech delivered during legal proceedings, to the extent justified by the purpose of providing current information.

### **14 Reproduction and adaptation of computer programs**

- (1) Notwithstanding section 6(1)(a) and (c), the reproduction, in a single copy, or the adaptation of a computer program by the lawful owner of a copy of that computer program shall be permitted without the authorisation of the author or other owner of copyright, provided that the copy or adaptation is necessary —
  - (a) for use of the computer program for the purpose and extent for which the computer program has been obtained;
  - (b) for archival purposes and for the replacement of the lawfully owned copy of the computer program where the said copy is lost, destroyed or rendered unusable.
- (2) No copy or adaptation of a computer program shall be used for any purpose other than those specified in subsection (1) and any such copy or adaptation

shall be destroyed when continued possession of the copy of the computer program ceases to be lawful.

### **15 Importation for personal purposes**

Notwithstanding the provisions of section 6(1)(f), the importation of a copy of a work by a person for his own purposes shall be permitted without the authorisation of the author or other owner of copyright.

### **16 Display of works**

Notwithstanding the provisions of section 6(1)(g), the public display of originals or copies of works shall be permitted without the authorisation of the author, provided that the display is made other than by means of a film, slide, television image or otherwise on screen or by means of any other electronic device or process, and provided further that the work has been published or the original or the copy displayed has been sold, given away or otherwise transferred to another person by the author or his successor in title.

### **17 Ephemeral recording**

Notwithstanding the provisions of section (6)(1)(a), any broadcasting organisation may make, for the purpose of its own broadcasts and by means of its own facilities, an ephemeral recording of any work which it is authorised to broadcast. All copies of it shall be destroyed within 6 months of the making or within any longer term agreed to by the author; however, where such recording has an exceptional documentary character, one copy of it may be preserved in official archives.

### **18 Duration of Copyright**

- (1) Subject to the provisions of subsections (2) to (5), the economic and moral rights shall be protected during the life of the author and for 50 years after his death.
- (2) In the case of a work of joint authorship, the economic and moral rights shall be protected during the life of the last surviving author and for 50 years after his death.
- (3) In the case of a collective work, other than a work of applied art, and in the case of an audiovisual work, the economic and moral rights shall be protected for 50 years from the date on which the work was either made, first made available to the public, or first published, whichever date is the latest.
- (4) In the case of a work published anonymously or under a pseudonym, the economic and moral rights shall be protected for 50 years from the date on which the work was either made, first made available to the public or first published, whichever date is the latest, provided that where the author's

identity is revealed or is no longer in doubt before the expiration of the said period, the provisions of subsection (1) or subsection (2) shall apply, as the case may be.

- (5) In the case of a work of applied art, the economic and moral rights shall be protected for 25 years the making of the work.
- (6) Every period provided for under the preceding subsections shall run to the end of the calendar year in which it would otherwise expire.

## **19 Original ownership of economic rights**

- (1) Subject to the provisions of subsections (2) to (5), the original owner of economic rights is the author who has created the work.
- (2) In respect of a work of joint authorship, the co-authors shall be the original owners of the economic rights. If, however, a work of joint authorship consists of parts that can be used separately and the author of each part can be identified, the author of each part shall be the original owner of the economic rights in the part that he has created.
- (3) In respect of a collective work, the natural person or legal entity at the initiative and under the direction of whom or which the work has been created shall be the original owner of the economic rights.
- (4) In respect of a work created by an author, employed by a natural person or legal entity, in the course of his employment, the original owner of the economic rights shall be the employer unless provided otherwise in a contract.
- (5) In respect of an audiovisual work, the original owner of the economic rights shall be the producer, unless provided otherwise in a contract. The co-authors of the audiovisual work and the author of the pre-existing works included in or adapted for the making of the audiovisual work shall maintain their economic rights in their contributions or pre-existing works can be subject to acts covered by their economic rights separately from the audiovisual work.

