



PERFORMING RIGHTS – part 2

Performing Rights in Sound Recordings in South Africa up to 1965

By virtue of section 143 of South Africa's Patents, Designs, Trade Marks and Copyright Act of 1916, the British Copyright Act of 1911 (hereinafter referred to as "the British Act") was made applicable to the Union of South Africa. In 1932, the organised record industry suggested that section 19(1) of the British Copyright Act, had an implied "performing right" in a sound recording because of the words: "in like manner as if such contrivances were musical works". Since a "performing right" existed in musical works, logic dictated that a performing right should exist in a sound recording.

This view was put to the test in the case of *Gramophone Co Ltd. v Stephen Cawardine & Co* (1934) Ch 450. The court held that section 19(1) did in fact confer a performing right on the record manufacturer.

In the early days of broadcasting in South Africa, the licence fee for broadcasting sound recordings amounted to a few pence per annum for every licensed listener. In approximately 1949, the International Federation of Phonographic Industry (IFPI), i.e. the representative association of the recording industry, and the SABC reached an agreement whereby the SABC would pay the IFPI a fee per side of a record used in a "spot" programme.

This agreement continued until 1964. In that year, a Select Committee of Parliament was appointed to consider a Draft Bill on copyright. The said Bill had been prepared along the lines of the (then) recently adopted Copyright Act of 1956 of the United Kingdom. Similar to the British Act, the proposed Bill provided for separate rights in a "sound recording". This did not find its way into the Act. In 1965, the right of record companies to be remunerated for the use of their sound recordings was removed by Parliament at the instance of the government

of the day and the lobby of commercial users of recorded music.

The amendment, amongst others, favoured the South African Broadcasting Corporation and it has taken the recording industry, and the South African performer community, about 40 years to restore a right that should never have been taken away.

The Copyright Amendment Act, 2002

On 25 June 2002 the Copyright Amendment Act was promulgated, re-introducing performance right income, popularly referred to as "needletime", after an absence of 37 years. The amendments granted the owners of copyright in music sound recordings the exclusive right to do or to authorise the doing of any of the following acts in the Republic of South Africa:

- Broadcasting the sound recording.
- 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 (e.g. music-on-hold on a switchboard).
- Communicating the sound recording to the public (e.g. background music played in a retail outlet, restaurant or shopping centre).

Although owners and performers had been entitled to be paid by broadcasters and other users for the commercial use of their sound recordings since June 2002, there had been a long delay in implementing these rights by owners of sound recordings. The delay had been caused primarily by the delay in publishing regulations to govern collecting societies that implement and administer the right. The process of applying for accreditation, after the publication of the regulations, also added to delays in the implementation of the right.

The copyright owner of the music sound recording, as defined in this legislation, is the

person that invested in making the sound recording, being the record company or record label. The copyright owner of the music sound recording has an exclusive right to receive a royalty, but has an obligation to share the royalty with the performer whose performance(s) is/are embodied in each sound recording.

In this way, investors in sound recordings will be remunerated for their investment and risk in creating new sound recordings that are used in the course of the third parties' commercial activities, while performers will be remunerated for their performance contributions to those recordings.

The South African Music Performance Rights Association (SAMPRO) has more than thirty published tariffs that are applicable to various categories of use. Details of the applicable tariffs are available on SAMPRO's website (<http://www.sampra.org.za>), or can be obtained from SAMPRO's offices at Suite 4, 150 Bram Fischer Drive, cnr Republic Road, Randburg. At the beginning of 2008, SAMPRO representatives embarked on a national licensing programme and have been mandated to make contact with all users in all the relevant usage categories.

The trading names of record companies and labels that are members of Recording Industry South Africa (RiSA) and the copyright owners of the sound recordings, which may not be broadcast, diffused or communicated to the public without payment of a licence fee can be found on the SAMPRO website. These record companies and labels own an estimated 95% of music sound recordings that have been played on South African radio stations since June 2002, and that are currently played by broadcasters. SAMPRO offers users a blanket licence in respect of all repertoires owned by these record companies and labels, but is not able to license music sound recordings that are owned by non-members of RiSA. All these

owners assert their copyright ownership on all sound carriers, accompanying artwork and packaging of all sound recordings released by them. If a user raises a dispute regarding a licence royalty charged by SAMPRO in terms of the applicable tariff, the user may (until such time as the matter is resolved by the Copyright Tribunal), continue to use the sound recordings in SAMPRO's repertoire if the user pays the licence fee proposed by SAMPRO into an escrow account.