## **20 Presumption of authorship and of representation of the author**

- (1) The person whose name is indicated as the author on a work in the usual manner shall, in the absence of proof to the contrary, be presumed to be the author of the work. This provision shall be applicable even if the name is a pseudonym, where the pseudonym leaves no doubt as to the identity of the author.
- (2) In the case of an anonymous or pseudonymous work, subject to the provision of subsection (1), the publisher whose name appears on the work shall, in the absence of proof to the contrary, be presumed to represent the author and, in this capacity, shall be entitled to exercise and enforce the moral and economic rights of the author. This presumption shall cease to apply when the author reveals his identity.

## 21 Assignment and licence of authors' rights

- (1) Economic rights shall be assignable in whole or in part.
- (2) Any assignment of an economic right, and any licence to do an act subject to authorisation by the author or other owner of copyright, shall be in writing signed by the assignor and the assignee, or by the licensor and the licensee.
- (3) An assignment in whole or in part of any economic right, or a licence to do an act subject to authorisation by the author or other owner of copyright, shall not include or be deemed to include the assignment or licence of any other rights not explicitly referred to therein.

## PART II — PROTECTION OF PERFORMERS, PRODUCERS OF PHONOGRAMS AND BROADCASTING ORGANISATIONS

### 22 Acts requiring authorisation of performers

- (1) Subject to the provisions of section 26 a performer shall have the exclusive right to carry out or to authorise any of the following acts —
  - (a) the broadcasting or other communication to the public of his performance, except where the broadcasting or the other communication —
    - (i) is made from a fixation of the performance, other than a fixation made under the terms of section 26 or otherwise made without the authorisation of the performer; or
    - (ii) is a re-broadcasting made or authorised by the organisation initially broadcasting the performance;
  - (b) the fixation of his unfixed performance;
  - (c) the direct or indirect reproduction of a fixation of his performance in any manner or form;
  - (d) the distribution to the public by sale or other transfer of ownership of a fixation of his performance, or copies thereof, that has not already been subject to a distribution authorised by the performer;
  - (e) rental to the public or public lending of a fixation of his performance, or copies thereof, irrespective of the ownership of the copy rented or lent;
  - (f) the making available to the public of his fixed performance, by wire or wireless, in such a way that members of the public may access them from a place or at a time individually chosen by them.
- (2) Once the performer has authorised the incorporation of his performance in an audiovisual fixation, the provisions of subsection (1) shall have no further application.



- (3) Independently of the performer's economic rights, also after the transfer of those rights, the performer shall, as regards his live aural performances and performances fixed in phonograms, have the right to claim to be identified as the performer of his performances, except where omission is dictated by the manner of the use of the performance, and to object to any distortion, mutilation or other modification of his performances that he considers prejudicial to his reputation. The provisions of subsections (2) and (3) of section 7 apply mutatis mutandis to the rights granted under this subsection.
- (4) Nothing in this section shall be construed to deprive performers of the right to agree by contracts on terms and conditions more favourable for them in respect of their performances.
- (5) The right under this section shall be protected until the end of the 50th calendar year following the year in which the performance was fixed in a phonogram, or in the absence of such a fixation, from the end of the year in which the performance took place.

### **23 Acts requiring authorisation of producers of phonograms**

- (1) Subject to the provisions of section 26 a producer of a phonogram shall have the exclusive right to carry out or to authorise any of the following acts —
  - (a) direct or indirect reproduction of the phonogram, in any manner or form;
  - (b) importation of copies of the phonogram;
  - (c) the distribution to the public by sale or other transfer of ownership, of the original or copies of the phonogram that have not already been subject to a distribution authorised by the producer;
  - (d) rental to the public or public lending of the original or copies of the phonogram, irrespective of the ownership of the copy rented or lent;
  - (e) the making available to the public of the phonogram, by wire or wireless, in such a way that members of the public may access it from a place or at a time individually chosen by them.
- (2) The rights under subsection (1) shall be protected from the publication of the phonogram until the end of the 50th calendar year following the year of publication or, if the phonogram has not been published from the fixation of the phonogram until the end of the 50th calendar year, following the year of fixation.

### **24 Equitable remuneration for use of phonograms**

- (1) If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or other communication to the public, or is publicly performed, a single equitable remuneration for the

performer or performers and the producer of the phonogram shall be paid by the user to the producer.

- (2) Unless otherwise agreed between the performers and the producer, half of the amount received by the producer under subsection (1) shall be paid by the producer to the performer or performers.
- (3) The right to an equitable remuneration under this section shall subsist from the date of publication of the phonogram until the end of the 50th calendar year following the year of publication or, if the phonogram has not been published, from the date of fixation of the phonogram until the end of the 50th calendar year following the year of fixation.
- (4) For the purposes of this section, phonograms that have been made available to the public by wire or wireless, in such a way that members of the public may access them from a place and at a time individually chosen by them shall be deemed to have been published for commercial purposes.

## **25 Acts requiring authorisation of broadcasting organisations**

- (1) Subject to the provisions of section 26 a broadcasting organisation shall have the exclusive right to carry out or to authorise any of the following acts —
  - (a) the re-broadcasting of its broadcast;
  - (b) the communication to the public of its broadcast;
  - (c) the fixation of its broadcast;
  - (d) the reproduction of a fixation of its broadcast.
- (2) The rights under this section shall be protected from the moment when the broadcasting takes place until the end of the 50th calendar year following the year in which the broadcast takes place.

## **26 Limitations on protection**

Sections 22, 23, 24 and 25 shall not apply where the acts referred to in those sections are related to —

- (a) using short excerpts for reporting current events to the extent justified by the purpose of providing current information;
- (b) reproduction solely for scientific research;
- (c) reproduction solely for the purpose of face-to-face teaching activities, except for performances and phonograms which have been published as teaching or instructional materials;
- (d) cases where, under Part I, a work can be used without the authorisation of the author or other owner of copyright.

## PART III — ENFORCEMENT OF RIGHTS

### 27 Conservatory and provisional measures

- (1) The Court having jurisdiction of a civil action arising under this Act, shall have the authority —
  - (a) to grant injunctions to prohibit the committing, or continuation of committing, of infringement of any right protected under this Act;
  - (b) to order the impounding of copies of works or phonograms suspected of being made or imported without the authorisation of the owner of any right protected under this Act where the making or importation of copies is subject to such authorisation, as well as the impounding of the packaging of, the implements that could be used for the making of, and the documents, accounts or business papers referring to, such copies.
- (2) The provisions of the Police Act and the Magistrate's Court Act relating to search and seize shall apply as if all references to an offence in those provisions include infringements of rights under this Act.
- (3) The provisions of the Customs and Excise Act dealing with suspension of the release of suspected illegal goods shall apply to articles and implements protected under this Act.

### 28 Civil remedies

- (1) The owner of any right protected under this Act whose right has been infringed shall be entitled to payment, by the infringer, of damages for the prejudice suffered as a consequence of the act of infringement and the payment of expenses caused by the infringement, including legal costs. In fixing the amount of damages the Court shall take into account the importance of the material and moral prejudice suffered by the owner of the right and the infringer's profits attributable to the infringement. Where the infringer did not know or had no reasonable cause to know that he was engaged in infringing activity, the Court may limit damages to the profits of the infringer attributable to the infringement.
- (2) Where infringing copies exist, the Court shall have the authority to order the destruction or other reasonable disposition of those copies and their packaging in such a manner as to avoid harm to the owner of the right unless he requests otherwise. This provision shall not be applicable to copies and their packaging which were acquired by a third party in good faith.
- (3) Where there is a danger that implements may be used to commit or continue to commit acts of infringement, the Court shall order their destruction or other reasonable disposition in such a manner as to minimise the risks of further infringements or surrender to the owner of the right.

- (4) Where there is a danger that acts of infringement may continue, the Court shall order that no such further acts be committed and fix a fine not exceeding \$20,000 which shall be due if the order is not respected.

## 29 Criminal sanction

- (1) Any person who wilfully infringes any right protected under this Act commits an offence and is liable on conviction to a fine not exceeding \$20,000 or imprisonment for a period not exceeding 3 years or both.
- (2) Where the defendant has been convicted of a new act of infringement within 5 years of a previous conviction for an infringement the penalty in subsection (1) shall be double.
- (3) In any criminal proceedings the Court may apply the measures and remedies referred to in sections 27 and 28, provided that no decision has yet been taken on such remedies in a civil proceeding.