Auditor's Responsibility

Non-compliance with the provisions of the Copyright Act exposes music users to the risk of litigation. The obligation to pay a royalty, is a statutory obligation. All accountants and auditors, as well as trainees, are urged to ensure compliance by clients that are music users and need to ensure that these obligations are provided for in their clients' financial statements in accordance with International Auditing Standards.

South African businesses have become accustomed to making payment of a licence fee to the Southern African Music Rights Organisation (SAMRO). There is no connection whatsoever between SAMRO and SAMPRO.

When you pay SAMRO you pay a royalty that is intended to go to the composer of each song you play. When you pay SAMPRO, you pay a royalty that goes to the artist that performs the song and to the record company that has invested in making the recording of that song by that artist.

Bibliography

Articles

Greg Barrow *Hope for SA's township musicians* at <http://www.bbc.co.uk/1/hi/world/africa/784188.stm>

Andrew Donaldson *A song and dance about copyright* Sunday Times, 10 June 2001 at <http://www.suntimes.co.za/2001/06/10/insight/in02.htm>

Hugh Duffy *Cost Revenue Ratio - a Measure of Inefficiency* at http://www.imro.ie/about/documentsarchive/cost_revenue_ratio_a_measure_of_inefficiency.shtm

Gus Jansen *The Common Information System*, a paper presented at the Indecs Conference, Sydney, March 2000 at <http://www.indecs.org/sydney/Jansen.PDF>

Cohen Jehoram *Gestão colectiva do direito de autor e direitos conexos no ambiente digital Riscos e desafios* at <http://www.gda.pt/novidades/coloquio/cohen.html>

Carlo Scollo Lavizzari, *Needletime Revived: South Africa: Ready for a Global and Digital Century?* Copyright World Vol. 131, June 2003, pp. 24-29.

Uma Sunthersanen *European Union Experience in the Management of Copyright* a paper presented at

the EU-ASEAN SYMPOSIUM ON COPYRIGHTS AND NEIGHBOURING RIGHTS, 24- 25 October 2002.

Coenraad Visser *The Protection of Rights of Performers and Publishers of Phonograms under the Rome Convention, the Agreement on Trade-related Agreements of Intellectual Property Rights (TRIPS agreement) and the WPPT A paper presented at a regional workshop for countries of Africa on 3 July 2001 in Windhoek.*

Collective Management of Intellectual Property and Related Rights: History, Meaning and Future Outlook at <http://www.roms.ru/romseng/ind1.html>

Collective Management of Copyright and Related Rights at http://www.wipo.org/about-ip/en/about_collective_mngt.html

Needletime' legislation put on hold at http://www.legalbrief.co.za/view_1.php?artnum=2680

Portfolio Committee approves needletime legislation at http://www.nab.org.za/templates/article_template_184.asp

Reports

Advisory Committee on Copyright Report on "Needle Time" and "Blank Tape Levy" dated 5 November 1993.

Deloitte Et Touche *Report on the collective management of copyright in the European Union*, Brussels, 2000. [ASA](#)

David du Plessis is the Operations Director at RISA and CEO of SAMPRO.



MUSIC MAKES GOOD BUSINESS SENSE.

RECORDED MUSIC THAT MAKES
YOUR BUSINESS SOUND.



South African Music Performance Rights Association

0861 SAMPRO
INFO@SAMPRO.ORG.ZA
WWW.SAMPRO.ORG.ZA

The communication of sound recordings to the public, the diffusing of sound recordings and the broadcasting of sound recordings are copyrights which are administered by SAMPRO.

To ensure compliance with International Auditing Standards, Auditors must ensure that their clients make payment of required copyright royalties to SAMPRO in respect of their usage of music sound recordings.

Copyright theft is the same as any other theft.

SAMPRO serves the interests of copyright owners of sound recordings, business owners and auditors by providing a one stop shop to ensure compliance with all legal requirements in respect of the commercial usage of music sound recordings.