## 30 Measures, remedies and sanctions against abuses in respect of technical means of protection and rights management information

- (1) The following acts shall be considered unlawful and, in the application of sections 27 to 29, shall be deemed to be an infringement of the rights protected under this Act —
  - (a) the manufacture or importation for sale or rental of any device or means specifically designed or adapted to circumvent any device or means intended to prevent or restrict reproduction of a work, a phonogram or a broadcast, or to impair the quality of copies made;
  - (b) the manufacture or importation for sale or rental of any device or means that is designed to adopt, enable or assist the reception of an encrypted program, which is broadcast or otherwise communicated to the public, including by satellite, by those who are not entitled to receive the program;
  - (c) the removal or alteration of any electronic rights management information without authority;
  - (d) the distributing, importing for distribution, broadcasting, communicating to the public or making available to the public, without authority, of works, performances, phonograms or broadcasts, knowing or having reason to know that rights management information has been removed or altered without authority.
- (2) In the application of sections 27 to 29, any illicit device and means mentioned in subsection (1) and any copy from which rights management information has been removed, or in which such information has been altered, shall be deemed to be infringing copies of works, and any illicit act referred to in subsection (1) shall be treated as an infringement of copyright or related rights

to which the civil remedies and criminal sanctions provided in sections 27 to 29 are applicable.

## PART IV — MISCELLANEOUS

### 31 Scope of application of protection of literary and artistic works

- (1) The provisions of this Act concerning the protection of literary and artistic works shall apply to —
  - (a) works of authors who are nationals of, or have their habitual residence in, Tonga;
  - (b) works first published in Tonga and works first published in another country and also published in Tonga within 30 days, irrespective of the nationality of residence of their authors;
  - (c) audiovisual works, the producer of which has his headquarters or habitual residence, in Tonga; and
  - (d) works of architecture erected in Tonga and other artistic works incorporated in a building or other structure located in Tonga.
- (2) The provisions of this Act shall also apply to works that are eligible for protection in Tonga by virtue of and in accordance with any international convention or other international agreement to which Tonga is a party.

### 32 Scope of application of protection of performers, phonogram producers and broadcasting organisations

- (1) The provisions of this Act on the protection of performers shall apply to —
  - (a) performers who are nationals of Tonga;
  - (b) performers who are not nationals of Tonga but whose performances —
    - (i) take place in Tonga;
    - (ii) are incorporated in phonograms that are protected under this Act; or
    - (iii) have not been fixed in a phonogram but are included in broadcasts qualifying for protection under this Act.
- (2) The provisions of this Act on the protection of phonograms shall apply to —
  - (a) phonograms the producers of which are nationals of Tonga;
  - (b) phonograms first fixed in Tonga; or
  - (c) phonograms first published in Tonga.
- (3) The provisions of this Act on the protection of broadcasts shall apply to —

- (a) broadcasts of broadcasting organisations the headquarters of which are situated in Tonga; and
  - (b) broadcasts transmitted from transmitters situated in Tonga.
- (4) The provisions in this Act shall also apply to performers, producers of phonograms and broadcasting organisations that are eligible for protection by virtue of and in accordance with any international convention or other international agreement to which Tonga is a party.

### **33 Application of international treaties**

The provisions of any international treaty in respect of copyright and related rights to which Tonga is a party shall apply subject to this Act.

### **34 Regulations**

The Minister responsible for commerce may, with the consent of Cabinet, make Regulations for the implementation of the purposes and provisions of this Act.<sup>3</sup>

### **35 Repeal and saving**

- (1) The Copyright Act (Cap. 121) is repealed.
- (2) The provisions of this Act shall apply also to works, performances, phonograms and broadcasts dating back to before the coming into force of this Act, provided that the term of protection has not expired under the former legislation or under the legislation of the country of origin of such works, performances, phonograms or broadcast that are to be protected under an international convention or other international agreement to which Tonga is a party.
- (3) Contracts on works, performances, phonograms and broadcasts concluded before the coming into force of this Act shall not be affected by this Act.

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## ENDNOTES

<sup>1</sup> Act 12 of 2002

Amended by Act 5 of 2012, commencement 30 July 2012

<sup>2</sup> By GS 32/2008

<sup>3</sup> Amended by Act 5 of 2012